Administrative Subordination

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Much of the scholarship on immigration enforcement and environmental justice assumes that agencies negatively impact vulnerable and marginalized people as a result of individualized bias or arbitrariness in administration. This Article argues that, beyond idiosyncrasies or flaws in administrators themselves, the poor impact of administration on minorities emanates from institutional systems. In doing so, this Article introduces a framework of institutional oppression into the study of administration that illustrates how agencies subordinate minority interests to the ends of administrative competence and self-preservation.

A healthy federal bureaucracy is sustained by administrative efforts to reduce institutional burdens, improve efficiency, conserve resources, and preserve the structures underlying the agency's power to regulate. In addition, a conventional justification for the existence of agencies is that they act on behalf of the public interest, and public interest theories of regulation prize criteria such as efficiency. Administrative actors, therefore, are motivated to pursue these values in order to maintain the administrative state.

However, as this Article shows, agencies harm marginalized communities in pursuit of these institutional virtues. Put simply, agencies mistreat vulnerable people by acting as intended. Essentially, agencies that are operating as expected perpetuate systematic bias. Ironically, by prioritizing public interest values (such as efficiency), agencies may, in fact, cause harm. Arguably, this renders agencies less efficient to the extent efficiency requires not only speed and cost savings, but also good results.

For example, immigration officials at the Department of Homeland Security (DHS) use arrest records to decide whom to deport, even if the targeted noncitizens were never convicted of a crime, because arrest records are inexpensive and accessible proxies for immigration data. The Federal Emergency Management Agency (FEMA) failed to evacuate tens of thousands of poor people of color in the wake of Hurricane Katrina both as a result of the systematic management of an institutional

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history of limited resources and due to FEMA's post 9/11 placement as a subcomponent of DHS, whose focus on national security has overwhelmed FEMA's core mandate. The Bureau of Land Management approves gas and oil leases in rural towns quickly, even though the resulting rapid labor expansion reduces the safety of Native women, because focusing on rural communities for energy project expansion allows the agency to streamline its environmental review process.

This Article's prescription is for institutional redesign. First, from the top down, filtered through legislation, Congress could utilize small-scale, targeted appropriations and pointed procedural interventions to influence how agencies exercise discretion. Second, from the bottom up, the President or agencies themselves could instigate efforts to use more accurate information and more meaningful process. Third, a focus on reviving a government of small, discrete agencies could shape and constrain administrative discretion in ways that encourage agencies to rebalance their priorities in the implementation of law.

INTRODUCTION

Almost fifty years ago, a prominent scholar identified a set of enduring concerns about the administrative state: first, that the bureaucracy's protection of individual interests had become increasingly inadequate "in view of the seemingly inexorable expansion of governmental power over private welfare," and second, "that agencies have failed to discharge their respective mandates to protect the interests of the public."[1] Bureaucratic discretion arguably renders agencies "the primary lawmakers in our society,"[2] but agencies are "not clearly making us better off."[3] "The experience of the regulatory state includes many self-defeating regulatory strategies."[4] As a result, "[a] fundamental problem of trust pervades" the federal government.[5]

Notably, the academics making these remarks are in favor of a robust administrative state.[6] However, they and others in the same camp also recognize that the study of administrative law would benefit from additional emphasis on agencies' social utility.[7] And while the exercise of administrative discretion is arguably both lawful and expected, these scholars raise concerns about

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[1] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975). *See generally* Stewart, *supra* (grappling with the failures of the interest representation model, which contends that all impacted interests will be considered and accommodated by the administrative state).

[2] EDWARD H. STIGLITZ, THE REASONING STATE, at ii (2022); *see also* Stewart, *supra* note 1, at 1669 (noting the difficulty of reconciling "the discretionary power enjoyed by agencies with the basic premise of the liberal state that the only legitimate intrusions into private liberty and property interests are those consented to through legislative processes"); Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 775 (1975) (assessing "sociological, political, [and] legal" reasons for the broad delegation of authority to agencies).

[3] Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L. REV. 1, 16 (1994); *see also* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 161 (2006) (addressing the ongoing discussion regarding the tension between the ideal of democratic policymaking and the ubiquity of bureaucratic discretion); Rodriguez, *supra*, at 12–14 (considering some trade-offs between regulatory priorities by the Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Products Safety Commission, and the Federal Trade Commission that have led to inadequate regulation by these agencies).

[4] Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 441 (1990) [hereinafter Sunstein, *Paradoxes*].

[5] STIGLITZ, *supra* note 2, at ii.

[6] *See, e.g.*, STIGLITZ, *supra* note 2, at 8 (arguing that agencies make good policy because of their capacity to "credibly reason"). *See generally* Gellhorn & Robinson, *supra* note 2; Rodriguez, *supra* note 3.

[7] Stewart, *supra* note 1, at 1671 ("If we take seriously the possibility of a legal system giving expression to such basic values, then an inquiry into these values and their institutional realization is justified."); *see also* Gellhorn & Robinson, *supra* note 2, at 773 (arguing that the "complexity and diversity of administrative practice" requires further

whether agencies exercise their delegated authority capably and to justifiable ends in the real world.[8]

One nascent aspect of this important inquiry concerns the impact of administration on marginalized communities. To this end, some have observed how the bureaucracy determines inclusion and access.[9] Others, building on the "separation of parties, not powers" line of work,[10] note the "central role" of political parties "in determining the salience and significance of structural biases"[11] and call for "direct treatments" exploring the impact of constitutional structure on sidelined "political blocs" and "demographic groups of various kinds."[12] A literature on the distributional consequences of regulation has also emerged.[13]

An important part of studying the actual effect of administration on minorities and other vulnerable people concerns the origin and influence of bias. Crucially, bias in the administrative state is understood to be the result of individualized bureaucratic discrimination.[14] Consider, for instance, narratives foregrounding

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study); Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 427 (arguing against an "infatuation with procedural safeguards" because it diverts attention away from "critical substantive problems"); *id.* at 459 (arguing that agencies with expansive purviews have a penchant to use "layers of procedure" to avoid "controversial substantive decisions").

8 *See* Rodriguez, *supra* note 3, at 2 (asking, about regulatory law, "how [ ] legal doctrine [can] be brought to bear on processes of politics and political decisionmaking in order to produce superior outcomes"); Sunstein, *Paradoxes*, *supra* note 4, at 408 ("[The] evaluation of regulatory controls and legal doctrines must depend in large part on their effects in the world.").

9 *See, e.g.*, Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550, 559–60 (2012) (noting how some restrictions on access to benefit programs function as moral regulation of the poor). *See generally, e.g.*, K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447 (2018).

10 *See generally, e.g.*, Daryl Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016); Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

11 Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 67 (2022).

12 *Id.* at 62 (identifying biases in structural constitutionalism and arguing that they may "tilt the playing field, whether by design or by accident, for or against the policy objectives or electoral fortunes of one faction or another").

13 *See generally, e.g.*, Daniel J. Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649 (2022); Richard Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489 (2018).

14 In this Article, as in my other work, the terms "bias" and "discrimination" do not refer to constitutionally prohibited discrimination. *See, e.g.*, Bijal Shah, *Deploying the Internal Separation of Powers Against Racial Tyranny*, 116 NW. U. L. REV. ONLINE 224, 251 (2021) [hereinafter Shah, *Internal Separation*]. *See generally* Bijal Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, 85 OHIO ST. L.J. 1007 (2024) [hereinafter Shah, *A Critical Analysis*] (beginning the work of integrating the insights of critical theory

the racism, xenophobia, and Islamophobia that drive individualized adjudication and enforcement in immigration.[15] Discrete administrative decisions, such as those involving the underenforcement of environmental regulation in certain communities and the siting of hazardous waste, are also understood to drive the negative impact of administration on Black and Brown communities and on the poor, as identified by scholars of environmental justice.[16]

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into functionalist approaches to the separation of powers); Bijal Shah, *A Take on Formalist Interpretation*, 22 GEO. J.L. & PUB. POL'Y (forthcoming 2024) (beginning the work of integrating the insights of critical theory into formalist approaches to the separation of powers). Rather, the idea is that—as a descriptive, as opposed to constitutional or legal, matter—agencies sometimes treat poorly, consider differently, make distinctions against, or permit subpar outcomes for people from minority and marginalized communities. Some of this behavior might be characterized as discriminatory in a constitutional sense, were it not for the dearth of constitutional protections from discrimination by agencies.

[15] *See, e.g.*, Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1397, 1397–98 (2019) (discussing prejudice against Muslims in the administrative application of national security law); Nermeen Saba Arastu, *Aspiring Americans Thrown Out in the Cold: The Discriminatory Use of False Testimony Allegations to Deny Naturalization*, 66 UCLA L. REV. 1078, 1137 (2019) ("Whether looking at the earliest stages of an immigrant's admission, adjustment to permanent residence, or naturalization, an aspiring American's fate rests in an administrative review process governed by personal discretion vulnerable to racial animus."); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 621–22 (2006) (arguing that the disadvantages of discretionary deportation practices for minorities were exacerbated post-9/11); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 975–76 (2002) (noting Justice Department bias against Arab and Muslim noncitizens after 9/11). *See generally, e.g.*, Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794 (2022) (discussing how the doctrinal legacy of Chinese exclusion enables race-based domestic policing under the guise of immigration enforcement); Sophia Porotsky, *Rotten to the Core: Racism, Xenophobia, and the Border and Immigration Agencies*, 36 GEO. L.J. 349 (2021); Zainab Ramahi, *The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future*, 108 CALIF. L. REV. 557 (2020); Michael H. LeRoy, *The President's Immigration Powers: Migratory Labor and Racial Animus*, 75 N.Y.U. ANN. SURV. AM. L. 187 (2020); Christian Briggs, *The Reasonableness of a Race-Based Suspicion: The Fourth Amendment and the Costs and Benefits of Racial Profiling in Immigration Enforcement*, 88 S. CAL. L. REV. 379 (2015) (discussing racial profiling in immigration).

[16] *See, e.g.*, Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 787 (1998); Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393, 413–15 (2019). *See generally, e.g.*, Devon C. Payne-Sturges, Gilbert C. Gee & Deborah A. Cory-Slechta, *Confronting Racism in Environmental Health Sciences: Moving the Science Forward for Eliminating Racial Inequities*, 129 ENVTL. HEALTH PERSPS. 1 (2021); David M. Konisky & Christopher Reenock, *Compliance Bias and Environmental (In)Justice*, 75 J. POL. 506 (2013); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993); Sarah Pedigo Kulzer, Brian Pitman & Stephen T. Young, *Critical Criminology: State-Facilitated Corporate Crime, Environmental Racism, and the Atlantic Coast Pipeline*, 60 HOW. J. CRIME & JUST. 323 (2021).

Another hidden assumption underlying accounts of biased administrative process or problematic administrative outcomes "is that racism is a specific thing whose effects can be neatly isolated."[17] (It may be that this view has developed in lockstep with the evolution of administrative theory, which "tended to view [regulatory] agencies and their statutory mandates as isolated phenomena."[18]) Put another way, important accounts of administration suggest that bureaucratic idiosyncrasies have given rise to discriminatory administration (as a descriptive, if not a legal, matter). This work paints the picture that it is not the project of the administrative state that is flawed, but rather that administration sometimes devolves into exclusionary, arbitrary, or prejudicial behavior. As a result, "prior research [on race- and class-based disparities in regulatory outcomes] has not developed a strong theoretical account of the sources of this bias."[19]

This Article offers a grounded account that goes beyond the conventional view that administrative injuries against noncitizens and violations of environmental justice are the results of individualized bureaucratic bias alone. More specifically, this Article argues that it is *institutional systems* governing the exercise of bureaucratic discretion that have led to problematic administrative policies and outcomes. For instance, interests in "efficiency," cost-benefit analysis, and other institutional values contribute to a concerning dynamic for minorities and other

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[17] *See* Foster, *supra* note 16, at 788 (citing Laura Pulido, *A Critical Review of the Methodology of Environmental Racism Research*, 28 ANTIPODE 142, 149–51 (1996)) (discussing environmental justice in particular).

[18] RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, ADMINISTRATIVE LAW: CASES AND MATERIALS 14 (8th ed. 2020) (noting that the "emergence of the 'public administration' movement hastened" the awareness of "unifying threads" in the administrative state).

[19] Konisky & Reenock, *supra* note 16, at 506.

vulnerable communities. Note that this Article continues my previous work exploring agencies' systemic efforts to increase[20] and guard[21] their power.

Institutionalism, in the field of public administration, is essentially "the sociological study of organizations and their environments,"[22] and it focuses on the incentives that drive and sustain bureaucracies both within and outside the legal context.[23] An institutionalist framework forces legal scholars to "take internal features of the legal process more seriously."[24] "Institutionalism," as a descriptor, has come to mean an "emphasis on organization . . . at the expense of other factors."[25]

As Professors Ryan Goodman and Derek Jinks have noted, an institutionalist approach to legal scholarship "emphasize[s] the ways in which actors and purposive action are embedded in and constructed by institutions."[26] "The transformative insight" of

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[20] Agencies often engage institutional levers in explicit bids to gather power. *See generally, e.g.*, Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641 (2020) (discussing how agencies sue each other to maintain their turf); Bijal Shah, *Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. REV. 101 (2017) [hereinafter Shah, *Intra-Agency SOP*] (engaging the "internal separation of powers" framework, whereby bureaucrats and other agency players seek to increase their power vis-à-vis other institutional actors); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015) [hereinafter Shah, *Coordinated Interagency Adjudication*] (discussing how agencies compete for adjudicatory power). Other academics have similarly analyzed this concept. *See, e.g.*, Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 94 (1995) (arguing that agencies "look after their own interests in mutual competition for power").

[21] *See generally, e.g.*, Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REGUL. 279 (2017) (discussing shirking among agency adjudicators that allows agencies to cede their statutory responsibility in order to preserve their resources).

[22] Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1754 (2003); *see also id.* (noting that thinkers like Max Weber were interested in developing "a general theory of formal organizations").

[23] *See, e.g.*, *id.* at 1756 (noting that "'world polity institutionalism'[ ]has generated substantial empirical work emphasizing the cultural and associational aspects of international politics"); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2116 (1999) (noting that "historical institutionalism" in political science focuses on the evolution of the state through U.S. history); William H. Clune, *Courts and Legislatures as Arbitrators of Social Change*, 93 YALE L.J. 763, 769 (1984) (applying "comparative institutionalism" to evaluate the comparative fitness of courts and the legislature to represent minority interests).

[24] Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 482 (2001); *see also* Gregg P. Macey, *Coasean Blind Spots: Charting the Incomplete Institutionalism*, 98 GEO. L.J. 863, 868–69 (2010) (arguing that law and economics are insufficiently informed by institutionalism).

[25] *Institutionalism*, MERRIAM-WEBSTER, https://perma.cc/WK5K-GJVQ.

[26] Goodman & Jinks, *supra* note 22, at 1755; *see also id.* at 1781 ("[In] the 'new institutionalism' we embrace . . . the concept of 'institution' [which] refers to all regulative and cognitive features of the organizational environment such as rules or shared beliefs.");

institutionalism, Goodman and Jinks continued, is "that formal organizations are, over time, 'infuse[d] with value beyond the technical requirements of the task at hand'"[27]—in other words, that agencies incorporate value judgments into their implementation of the law that go beyond those coded in the law itself.[28]

Scholars of public administration have recognized that the U.S. federal bureaucracy engages in self-preserving, institutionalist behavior.[29] Self-preservation in this context refers to behaviors that preserve important resources (such as time, funding, or other agency assets) and that allow institutions to expand and proliferate. Indeed, institutionalism is necessary to sustain and build a bureaucracy. Therefore, agencies engage institutionalist values not necessarily because they are required by statute to do so, but (as in the examples in this Article) as a matter of discretion, with the understanding that doing so is beneficial to administration.

In addition, it is commonly understood that democratic bodies, like Congress, "do not have the expertise or capacity to resolve the multitudinous problems that our complex society presents."[30]

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id. at 1761 ("Our approach . . . again following the precepts of sociological institutionalism, emphasizes the cultural processes that construct actors and their preferences.").

[27] *Id.* at 1755 (citing Philip Selznick, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION 17 (1957)); *see also id.* at 1755 n.24 (citing THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); W. RICHARD SCOTT & JOHN W. MEYER, INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS (1994); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOCIO. 340 (1977); Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, 42 AM. SOCIO. REV. 726 (1977)).

[28] Bijal Shah, *Acknowledging Values in Administration*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 2022) [hereinafter Shah, *Values in Administration*], https://perma.cc/VJ8W-QY7T (arguing that "[i]f credible reasoning is understood to be something more than policymaking based in high-quality expertise, but is neither defined by the legislature, nor guaranteed by process or analysis, then it is administrators themselves who determine whether reasoning is credible, based on their own values").

[29] *See, e.g.*, Samuel DeCanio, *Efficiency, Legitimacy, and the Administrative State*, 38 SOC. PHIL. & POL'Y 198, 203 (2021) (noting that agencies are valued for their capacity to be efficient despite the fact that efficiency may render administrators "self-interested, captured, and corrupt"). *But see* Stuart Kasdin & Luona Lin, *Strategic Behavior by Federal Agencies in the Allocation of Public Resources*, 164 PUB. CHOICE 309, 311 (2015) (noting and arguing against the longstanding view that efficient behavior preserves agencies); Daniel L. Feldman, *The Legitimacy of U.S. Government Agency Power*, 75 PUB. ADMIN. REV. 75, 75, 77 (2014) (noting a bias among bureaucrats in favor of "managerial values" such as security and efficiency); *see id.* at 75, 77 (noting that "[e]very generation proposes its own theory of American government administrative agency legitimacy" while arguing that government agencies' focus on managerial values, as opposed to constitutional values, diminishes their legitimacy).

[30] STIGLITZ, *supra* note 2, at 4.

And courts are not politically accountable,[31] relatively speaking, and thus should not be imbued with the discretion to make policy.[32] Therefore, functionalists assert that a good solution[33] to the lack of legislative capacity and expertise involves "establish[ing] institutions that *do* have the time and expertise necessary to resolve the relevant problems,"[34] and allowing for delegation, "in large measure," of "the responsibility of sorting out the problems to these institutions."[35]

As a result, one common justification for agency discretion both recognizes the unique competencies of the bureaucracy and asserts that agencies are rational managers of the public values encoded in statutes.[36] An accompanying rationalization for administrative agencies is that they act "in the public interest,"[37] and public interest theories of regulation also value institutional interests, such as efficiency.[38] Overall, these bureaucratic values

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[31] *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1256 (noting that the federal judiciary maintains a "democratically unaccountable status").

[32] *See* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1283–84 (2002) (explaining *Chevron*'s intuition that gaps in policy choices should not be filled by members of the judiciary because they "have no constituency").

[33] Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 27 (2001) (referring to the administrative state as "the triumph of legitimate, liberal governance in a world full of dangerous alternatives").

[34] STIGLITZ, *supra* note 2, at 4 (emphasis in original); *see also* David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 701 (1994) (noting that agencies function "in areas where Congress has neither the time nor expertise to micromanage policy decisions").

[35] STIGLITZ, *supra* note 2, at 4.

[36] DeCanio, *supra* note 29, at 198–99 (noting that Max Weber argued on behalf of the "the triumph of legal rational bureaucracies"). *But see* Shah, *Values in Administration*, *supra* note 28 (observing, with concern, that bureaucrats incorporate their own value judgments into their implementation of the law).

[37] Shah, *A Critical Analysis*, *supra* note 14, at 1052 (quotation marks omitted); *see also id.* at 1033–35 (discussing various statutory mandates and intelligible principles that authorize agencies to act in pursuit of the public good); JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 21 (1997) (arguing, among other things, that bureaucrats are motivated by a commitment to public values).

[38] STIGLITZ, *supra* note 2, at 56 (noting that "older 'public interest' theories of regulation [ ] posit that regulation exists to pursue the public interest, under some plausible definition (e.g., efficiency)") (citing ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE 132 (1938); ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 72–73 (2022) (describing how the increasing influence of economic reasoning on market governance led the bureaucracy to prioritize allocative efficiency over social and political ends); Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401, 402 (2003) (presenting a theoretical analysis that "points to a fundamental change that made it efficient for American society

moor the behemoth of the administrative state, improve how agencies function, and validate the administrative enterprise as a whole.

In contrast to these accounts, this Article illustrates that a culture of institutionalist values may allow—and even motivate—agencies to deprioritize important democratic virtues in order to maintain the federal bureaucracy. More specifically, this Article asserts that agencies engage in behavior, in the implementation and enforcement of regulatory law, that subordinates[39] the interests of vulnerable and marginalized people to institutional priorities. On the one hand, a healthy government prioritizes institutional interests such as improving efficiency (in a lay sense, by emphasizing maximum productivity with a minimal "use of resources, time, and/or effort"[40]); conserving resources and reducing institutional burdens; and preserving the hierarchical and overlapping institutional structures that scaffold agencies' expansive discretionary power. On the other hand, this Article shows how these particular aims may come at the expense of other important values.[41]

In order to make this argument, this Article identifies a set of dynamics that may be maintained by or reflective of bias, but that nonetheless go beyond accounts of individualized, discriminatory exercises of bureaucratic discretion. In doing so, this Article introduces a framework of systemic bias to ongoing conversations about the functionality and legitimacy of the administrative state. For decades, scholars have pushed back against the assumption that bias is experienced primarily in an individualized or intentional way by engaging the paradigms of systemic

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to increasingly rely on regulation"); DeCanio, *supra* note 29, at 198–99 ("While elected officials derive their authority from the consent of the governed, a long tradition in the social sciences argues that expert administrators are legitimized by the technical efficiency of their decisions.")).

39 To subordinate is "to make subject or subservient" or "to treat as of less value or importance." *Subordinate*, MERRIAM-WEBSTER, https://perma.cc/76JL-SC5Q.

40 *See* Luke Herrine, *Who Cares About Efficiency?*, L. & POL. ECON. BLOG (Oct. 11, 2023), https://perma.cc/K6N5-P8CD ("In its everyday use, 'efficiency' is the opposite of 'wastefulness." . . . Whatever one's goal is, to achieve it *efficiently* is to do it without unnecessary use of resources, time, and/or effort." (emphasis in original)).

41 For example, Max Weber anticipated "the diminished prospects for individual freedom in the face of rationalized bureaucratic power." DeCanio, *supra* note 29, at 199.

bias or structural racism.[42] In the education,[43] healthcare,[44] and employment[45] contexts, for instance, scholars have uncovered systems of oppression that both are fundamental to the structures of these systems and operate beneath the surface, such that their impact is all-encompassing but also difficult to discern. And, like the work of scholars exploring other institutional structures, this Article advocates for changes to administrative institutions while recognizing that it may not be possible, or even preferable, to dismantle these institutions altogether.

This Article refers to the interplay between bureaucratic institutional priorities and harm to minorities as "administrative subordination."[46] In other words, institutional interests may disadvantage people, which means, ironically, that agencies may harm members of the public while pursuing bureaucratic values "in the public interest." This is counterintuitive particularly to liberals and progressives who advocate for an expansive, discretionary bureaucracy in the face of conservative efforts, for example, to install a unitary and more politically responsive executive branch.[47]

Administration subordination happens in at least two areas of administration associated with the exclusion of and poor outcomes for minorities—immigration/national security law[48] and

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[42] *See generally, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Pathological Racism, Chronic Racism & Targeted Universalism*, 109 CALIF. L. REV. 1107 (2021); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

[43] *See generally, e.g.*, Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385 (2019).

[44] *See generally, e.g.*, Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229 (2020).

[45] *See generally, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

[46] Importantly, the words "subordinate" and "subordination" are applied in this Article neither as legal terms nor to describe necessarily unlawful behavior, and also are not intended to be a transposition or mapping of the legal equal protection concept of "antisubordination" onto structural constitutionalism and administrative law. In equal protection law, "the antisubordination principle [is] the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups." Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004). This Article is situated squarely in the administrative law and structural-constitutionalism spaces, in recognition of the fact that constitutional antidiscrimination principles are viewed as orthogonal to the administrative and separation-of-powers contexts.

[47] *See generally, e.g.*, Bijal Shah, *The President's Fourth Branch?*, 92 FORDHAM L. REV. 499 (2023) [hereinafter Shah, *President's Fourth Branch*]; Bijal Shah, *Expanding Presidential Influence on Agency Adjudication*, REGUL. REV. (July 23, 2021) [hereinafter Shah, *Expanding Presidential Influence*], https://perma.cc/PX2Q-HSXZ.

[48] *See supra* note 15 and accompanying text.

environmental/energy law.[49] This Article covers a number of examples of administrative subordination[50] and provides an overview/typology in the Appendix. In exposing these dynamics of administrative subordination, this Article forefronts work from immigration empiricists and environmental justice advocates, as well as scholarship that is grassroots and engaged in critical theory, which has been marginalized in conversations about the fundamental commitments of administrative law and the separation of powers.[51]

For instance, efficiency is important to administrators pursuing the government's interest in enforcement and exclusion, notwithstanding its impact on vulnerable groups:

- The Department of Homeland Security (DHS) uses noncitizens, particularly Muslims, as "proxy groups" for terrorists in order to identify and manage potential threats to security more quickly.[52]
- Immigration officials at DHS Immigration and Customs Enforcement (ICE) draw on arrest records to decide whom to deport, even if the targeted noncitizens were never convicted of a crime,[53] because arrest records serve as inexpensive and accessible proxies for immigration data that would be more difficult and expensive to identify with greater precision. In this way, the use of arrest records saves both time and precious resources in overburdened systems of immigration adjudication.[54]

In addition, the reduction of institutional burdens and an interest in resource conservation motivate energy and environmental administration that harms minority communities:

- The Bureau of Land Management (BLM) approves gas and oil leases in rural towns quickly, resulting in rapid labor expansion that negatively impacts the safety of Native women.[55] But by focusing on rural communities for energy

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49 *See supra* note 16 and accompanying text.

50 *See infra* Part I.

51 *See* Bijal Shah, *Toward a Critical Theory of Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (July 30, 2020), https://perma.cc/9GEE-CFYF (noting the lack of critical race perspectives in administrative and separation of powers law and arguing that the "inner circle of administrative law scholarship must expand their sense of which literature speaks to the fundamental" aspects of administrative law and structural constitutionalism); *see also* Bijal Shah, *A Critical Analysis*, *supra* note 14, at 1011.

52 *See infra* notes 146–53 and accompanying text.

53 *See infra* notes 157–70 and accompanying text.

54 *See infra* notes 167–70 and accompanying text.

55 *See infra* notes 201–10 and accompanying text.

project expansion, the BLM is able to streamline its environmental review process.[56]

- The Federal Emergency Management Agency (FEMA) failed to evacuate tens of thousands of poor people of color in the wake of Hurricane Katrina.[57] However, this is a result of FEMA's employing a systematic approach in which the agency leaves important decisions—such as those involving funding—until the last minute in order to handle an institutional history of limited resources.[58]

And the centralization of mandates within large agencies, as well as the coordination between and overlap of distinct areas of enforcement, can come at the expense of marginalized interests:

- DHS pressures its subcomponent, the U.S. Citizenship and Immigration Services (USCIS), to drown its humanitarian mandate in a sea of national security measures, which slows down or even halts USCIS's immigration benefits adjudication process.[59] But USCIS's resulting emphasis on national security is in keeping with the priorities of its parent agency, DHS, created in the wake of 9/11.[60]
- The shared responsibility of criminal prosecutors and immigration officials for the prosecution and enforcement of immigration law has reduced fair process and outcomes for noncitizens impacted by the criminal legal system.[61] However, this approach serves the government's interest in increasing the speed and ease with which both criminal and immigration law are implemented.[62]

Broadly, this Article builds on recent work that seeks to better understand and improve how agencies balance the virtues of "administrativism"—that is, support for the function and preservation of administrative institutions[63]—against its impact.[64] It

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56 *See infra* notes 208–11 and accompanying text.

57 *See infra* notes 220–27 and accompanying text.

58 *See infra* notes 226–29 and accompanying text.

59 *See infra* note 283 and accompanying text.

60 *See infra* notes 279–83 and accompanying text.

61 The term "criminal legal system" implies a sort of formal content to the administration of criminal law. Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899, 922–23 (2023) (noting that the use of the phrase "criminal legal system" in lieu of "criminal justice system . . . disclaims any suggestion that the system either *is doing* or *is designed to do* justice" (emphasis in original)).

62 *See infra* notes 186–97 and accompanying text.

63 *See* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3, 5 (describing "a deep distrust of bureaucracy" as "anti-administrativist").

64 *See, e.g.*, BERMAN, *supra* note 38, at 4 (observing that "economic reasoning," or a "high value" on "efficiency, incentives, choice, and competition frequently conflict[ ] with

does so by evaluating the external effects of the internal commitments of the bureaucracy, which have been brought to the fore in recent literature. On one side, academics assert that internal administrative structures support accountability through the processes of reason-giving, testing, and adaptation.[65] On the other, agencies have been found to deliberately undermine the programs they administer.[66] This Article strikes a middle ground, by advocating for support of the administrative state with a recognition of its particularized and systemic flaws.

From a distance, this Article appears to offer a critique of administration from the conventional perspective of liberal proceduralism. In other words, this Article might seem to argue that agency efforts to implement their mandates suffer from incomplete public input and participation or rely on data that favors sophisticated stakeholders. To the contrary, however, this Article is an effort to assert the importance and locate the place, in federal administration, of substantive values related to equity and justice, as opposed to simply identifying instances of weakness in administrative procedure, with the understanding that procedure can assist in the prioritization of such values.

More to the point, this Article asserts that it is important for legal theorists, critics, and advocates to recognize and comprehend the tension between institutionalist incentives—that is, theoretically, good administration—and the goal of ensuring that administration does not harm people.[67] In addition, this Article argues that, to the extent institutional interests motivate agencies to harm marginalized people, the core commitments of the current administrative state are inconsistent with just administration. In this vein, this Article contends that agencies

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competing political claims grounded in values of rights, universalism, equity, and limiting corporate power" in the making of public policy); *see also id.* at 154–79.

65 *See, e.g.*, Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 3000, 3011 (2023) (arguing that agency practices engender administrative accountability); *id.* at 3008 (noting "the virtues of accountability: to be pragmatically responsive to social needs, to problem-solve in the public interest, and to justify the exercise of government power"); Jon D. Michaels & Blake Emerson, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 108 (2021) (advocating for a diffusion of power away from the President that empowers the bureaucracy).

66 *See, e.g.*, David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 785–811 (2022) (explaining the pressures agencies face to nullify administered programs); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 587 (2021) (arguing that the President exacerbates "structural deregulation," which "erodes an agency's staffing, leadership, resource base, expertise, and regulation—key determinants of the agency's capacity to accomplish its statutory tasks").

67 *See* BERMAN, *supra* note 38, at 72–73.

engaging in administrative subordination betray true efficiency, which requires good outcomes as opposed to merely speed or crude cost-saving efforts to poor ends.

To grapple with the problems of excessive institutionalism, the second half of this Article applies tools identified by positive political theorists to advocate for institutional redesign that could enable agencies to confront administrative subordination. In doing so, it contributes to legal scholarship the argument from public administration that rather than public servants' "excessive tilt" toward values that enhance bureaucratic security and efficiency, it is "institutional behavior consistent with societal values . . . [that] will increase [bureaucratic] legitimacy, while behavior that is inconsistent with such values will decrease it."[68]

While it seeks to improve an essentially flawed institution, this Article's approach is conservative, and its suggested interventions are focused and directed. For instance, it advocates neither for the continuation of conventional bureaucracy nor for the dismantling of agencies championed by some critics of the administrative state (and by public choice theory, to some extent[69]). Rather, it promotes a critical adjustment to bureaucracy. If the problem is that agencies are motivated to subordinate the well-being of marginalized communities to achieve institutional interests, then potential solutions lie in shifting administrative incentives or in curtailing the bureaucracy's discretion to pursue them.

Accordingly, this Article's prescription offers several targeted, ground-level approaches to altering institutional incentives that emphasize efficiency, resource conservation, and aggregation of capacity. The overarching goal is to constrain administrative discretion—including discretion in policymaking, enforcement, and adjudication—in ways that motivate agencies to rebalance their priorities in the implementation of law. These aims could be furthered from the top down, filtered through legislation; from the bottom up, instigated by the President and agencies themselves; and with a focus on reviving a government of small, discrete agencies. Some of the proposed changes may align with functionalist best practices, such as the enhancement of reason-giving requirements in adjudication. Others, like

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[68] Feldman, *supra* note 29, at 75; *see generally id.* (drawing on the work of Professors John Rohr and Lon Fuller to advocate for the view that public servants owe their loyalty to constitutional values and people, not "managerial" values).

[69] *See* Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746, 1772 (1998) (describing how one segment of public choice theory leads theorists to advocate for the breakdown of the administrative state).

greater constraint of agency discretion by Congress or more concrete boundaries between conflicting administrative functions, enlist formalist approaches.

The Article unfolds as follows. Part I argues that agencies subordinate good process and outcomes for vulnerable communities to the institutional virtues that legitimately contribute to a robust administrative state. To make this argument, this Part identifies instances in which institutional values overshadowed the potential to minimize harm to minorities in administrative processes or outcomes. Table I offers a categorized overview of the examples detailed in this Part.

The bureaucratic virtues Part I examines include agency efforts to reduce institutional burdens by improving efficiency, including by drawing on less expensive and easier-to-obtain data ("information proxies") and by curtailing process; limiting resource expenditure, including by saving money and reducing the amount spent on gathering information; and by centralizing institutional structures in order to privilege the values of an agency's or regulatory framework's most influential component(s). It argues that administrative behavior subordinates minorities to bureaucratic self-preservation in contexts plagued by injustice (including national security, immigration, environmental crisis, energy justice, and land use law) and, accordingly, in agencies such as DHS and its immigration subcomponents, including USCIS and ICE; the Department of Justice (DOJ) and its immigration subcomponent, the Executive Office for Immigration Review (EOIR); and the Environmental Protection Agency (EPA), FEMA, and BLM, among others.

Part II applies positive political theory to advocate for adjustments to bureaucracy that stave off the subordination of minority interests to administrative values. More specifically, institutional (re)design could correct for previous agency behavior and drain agencies of bureaucratic incentives that lead to the enforcement of law in subordinating and biased ways. Table II offers a categorized overview of how the prescriptions described in Part II might improve the dynamics identified in Part I.

More specifically, Part II advocates for changes to agency structure to build new pathways of accountability, including both top-down and bottom-up institutional (re)design. Congress could make shifts: one, by manipulating appropriations subtly—namely, via earmarks and limitation riders—to shape how agencies exercise discretion, and two, by statutorily bolstering administrative process in nuanced ways to improve equity. The

President and agencies themselves could take the reins to privilege more accurate information and more generous, accessible process. Finally, this Part argues that future administrative growth should place greater emphasis on building small, discrete agencies, instead of behemoths like DHS, in which public welfare and the nuanced exercise of discretion by agency subcomponents are overshadowed by broader agency mandates. A comprehensive typology displaying the interaction between the case studies in Part I and prescriptions in Part II can be found in the Appendix.

I. SUBORDINATING MARGINALIZED COMMUNITIES TO INSTITUTIONALISM

An important objective of the federal government is to protect the public from harm and overreach by private entities,[70] and a healthy administrative state is required to accomplish this goal. Robust administration requires expansive administrative policymaking discretion.[71] As a descriptive matter, agencies "possess enormous discretion that they can exercise in ways that matter to the parties who have a stake in what they do."[72] This fact has normative implications as well.[73]

More to the point, the exercise of extensive administrative discretion has drawbacks.[74] Arguably, institutional actors "essentially pursu[e] self-interested and parochial concerns."[75] Furthermore, administrators sometimes engage in arbitrary behavior under the guise of exercising discretion, to the detriment of

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[70] *See* Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1382–84 (1973).

[71] *See* Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 HARV. J.L. & PUB. POL'Y 103, 108 (2010) (arguing that a strong administrative state with discretion to make policy and delegate is necessary for the bureaucracy).

[72] Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 859 (2009).

[73] *Id.* ("For many social scientists who study bureaucracy, that discretion is just a fact about the world that bureaucrats inhabit. Legal scholars have tended to take a more normative view.").

[74] Over a decade ago, Professor Edward Rubin mined the personally "oppressive" treatment by agencies of regulated parties. *See* Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291, 291 (2012). *See generally id.*

[75] STIGLITZ, *supra* note 2, at 18.

marginalized people.[76] Notably, agencies can engage in racist behavior.[77] They can also violate the arbitrary and capricious standard of the Administrative Procedure Act[78] (APA) in a manner that harms, for instance, the poor.[79]

Furthermore, "[a]dministrative states' regulatory failings" are also attributable "to the objectives or interests that administrative actors pursue," including institutional self-interest.[80] In this vein, this Part applies a new institutionalist approach[81] to evaluate concerning administrative behavior. In his work exploring how individual actors unintentionally engage in racist behavior as a result of relying on unexamined background understandings, Professor Ian Haney López noted, "New Institutionalism argues that to a significant degree human behavior is not consciously motivated, or at least not principally so, but instead stems from the unconsidered repetition of cognitively familiar routines."[82] Historical institutionalism, a form of new institutionalism,[83] has provided a useful framework for better

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[76] Sinnar, *supra* note 15, at 1397 ("[N]othing opens the door to arbitrary action so effectively as to allow officials to pick and choose only a few to whom they will apply legislation . . . ." (quoting Ry. Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring))).

[77] *See Symposium on Racism in Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT, https://perma.cc/ZQE5-FCYK; *Race and Regulation Lecture Series*, PENN PROGRAM ON REGUL., https://perma.cc/3EGN-8WTA; Symposium, *Inclusion, Exclusion, and the Administrative State*, 66 DUKE L.J. 1677 (2017); *see also supra* notes 15–16.

[78] 5 U.S.C. §§ 551, 553–559, 701–706.

[79] *See, e.g.*, United States v. Tarkowski, 248 F.3d 596, 602 (7th Cir. 2001) (finding that the EPA violated the arbitrary and capricious standard of the APA by enforcing a law authorizing it to investigate complaints of environmental contamination in a manner that harmed a poor person); *see also* Todd S. Aagaard, *Agencies, Courts, First Principles, and the Rule of Law*, 70 ADMIN. L. REV. 771, 777 (2018) (noting the Seventh Circuit suggested that the EPA assumed "absolute and unrestrained authority to come onto Tarkowski's property and disrupt his life" in part because Tarkowski was poor).

[80] DeCanio, *supra* note 29, at 204 (suggesting that "bureaucrats' self-interest, and patterns in the concentrated benefits and dispersed costs of regulatory decisions, cause administrative actors to deviate from the public interest").

[81] For a definition and discussion of this approach, see *supra* notes 22–28 and accompanying text.

[82] Ian F. Haney López, *Institutional Racism: Judicial Conduct and A New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000) ("New Institutionalism also makes the cultural claim that routinized sequences of behavior eventually come to define normalcy, or more broadly, reality."); *accord* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1115 (2000) (suggesting that "the evolution of agency custom, and its culmination in established practice, manifests a pragmatic adaptation of law to . . . individualized administration").

[83] *See* Griffin, *supra* note 23, at 2116; *see, e.g.*, Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 405 (2007) (noting that historians have drawn on institutionalism to illustrate that

understanding the subordinating dimensions of the foundations of administrative programs.[84] Likewise, this Part catalogues how, in the present day, administrative institutions prioritize bureaucratic self-preservation and proliferation over the welfare of the people that agencies are tasked with regulating.

This Part continues to acknowledge the insight noted in the Introduction: institutional priorities are justifiably important to maintaining a functional administrative state.[85] But it also asserts that administrativism may give agencies rein to harm people. Importantly, while the relevant agency behavior is certainly shaped by statutory and regulatory mandates, administrators' choices to pursue administrative values are largely discretionary. Broadly, this Part uncovers a relevant set of factors that shapes discretion in ways that harm minority and vulnerable communities, beyond flaws that originate in bureaucrats themselves. The administrative values considered in this Part encompass an interest in improving institutional efficiency, including by relying on less accurate sources of information, lower-cost data, and reduced process; preserving institutional resources, including capacity and money; and sustaining the centralized and overarching mandates, hierarchical institutional structures, and overlapping and conflated agency enforcement mandates that both drive and sustain agencies.

Unlike explanations for exclusionary and unequal administrative practice that center on uncovering the individualized criteria underlying decision-making and the idiosyncrasies of specific exercises of discretion, this approach emphasizes systemic reasons for inaccessible process and harmful outcomes. Others have employed this approach. For instance, Professor David Super has argued that the public welfare system involves "informal rationing," which is based on nonobvious factors that burden claimants.[86] Likewise, Professors Pamela Herd and

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"the emerging administrative state was shaped by" political impulses "refracted by existing institutional structures, both constitutional and bureaucratic in nature"); Whittington, *supra* note 24, at 484–86.

84 *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 20–21 (2017); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1–26 (2016) (tracing the rise of mass incarceration to assumptions underlying President Lyndon B. Johnson's federal social welfare programs at the height of the Civil Rights era).

85 *See supra* notes 29–38 and accompanying text.

86 David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 817–18 (2004); *id.* at 818:

Donald Moynihan have noted the costs, suffered by regulated parties, of engaging the administrative state.[87] For instance, the burden of understanding and complying with the requirements of regulation fall disproportionately on vulnerable communities and, moreover, may be the result of systematic administrative choices.[88]

This Part builds on these observations by arguing that an emphasis on institutional interests may similarly burden claimants, in particular, by encouraging agencies to subordinate individual interests to administrative self-preservation. As this Part will argue, an administrative focus on priorities that serve to maintain and expand the bureaucracy may create space for and even incentivize inaccessible and unequal implementation of the law.

Before proceeding to its analysis, note a few observations about the contribution of this Part. First, while this Part grapples with administrative self-interest just like public choice theory does,[89] it does not make a public choice argument. Certainly, public choice theory considers how agencies are designed and "the implications of these design principles for effective and efficient government."[90] Concern for the structure and management of "divergent incentives, however, goes well beyond public choice analysis."[91] More to the point, public choice theory is concerned

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> [F]ormal, explicitly substantive rules are only one way in which the government rations public benefits. Systems that lead to procedural denials of substantively eligible claimants, that discourage claimants from seeking or continuing to receive benefits, or that give third parties influence over whether a claimant will receive benefits also have a rationing effect.

87 PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22 (2018).

88 *Id.* at 3; *see also* Cass R. Sunstein, *Wading Through the Sludge*, N.Y. REV. BOOKS (Apr. 4, 2019) [hereinafter Sunstein, *Wading*], https://www.nybooks.com/articles/2019/04/04/paperwork-wading-through-sludge/?lp_txn_id=1531234:

> [Herd and Moynihan] use the phrase "administrative burdens" to include not just paperwork requirements but also an assortment of other obstacles, including waiting times, fees, and in-person interviews. In their view, administrative burdens undermine individual rights . . . [and t]hey are keenly interested in distributive questions—in the effects of administrative burdens on specific social groups (including the poor, the disabled, and the elderly).

89 Rubin, *supra* note 74, at 315 ("Public choice theory is grounded on the premise that people maximize their material self-interest."); DeCanio, *supra* note 29, at 204 ("[P]ublic choice and regulatory capture theorists argue that bureaucrats' self-interest, and patterns in the concentrated benefits and dispersed costs of regulatory decisions, cause administrative actors to deviate from the public interest.").

90 Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

91 Rubin, *supra* note 74, at 317.

with stakeholder issues, rather than issues rooted in the structures of agencies themselves.

Public choice theorists argue that administrative failures are the result of agencies aligning with legislative preferences determined by powerful interest groups.[92] This dynamic plays a role in environmental justice[93] and consumer protection.[94] However, while public choice theory has had considerable success in modeling legislators as power maximizers,[95] "it has struggled to identify the equivalent maximizing behavior for administrative agents."[96]

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[92] *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 39–40 (1998) (explaining how under public choice theory, "[i]nterest groups . . . see their demand for regulation met by legislators who acquiesce in order to enjoy continued electoral success"); Rubin, *supra* note 74, at 315–16 ("[Public choice theory] asserts that the self-interest of elected officials, most notably legislators, lies in obtaining reelection, rather than in any desire to either represent their constituents' views or implement their own view about the public good."); Gersen, *supra* note 90, at 333 (characterizing public choice as focused on legislative control over agency behavior); Michael D. Makowsky & Thomas Stratmann, *Politics, Unemployment, and the Enforcement of Immigration Law*, 160 PUB. CHOICE 131, 131 (2014) (finding that "a congressman's party affiliation . . . correlate[s] to decisions made at every stage of [immigration] enforcement"); *id.* at 140–49.

[93] "As many studies document, commercial waste facilities are disproportionately located in poor communities of color." Foster, *supra* note 16, at 787. Scholars have shown that because "a white, upper-socioeconomic neighborhood often engenders strong public opposition," public-private siting processes focus "on industrial or rural communities, many of which . . . have predominantly minority populations. . . . [T]hese communities are presumed to pose little threat of political resistance due to their subordinate socioeconomic, and often racial, status." *Id.* at 800–01.

[94] "The Federal Trade Commission [FTC], for example, was notorious for adopting a lenient approach to unfair and deceptive trade practices committed by large, politically powerful companies and pursuing remedies against small, marginal operators." Rubin, *supra* note 74, at 313 (citing EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969)); ALAN STONE, ECONOMIC REGULATION AND THE PUBLIC INTEREST: THE FEDERAL TRADE COMMISSION IN THEORY AND PRACTICE (1977)). Securities and Exchange Commission policies have also been shown to benefit special interests over the individual. Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation*, 47 WASH. & LEE L. REV. 527, 528–29 (1990).

[95] David E. Bernstein, *Administrative Constitutionalism: Considering the Role of Agency Decision-Making in American Constitutional Development*, 38 SOC. PHIL. & POL. 109, 126–27 (2021) (citing THE BUDGET MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE (Andre Blais & Stephane Dio eds., 1991)). *But see* Rubin, *supra* note 74, at 316 ("William Niskanen's idea that [legislators] are trying to maximize their agency's budget has proven to be empirically untenable."). *See generally* William A. Niskanen, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); Samuel Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

[96] Rubin, *supra* note 74, at 316.

In contrast, this Part's emphasis is more consistent with literature focused on agencies' interests in increasing their budget[97] and discretion.[98]

Second, this Part does more than add to the account of capture. The public choice theory of regulatory capture asserts that agencies are particularly responsive to the interests of powerful, well-heeled interest groups[99] and the threat of retribution from them.[100] Fundamentally, capture explains how powerful *external* parties can influence agency behavior outside of legislative oversight and process.[101] This Part focuses on pressures and dynamics *internal* to agencies.

However, capture by external interests and internal institutional pressures may interact to drive an agency to subordinate minority and marginalized interests.[102] When the interests of a vulnerable or minority community do not converge[103] with those

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97 Gersen, *supra* note 90, at 334 ("Regardless of what ends legislators prefer, bureaucrats maximize budgets for their agencies [and] the scope of their own power.").

98 *See generally* Jean-Luc Migué & Gérard Bélanger, *Toward a General Theory of Managerial Discretion*, 17 PUB. CHOICE 27 (1974) (describing administrator maximization of discretion, or "slack"); Paul Gary Wyckoff, *The Simple Analytics of Slack-Maximizing Bureaucracy*, 67 PUB. CHOICE 35 (1990) (same).

99 Croley, *supra* note 92, at 5 (noting that the concept of agency capture is a core aspect of public choice theory); Stewart, *supra* note 1, at 1684–85. "Regulatory capture is problematic because it undermines expert decisionmaking as the agency becomes persistently biased in favor of its regulated industry in executing its mission." Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 25 (2015).

100 For example, corporations sometimes "flex their muscles" (for instance, by use of lobbying or contributing to election campaigns) to signal to the bureaucracy that they will fight regulation. Sanford C. Gordon & Catherine Hafer, *Flexing Muscle: Corporate Political Expenditures as Signals to the Bureaucracy*, 17 AM. POL. SCI. REV. 245, 258 (2005) (finding that the Nuclear Regulatory Commission "reduces its inspection at nuclear plants whose operators make large contributions to political campaigns").

101 Matthew Wansley, *Virtuous Capture*, 67 ADMIN. L. REV. 419, 419 (2015) ("A regulatory agency is captured if, instead of the public interest, it pursues the interests of powerful firms it is intended to regulate."); *see, e.g.*, Kulzer et al., *supra* note 16, at 332–33 (2021) (describing how agencies like the Federal Energy Regulatory Commission approve, as a result of capture by gas corporations, pipeline projects that manifest "environmental racism" by harming minority and poor communities).

102 *See, e.g.*, *infra* notes 197–200 and accompanying text (discussing how both capture by powerful oil and hydropower companies *and* internal institutional pressure to create faster and more efficient process contributed to the harm against the Indigenous community).

103 Professor Derrick Bell's interest-convergence theory states that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). Others have argued that interest convergence has significance "not just for blacks but also for latinos and other people of color, women, and lesbigay people." William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2393 (2002).; *see also* Khiara M. Bridges, *Foreword: Race in the Roberts Court*,

of powerful stakeholders *and* these marginalized concerns are at odds with the priorities of the agency itself, this combination may exacerbate the subjugation of marginalized groups' interests to both influential stakeholders' and the agency's priorities.[104]

In addition, when the concerns of marginalized communities are at odds with the priorities of the agency itself, institutionalism can overwhelm the interests of those with a relative lack of status or power to dissuade bureaucrats from acting according to their institutional drivers. This suggests that the administrative pursuit of institutional values—including efficiency, cost-effectiveness, and centralized mandates dictated by administrative structure—favors the powerful and is not, in practice, race-, gender-, or wealth-neutral.

Consider the facts that harmful public projects end up sited in places, populated by vulnerable people, where the cost of land is inexpensive;[105] marginalized communities benefit from fewer environmental protections;[106] and minorities, those impacted by the criminal legal system,[107] and even children,[108] suffer from subpar administration. Outwardly racist policies, or even implicit bias, are not required to reach these results. Rather, the interaction between bureaucratic interests, susceptible or exploitable conditions, and impacted communities' limited resources and lack of political power to fight administrative choices may lead to problematic procedures and results.

Of course, it is difficult to determine the relative proportion of bias to institutionalism underlying administrative subordination. The point of this Part is merely to suggest that institutionalism shapes administration to some extent. Even if institutionalism serves as a cover for bias, it nonetheless has contributed to the administrative action or outcome at issue. Also,

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136 HARV. L. REV. 23, 28 (2022) (suggesting "that the Court is willing to recognize nonwhite people's modern racial injuries only when nonwhite people's interests align with white interests"); *id.* at 153 n.779 ("This would be an example of Professor Derrick Bell's interest-convergence thesis.").

104 For example, Professor Dorothy Brown has explored "Bell's interest-convergence thesis" as it pertains to tax policy, which demonstrates how a seeming lack of overlap between the interests of white regulated parties and agencies can discredit a governmental program. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 799 (2007) ("Once the low-income taxpayer credit is 'properly' raced, and viewed as primarily benefiting whites, it will no longer be perceived as welfare but as a tax credit available to the hardworking poor.").

105 *See infra* note 229 and accompanying text.

106 *See infra* notes 228, 230–33, and accompanying text.

107 *See infra* notes 156–73, 186–97, and accompanying text.

108 *See infra* notes 240–46 and accompanying text.

this Part asserts that administrative behavior across all of the case studies is driven by key values and pursuits that allow agencies to sustain and enhance themselves. However, the examples are different in important ways too, and this is a challenge of building out a systemic theory. In addition, it is not easy to determine, with precision, how many instances of subordinating minority interests to institutionalism indicate a systemic failure. But even isolated instances of administrative subordination indicate institutional weaknesses that require consideration in order to evaluate and improve the administrative state.

Essentially, this Part makes the simple point that, in general, it is not good for the administrative state to inflict harm on minority and vulnerable communities in order to maintain itself. It is possible to dismiss the trade-offs between institutionalism and equity as merely byproducts of institutional scarcity and other limitations to agencies' capacity. Certainly, agencies work under the pressure to act efficiently and in the shadow of resource limitations, and administrative actors are motivated to pursue both bureaucratic values and maintain the structures that undergird their power in order to preserve and grow the administrative state. However, on closer examination, it is the interaction between, on the one hand, administrative time restrictions, organizational burdens, and monetary constraints, and, on the other hand, administrative choices based in institutional values (combined with unfair background conditions in some cases) that appears to lead to administrative subordination. As a result, administrative subordination both calls into question the validity of a model of administration whose success is based on the impossible scenario of plentiful resources and, beyond the fact that limited means necessarily reduce the quality of administration, casts a shadow on the de facto success of the administrative state.

Admittedly, this perspective privileges equity and substantive (and sometimes nonmajoritarian) democratic values—such as civil liberties, transparency, and accountability to the public—over concepts of effectiveness and the attendant priorities, like efficiency, that allow agencies to function.[109] Then again, the existence of administrative subordination is arguably an affront to both democratic legitimacy *and* efficiency, to the extent that efficiency is measured not only by speed and reductions in costs but also by fair administration and just outcomes. Indeed, reducing

[109] Other academics prioritize similar values. *See generally, e.g.*, BERMAN, *supra* note 38; Christopher Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749 (2023); Rubin, *supra* note 74.

costs (for instance, by using lower-quality data) to the detriment of designated goals and values is not efficient because it is not efficacious; rather, this form of cost savings is simply cheap.

Finally, for those administrative functionalists who have an affirmative interest in parity and equity in administration, institutionalism in its current form may be appealing but nonetheless inconsistent with their values. Likewise, under a separation-of-powers framework that views liberty as consistent with nondomination, administrative subordination may be self-defeating.[110] Succinctly, the separation-of-powers theory's emphasis on the "'distribution of national powers' serves not only efficiency, but also 'the need to diminish the risk of tyranny.'"[111] Furthermore, "republican democratic freedom" may be defined by "nondomination—that is, not as freedom from all power, but as a reason-demanding freedom from the potentially arbitrary exercise of power that fails to take relevant interests into account."[112] Therefore, a functionalist bureaucracy in service of liberty by today's standards, which arguably encompasses the protection of individual and equal rights,[113] must contend with the tension between institutional virtues and bureaucratic harm to vulnerable communities in order to adequately accomplish the separation-of-powers framework's goals.

This Part proceeds as follows. First, it considers the harms of efficiency—that is, agencies' efforts to conserve time and resources—on marginalized communities. More specifically, it discusses the consequences, for high-quality decision-making, of administrative reliance on data that is easier to gather in lieu of high-quality information that would be more difficult to obtain. In addition, it reviews some consequences of streamlining administrative process. Second, this Part evaluates the outcomes of agency efforts to preserve resources. This includes measures to save money and reduce administrative burdens outright, as well

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[110] *See* Shah, *A Critical Analysis*, *supra* note 14, at 1018 (arguing that "under a theory of liberty as non-domination, a functionalism devoid of equity- or justice-oriented values is perhaps not enough to achieve the [separation-of-powers] framework's core goal of preserving and promoting liberty").

[111] *Id.* at 1018–19.

[112] Bernstein & Rodríguez, *supra* note 65, at 3052 (citing Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163, 164–65, 180 (Ian Shapiro & Casiano Hacker-Cardón eds., 1999)); *see also* Shah, *A Critical Analysis*, *supra* note 14 (discussing the theory of liberty as nondomination).

[113] *See* Shah, *Internal Separation*, at 251 ("[T]he same sordid U.S. history and dynamics that have given way to individual-rights jurisprudence also materialize into tyranny. More broadly, the assumption that the divide between the separation of powers and equal protection is justified on its own terms . . . lacks a critical dimension.").

as reliance on cheaper data instead of more expensive or time-consuming analysis. Third, this Part reflects on the impact of conflicts between and the conflation of separate agency responsibilities and missions. In particular, it examines the influence of the culture and priorities of large agencies on the goals and values of subcomponent agencies. It also observes drawbacks of coordinating and overlapping the actions and responsibilities of distinct agencies.

To support its exposition, this Part highlights case studies that illustrate how institutional values may overwhelm the welfare of vulnerable communities in administrative processes or outcomes. Table I illustrates, at a glance, the institutional incentives, resulting agency acts, their benefit to agencies, and their impact on minorities and vulnerable people, all of which will be explored in the rest of Part I. Each of the examples that follow may embody more than one institutional incentive. The examples have been grouped under just one category, for ease of discussion.

TABLE I: INSTITUTIONAL INCENTIVES, RESULTING BEHAVIORS, BENEFITS, AND HARM TO MARGINALIZED COMMUNITIES

Institutional Motivation	*General Agency Behaviors*	*Agency*	*Regulatory Areas*	*Specified Agency Behavior*	*Plausible Benefits to Agency*	*Harm to Marginalized Community*
Improving efficiency	Using information proxies (i.e., drawing on personal identity and characteristics or on other information) to make enforcement or policy decisions	DOJ, DHS / ICE, DHS / USCIS	National security, criminal law enforcement, immigration, notice-and-comment rulemaking	Using racial identity, Muslim religion, and undocumented status as a proxy for terrorists; using unemployed immigrants and immigrant advocates as proxies for undocumented status; using arrest records to target deportation, using the omission of minor criminal activity to target deportation, using data and analysis as a proxy for sophisticated comments[114]	Save time, money, and act more consistently with other agencies on parallel endeavors; agencies can save time and effort in reviewing comments in a notice-and-comment rulemaking[115]	Harm to noncitizens (including those who are employed, have engaged in advocacy, and have been impacted by the criminal legal system); U.S. citizens from religious and racial minorities; marginalized communities with limited access to technology[116]

[114] *Infra* Part I.A.1.
[115] *Infra* Part I.A.1.
[116] *Infra* Part I.A.1.

Institutional Motivation	*General Agency Behaviors*	*Agency*	*Regulatory Areas*	*Specified Agency Behavior*	*Plausible Benefits to Agency*	*Harm to Marginalized Community*
Improving efficiency	Curtailing process in administrative adjudication and decision-making	DHS / USCIS, DOJ EOIR, DHS / ICE, Federal Energy Regulatory Commission (FERC), BLM	Immigration, energy justice, administrative adjudication	Curtailing national security review, relying on the criminal enforcement system to provide immigration-enforcement screening, relying on applicants' studies and cost-benefit analysis to evaluate energy pipeline projects, employing streamlined environmental review and narrow standards to approve oil and gas leases[117]	Act with greater ease, speed, and efficiency and reduce administrative and fiscal burdens[118]	Harm to Muslim noncitizens, noncitizens who have come into contact with criminal enforcement, and Indigenous communities (particularly Native women)[119]
Conserving resources	Reducing financial and administrative burdens	DHS / FEMA, EPA, state agencies	Environmental justice, administrative adjudication	Limiting resources for disaster management and factoring the cost of land into decisions for siting and managing industrial waste, reduced enforcement of environmental regulation against companies in minority and low-income communities, prioritizing the reduction of resource and administrative burdens in administrative due process calculations[120]	Conserve financial and other resources and lower the cost of administering programs[121]	Poor, minority, and rural communities harmed by a lack of disaster management (e.g., during Hurricane Katrina), industrial waste hazards, and failure to detect corporate compliance and corporate noncompliance with environmental regulation; communities subjected to antiterrorism measures have reduced access to transparent and protective adjudicatory process[122]
Conserving resources	Relying on lower-quality data	EPA	Food safety and environmental justice	Relying on lower-quality pesticide and food-safety data and analysis, relying on data gathered from "self-monitoring" by gas and oil companies[123]	Reduce costs and administrative burdens of obtaining and evaluating new data[124]	Harm to children and communities that have historically suffered from environmental racism[125]

117 *Infra* Part I.A.2.
118 *Infra* Part I.A.2.
119 *Infra* Part I.A.2.
120 *Infra* Part I.B.1.
121 *Infra* Part I.B.1.
122 *Infra* Part I.B.1.
123 *Infra* Part I.B.2.
124 *Infra* Part I.B.2.
125 *Infra* Part I.B.2.

Institutional Motivation	*General Agency Behaviors*	*Agency*	*Regulatory Areas*	*Specified Agency Behavior*	*Plausible Benefits to Agency*	*Harm to Marginalized Community*
Adhering to top-level agency mandates	Subordinating subcomponent mission to broader agency mandate	DHS, DHS / USCIS, DHS / FEMA, FBI, FBI / High-Value Detainee Interrogation Group (HIG)	Immigration, national security, disaster management, land use	Placing subcomponents in larger agencies (USCIS in DHS, FEMA in DHS, HIG in the FBI)[126]	Accrue legitimacy benefits to the broader umbrella agency through subcomponent compliance, yield benefits to the subcomponent from the umbrella agency's structural and experiential resources, and obtain agency benefit from state and local expertise[127]	Subcomponent efforts to benefit noncitizens, manage natural disasters, and improve torture techniques are overshadowed by larger agencies' anti-terrorism and national security mandates and their cultures of coercive methods[128]
Adhering to overlapping agency mandates	Conflating mandates across agencies	DOJ, DHS / ICE, DHS / Customs and Border Patrol (CBP)	Immigration, national security	Deploying ICE and CPB personnel to further the DOJ's criminal prosecution of noncitizens[129]	"Fast track" criminal and deportation processes and deploy as many administrative resources as possible toward anti-terrorism ends[130]	The conflation of criminal and immigration functions reduces process for noncitizens in both contexts[131]
Adhering to overlapping agency mandates	Conflating mandates within a regulatory area or agency	DOJ, DHS / USCIS	Immigration	DHS officials act as both adjudicators of asylum cases and counsel against noncitizens facing deportation[132]	Conserve administrative resources and exclude more noncitizens[133]	Humanitarian asylum adjudications are influenced by DHS's broader mission of security, punitive enforcement, and exclusion[134]

[126] *Infra* Part I.C.1.
[127] *Infra* Part I.C.1.
[128] *Infra* Part I.C.1.
[129] *Infra* Part I.C.2.
[130] *Infra* Part I.C.2.
[131] *Infra* Part I.C.2.
[132] *Infra* Part I.C.2.
[133] *Infra* Part I.C.2.
[134] *Infra* Part I.C.2.

A. The Fallout of Efficiency

Legislators care about administrative efficiency.[135] This concern filters into and is present at the agency level as well.[136] Moreover, administrative states are hailed for "their superior efficiency relative to rival forms of organization."[137] Time, like money and information,[138] is an important administrative resource. Increasing efficiency, including the speed at which tasks are completed, saves an agency time, which it can spend selectively on other tasks. Reducing the time an agency takes to complete a task or meet an obligation may also translate to concrete resource or monetary savings.

Efficiency is important to regulated parties as well. For instance, in the immigration context, more efficient adjudication might allow immigration judges to decide more cases, and to do so more quickly, thereby resolving immigration matters and allowing noncitizens to exit a state of immigration limbo.[139] Efficiency and expediency might also allow agencies to regulate in a manner that is more responsive to political pressures and ongoing problems.[140]

Efficiency, essential to agencies, is a difficult value to contest. But efficiency has trade-offs, including the possibility that the policy resulting from speedier process is of lower quality, and the fact that efficient processes may encourage agencies to overlook important alternatives. For instance, the Food and Drug Administration (FDA) "faces a basic trade-off between the speed with which new drugs are evaluated and its error rate in either

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[135] Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989) [hereinafter McCubbins et al., *Administrative Arrangements*] ("[L]egislators are concerned about agency efficiency in collecting and evaluating relevant information to guide administrative decisions, and in implementing these decisions.").

[136] *See id.*

[137] DeCanio, *supra* note 29, at 199 (describing Weberian theory).

[138] Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 19–21 (2008) [hereinafter Biber, *Resource Allocation*] (discussing the importance of resources to fund agency programs); *see also infra* Part I.B (discussing financial resources and information management).

[139] Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1647–48 (2010).

[140] Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1260–61 (2022) [hereinafter Shah, *Statute-Focused Administration*] (describing cases in which agencies acted quickly in order to respond to political pressure.

mistakenly approving drugs that are unsafe, or in delaying approval of drugs that are safe and effective."[141] In addition, efficiency may exacerbate arbitrariness as a general matter. Other contexts also grapple with the trade-offs between efficiency and quality.[142]

This Section reveals that, at least in some cases, efficiency is particularly harmful to minorities. This may be due, as noted before, to the relative lack of power vulnerable communities have to dissuade agencies from acting according to their institutional incentives.[143] Ultimately, efficiency may either conceal bias or be more valuable to the agency than ensuring that its tactics do not have a disparate impact—or both. In any case, an emphasis on efficiency provides the agency a justification for subordinating the well-being of vulnerable communities to institutionalist needs and interests.

1. Information proxies.

Decision-making in our bureaucracy is substantially dependent on information.[144] Agencies are valued for their expertise; indeed, the legitimacy of the administrative state is based on the understanding that agencies' relative expertise renders them more suitable policymakers than Congress in many contexts.[145] However, bureaucrats will sometimes act on the basis of data that is relatively easy to obtain but is nonetheless less helpful for the agency's purposes than information that would be more onerous or costly to gather or analyze. This Section refers to these easier-to-obtain forms of data as "information proxies." By relying on information proxies, agencies are able to save both effort and time, but at the cost of flawed enforcement.

People can be proxies for information. As Professors David Zaring and Elena Baylis have noted, antiterrorism law targets what they refer to as "proxy groups"—namely, undocumented immigrants in lieu of people actually engaged in terrorist activity—in order to accomplish its goals,[146] and the harms of this

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141 DeCanio, *supra* note 29, at 210.

142 For example, the "paradox of procedure" in civil procedure requires courts to balance the efficiency of trials and fair outcomes. *See* Stephen K. Bailey, *Ethics and the Public Service*, 24 PUB. ADMIN. REV. 234, 239–40 (1964).

143 *See supra* notes 102–09 and accompanying text.

144 *See* STIGLITZ, *supra* note 2, at 254 (noting this in the Social Security Administration claims-adjudication context).

145 *See supra* notes 30, 34–35, and accompanying text.

146 David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1383–84 (2007).

form of proxy are exacerbated by the broad discretion allotted to DHS and its subcomponents in the application of the law.[147] Also in the national security context, Professor Shirin Sinnar illustrates that statutory law distinguishes between "international" and "domestic" terrorists,[148] and categorization as the former subjects individuals to intense punishment.[149] Even where certain laws apply to both domestic and international terrorism, law enforcement officials sometimes apply them differentially to Muslim individuals."[150] This includes Muslim U.S. citizens, who are commonly folded into the legal category of "international" terrorists by DOJ prosecutors and other agency actors.[151]

Moreover, Sinnar has argued that "legal differences do not account for all observed disparities between the treatment of Muslim suspects and those of other identities and ideologies. Indeed, "formal legal divisions by no means furnish the whole explanation for differential treatment. . . . [However, b]ecause the legal distinction appears facially plausible, it allows government officials and society to excuse observed disparities as the incidental consequences of a neutral and rational scheme."[152] This, in turn, leads to more severe punishments against these racial, ethnic, and religious minorities.[153] And yet, by drawing on the criterion of "Muslim" as a proxy for connection to international forces, agencies are able to stave off and make an example of threats to security in a more automated fashion, accuracy notwithstanding.

Agencies use people as proxies in immigration enforcement as well. For example, the prevalence of unemployed U.S. citizens serves as a proxy for the unlawful employment of noncitizens; this incentivizes the government to target employers of noncitizens more efficiently.[154] In addition, noncitizens who criticize the immigration apparatus are targeted for arrest and removal; this

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147 Sinnar, *supra* note 15, at 1384, 1390.

148 *See id.* at 1355–57.

149 *See id.* at 1335–36; *id.* at 1339 (noting that "disproportionate federal treatment of international terrorism unequally exposes defendants to a severe federal terrorism sentencing enhancement that treats even first-time offenders charged with nonviolent offenses like defendants with the most serious criminal histories").

150 *Id.* at 1339.

151 *See* Sinnar, *supra* note 15, at 1337.

152 *Id.* at 1339.

153 *Id.* at 1337.

154 *See* Makowsky & Stratmann, *supra* note 92, at 139 (suggesting that the "anti-immigrant sentiment" that noncitizens are taking jobs that rightfully belong to citizens "encourage[s] individuals in the enforcement agency to more strictly follow procedures [for auditing employers of noncitizens] and exercise their discretion in a less forgiving manner").

response appears to be a combination of retaliation and reliance on outspokenness against immigration enforcement as a proxy for undocumented immigrant status.[155]

Another example of an information proxy is an arrest record. Professor David Hausman has argued that deportations are unjustifiably biased against criminality.[156] Perhaps accordingly, arrest records are used to inform administrative actions in many contexts,[157] including immigration.[158] At the federal level, arrest records are used to make decisions about who receives official immigration status[159] and who is deported.[160] More specifically, "arrests function as a way of determining whether the arrested individual falls within an immigration removal priority."[161] This is the case even though arrests alone do not disqualify an undocumented immigrant from receiving status and even if the arrest did not lead to a conviction that would render a noncitizen ineligible for status.[162]

The decision to rely on arrest records in noncriminal, administrative contexts, whether in a particular case or to set categorical priorities, is an exercise of administrative discretion.[163] Furthermore, the connection between criminality[164]—let alone a mere arrest[165]—and unlawful immigration behavior is tenuous. Indeed,

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155 *See* Daniel Simon, *Immigration, Retaliation, and Jurisdiction*, 2020 U. CHI. LEGAL F. 477, 498; Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1442–45 (2018) (cataloging instances of noncitizens who were detained or removed after engaging in political speech or activism).

156 David Hausman, *The Unexamined Law of Deportation*, 110 GEO. L.J. 973, 976 (2022) ("[B]eing convicted of a crime raises the probability of being deported from a fraction of 1% to above 50%.").

157 *See generally* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) [hereinafter Jain, *Arrests as Regulation*].

158 *See id.* at 857–58; *see generally* Erica D. Rosenbaum, *Relying on the Unreliable: Challenging USCIS's Use of Police Reports and Arrest Records in Affirmative Immigration Proceedings*, 96 N.Y.U. L. REV. 256 (2021).

159 Rosenbaum, *supra* note 158, at 258–61, 267–71 (considering USCIS's reliance on arrest records, police records, and other criminal records, even when the charges are dropped, and the role these documents play in the assessment of immigration applications).

160 Jain, *Arrests as Regulation*, *supra* note 157, at 826–33.

161 *See id.* at 811, 829.

162 *See id.*

163 *Id.* at 856 (noting that "administrative discretion can fail to mitigate some of the most serious noncriminal consequences of arrests").

164 Adam B. Cox & Thomas J. Miles, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937 (2014).

165 *See* Jain, *Arrests as Regulation*, *supra* note 157, at 832–33.

immigration decisions that take arrests into consideration "exacerbate the racial and class-based dynamics that undergird arrest decisions."[166]

But agencies also rely on arrest records because they are inexpensive and accessible,[167] and considered to be close-enough proxies for their own priorities.[168] In the immigration context, the use of arrest records "conserve[s] enforcement dollars."[169] In addition, immigration agencies "that make decisions based on arrests can coordinate and pool resources with prosecutors and police officers, achieving a level of enforcement that neither could achieve alone."[170]

Another use of an information proxy involves the extensive rejection of noncitizens who omit information about minor criminal activity on their naturalization applications.[171] This approach "likely has an outsized effect on communities of color who are subject to greater policing, compounding the discriminatory impacts of" these denials.[172] However, it also offers the agency an efficient way to prioritize certain noncitizens for access to official status and benefits.

Finally, agencies conducting notice-and-comment rulemaking rely on "data and analysis," as a proxy for expertise to determine the validity of a public comment and whether it merits incorporation into the regulation,[173] and they have the discretion to

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166 *Id.* at 860.

167 *See id.* at 809, 815 (explaining that agencies rely on arrests "because arrests are often easy and inexpensive to access"); *id.* at 856 (noting that agencies "rely on arrests because arrest data are readily available and because they regard arrests as a proxy for information they value—but not because arrests are necessary to making regulatory decisions").

168 *See id.* at 815 (asserting that agencies rely on arrests "because they regard arrests as proxies for information they value"); Jain, *Arrests as Regulation*, *supra* note 157, at 856 (same).

169 *Id.* at 830 (explaining that "[a]s compared to other alternatives—such as street sweeps or workplace raids—arrests give immigration enforcement officials a limited and captive population to screen," reducing agencies' need to "invest resources trying to locate them").

170 *Id.* at 809.

171 *See, e.g.*, Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1353–54 (2010).

172 Nermeen Saba Arastu, *Aspiring Americans Thrown Out in the Cold: The Discriminatory Use of False Testimony Allegations to Deny Naturalization*, 55 UCLA L. REV. 1078, 1114 (2019).

173 *See* Richard J. Pierce, Jr., *Comment from Senior Fellow Richard J. Pierce on* Mass Comments, Computer-Generated Comments and Fraudulent Comments (May 25, 2021), https://perma.cc/7EK9-NXGQ.

choose which comments to consider seriously.[174] Limiting whose comments matter results in agencies overlooking ubiquitous or "situated knowledge" and views that could be "relevant, useful, and even important to many rulemakings."[175] In other words, bureaucrats exclude the perspectives of marginalized communities who may not have technocratic language or complicated tools of data analysis at their disposal, but who are in a meaningful position to communicate their own experience of ongoing regulation and understanding of conceivable regulatory choices. But given the burdensome nature of regulatory process,[176] the rise in automated[177] and repetitive commenting, and the increased ease of access to online comment submissions,[178] agencies are attracted to screening mechanisms in this context.

2. Curtailed process.

Years ago, Professor Paul Verkuil noted that "a concept of administrative procedure that offers a spectrum of procedural alternatives" "would seem to have the best chance of reconciling the values of fairness, efficiency, and satisfaction."[179] However, informal adjudication, which allows agencies significant discretion in

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[174] *See* Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 86–87 (2012) (explaining that administrative agencies often choose the "most sophisticated comments" to answer over those from the average citizen); Stewart, *supra* note 1, at 1775 ("In notice and comment rulemaking the agency is not bound by the comments filed with it, and many such comments may be ignored or given short shrift.").

[175] Nina A. Mendelson, Separate Statement for Administrative Conference Recommendation 2021-1, 86 Fed. Reg. 36075, 36078 (July 8, 2021).

[176] *See* Lauren Moxley, *E-Rulemaking and Democracy*, 68 ADMIN. L. REV. 661, 665–68 (2016) (describing the physical impediments to public participation in notice-and-comment rulemaking).

[177] *See Managing Mass, Computer-Generated, and Falsely Attributed Comments*, ADMIN. CONF. OF THE U.S. (June 30, 2021), https://perma.cc/S6X8-Y9RA (acknowledging three types of comments that present challenges to administrative agencies: mass comments, computer-generated comments, and falsely attributed comments).

[178] *See* Steven J. Balla, Reeve Bull, Bridget C.E. Dooling, Emily Hammond, Michael Herz, Michael Livermore & Beth Simone Noveck, *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95, 108–09 (2022) (describing how technological advances of allowing online comments has increased the number of false and computer-generated comments).

[179] Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 284 (1978).

choosing which procedures to follow,[180] may lend itself to inadequate process.[181] Both the choice of policymaking instrument and the flexibility to minimize procedure may, in certain situations, negatively impact decision-making outcomes or lead to unanticipated, collateral consequences. But agencies sometimes subordinate the benefits of ample and inclusive process for vulnerable petitioners to increased efficiency.

Immigration enforcement is a mechanism for maintaining national security, which more generally permits the government to oppress people who are deemed risky.[182] "The government tasks [immigration] adjudicators with rejecting an application however they can to prevent a lengthy and extensive external vetting process that would reveal whether the security concern classification was relevant or legitimate in the first place."[183] As a result, curtailed administrative review of citizenship applications and petitions for national security review have resulted in systematic exclusion of Muslim applicants.[184] That having been said, this approach promotes efficiency, which is the coin of the realm in national security policy, given the immense burden on agencies to stave off terrorism and related political disaster on behalf of governmental leadership.[185]

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[180] Bijal Shah, *Procedural Discretion* (work in progress) (on file with author); Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749, 1749 (2020) (noting "there are few uniform, cross-cutting procedural requirements in adjudication, and most hearings are conducted using procedures tailored for individual agencies or programs").

[181] Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN L. REV. 79, 111–13 (2007) (explaining how informal adjudication can be less protective of individual rights compared to formal adjudication).

[182] *See* Ramahi, *supra* note 15, at 573–74 (discussing the longstanding, misguided exclusion and surveillance of Muslims for national security reasons); Porotsky, *supra* note 15, at 354–56 (explaining that governmental oppression of Indigenous groups was "justified by national security concerns").

[183] *See* Arastu, *supra* note 15, at 1107 (citing Memorandum from Jonathan R. Scharfen, Deputy Dir., U.S. Citizenship & Immigr. Servs., to Field Leadership, U.S. Citizenship & Immigr. Servs., Policy for Vetting and Adjudicating Cases with National Security Concerns (Apr. 11, 2008) (available at https://perma.cc/J7KT-BTE6)).

[184] *See id.* at 1103–08; *see also* Ramahi, *supra* note 15, at 573–74 (describing surveillance of Muslim citizens and restrictions on primarily Muslim immigrants associated with the Patriot Act and related legislation).

[185] *See, e.g.*, Porotsky, *supra* note 15, at 375 (asserting that "identifying the border and immigration agencies' functions as a pillar of the U.S. national security strategy normalized viewing migrants and migration through an explicit security lens, which then legitimized discriminatory treatment of racial 'others' residing in the country").

Like process in the immigration and antiterrorism contexts, immigration and criminal procedures have been conflated,[186] and each has been curtailed as a result. This blurred administrative model is sometimes referred to as the "crimmigration" system.[187] On the front end, "[a]s the criminal system has taken on the screening function of the immigration agency, the immigration agency's role within the criminal prosecution has expanded."[188] On the back end, "the civil immigration law can funnel cases into the criminal system in ways that loosen" ordinarily more restrictive procedural rules in the criminal context.[189] These approaches both "maximiz[e] administrative discretion to deport" and "reduc[e] procedural protections in immigration proceedings."[190]

This "blending of our criminal and immigration systems"[191] intensifies the vulnerability of noncitizens in the criminal legal system.[192] Noncitizens accused of crimes may be ineligible for bail due to immigration detainers,[193] are more vulnerable to accepting plea deals under pressure from prosecutors' threats of additional sanctions,[194] and may be forced to accept immigration consequences, including deportation, as a mandatory term of plea agreements.[195] And yet, as Professor Ingrid Eagly has noted, the expansion of immigration enforcement discretion is "motivated by

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[186] *See* Eagly, *supra* note 171, at 1337 ("From the initiation of the investigative stage of a criminal case to the completion of any criminal sentence, immigration prosecution has reshaped the standard flow of the criminal system.").

[187] "At its most basic, 'crimmigration' law describes the convergence of two distinct bodies of law: criminal law and procedure with immigration law and procedure." CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 1 (2d ed. 2021).

[188] Eagly, *supra* note 171, at 1349.

[189] *Id.* at 1343. *Id.* at 1337:

> Noncitizen defendants can enter the system based not only on suspicion of a crime, but also on suspicion of a civil immigration violation. Protections against unreasonable searches and coercive interrogations can be undermined through diluted agency standards. Once inside the formal criminal system, bail hearings are erased, plea bargaining is placed on a fast-track timetable, and adjudication is often funneled into a magistrate court system that lacks the safeguards of Article III and is designed for expediency.

[190] *Id.* at 1342.

[191] *Id.* at 1304.

[192] *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 524 (2007) ("Procedurally, the combination of harsh penalties borrowed from the criminal enforcement model and rejection of the procedural safeguards embodied in the criminal adjudication model leaves a disturbing imbalance [in immigration law].").

[193] Eagly, *supra* note 171, at 1302.

[194] *Id.* at 1302–03.

[195] *Id.* at 1303.

a desire to create a broad discretionary system of immigration enforcement across the civil and criminal law" that "makes it easier to investigate and prosecute immigration crime" and "easy to investigate any criminal activity thought to be committed by noncitizens."[196]

Energy-management and environmental-protection agencies streamline processes as well. For instance, scholars have observed that the Federal Energy Regulatory Commission (FERC), which is required to perform studies and conduct comprehensive review before approving gas and hydropower pipeline projects, relies on applicants' own cost-benefit analyses to evaluate the harms of these projects.[197] This approach curtails process (an effect possibly exacerbated by agency capture[198]). More specifically, the agency allowed "the impact of a project on Indigenous cultural properties" to be assessed "without proper consent/consultation of the tribal nation."[199] Arguably, the agency's "passive nature allowing companies to conduct their own cost/benefit analysis is a failure of the state's perceived duty to place people and safety over profits."[200] But this procedural choice also allows FERC to avoid expensive studies and to engage in a more efficient process by relying on data funded and provided by an external stakeholder.

In another example, BLM has "expansive control" to narrow procedure in the approval of oil and gas leases,[201] which may exclude the perspectives of Indigenous communities impacted by these leases. As one commentator observed, this has led "to a haphazard leasing process that does not anticipate the adverse impacts on communities from major oil and gas leasing activities"—in particular, that approving gas and oil leases in rural towns negatively impacts the safety of Native women due to rapid labor expansion resulting from the leases.[202]

More specifically, extractive projects that are approved by this streamlined process may result in "energy boomtowns" that create a "rapid growth of male laborers," which researchers agree

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196 *Id.* at 1342.

197 Kulzer et al., *supra* note 16, at 333.

198 *See id.* at 334 (noting that FERC "has a financial incentive to serve at the behest of natural gas companies").

199 *Id.* at 333.

200 *Id.*; *id.* at 333–34 (noting that FERC "ignored or left unacknowledged their own data demonstrating the disproportionate impact [a] pipeline would have on Indigenous people in North Carolina").

201 Angela E. Washington, *Booming Impacts: Analyzing Bureau of Land Management Authority in Oil and Gas Leasing Amid the Missing and Murdered Indigenous Women's Crisis*, 72 ADMIN. L. REV. 719, 739 (2020).

202 *See id.* at 725, 732.

"directly corresponds with the development of a sex work industry and an increase in sexual assaults against Native women,"[203] and that exacerbate "socioeconomic inequalities for Native women living from that land."[204] Complementarily, significant discretion and public-private partnerships allow BLM to avoid contending with the collateral consequences of these leasing decisions[205] and to sidestep "responsibility for the looming presence of th[is] workforce."[206] But the agency also benefits from "[e]xpedited environmental review—and the imposition of standards that narrow which projects get reviewed" in its approval of oil and gas leases.[207] And by limiting its role in environmental review[208] and curtailing the "environmental review process for onshore oil and gas permitting and leasing projects,"[209] the agency has both "expand[ed] domestically-produced energy sources" and improved efficiency.[210]

B. The Price of Resource Conservation

Agencies are interested in preserving both tangible resources and institutional capacity, as these are limited.[211] For instance, agencies may both seek to maximize their budgets and endeavor to cut costs out of a sense of scarcity.[212] Furthermore, according to Professor Eric Biber, "[g]iven the centrality of resource allocation to decisionmaking in . . . the federal government, it is not surprising that the Court has viewed resource allocation as so central to agency discretion."[213]

Scholars, too, have argued that resource constraints justify discretionary executive action—for instance, priority setting[214]

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[203] *Id.* at 724–25.

[204] *Id.* at 725.

[205] *See id.* at 729, 732 (noting how BLM has exercised discretion to prioritize rapid oil and gas development and that lessees have further discretion in hiring).

[206] Washington, *supra* note 201, at 732.

[207] *Id.*

[208] *Id.* at 744; *see id.* at 745 (arguing that BLM should "repudiat[e] a check-the-box approach to environmental review" (emphasis omitted)).

[209] *See id.* at 745.

[210] Washington, *supra* note 201, at 744.

[211] Biber, *Resource Allocation*, *supra* note 138, at 17 (explaining that because "no agency has limitless resources, and perfect enforcement of any statute is impossible," agencies "must make difficult choices every day about how to allocate [their] resources between different problems, concerns, dreams, and goals").

[212] *Id.*

[213] *Id.*

[214] *Id.* at 17 ("An administrative agency cannot function without setting priorities."); *id.* at 18 (arguing that without the "discretion" to set priorities, "the Executive's scope for policymaking would be sorely reduced").

that leads to deferred action or decision-making[215]—and suggested that resource conservation might improve justice by building institutional capacity.[216] In contrast, this Section maintains that the conservation of resources, financial and institutional, can also overshadow other important priorities and lead to harm. Moreover, the "source of bias need not rest with deliberate prejudice, but with bureaucrats' rational responses to their resource constraints."[217]

1. Reduced financial and administrative burdens.

Expending a minimum number of resources on any given task allows an agency to fulfill more of its duties. Agencies may also conserve funds in order to comport with the policy agendas of political leaders or the political party in power.[218] Resource management, whether in response to apparent scarcity or not, is a conventional rationalization for the exercise of executive discretion.[219] But it is nonetheless important to recognize the problematic results of resource conservation for marginalized communities.

This tension can be found in the environmental justice context. For instance, Professor David Super has discussed how an agency may choose to save money in the context of emergency

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[215] Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157, 161 (2014) (emphasis omitted):

> This principle of priority setting (in the face of limited resources) captures a significant amount of the territory of decisions not to decide. . . . Especially in a period in which agencies are required or authorized to engage in a dazzling number of tasks, and in which they have limited budgets, they may legitimately decline to decide, or defer decisions, on resource-allocation grounds.

[216] *See generally* Nicholas R. Bednar, *The Public Administration of Justice*, 44 CARDOZO L. REV. 2139 (2023) (arguing that reduced agency capacity systematically biases immigration courts against noncitizens).

[217] Konisky & Reenock, *supra* note 16, at 518.

[218] *See* Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1749 (2015) [hereinafter Metzger, *Agencies, Polarization*] (describing how Congress uses funding to control administrative agencies); *see, e.g.*, Shah, *Statute-Focused Administration*, *supra* note 140, at 1167 (noting the "Trump Administration's 'major deregulatory ambitions'" (quoting Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN L. REV. 353, 366 (2021))); Outka & Kronk Warner, *supra* note 16, at 412–15 (discussing how, during the Trump administration, presidential administration altered the exercise of administrative discretion in ways that stymied environmental justice).

[219] *See* Shah, *Statute-Focused Administration*, *supra* note 140, at 1222.

preparedness and management, drawing specifically on the example of FEMA's response to Hurricane Katrina.[220] Indeed, FEMA was "strikingly parsimonious" in planning and allocating money for disaster relief.[221] This led to slowdowns and stops in "the development of a hurricane federal response plan for the region," limits to "evacuation routes and no provision for evacuating one hundred thousand people without transportation," the omission of several options for evacuation, and the rushed scheduling of and failure to fund participants in an essential simulation "intended to identify additional problems and refine disaster planning."[222] The agency's resulting failure to allocate adequate resources to stave off severe risks in New Orleans—risks that the agency had previously recognized[223]— "left tens of thousands of people stranded in the city" before Hurricane Katrina struck.[224]

Certainly, FEMA's actions were colored by President George W. Bush's perception of New Orleans, just as its poor response to Hurricane Maria was influenced by President Donald Trump.[225]

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[220] *See* David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1452–56 (2011) [hereinafter Super, *Against Flexibility*] (arguing that the valorization of administrative flexibility has exacerbated delayed decision-making and the inadequate investment of resources required to manage national disaster).

[221] *Id.* at 1442.

[222] *Id.*

[223] *Id.*

[224] *Id.* at 1429. Professors David Lewis and Paul C. Light also have corroborated that "'slowed progress on the National Response Plan' . . . [left] officials 'unprepared and uncoordinated' . . . . [and that there were] forty-one government failures when agencies did not 'design and deliver effective public policy'" for Hurricane Katrina. Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 698 (2020) (first quoting David Lewis, *Trump's Slow Pace of Appointments is Hurting Government—and His Own Agenda*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/03/six-months-into-his-presidency-trump-continues-to-be-exceptionally-slow-at-appointing-officials-heres-why-that-matters; then quoting PAUL C. LIGHT, CTR. FOR EFFECTIVE PUB. MGMT., BROOKINGS INST., A CASCADE OF FAILURES: WHY GOVERNMENT FAILS, AND HOW TO STOP IT 16–19 (2014)); *see also* Lisa Grow, Brigham Daniels, Doug Spencer, Chantel Sloan, Natalie Blades, M. Teresa Gomez & Sarah R. Christensen, *Disaster Vulnerability*, 63 B.C. L. REV. 957, 970 (2022) (describing how "federal disaster spending appears to exacerbate [ ] wealth inequality" "at both the individual and community level"); Tatiana M. Davidson, Matthew Price, Jenna L. McCauley & Kenneth J. Ruggiero, *Disaster Impact Across Cultural Groups: Comparison of Whites, African Americans, and Latinos*, 52 AM. J. CMTY. PSYCH. 97, 104 (2013) (noting that some racial disparities in hurricane impact identified in the wake of Hurricane Katrina persisted after Hurricane Ike, three years later).

[225] *See* Charley E. Willison, Phillip M. Singer, Melissa S. Creary & Scott L. Greer, *Quantifying Inequities in US Federal Response to Hurricane Disaster in Texas and Florida Compared with Puerto Rico*, 4 BRIT. MED. J. GLOB. HEALTH 1, 2–3 (2019) (describing federal response to Hurricane Maria that was slower and scantier than that to other, less impactful hurricanes in Texas and Florida in the same year).

However, FEMA was also dealing with scarce resources.[226] It managed its institutional history of limited resources by employing a systematic approach in which the agency left important decisions—including those involving funding—until the last minute, out of scarcity and necessity, resulting in inadequate spending on disaster management in preparation for and in the wake of Hurricane Katrina.[227]

Consider further the example of weaker environmental-regulation enforcement against companies in minority and low-income communities. This results in "disproportionate environmental hazards," which are commonly understood to be based in either "bias originating in an agency's decision to take that action" or "bias originating in the initial compliance determination."[228] Bias does not form the entire reason for problematic administration, however. For instance, "reduc[ing] the cost of doing business" is important to siting decisions, and land values in poor or rural communities, often populated by minorities, are lower,[229] thereby making those communities more attractive as waste sites.

Likewise, as Professors David Konisky and Christopher Reenock have observed in the state-level administration of the Clean Air Act, "compliance bias, or the systematic nondetection of violations," is motivated by a bureaucratic desire to minimize costs.[230] First, regulatory costs "are lower in poor and minority communities because these communities have fewer resources with which to document and protest" a lack of corporate compliance with environmental requirements.[231] In addition, impacted communities have little recourse to fight these decisions under federal law, which currently prohibits discrimination only by

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[226] Super, *Against Flexibility*, *supra* note 220, at 1442 ("Scarce federal budgetary resources continually stymied efforts to plan for known hurricane risks in the New Orleans area.").

[227] *Id.* at 1375 (noting the disastrous FEMA response to Katrina was the result of the agency's lack of appreciation for "the scarcity of decisional resources").

[228] Konisky & Reenock, *supra* note 16, at 506.

[229] Foster, *supra* note 16, at 800–02.

[230] Konisky & Reenock, *supra* note 16, at 507.

[231] *Id.* Notably, this study finds firms more likely to be noncompliant in poor and Latine communities than in Black communities. *Id.* at 514–15, 517. "Furthermore, these communities are presumed to pose little threat of political resistance due to their subordinate socioeconomic, and often racial, status." Foster, *supra* note 16, at 801.

non-governmental entities that receive federal funding and does not constrain governmental agencies themselves.[232]

Finally, agencies may manipulate process in administrative adjudication[233] in order to limit institutional burdens. While the implementation of a plethora of procedural requirements was considered a requirement of administrative due process in the *Goldberg v. Kelly*[234] era, this is no longer the case.[235] Now, the calculus used to determine whether the individual's interests have been adequately considered—the *Mathews v. Eldridge*[236] three-factor balancing test[237]—allows the government to limit process in order to prioritize the government's institutional interest in conserving fiscal and administrative resources,[238] as well as its substantive concern with maintaining national security, even at the expense of individual liberty.[239]

2. Lower-quality data.

Agencies sometimes save money by reducing the amount or quality of data they gather and analyze in order to determine how best to implement the law. For example, the EPA was tasked with carrying out a statute that has special provisions for safeguarding

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[232] *See* Shah, *A Critical Analysis*, *supra* note 14, at 1056–57 (describing how neither the APA nor constitutional law offer avenues to sue agencies for discrimination or disparate impact).

[233] *See supra* text accompanying notes 180–81.

[234] 397 U.S. 254 (1970).

[235] Verkuil, *supra* note 154, at 288 ("Without saying so directly, the Court has set *Goldberg*'s rigid model aside and replaced it with an admittedly vague procedural balancing process."); *see id.* at 323.

[236] 424 U.S. 319 (1976).

[237] *Id.* at 335:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[238] *Id.* at 348 (noting that a visible burden to the government is the cost of an increased number of hearings and the expense of providing benefits to ineligible recipients pending decision, and weighing this consideration heavily in the Social Security Administration context).

[239] Cole, *supra* note 15, at 982–83 (arguing that measures taken in the name of security have reduced detained and other noncitizens' due process); *see, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (rejecting the executive branch's assertion of power to indefinitely detain citizen enemy-combatants without judicial review); Boumediene v. Bush, 553 U.S. 723, 798 (2008) (same for noncitizens).

children from pesticides.[240] Instead of focusing its risk-assessment analysis on the most dangerous pesticides, as required by statute, the EPA chose instead to focus on pesticides that are no longer in use or with low risk factors.[241] The agency also applied the less stringent hundred-fold safety standard[242] to determine pesticide risk, despite the fact that a more rigorous approach is the default.[243] As a result, the Natural Resources Defense Council both brought a lawsuit[244] and produced a report[245] asserting that the EPA allowed pesticide levels to remain at an unsafe level for children.

The EPA's failure to use the higher standard is motivated by the lower cost of the less demanding hundred-fold factor test,[246] the agency's difficulties obtaining the data it needs to engage in additional pesticide review,[247] and the burden of evaluating the data effectively.[248] Even "assuming that the EPA could amass the vast amount of information required by the" statute,[249] the agency

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[240] Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (codified as amended in scattered sections of 7 U.S.C. and 21 U.S.C.).

[241] Valerie Watnick, *Risk Assessment: Obfuscation of Policy Decisions in Pesticide Regulation and the EPA's Dismantling of the Food Quality Protection Act's Safeguards for Children*, 31 ARIZ. ST. L.J. 1315, 1341–42 (1999) (citing 21 U.S.C. § 346a(q)(2)).

[242] Note that "the hundred-fold margin of safety" is a threshold level of pesticide residue that is presumed safe for adults because it represents a putatively safe level divided by one hundred for an "increased margin of safety." *Id.* at 1319. The EPA then compares this adjusted threshold estimate to estimates about consumers' maximum exposure to the pesticide residue from consumption of the food on which it will be used. If the estimated potential exposure is less than the adjusted threshold level, then the EPA will most likely approve the tolerance. *Id.* at 1319–20.

[243] *Id.* at 1342 (observing that "[t]he EPA generally continues to use a standard safety factor of hundred-fold" and has "not routinely or consistently applied [an] additional tenfold safety factor" despite the fact that it is generally required by the Food Quality Protection Act "to protect children"); *see* 21 U.S.C. § 346a(b)(2)(C)(ii) (instructing that "an additional tenfold margin of safety . . . shall be applied for infants and children . . . [and the] Administrator may use a different margin of safety for the pesticide chemical residue only if, on the basis of reliable data, such margin will be safe for infants and children").

[244] *See* Complaint for the Natural Resources Defense Council at 2, Nat. Res. Def. Council v. Browner, No. C99-3701 (N.D. Cal. Aug. 3, 1999) (arguing that the EPA "fail[ed] to meet statutory deadlines for protecting children, workers, the general public, and the environment from high-risk pesticides"); *id.* at 1 (arguing that the EPA's lack of completion of the assessment of the riskiest pesticide assessment put children at risk).

[245] *See* DAVID WALLINGA, NAT. RES. DEF. COUNCIL: PUTTING CHILDREN FIRST: MAKING PESTICIDE LEVELS IN FOOD SAFER FOR INFANTS & CHILDREN 6–7 (1998) (noting the EPA's failure to implement the Food Quality Protection Act to protect children from pesticides).

[246] *See* Watnick, *supra* note 241, at 1347–48 (describing the EPA's motivation not to seek additional toxicity data for certain pesticides).

[247] *Id.* at 1354–55.

[248] *Id.* at 1355–57.

[249] *Id.* at 1355–56.

would have to intensively analyze each pesticide, a task that requires several levels of administrative review.[250] "Given this administratively burdensome risk characterization process," the EPA sought to mitigate the enormous administrative burden of "implementing this complex and broad" set of pesticide provisions[251] by streamlining and reducing its institutional requirements for pesticide review. (This set of dynamics is distinct from the EPA's reliance on inadequate science to obscure the extent to which its policy outcomes reflect political interests.[252])

Finally, in a matter of energy and environmental safety, the EPA, under President Trump's administration, "allowed gas and oil companies to self-monitor" methane leaks.[253] This approach led to several deadly explosions.[254] Nonetheless, the agency apparently relied on the information gathered from corporate self-monitoring to approve another pipeline project with similar risks that was "slated to travel through areas historically plagued with the harms associated with . . . environmental racism."[255] The political and corporate loyalties of the President Trump EPA likely factored into the decision.[256] However, the agency may have also relied on previous information to save the government costs associated with monitoring methane leaks itself.

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[250] Watnick, *supra* note 241, at 1356–57 (detailing how, for each of almost ten thousand pesticides in the mid-1990s, not counting new requests, each review could require input from the EPA's Health Effects Division; Environmental Fate and Effects Division; Science Assessment Review Committees (which includes the Hazard Identification Assessment, Cancer Assessment, Mechanism of Toxicity and Reproductive and Developmental Toxicity Committees); Food Quality Protection Act Safety Factor Committee Risks Characterization Committee, and the pesticide registrant before the EPA could publish a tolerance decision for the pesticide).

[251] *Id.* at 1357.

[252] *See* Eric Biber, *Which Science? Whose Science? How Scientific Disciplines Can Shape Environmental Law*, 79 U. CHI. L. REV. 471, 538–39 (2012) (observing that interest groups have incentives to encourage scientific dissent as a predicate for preferred administrative actions); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1617 (1995) ("Although camouflaging controversial policy decisions as science assists the agency in evading various political, legal, and institutional forces, doing so ultimately delays and distorts the standard setting mission, leaving in its wake a dysfunctional regulatory program.").

[253] Kulzer et al., *supra* note 16, at 330.

[254] *See id*. (listing several recent explosions). President Biden has since reversed this policy. *Id.*

[255] *Id.* at 330–31 (noting "that a disproportionate number of Black and Indigenous people," as well as "impoverished communities," live near the proposed pipeline site).

[256] *See* Outka & Kronk Warner, *supra* note 16, at 409–15 (discussing similar considerations concerning the Dakota Access Pipeline).

C. The Harms of Institutional Mandates and Intra- and Interagency Tension

Both the President and Congress oversee and "design[ ] the structure of every agency and administrative subcomponent."[257] The pressure that elected or political officials, particularly the President and her Cabinet members, exert on agency action has been of consistent interest to legal scholars. Conventionally, agencies are designed with political appointees at the top overseeing a swath of expert administrators.[258] While some assert that this organizational structure fosters accountability by keeping civil servants in check,[259] others are concerned that administrative insulation from political pressure, which has long been key to preserving the competencies of administrative adjudicators and experts, is eroding.[260]

In contrast, scholars have paid somewhat less attention to how the longstanding or conflicting institutional mandates of agencies themselves (as opposed to the transitory preferences of the President and the agency heads she appoints) may compel bureaucrats to alter their priorities.[261] Agencies' mandates and

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[257] Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 1963–64 (2019) [hereinafter Shah, *Congress's Agency Coordination*].

[258] *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42–44 (2010); Mark Seidenfeld, *A Civil Republic Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1559 (1992).

[259] *See, e.g.*, Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399–1400 (1975) (arguing that "[r]egulatory 'failure,' . . . occurs when an agency has not done what elected officials would have done had they exercised the power conferred on them by virtue of their ultimate political responsibility").

[260] *See, e.g.*, Shah, *President's Fourth Branch*, *supra* note 47, at 504–09 (arguing that presidential interference with agency structure and process has undermined the role of expertise); Shah, *Expanding Presidential Influence*, *supra* note 47; Paul R. Verkuil, *Presidential Administration, the Appointment of ALJs, and the Future of For Cause Protection*, 72 ADMIN. L. REV. 461, 465–68 (2020) (warning of negative consequences of increased political influence over the administrative-law-judge selection process); Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 39 MINN. L. REV. 39, 85–86 (2020) [hereinafter Levy & Glicksman, *Restoring ALJ Independence*] (discussing the implications for systemic bias of situations where the executive branch interferes with independent administrative adjudication); Barkow, *supra* note 258, at 21–24; A. Michael Froomkin, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 787–89 (1987) (expressing concern about Supreme Court decisions that might render independent agencies unconstitutional, which means that "Congress will lose the most practical of its few remaining tools for ensuring federal administrative fidelity to legislative intentions").

[261] There has been some work on the competing priorities that street-level bureaucrats face, which may include overbearing institutional culture. *See generally, e.g.*, BERNARDO ZACKA, WHEN THE STATE MEETS THE STREET: PUBLIC SERVICE AND MORAL AGENCY (2017); MICHAEL LIPSKY, STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627 (2020).

structures are often established by the priorities and political leanings of their enacting legislature, and may be influenced by the President. Nonetheless, these mandates become institutional, baked into the agency after a certain point, and therefore distinct from the agendas established by temporary political leadership.

This Section suggests that institutional mandates allow powerful, unified missions to obscure other distinct and important agency priorities that lead to better policies and outcomes for vulnerable people. To make this argument, it considers the contribution of competing and conflated agency mandates to administrative behavior that causes harm. Arguably, "patterns of bias stem from the decision-making structures of regulatory officers, not necessarily from intentional discrimination."[262] This Section examines priorities and structures that are, to a great extent, internal to administrative agencies, and it identifies administrative hierarchies and relationships in which agency centralization and overlap may negatively impact vulnerable communities.

First, in an agency with multiple lower-level subcomponents, the enforcement mission of the parent agency may conflict with subcomponent efforts to pursue distinct policy mandates and to do so equitably. Second, nuanced policy and administrative interests may also be overwhelmed when enforcement functions across regulatory areas intensify one another. Third, intra- and interagency functions at odds with one another—namely, prosecutorial duties and adjudicatory responsibilities—that nonetheless coexist or overlap allow the bureaucratic self-interest of the former to sap the latter of the decisional independence and expertise required to center fair and unbiased process. Ultimately, these forms of agency structure incentivize bureaucrats to choose institutional consistency and ease of function over principled administration and obscure lines of accountability to regulated communities.

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[262] Konisky & Reenock, *supra* note 16, at 518.

1. Subcomponent placement in a large agency.

The centralization of governmental mandates renders them more influential. While there are benefits to administrative consolidation[263] and overlap,[264] larger agency mandates may also bury or overshadow good policy practices or the beneficial exercise of discretion at the level of subcomponents.[265] Large agencies in this Section are not characterized by the number of civil servants they employ, although a sizeable staff might be a detriment to how well an agency operates.[266] Rather, "large" agencies, for the purpose of the following discussion, consist of multiple subcomponents that have unique mandates and an attendant, complicated structure with a "bundle of institutional arrangements."[267]

A consummate example of a large agency with multiple missions, the Federal Security Agency (FSA) was created on the heels of the New Deal and placed in charge of a variety of health and welfare mandates.[268] Scholar and former California Supreme Court Justice Mariano-Florentino Cuéllar has observed that the construction of the FSA was the Roosevelt Administration's effort to both "centralize vast legal responsibilities"[269] and "reconstruct[ ] the national agenda around an expansive conception of security."[270] The White House "then proceeded," Cuéllar continued, "to justify the executive branch's new legal architecture by

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[263] *See, e.g.*, Edward T. Jennings & Jo Ann G. Ewalt, *Interorganizational Coordination, Administrative Consolidation, and Policy Performance*, 58 PUB. ADMIN. REV. 417, 420 (1998) (noting that agency coordination and consolidation are recommended "as a way to enhance efficiency, improve performance, and reduce the cost of government").

[264] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1174 (2012) (noting that agency overlap may reinforce a mandate and improve collective action problems).

[265] *See* Shah, *Coordinated Interagency Adjudication*, *supra* note 20, at 827–34.

[266] For instance, the Department of Veterans Affairs, which is "the federal government's second largest department after the Department of Defense," faces significant challenges as a result of its size. *U.S. Department of Veterans Affairs Structure*, OFF. OF RURAL HEALTH, U.S. DEP'T OF VETERANS AFFS. (last updated May 14, 2024), https://perma.cc/P8NP-NVUP; Lawrence J. Korb & Kaveh Toofan, *The Challenges Facing the Department of Veterans Affairs in 2021*, CTR. FOR AM. PROGRESS (May 17, 2021), https://perma.cc/W737-TQZ3.

[267] Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 691–93 (2000) (referring to agencies with complicated structures as "superagencies").

[268] *See* 5 U.S.C. App. 1.

[269] Mariano-Florentino Cuéllar, *"Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953*, 76 U. CHI. L. REV. 587, 587 (2009).

[270] *Id.* at 590 (stating that President Franklin Delano Roosevelt's "administration wove together multiple strands of its security trope while using a sliver of legal authority for executive reorganization to forge a colossal new [FSA]").

arguing that the ability to face international threats depended on the strengthened domestic capacity provided by the FSA to implement the law effectively in domains such as health and education."[271] "By 1943, the FSA's bureaus included the Public Health Service (PHS), the Social Security Board, the Office of Education, the Food and Drug Administration (FDA), the Office of Community War Services, the War Research Service (WRS), and nearly a dozen other organizations";[272] soon after, the FSA was reorganized as the Department of Health, Education and Welfare.[273]

Superficially, the FSA broadened the definition of security beyond terrorism and geostrategic threats in order to "to place social, economic, and health-related security *on par with* traditional definitions of national security [and] to emphasize the interconnections between national security and security involving public health, economic, and social guarantees."[274] However, in doing so, the agency redirected many of its resources toward traditionally defined national security goals, such as national defense.[275] In the end, the agency's relentless focus on a narrow, conventional understanding of national security, including its substantial role in the Japanese internment debacle,[276] suggests that the FSA's overarching mandate in fact cut against the "ordinary health, education, and public welfare activities" to which the FSA was, ostensibly, dedicated.[277]

The FSA was a prototype for DHS, today's paradigmatic example of a large agency with a complex institutional design.[278] As an initial matter, DHS was designed by Congress as a means to further legislators' political interest in appearing to defend the country from terrorists.[279] Despite the several, diverse missions represented by the subcomponents within DHS, the agency now uses an antiterrorism mandate as a justification for heightened

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271 *Id.*

272 *Id.* at 593.

273 *Id.* at 593, 624.

274 *See* Cuéllar, *supra* note 269, at 678–79 (emphasis in original).

275 *Id.*

276 *Id.* at 593, 631–32.

277 *Id.* at 676–77.

278 *See id.* at 591, 593–94 (drawing parallels between the agencies and noting that the FSA "foreshadows" DHS).

279 Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 689–700 (2006).

immigration enforcement[280] instead of to improve governmental coordination[281] or to support the mandates of the individual agencies incorporated into its structure.[282] As a result, the agency's overarching focus on national security has come to eclipse good outcomes in immigration and the mission of FEMA.

As to immigration, the replacement of the benefits offices of the DOJ Immigration and Naturalization Service with USCIS and the placement of this new agency in DHS have meant that USCIS is sometimes overwhelmed by DHS's national security mandates, which slow down or even halt USCIS's benefits-adjudication process for noncitizens deemed to be potential national security threats.[283] As to FEMA's mandate, "transition costs and structural problems associated with the creation of DHS" "accelerated a process through which FEMA's natural disaster and mitigation missions were eviscerated" and, in particular, hindered FEMA's response to Hurricane Katrina.[284]

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[280] Zaring & Baylis, *supra* note 146, at 1425–26; *see also* Julie Braker, *Navigating the Relationship Between the DHS and DOL: The Need for Legal Legislation to Protect Immigrant Workers' Rights*, 46 COLUM. J.L. & SOC. PROBLEMS 329, 337–38 (2013) (describing the problematic development of immigration enforcement under DHS after previously being executed by the Immigration and Naturalization Services); Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63, 63–64, 67–68 (2002) (discussing the "broad-based support" for more stringent immigration laws after 9/11); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 482, 495 (discussing how changes in immigration law and procedure after 9/11 were often justified by antiterrorism initiatives).

[281] *See* Cohen et al., *supra* note 279, at 718–20; Freeman & Rossi, *supra* note 264, at 1152–54 (2012) (describing how the lack of coordination between agencies in DHS causes overlapping and conflicting functions).

[282] Freeman & Rossi, *supra* note 264, at 1152–55 (arguing that "large-scale consolidation" may simply "convert an *inter*agency coordination problem into an intra-agency problem" (emphasis in original)).

[283] *See* Robert Knowles & Geoffrey Heeren, *Zealous Administration: The Deportation Bureaucracy*, 72 RUTGERS U. L. REV. 749, 780 (2020) (explaining how the restructuring of USCIS in DHS has shifted USCIS to prioritize "enforcement over service"); *id.* at 779 (explaining that the agency's increased scrutiny of applicants has caused a significant increase in delays). For instance, USCIS will often put asylum applicants on "national security hold" based on superficial factors, and without any determination as to whether they pose an actual threat to national security, which stops the adjudication process and effectively places the applicant in permanent limbo. KATIE TRAVERSO & JENNIE PASQUARELLA, ACLU OF S. CAL., PRACTICE ADVISORY: USCIS'S CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM 7–8 (2016) (stating that USCIS directs agents to delay or hold adjudication of applications to investigate "national security concerns" and that cases may be held in abeyance for 180 days, subject to indefinite extensions).

[284] Cohen et al., *supra* note 279, at 740–41; *id.* at 742 ("[T]he available evidence suggests that the structural problems associated with DHS . . . made things worse [for FEMA]."); *see also supra* notes 226–28 and accompanying text (discussing the institutional factors that contributed to FEMA's poor disaster-relief response to Hurricane Katrina).

The High-Value Detainee Interrogation Group (HIG) offers another example of a subcomponent whose policies were suppressed its parent agency's priorities. The HIG was created by President Barack Obama's administration to utilize noncoercive interrogation methods that comply with international law norms against torture.[285] In addition, the HIG was made part of the FBI so that it would benefit from the FBI's structural competence and expertise in investigation, as well as from the clout associated with the vaunted law enforcement agency.[286] However, because of the HIG's status as part of the FBI and its dependence on other agencies in the national security space, the subcomponent was unable to fulfill its mission against the prevailing emphasis on coercive techniques perpetuated by more established counterterrorism agencies.[287]

Just as an umbrella agency's mandate may impact its subcomponent's actions, so too might the priorities and culture of the larger agency influence the subcomponent's policymaking. In regard to state implementation of the Clean Air Act, Professors David Konisky and Christopher Reenock have "posit[ed] that compared to lower-level field officers (e.g., career civil servant front-line compliance officers), higher-level bureaucrats serving in agency management roles (e.g., Department Secretaries, Deputy Secretaries, Division Managers, or Regional Directors) have additional incentives to" engage in cost-saving measures that impede environmental justice.[288] This results in pressure on lower-level bureaucrats to deemphasize regulatory efforts that incorporate values besides cost-cutting in order to ensure that the agency as a whole is (or appears) more likely to meet certain cost-related metrics in reports to "federal overseers"—that is, federal legislators.[289]

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[285] *High-Value Detainee Interrogation Group*, FBI, https://perma.cc/N4Z7-GFEB.

[286] *See* Robert Knowles, *Torture and Institutional Design*, 130 YALE L.J.F. 249, 260–61 (2020).

[287] *Id.* at 262 (noting that "the HIG was encountering resistance to its efforts to displace traditional accusatory interrogation methods—both from within the FBI and without" and that "[t]he resistance to HIG's mission had become strong even—perhaps especially—within its parent agency, the FBI"); *id.* (describing how the HIG Director was pushed out "after clashing with FBI leadership over the HIG's mission," and noting that the "HIG's supporters described 'an increasingly dismissive attitude at the FBI'" and that the FBI refused "to adopt the [HIG's] non-coercive approach" (quoting Ali Watkins, *Elite Terrorist Interrogation Team Withers Under Trump*, POLITICO (Dec. 5, 2017), https://perma.cc/8XLZ-RVAH)).

[288] Konisky & Reenock, *supra* note 16, at 510 (noting that in particular, lower-level compliance officers are pressured by high-level bureaucrats "to inaccurately characterize noncompliant firms as compliant").

[289] *See id.*

In addition, the overarching mission of the agency may be inconsistent with fair administrative appeals processes and outcomes, perhaps in part because the placement of administrative appeals in the same agency as front-line adjudication infuses the appeals process with an institutional bent. There are benefits to placing an appellate process in an agency and allowing the appeals body only limited decisional independence; these include access to a deep pool of institutional expertise and agency-head oversight of both lower- and appellate-level administrative adjudication.[290] However, underlying problems may "arise[ ] when nominally independent and impartial adjudicators are employed by the agencies whose cases they decide, including both the appearance of bias and improper efforts to exert political influence in individual cases."[291]

For example, in immigration adjudication, intra-agency appeals fail to moderate disparities across adjudicators.[292] More specifically, the DOJ Board of Immigration Appeals (BIA) is not "likely to reverse the decisions of harsher judges when immigrants appeal. By contrast, when the government appeals—which it does more than ten times less frequently than immigrants—the BIA more often reverses the decisions of generous judges than those of harsher judges."[293] Administrative review that disadvantages noncitizens also casts doubt on whether immigration "discretion is serving its proper purposes."[294] Concerns about the legitimacy of discretion also weakened the legitimacy of *Chevron*

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[290] *See* Shah, *Coordinated Interagency Adjudication*, *supra* note 20, at 851–58; Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129, 132 (2017).

[291] Robert E. Levy & Robert L. Glicksman, *Toward a Federal Central Panel for Administrative Adjudication*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 14, 2022), https://perma.cc/C4QB-X2FP.

[292] *See generally* David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177 (2016) [hereinafter Hausman, *Failure of Immigration Appeals*] (confirming that disparities across immigration judges do not only reflect case assignment and tracking those disparities on appeal).

[293] *Id.* at 1178.

[294] *See* Neuman, *supra* note 15, at 631–33 (arguing that administrative adjudication cannot curb "excessive hardship to long-term residents or citizen spouses and children").

deference in immigration adjudication[295] even prior to the Supreme Court's overturning of this doctrine.[296]

Finally, the converse might also be the case—in other words, bureaucrats and subcomponents can influence the implementation of upper-level agency mandates in concerning ways. As Professor Mark Seidenfeld has noted, "bureaucrats [can] exert significant influence on public policy even when their role is merely advisory."[297] Indeed, "the debate over policy alternatives often starts at lower levels and travels up the pyramid."[298] Arguably, bureaucratic control over policy has the potential to "focus the discussion away from pure political concerns" and introduce "credible interest group concerns to the upper echelons of the agency."[299] Then again, the concentration of power in a professional staff who "derive their power primarily from their professional training and their relationships with interest group representatives who frequently control important information"[300] may lend itself to problematic policymaking choices vis-à-vis those communities with inadequate interest group representation.

In addition, administrators who find themselves at odds with the goals of political appointees and the presidential interests they represent may engage in "subversion" of their agency's aims,[301] which may lead these bureaucrats to "establish intermediate goals whose consequence is to harm the people they are supposed to help."[302] Officials who serve as the "front line" and make personalized and case-by-case decisions[303] may be particularly

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[295] *See* Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1215–35 (2021) (arguing that "*Chevron*'s theoretical foundation is particularly weak in the immigration adjudication context" when evaluated with respect to expertise, deliberative process, and political accountability); Maureen A. Sweeney, *Enforcing/Protection: The Danger of* Chevron *in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 128 (2019) (concluding that "Congress likely intended for courts not to defer to, but rather to exercise robust review of the Board of Immigration Appeals and the Attorney General, to ensure full enforcement of all immigration law—including asylum provisions that protect individuals facing persecution").

[296] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron* to find that the judiciary must exercise its independent judgment in deciding whether an agency has acted within the bounds of statutory authority).

[297] Seidenfeld, *supra* note 258, at 1559.

[298] *Id.* at 1554.

[299] *Id.* at 1559.

[300] *Id.* at 1554.

[301] Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 612–16 (2003) [hereinafter Mendelson, *Agency Burrowing*].

[302] Rubin, *supra* note 74, at 312; *see also id.* at 301 & n.30.

[303] Rubin, *supra* note 74, at 300–01, 307–11.

susceptible to engaging in "oppressive" behavior[304] that is at odds with the agency's objectives. For example, in the context of Indigenous rights, civil servants in the Bureau of Indian Affairs exploited a moment of political transition to undercut the agency's effort to recognize the Duwamish tribe.[305] This has harmed the Duwamish community's ability to obtain federal funding to sustain important local programs and to support itself financially in the absence of monetary support.[306]

2. Substantive intra- and interagency conflicts.

Redundancy in administration offers advantages.[307] For example, overlapping responsibilities strengthen competencies.[308] Agency coordination is responsive to political interests,[309] there are functional benefits to overlap,[310] and regulatory redundancy among agencies may be difficult to undo. And conflict caused by overlap, while possibly inefficient or deleterious to coordination, "may lead to stronger outcomes that take into account different sets of information or political viewpoints."[311]

However, if agencies have "distinct differences in their programmatic priorities, they may seek to alter one another's priorities, clip each other's wings, or chip away at each other's

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304 *Id.* at 301 ("Bureaucratic oppression is not limited to personal or face-to-face interactions, but it certainly flourishes in these settings."); *id.* at 301 n.30 ("[Oppression] is therefore common among the front-line employees who deal with the public.").

305 Mendelson, *Agency Burrowing*, *supra* note 301, at 614 (noting the civil servant subversion of the agency's effort to recognize the Duwamish Tribe).

306 Paul Shukovsky, *Duwamish Tribe Fights for Recognition*, SEATTLE POST-INTELLIGENCER (Sept. 4, 2008), https://perma.cc/H7DS-L57D.

307 For discussions of redundancy in the administrative law space, see generally Shah, *Coordinated Interagency Adjudication*, *supra* note 20; Freeman & Rossi, *supra* note 264; Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011).

308 *See* Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1678 (2006) [hereinafter O'Connell, *Smart Intelligence*] (explaining that the overlapping responsibilities, specifically in the national security context, could "increase reliability by decreasing the chances of the system failing entirely"); Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 349 (1969) (identifying redundancy as a potential solution to problems of agency reliability).

309 *See* Shah, *Congress's Agency Coordination*, *supra* note 257, at 1974–80.

310 *See* Shah, *Coordinated Interagency Adjudication*, *supra* note 20, at 807 n.2 (referencing "shared regulatory space" between agencies, particularly in environmental regulation).

311 Shah, *Congress's Agency Coordination*, *supra* note 257, at 1963–64; O'Connell, *Smart Intelligence*, *supra* note 308, at 1676–77 (2006) (explaining that institutional overlap in national security could have several benefits, including providing a diversity of viewpoints and decreasing politicization).

discretionary powers in order to assert their own interests."[312] First, the conflation of divergent mandates across agencies may lead them to behave in ways that harm. The matter goes beyond the consequences of poorly administered coordination.[313]

For example, administrative distinctions between the enforcement of criminal law and immigration law have been elided, with immigration officials engaging in criminal prosecution and criminal prosecutors participating in deportation. As to the former, civil immigration agencies exercise discretion regarding who should be prosecuted for immigration crimes.[314] For example, immigration officials have been raised to the level of "'Special Assistant' U.S. Attorney[ ]," albeit "employed by DHS rather than by DOJ. Yet like regular Assistant U.S. Attorneys, they play the role of criminal prosecutor in the courtroom."[315] In addition, Border Patrol agents "serve as prosecutors in court" by handling misdemeanor criminal charges.[316] Conversely, actual criminal prosecutors "fast track" deportation decisions by engaging in immigration adjudication.[317] These approaches, which streamline both criminal and immigration enforcement, exacerbate the consequences of the "crimmigration" system[318] by further curtailing the protections available to noncitizens in both contexts.

Second, institutional pressure may arise as well from conflict between regulatory functions. More specifically, adjudicators' actions may be influenced by the fact that divergent functions that would be at odds with one another in the Article III system—for instance, adjudication and law enforcement conducted by the same office—may be performed within a single agency or group of agencies that work within the same regulatory field. The Supreme Court has held that even a lack of separation of functions within a single agency is consistent with constitutional and

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312 Shah, *Congress's Agency Coordination*, *supra* note 257, at 1994.

313 *See* Shah, *Coordinated Interagency Adjudication*, *supra* note 20, at 814–20 (discussing the negative impact of poor coordination between DHS and DOJ on asylum seekers and mentally ill noncitizens).

314 *See* Eagly, *supra* note 171, at 1333–34.

315 *Id.* at 1332. In some cases, these immigration agents do "the traditional work of prosecutors[, which means] they make verbal plea offers, resolve cases, and represent the government at change-of-plea hearings in federal court," while in other situations, they screen cases for prosecution. *Id.*

316 *Id.* at 1332–33. "Under this model, the same agent who signs the criminal complaint handles the actual court proceeding, including presiding over the change of plea and sentencing hearing." *Id.* at 1333.

317 *Eagly, supra* note 171, at 1322–29. "Only if a defendant were to request a trial would a licensed attorney prosecutor be called to the courtroom." *Id.* at 1332–33.

318 *See supra* notes 186–96 and accompanying text.

administrative due process requirements, distinguishing this structural concern from issues of prejudgment and bias, which are inconsistent with fair administrative adjudication.[319] But the coexistence of these functions in the Article I context undercuts the quality of administrative adjudication. Indeed, conflicting priorities and values between bureaucrats in a nonhierarchical relationship within an agency or between actors working in the same space across agencies may reduce fairness and inclusion.

As to administrators within a single agency, bureaucrats in DHS act as both adjudicators of asylum cases and law counsel against noncitizens facing deportation in immigration courts.[320] As a result, USCIS's adjudication of humanitarian asylum adjudications within DHS may be influenced by DHS's broader mission of security, punitive enforcement, and exclusion.[321] Furthermore, the quality of the DHS adjudicator record may suffer due to the fact that the administrative adjudicator built the record while anticipating DHS's future role as attorney for the government before immigration judges and BIA members, in opposition to the petitioner whose case DHS initially adjudicated.[322] On the flip side, an institutional emphasis on enforcement allows DHS overall to devote its energy to national security, which has been of particular importance to the government in the wake of 9/11.[323]

As to actors across agencies, the DHS attorney prosecuting the case in immigration court hails from the same immigration apparatus writ large as the immigration judges and the BIA members, located in DOJ/EOIR, who adjudicates both defensive immigration cases and appeals of DHS immigration decisions. As

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[319] Withrow v. Larkin, 421 U.S. 35, 52–55 (1975) (observing that there is "no support for the bald proposition . . . that agency members who participate in an investigation are disqualified from adjudicating"); United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Marshall v. Jerrico, 446 U.S. 238, 250 (1980) (holding that requirements of neutrality are lower for administrative prosecutors than for judges); *see also* Fred Davis, *Case Commentary:* Withrow v. Larkin *and the "Separation of Functions" Concept in State Administrative Proceedings*, 27 ADMIN L. REV. 407, 408–11 (1975) (discussing the *Withrow* decision and its implications for administrative due process).

[320] *See* Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WIS. L. REV. 707, 752–53.

[321] *See id.* at 751–55 (highlighting that DHS employees are required to demonstrate "[a]lignment to the Department's mission," which calls into question the adjudicators' impartiality when reviewing applications (quotation marks omitted) (quoting DEP'T OF HOMELAND SEC., DIRECTIVE 255-09, EMPLOYEE PERFORMANCE MANAGEMENT 3 (2016) (available at https://perma.cc/NR5R-F664))); Sweeney, *supra* note 295, at 162, 170 (noting reasons that courts doubt the BIA's objectivity as an adjudicator).

[322] *See* Shah, *Coordinated Interagency Adjudication*, *supra* note 20, at 839, 880.

[323] *See generally* O'Connell, *Smart Intelligence*, *supra* note 308; *see also* Porotsky, *supra* note 15, at 374–75.

a result, immigration judges and the BIA may face institutional pressure to exclude noncitizens in order to serve the government's enforcement interest,[324] which could bear on both the quality and fairness of adjudication processes and outcomes.[325]

II. INSTITUTIONAL (RE)DESIGN TO REBALANCE ADMINISTRATIVE PRIORITIES

Part I illustrated that, at times, agencies subordinate the interests of marginalized and minority communities to institutional priorities and preservation. Part II suggests that, therefore, legislators and policymakers should reevaluate their approach to maintaining and growing the administrative state. Essentially, it advocates for a rebalancing of institutional priorities—in other words, for the use of sticks and carrots to shift administrative incentives in targeted ways and to build out selected administrative process.

Solutions for improving both agency responsiveness to marginalized communities and minority access to administrative processes typically involve empowering the vulnerable by gathering political support for their interests.[326] Progressives have also relied on litigation to shape public policies to better align with their values, but only under highly favorable political circumstances and to limited success.[327] In many instances, marginalized communities may not have the resources and capacity to push back against administrative subordination at the structural level, or even on a case-by-case basis.[328]

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[324] Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 240–42 (2014) (discussing the "conflicting tasks" of immigration enforcement agencies and the challenges thereby created for bureaucracies).

[325] *See* Shah, *Coordinated Interagency Adjudication*, *supra* note 20, at 814–19 (discussing how the poor coordination between the two agencies led to poor outcomes for asylees and noncitizens with mental disorders).

[326] *See, e.g.*, Rachel E. Barkow, *The Reformation of American Criminal Law*, 29 N.Y.U. ENVTL. L.J. 363, 370, 372–73 (2021) (suggesting that creating a political scheme that represents all interested parties could amplify the voices of marginalized communities in administrative agencies).

[327] *See* Jonathan S. Gould, *Puzzles of Progressive Constitutionalism*, 135 HARV. L. REV. 2054, 2070 (2022) (observing that constitutional litigation can have negative second-order effects for progressives); Stewart, *supra* note 1, at 1701 (noting that the "reformation" of the administrative state by the judiciary has had mixed results as it pertains to interest representation).

[328] *See supra* notes 102–05 and accompanying text.

This Part contributes approaches that engage the levers of internal agency structures and considers lessons from positive political theory that might bear on how agencies take accountability without being persuaded by advocates or forced by judges to do so. As a result, this Part both remains consistent with this Article's focus on dynamics driven by structures and incentives that are endogenous to agencies and also offers an approach to improving the influence of the administrative state on inclusion and equity that is not based in impact litigation. Notably, since the examples in Part I generally fall into the sublegal category of action left to agencies' discretion, efforts to hold agencies more accountable to existing statutory law are unlikely to reach these discretionary administrative choices.

One possible prescription for administrative subordination is to increase agency responsiveness to the public.[329] Furthermore, scholars of social movements advocate for the preservation of democracy in the administrative state by enhancing inclusion[330] and social control.[331] These approaches are echoed by the proposal for more inclusivity in notice-and-comment rulemaking[332] and are reflected in "reactive" and "affirmative" agency efforts to engage the public.[333]

As a complement to the scholarship on agency interaction with *external* parties, this Part focuses on the problems of conflicting *internal* priorities that may overwhelm agencies and hinder administrative responsiveness. Like the work of Professors Pamela Herd and Donald Moynihan, this Part asserts that "administrative burdens can be reduced and sometimes even eliminated by legislators or administrators."[334] One way would be to

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[329] "[R]esponsiveness is essential to ensuring that government actions take account of and serve the interests of governed publics." Bernstein & Rodríguez, *supra* note 65, at 3052; *see also id.* at 3066 (advocating for responsiveness by pushing back against the idea that "elections and political control" lead to agency accountability); Havasy, *supra* note 109, at 822–23 (prescribing stronger relationships between agencies and the people potentially affected by administrative action).

[330] *See* K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1711–12 (2018); *see also* Amy Widman, *Inclusive Agency Design*, 74 ADMIN. L. REV. 23, 54–55 (2022) (recommending that administrative agencies build communication pathways to marginalized communities to bridge the gap between the agency and those it serves).

[331] *See* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 720–27 (2020) (proposing a framework for analyzing capacity of institutions to effect social control by marginalized groups).

[332] *See supra* notes 173–78 and accompanying text.

[333] Bernstein & Rodríguez, *supra* note 65, at 3052–63 (discussing informal and ad hoc bureaucratic interactions with external communities).

[334] Sunstein, *Wading*, *supra* note 88 (citing HERD & MOYNIHAN, *supra* note 87).

encourage exercises of discretion that prevent harm in the implementation of law. Another would be to dilute the emphasis on institutional self-interest that, while reasonable, sometimes provides incentives for problematic bureaucratic choices. To accomplish these shifts, this Part argues for changes to institutional incentives and design that reduce agencies' propensity to weigh self-preservation more heavily than the individual interests of politically powerless communities.[335] Crucially, the recommendations in this Part can be furthered alongside administrative responsiveness and social movements to improve equity.

Agency design could shape internal administrative accountability to benefit various purposes, including the goals of more equitable process and outcomes. Scholars propose that changes to agency design and institutional structure can evolve the administrative state from within.[336] As Mariano-Florentino Cuéllar has said, "[O]rganizational changes can exert powerful, underappreciated influence on law's implementation."[337] Furthermore, "[e]ven if agency design is an imperfect mechanism of control, that lawmaking coalitions" like those in Congress "employ it regularly emphasizes its importance as a policymaking tool."[338] Now, poor institutional design may lead to biased administrative enforcement by allowing for political dependence, narrow mandates, and a lack of judicial oversight in administration.[339] Nonetheless, institutional design could also be deployed to improve the regulation of minority, vulnerable, and underserved communities.[340]

Academics have begun to consider how structural modifications could improve the exercise of administrative discretion in immigration enforcement and environmental justice. Ingrid Eagly has proposed changes to institutional design, both to allow

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[335] Other recent scholarship also "sympathizes with efforts to infuse consumer or other subordinated interests into agency structures." STIGLITZ, *supra* note 2, at 290 (citations to scholarship omitted); *see e.g., id.* at 291 ("Changing the structure of the Federal Reserve and other agencies to more adequately represent the interests of labor interests may help to counter some of the challenges of regulatory governance.").

[336] *See, e.g.*, Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1028–34 (2017).

[337] Cuéllar, *supra* note 240, at 595.

[338] Jason A. MacDonald, *The U.S. Congress and the Institutional Design of Agencies*, 32 LEGIS. STUD. Q. 395, 396 (2007) [hereinafter MacDonald, *Institutional Design*] (citations omitted).

[339] *See* Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 847–48, 927–32 (2018) (arguing that "agencies can be designed to serve, or disserve, a broad range of constitutional goals" in the education context).

[340] *See* Bernstein & Rodríguez, *supra* note 65, at 3004 ("[E]mpirical research, involving interviews with administrators across a range of federal agencies, reveals numerous structures, relationships, and practices within the state that produce accountability.").

for better differentiation between the systems of immigration enforcement and criminal prosecution in practice[341] and to ensure that the exercise of enforcement discretion is either distinctly "administrative" or "criminal" in nature.[342] Professor Shoba Wadhia has suggested that administrative discretion be eliminated in immigration "cases where the statutory criteria are already rigorous and reflective of Congress's policy goals."[343] David Konisky and Christopher Reenock's empirical "results suggest that compliance bias,"[344] which is a significant matter of environmental justice,[345] "can be curbed not just by investing in the political capacity of communities but also by modifying agency decisionmaking structures"[346]—in particular, by "decentralizing authority."[347] This Part explains how agency design could further shape internal administrative accountability to benefit various purposes, including the goals of more equitable process and outcomes.

Before proceeding to a discussion of prescriptions, it is important to note that political feasibility may be a requirement for implementing the solutions proffered in this Part. As Professor Rebecca Brown has observed, "[T]he bulk of the responsibility for structural design [has been left] to the elected departments of government."[348] Administrative agencies are creatures of political process,[349] and administrative design is a political tool.[350] Accordingly, accounts of institutional design often focus on their capacity

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341 Eagly, *supra* note 171, at 1348.

342 *Id.* at 1349.

343 Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 413 (2020).

344 Konisky & Reenock, *supra* note 16, at 507.

345 *See supra* notes 228–32 and accompanying text.

346 Konisky & Reenock, *supra* note 16, at 507.

347 *Id.* at 518 (concluding that "decentralizing authority to regulatory officers in agencies could result in fewer cases of deliberate nondetection of compliance," and, more specifically, that "moving the location of compliance determinations away from high-ranking officials with incentives to overreport compliance may result in fairer—although not necessarily fair—treatment of communities hosting regulated firms").

348 Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1529 (1991).

349 *See* Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1497 (2018) (describing that administrative agencies sometimes alter rules and regulations in response to changes in electoral politics).

350 Recent theory on "*how* the interplay of political forces affects the design of administrative agencies" "argues that administrative design reflects the efforts of enacting coalitions to maximize future political benefits. The earliest research in this tradition emphasized the importance of protecting the enacted policy from political adversaries, while at the same time preventing losses due to drift during policy implementation." Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176, 176–77 (2004) (citations omitted) (emphasis in original).

to increase or reduce presidential[351] or legislative[352] control over administration. From this perspective, a number of the structural changes prescribed here should be attractive to political leaders because, to the extent these interventions improve the issues identified in Part I, they may serve to legitimize those politicians who prompted the change.[353]

Of course, any solution is contingent on favorable political conditions, and the difficult issue of how to overcome legislative polarization is always present.[354] However, there is a recognition of the need for such reforms in scholarly and popular discourse, and this Part offers a toolkit for moments when such reforms could be on the table. In addition, the suggested interventions are narrow and targeted, which renders them more politically feasible than the broad legislative action that advocates often pursue to improve conditions for vulnerable communities,[355] as well as potentially impactful in the aggregate. In any case, due to limitations on length, this Part sets aside the thorny issue of how to convince politicians and bureaucrats to make the changes it suggests. In keeping with this approach, it also refrains from taking a strong stance on which solutions are preferable. Rather, this Part offers a menu of interventions that can be deployed individually or more comprehensively, depending on the substance and forms of administration at issue.

Also due to length constraints and in light of the existing scholarship on public rights doctrine, this Part reserves for future work an extensive discussion of judicial action, including questions regarding how to advance progressive and common-good

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[351] Cuéllar, *supra* note 269, at 595 ("Because organization is not neutral, the redistribution of authority within the executive branch can shape the law by facilitating a symbiotic burst of agency capacity-building coupled with presidential power to control that new capacity.").

[352] Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259, 265 (2017) ("[C]ongressional oversight of agency action is one of the most powerful tools that Congress has to exercise some measure of control over administrative policymaking."); *id.* at 266 ("[E]mpirical examination of the consequences of congressional oversight reveals that bureaucratic issues discussed in committee hearings are 19.7% less likely to reoccur than are similar bureaucratic issues that are not subject to hearings.").

[353] *Cf.* STIGLITZ, *supra* note 2, at 85 ("Fairness, again, is valuable not for its normative content, but instead for its political content, that is, for its ability to improve perceptions of the administrative process, and in turn the careers of those who delegated authority to and imposed the procedures on the administrative state."); *id.* at 86 (noting that "delegated authority possesses political value precisely because of the attributes effectuated by administrative procedures").

[354] *See generally* Metzger, *Agencies, Polarization*, *supra* note 218.

[355] *See supra* notes 326–29 and accompanying text.

values in the judicial treatment of constitutional and statutory law governing administration. For now, the focus is on structuring agencies' "discretionary power through appropriate safeguards," rather than asking courts to hold agencies to new standards.[356]

This Part proceeds as follows. Overall, it suggests that advancements to agency design, either via top-down correction prompted by the legislature or bottom-up structural change from within the executive branch, could be harnessed to reduce some of the negative impact of administration. First, this Part argues that Congress could make subtle shifts: one, by using appropriations to shape how agencies exercise discretion, and two, by mandating more meaningful process. Second, this Part suggests that the President might direct agencies to improve their responsiveness to and treatment of minority communities, and agencies themselves could take the reins to privilege more accurate information and more generous and accessible process. And third, this Part argues that moving toward a government of smaller agencies, with less complicated hierarchies and more discrete mandates, as well as a reduction in overlapping enforcement mandates and separation of functions, could improve agency accountability to minorities and the marginalized.

Table II illustrates, at a glance, the types of institutional redesign that will be explored in the rest of Part II, its potential to alter self-interested agency behavior, and its possible impact on minorities and vulnerable people.

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[356] *Cf.* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713, 730–33 (1969) (implying that such a design constitutes an appropriate delegation to agencies by Congress).

TABLE II: INSTITUTIONAL REDESIGN, POTENTIAL INFLUENCE ON AGENCY BEHAVIORS, AND BENEFITS TO MARGINALIZED COMMUNITIES

Potential Fixes (type)	*Potential Fixes (mechanism)*	*Institutional Motivations Shifted*	*Generalized Agency Behaviors Improved*	*Agencies*	*Regulatory Areas*	*Benefits to Marginalized Communities*
Legislative incentives (top-down)	Provide funding incentives to encourage agency to identify more accurate data[357]	Reduced emphasis on efficiency[358]	Reduced use of information proxies (e.g., drawing on personal identity and characteristics, such as Muslim or racial-minority identity, or on other superficial information) to make enforcement or policy decisions[359]	DOJ, DHS, DHS / ICE, DHS / USCIS	National security, immigration	Reduced antiterrorism targeting of racial and religious minorities and noncitizens (including those who are employed, have engaged in immigrant advocacy, and have been impacted by the criminal legal system)[360]
Legislative incentives (top-down)	Provide funding incentives to encourage agency to use higher-quality data[361]	Reduced emphasis on resource conservation[362]	Reduced reliance on lower-quality data to evaluate pesticide risks to children and to analyze the impact of pipeline projects on minority communities[363]	EPA	Food safety, environmental justice	Reduced potential harm to children and communities traditionally impacted by environmental racism[364]
Legislative incentives (top-down)	Provide funding incentives to encourage agency to use higher-quality data[365]	Less curtailing of process[366]	More likely to incorporate views of Indigenous communities into pipeline projects and into oil and gas lease approvals[367]	FERC, BLM	Energy justice	Reduced impact on Indigenous cultural properties resulting from harmful pipeline projects, and lowered socioeconomic impact on and sexual violence against Indigenous women resulting from "energy boomtowns"[368]

357 *Infra* Part II.A.1.
358 *Infra* Part II.A.1.
359 *Infra* Part II.A.1.
360 *Infra* Part II.A.1.
361 *Infra* Part II.A.1.
362 *Infra* Part II.A.1.
363 *Infra* Part II.A.1.
364 *Infra* Part II.A.1.
365 *Infra* Part II.A.1.
366 *Infra* Part II.A.1.
367 *Infra* Part II.A.1.
368 *Infra* Part II.A.1.

Potential Fixes (type)	*Potential Fixes (mechanism)*	*Institutional Motivations Shifted*	*Generalized Agency Behaviors Improved*	*Agencies*	*Regulatory Areas*	*Benefits to Marginalized Communities*
Legislative incentives (top-down)	Provide funding incentives to encourage agency to use higher-quality data[369]	Reduced concern with minimizing financial and administrative burdens[370]	Less likely to locate commercial waste facilities in poor, rural communities of color where land values are lower[371]	EPA	Environmental justice	Reduced impact of hazardous waste on poor and minority communities[372]
Legislative incentives (top-down)	Shore up reason-giving requirements[373]	Reduced emphasis on efficiency[374]	Less curtailing of process in adjudications at the intersection of immigration and national security, and less overlap in immigration and criminal law enforcement processes[375]	DHS / USCIS, DOJ / EOIR	Immigration	Less bias against Muslims in immigration-benefits adjudications and against noncitizens in the criminal system[376]
Legislative incentives (top-down)	Shore up reason-giving requirements[377]	Less curtailing of process[378]	More likely to incorporate views of Indigenous communities into pipeline projects and into oil and gas lease approvals, including as a result of more detailed environmental impact assessments and fortified statutory procedural requirements[379]	FERC, BLM	Energy justice	Reduced impact on Indigenous cultural properties resulting from harmful pipeline projects, and lowered socioeconomic impact on and sexual violence against Indigenous women resulting from "energy boomtowns"[380]

369 *Infra* Part II.A.1.
370 *Infra* Part II.A.1.
371 *Infra* Part II.A.1.
372 *Infra* Part II.A.1.
373 *Infra* Part II.A.2.
374 *Infra* Part II.A.2.
375 *Infra* Part II.A.2.
376 *Infra* Part II.A.2.
377 *Infra* Part II.A.2.
378 *Infra* Part II.A.2.
379 *Infra* Part II.A.2.
380 *Infra* Part II.A.2.

Potential Fixes (type)	*Potential Fixes (mechanism)*	*Institutional Motivations Shifted*	*Generalized Agency Behaviors Improved*	*Agencies*	*Regulatory Areas*	*Benefits to Marginalized Communities*
Executive self-regulation (bottom-up)	Redirect legislative funding allocation[381]	Less concern with reducing financial and administrative burdens[382]	Less likely to locate commercial waste facilities in poor, rural communities of color where land values are lower[383]	EPA	Environmental justice	Reduced burden of environmental hazards on poor, rural communities of color[384]
Executive self-regulation (bottom-up)	Prioritize collection and use of accurate information[385]	Reduced emphasis on efficiency[386]	Reduced use of information proxies (e.g., drawing on personal identity and characteristics, such as Muslim or racial-minority identity, or on other superficial information) to make enforcement or policy decisions[387]	DOJ, DHS, DHS / ICE, DHS / USCIS	National security, immigration	Reduced antiterrorism targeting of racial and religious minorities and noncitizens (including those who are employed, have engaged in advocacy, and have been impacted by the criminal legal system)[388]
Executive self-regulation (bottom-up)	Prioritize collection and use of accurate information[389]	Reduced emphasis on resource conservation[390]	Reduced reliance on lower-quality data to evaluate pesticide risks to children and the impact of pipeline projects on minority communities[391]	EPA	Food safety, environmental justice	Reduced potential harm to children and communities traditionally impacted by environmental racism[392]

381 *Infra* Part II.B.
382 *Infra* Part II.B.
383 *Infra* Part II.B.
384 *Infra* Part II.B.
385 *Infra* Part II.B.1.
386 *Infra* Part II.B.1.
387 *Infra* Part II.B.1.
388 *Infra* Part II.B.1.
389 *Infra* Part II.B.1.
390 *Infra* Part II.B.1.
391 *Infra* Part II.B.1.
392 *Infra* Part II.B.1.

Potential Fixes (type)	*Potential Fixes (mechanism)*	*Institutional Motivations Shifted*	*Generalized Agency Behaviors Improved*	*Agencies*	*Regulatory Areas*	*Benefits to Marginalized Communities*
Executive self-regulation (bottom-up)	Incorporate ubiquitous and situated knowledge into notice-and-comment rulemaking[393]	Reduced use of information proxies (namely, more apparently "data-driven" comments)[394]	More reliance on comments from a variety of sources[395]	Agencies with informal rulemaking authority	Notice-and-comment rulemaking (cutting across regulatory areas)	Reduced exclusion from the notice-and-comment process of the viewpoints of marginalized communities who are impacted by ongoing or potential regulation[396]
Executive self-regulation (bottom-up)	Redirect legislative funding allocation[397]	Less concern with reducing financial and administrative burdens[398]	Less likely to locate commercial waste facilities in poor, rural communities of color where land values are lower[399]	EPA	Environmental justice	Reduced burden of environmental hazards on poor, rural communities of color[400]
Executive self-regulation (bottom-up)	Bolster administrative due process[401]	Less focus on reducing financial and administrative burdens[402]	Reduced prioritization of the agency's interests in the administrative due process calculus[403]	Agencies with adjudicatory authority	Administrative adjudication (cutting across regulatory areas)	Improved due process, particularly for vulnerable communities impacted by antiterrorism measures[404]

393 *Infra* Part II.B.2.
394 *Infra* Part II.B.2.
395 *Infra* Part II.B.2.
396 *Infra* Part II.B.2.
397 -*Infra* Part II.B.2 (introduction).
398 *Infra* Part II.B.2 (introduction).
399 *Infra* Part II.B.2 (introduction).
400 *Infra* Part II.B.2 (introduction).
401 *Infra* Part II.B.2.
402 *Infra* Part II.B.2.
403 *Infra* Part II.B.2.
404 *Infra* Part II.B.2.

Potential Fixes (type)	*Potential Fixes (mechanism)*	*Institutional Motivations Shifted*	*Generalized Agency Behaviors Improved*	*Agencies*	*Regulatory Areas*	*Benefits to Marginalized Communities*
Agency redesign	Put subcomponents in umbrella agencies with similar missions[405]	Reduced emphasis on resource conservation, and more likely that broader agency will complement subcomponent mission[406]	More likely to emphasize humanitarian aims in immigration, and less likely to have to conserve funding because it would be made available for disaster relief[407]	DHS / USCIS, DHS / FEMA	Immigration, environmental justice	Greater sense of justice in the immigration process, and improved disaster-relief outcomes for poor and minority communities[408]
Agency redesign	Remove subcomponents from umbrella agencies with divergent missions[409]	Less likely that broader agency mandate overshadows subcomponent mission[410]	Less likely that the subcomponent's mission is colored by the broader agency's mandates or culture[411]	DHS, DHS / USCIS, FBI, FBI / HIG,	Immigration, national security, antiterrorism, law enforcement	Less likely that broader agency interest in national security, exclusion, or coercion will impact subcomponent humanitarian mission[412]
Agency redesign	Delimit and distinguish the roles of immigration and law enforcement officials[413]	Reduced emphasis on efficiency[414]	Less curtailing of process in adjudications at the intersection of immigration law and criminal law enforcement[415]	DOJ / EOIR	Immigration	Less bias in immigration-benefits adjudications against noncitizens in the criminal enforcement system[416]

405 *Infra* Part II.C.1.
406 *Infra* Part II.C.1.
407 *Infra* Part II.C.1.
408 *Infra* Part II.C.1.
409 *Infra* Part II.C.1.
410 *Infra* Part II.C.1.
411 *Infra* Part II.C.1.
412 *Infra* Part II.C.1.
413 *Infra* Part II.C.2.
414 *Infra* Part II.C.2.
415 *Infra* Part II.C.2.
416 *Infra* Part II.C.2.

Potential Fixes (type)	*Potential Fixes (mechanism)*	*Institutional Motivations Shifted*	*Generalized Agency Behaviors Improved*	*Agencies*	*Regulatory Areas*	*Benefits to Marginalized Communities*
Agency redesign	Remove adjudicative appeals body from umbrella agency[417]	Less likely that broader agency mandate overshadows subcomponent mission[418]	Less likely that the agency appeals process is colored by the broader agency's interest in exclusion or reduced access to benefits[419]	DOJ / EOIR	Immigration, social-security and disability claims	Less bias against noncitizens in the administrative appeals processes[420]
Agency redesign	End the informal policies by which immigration officials are given prosecutorial roles[421]	Less likely to have conflated mandates across agencies[422]	Reduced conflation of criminal and immigration functions[423]	DHS, DHS / ICE, DHS / CBP	Immigration	Improved process for noncitizens in both the criminal and immigration contexts[424]
Agency redesign	Separate and establish independence for humanitarian immigration adjudication[425]	Less likely to have conflated mandates within agency[426]	Reduced conflict between DHS adjudicators of asylum cases and DHS counsel against noncitizens facing deportation[427]	DHS / USCIS, DHS / ICE, DOJ / EOIR	Immigration, national security	Reduced influence on asylum adjudications of the broader agency's punitive, exclusionary, and antiterrorism mission[428]

417 *Infra* Part II.C.2.
418 *Infra* Part II.C.2.
419 *Infra* Part II.C.2.
420 *Infra* Part II.C.2.
421 *Infra* Part II.C.2.
422 *Infra* Part II.C.2.
423 *Infra* Part II.C.2.
424 *Infra* Part II.C.2.
425 *Infra* Part II.C.2.
426 *Infra* Part II.C.2.
427 *Infra* Part II.C.2.
428 *Infra* Part II.C.2.

A. Inducement from the Top Down (Legislative Action)

Agencies are highly responsive to congressional preferences.[429] "Through oversight, the limitation of discretion, and the design of the circumstances under which bureaucrats make policy decisions . . . [,] lawmaking coalitions attempt to maintain control over the bureaucracy's decisions."[430] Furthermore, "legislators debate fairness and the protection of individual rights when considering alternative institutional arrangements"[431] and could feasibly mold bureaucratic discretion in ways that support just administration.[432]

This Section argues that the legislature could prompt changes to administration in order to reduce administrative subordination. The legislature can constrain the exercise of administrative discretion both ex ante and ex post.[433] Ex ante, Congress relies heavily on institutional design to influence bureaucratic discretion[434]—in particular, as a strategic[435] way to enact its political goals.[436] More specifically, Congress uses both "structure and procedure" to "influence agencies' policy choices."[437] In addition, "structure and process can be viewed as embodying an ex ante agreement among legislators and the President that limits the ability of each to engage in ex post opportunistic behavior."[438]

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[429] *See*, *e.g.*, Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 791–92 (1983) (finding pronounced effects on agency decisions from changes in congressional committee personnel).

[430] Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 766 (2010) [hereinafter MacDonald, *Limitation Riders*] (citating JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990); JOHN D. HUBER & CHARLES R. SHIPAN, DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY (2002); McCubbins et al., *Administrative Agreements*, *supra* note 135; and Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? (1989)).

[431] McCubbins et al., *Administrative Agreements*, *supra* note 135, at 432.

[432] *See, e.g.*, Wadhia, *supra* note 343, at 369–70, 413.

[433] Gersen, *supra* note 90, at 338.

[434] *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 7 (1999).

[435] *See* Wood & Bohte, *supra* note 350, at 177 (showing that politicians succeed in "strategically manipulat[ing] administrative-design attributes to affect political transaction costs for future coalitions").

[436] HUBER & SHIPAN, *supra* note 430, at 9 (asserting that bureaucratic discretion is intended to maximally further the enacting legislature's political goals).

[437] MacDonald, *Institutional Design*, *supra* note 338, at 395–96.

[438] McCubbins et al., *Administrative Arrangements*, *supra* note 135, at 432–33.

Congress also has a significant ex ante role in shaping how heavily agencies weigh resource limitations against other interests. Consider the inevitability of resource constraints, as a result of which agencies may seek to postpone statutory deadlines.[439] Professors Cass Sunstein and Adrian Vermeule have argued that, while deadlines may sometimes be shifted in response to a lack of agency capacity, "agencies may not defer decisions . . . if (1) Congress has imposed a statutory deadline, (2) their failure to act amounts to a circumvention of express or implied statutory requirements, or (3) that failure counts as an abdication of the agency's basic responsibility to promote and enforce policies established by Congress."[440]

Likewise, when faced with the trade-off between, on one hand, efficiency and reduced cost and, on the other, better policy for marginalized communities, Congress might specify requirements that encourage agencies to concentrate on the latter. More specifically, Congress could use earmarks and limitation riders to incentivize agencies to reduce their dependence on information proxies, and it could ensure adequate process in adjudications in which agencies would otherwise prioritize efficiency over accessibility and fairness. As to ex post control, agencies can depart from the preferences of the Congress that enacted the legislation they are responsible for implementing, as well from the preferences of sitting Congresses.[441] As Professor Lisa Bressman has asserted, "[f]or both sorts of problems, legislative monitoring is the antidote."[442]

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439 Sunstein & Vermeule, *supra* note 215, at 180–81 (discussing how, when agencies face a conflict between statutory deadlines and resources constraints, agencies should generally have leeway to treat the deadlines as aspirational).

440 *Id.* at 157; *see also id.* at 162.

441 Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1768–69 (2007) [hereinafter Bressman, *Procedures as Politics*] (citing Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111, 113–15 (1992)).

442 Bressman, *Procedures as Politics*, *supra* note 441, at 1768; *see also* Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 505 (1989).

1. Employing earmarks and limitation riders to encourage higher-quality information.

Agencies subordinate minority well-being to cost saving by, among other efforts, using lower-quality data[443] and relying on information shortcuts.[444] Congress could feasibly direct funding in a manner that dissuades agencies from these approaches to implementing the law. Indeed, agencies rely fundamentally on appropriations, which renders them especially sensitive to "revenue insecurity."[445] As a result, Congress uses appropriations "to exert control over agencies by altering total funding, targeting specific programs through earmarks and riders, and using signals and threats."[446] This Section posits, more specifically, that Congress could use earmarks to fund higher-quality studies and appropriations riders to disincentivize agency reliance on information proxies. In doing so, Congress might play a role in helping agencies to become better versions of their expert selves and to engage less often in administrative subordination.

Professor David Super has remarked that if "Congress becomes involved in policymaking at all, it is likely to be as an adjunct to its funding role in the form of earmarks and other special provisions fine-tuning the program."[447] "Earmarks designate money for a particular activity, thereby preventing those funds from being used for other purposes."[448] Put another way, "[e]armark rules are akin to precommitment devices, albeit in weak form," which can allow the legislature to bind agencies in their future decision-making.[449]

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[443] *See supra* Part I.B.2.

[444] *See supra* Part I.A.1.

[445] Kasdin & Lin, *supra* note 29, at 311.

[446] Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1825 (2012).

[447] Super, *Against Flexibility*, *supra* note 220, at 1434.

[448] *See Independence, Congressional Weakness, and the Importance of Appointment*, *supra* note 446, at 1826 ("Earmarks may also be used to encourage an agency to take action not authorized by statute."); Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 819 n.223 (2021) [hereinafter Gould, *Legislative Representation*] (defining earmarks).

[449] Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 528 (2009). Precommitment devices are used to overcome the problem of imperfect rationality in future decision-making—in other words, they are "devices adopted by agents to bind themselves." *Id.* at 520; *see also id.* at 528 (arguing that earmarks improve transparency in the legislative process).

Furthermore, earmarks also "enable[ ] legislators to advance the material interests of their constituents."[450] For about a decade, earmarks were banned after condemnation as "the epitome of corrupt politics and wasteful spending,"[451] notwithstanding that the actual impact of the ban "is difficult to assess because legislators developed workarounds that mimicked direct earmarks."[452] In any case, their return comes with an opportunity to rehabilitate their reputation by putting them to good use.[453]

For instance, the legislature could earmark funding to encourage agencies to deprioritize cost saving at the expense of minority communities and to incorporate higher-quality data into their analyses. As to the former, such an approach might push an agency to improve its hazardous waste-siting decisions, instead of first and foremost conserving resources, for instance, by seeking to save costs associated with designating and purchasing land.[454] As to the latter, consider the examples of the EPA evaluating the impact of pesticides on children based on inadequate data,[455] and of the EPA,[456] FERC,[457] and BLM[458] relying on poor-quality information while deciding whether to approve oil, gas, or hydropower pipeline projects or leases. In each of these situations, an interest in saving the costs associated with identifying and using

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[450] Gould, *Legislative Representation*, *supra* note 448, at 819; *see also* Russell W. Mills, Nicole Kalaf-Hughes & Jason A. MacDonald, *Agency Policy Preferences, Congressional Letter-Marking and the Allocation of Distributive Policy Benefits*, 36 J. PUB. POL'Y 547, 548 (2015) (discussing "how members of Congress secure distributive policy benefits through earmarks" for their districts).

[451] Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1145 (2021) [hereinafter Metzger, *Taking Appropriations Seriously*]; *see also* Gould, *Legislative Representation*, *supra* note 448, at 819 ("The impact of the decade-long earmark ban on representation is difficult to assess because legislators developed workarounds that mimicked direct earmarks.").

[452] Gould, *Legislative Representation*, *supra* note 448, at 819.

[453] John Hudak, *Earmarks Are Back, and Americans Should Be Glad*, BROOKINGS INST. (Mar. 17, 2021), https://perma.cc/R2SX-JMMU (arguing that earmarks benefit "ordinary Americans"); *id.*:

> First, they serve a real purpose, allowing legislators—who well understand the needs of their districts/states—to target funds for important projects that can solve policy problems . . . . Second, . . . the vast majority of earmarks were meant to respond to constituents' concerns and needs. Third, earmarks have always composed a miniscule portion of the discretionary budget.

[454] *See supra* notes 228–30 and accompanying text (discussing how the agencies locate commercial-waste facilities in poor, rural communities of color where land values are lower and therefore the government's cost of doing business is less).

[455] *See supra* notes 240–53 and accompanying text.

[456] *See supra* notes 253–57 and accompanying text.

[457] *See supra* notes 197–200 and accompanying text.

[458] *See supra* notes 201–10 and accompanying text.

high-quality data contributed to concerning decisional outcomes harming marginalized communities. The legislature could draw on discretionary funding to ensure that these agencies incorporate into their decision-making process adequate information and ubiquitous or situated knowledge from communities,[459] such as minorities in rural areas and Indigenous people, that are substantially impacted by these agencies' decisions.

In addition, riders are an effective[460] way for Congress to change governmental policy[461] that attract "relatively little attention."[462] Appropriations riders, sometimes known as "limitation riders,"[463] "prohibit the expenditure of funds on specified activities."[464] Professor Roberta Romano has remarked that Congress "extensively—and successfully—uses limitation riders in appropriations bills."[465] This can include using riders to curtail "everyday decisions regarding statutory implementation . . . [in order to] constrain agencies' actions."[466] Given that past limitation riders have been fairly nuanced,[467] it seems possible for them to be

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[459] *See supra* note 175 and accompanying text.

[460] Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, 36 YALE J. ON REGUL. 273, 299 (2019) ("Appropriations riders are a particularly effective means for a legislative majority to exercise control because they have a privileged legislative status."); *id.* (noting that appropriation riders "are subject to special floor rules preventing minority holdup").

[461] Metzger, *Taking Appropriations Seriously*, *supra* note 451, at 1093 (remarking that appropriation riders' "prime use is to forestall the executive branch from proceeding with or developing particular agency initiatives"); *see also* Romano, *supra* note 460, at 335–36 (noting, regarding the Consumer Financial Protection Bureau, that Congress could have used appropriations riders to "discipline[ ] the agency early on").

[462] Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, 99 CORNELL L. REV. 1133, 1151–54 (2014) (comparing the appropriation rider to the legislative veto); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1981 n.199 (2008) ("Often appropriation riders 'fly below the political radar' and legislators may not even be aware of riders in bills on which they vote." (quoting Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 88–89 (2006))).

[463] Metzger, *Taking Appropriations Seriously*, *supra* note 451, at 1093 n.91.

[464] Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 456 n.2; *id.* at 457 ("Military activities in Southeast Asia, public funding of abortion, air bags for automobiles, tax-exemptions for discriminatory schools, religious activities in public schools, and public funding of school desegregation are but some of the areas affected by limitation riders."). "Congress frequently expresses policy preferences through limitation riders introduced on the House or Senate floor while an appropriations bill is under consideration." *Id.*

[465] Romano, *supra* note 460, at 299.

[466] *Id.*; *see also* Metzger, *Taking Appropriations Seriously*, *supra* note 451, at 1077 (noting that "Congress resorts to appropriations riders and funding denials as its tools of choice to control government policy").

[467] An empirical study shows that from 1994 to 2003, Congress issued about three hundred limitations riders per year to ensure that funding was limited on a variety of

employed in specific ways that stave off administrative subordination.

Recall that administrative law enforcement suffers from the use of information proxies. Relying on noncitizens as proxies to enforce antiterrorism measures,[468] and on arrest records[469] and the omission of minor criminal activity[470] as proxies for unlawful immigration enforcement, has a documented impact on vulnerable minorities. The legislature could discourage the administrative use of information proxies via limitation riders. For instance, Congress could limit funding for administration that neglects to identify and apply more accurate data, identified as such in a context-specific manner.

Notably, neither earmarks nor limitation riders entail directing resources to agencies that are contingent on equitable outcomes. Appropriation for explicitly equity-focused initiatives both requires significant political will to pass blockbuster legislation[471] and does not necessarily attend to the problems of administrative discretion, which may color the implementation of any law. Rather, the idea is for Congress to influence the exercise of discretion by providing incentives in the form of optional or additional funding, or by withholding money, in order to shape agency actions.

Finally, consider legislative control ex post—namely, monitoring.[472] Earmarks and limitation riders might also reduce the problem of information asymmetry that plagues legislative oversight.[473] First, such measures do not require particular regulatory outcomes resulting from a legislative mandate. Second, Congress could require agencies to report on their use of more accurate data in order to access discretionary funding. Depending on the results of reporting, Congress could draw on the tool of inaction[474] to quell agency behavior—in other words, legislators may choose not to renew funding or might reinforce riders for initiatives in which

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specific tasks. MacDonald, *Limitation Riders*, *supra* note 430, at 769 (detailing the specific tasks directed by riders).

468 *See supra* notes 146–48 and accompanying text.

469 *See supra* notes 157–71 and accompanying text.

470 *See supra* notes 171–73 and accompanying text.

471 Shah, *Internal Separation*, *supra* note 14, at 261.

472 *See supra* note 442 and accompanying text.

473 Bressman, *Procedures as Politics*, *supra* note 441, at 1768–70 (citing Moe, *supra* note 430, at 3).

474 Metzger, *Agencies, Polarization*, *supra* note 218, at 1750 (noting that "congressional influence through appropriations is often felt more through budgetary inaction than actual appropriations legislation" and that it is sometimes "a deliberate strategy of obstruction" used by "congressional opponents of agency action").

agencies have demonstrably subordinated minority interests to bureaucratic goals.

2. Designing process to shore up equitable and accessible procedure.

Setting limits to procedure—or arguably, allowing deficiencies in procedure—permits agencies to subordinate marginalized interests to efficiency in the administration of antiterrorism mandates, crimmigration enforcement, and environmental management.[475] More specifically, agencies have expedited the national security review of noncitizens at the expense of Muslim communities,[476] streamlined environmental review processes in gas and oil lease decision-making at the expense of the safety of Native women,[477] and infused immigration decision-making with broad discretion to deport noncitizens who have come into contact with the criminal system.[478]

This Section prescribes legislative requirements for administrative process to prioritize access and parity. Indeed, Congress shapes administrative decision-making by legislating specific administrative-procedure requirements to enhance political control.[479] In each of the above contexts, different forms of mandated procedure could ameliorate administrative subordination. Notably, this suggestion does not advocate for wholesale additions to the procedural requirements of the APA or to enabling statutes in general, an approach that has been derogatorily referred to as a "procedure fetish."[480] Rather, the prescription is for procedure aimed at specific problems—that is, procedure as a directed intervention.

For example, holding agencies accountable via legislation requiring detailed reason-giving in adjudication related to national security could stem the flow of biased exclusion. In addition, the federal statute governing oil and gas leasing[481] contains only

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475 *See supra* Part I.A.2.

476 *See supra* notes 182–86 and accompanying text.

477 *See supra* notes 197–206 and accompanying text.

478 *See supra* notes 156–73, 314–19, and accompanying text.

479 MacDonald, *Institutional Design*, *supra* note 338, at 396 (citing Moe, *supra* note 430); Bressman, *Procedures as Politics*, *supra* note 441, at 1768 (citing McCubbins et al., *Administrative Arrangements*, *supra* note 135, at 440–44).

480 Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 345 (2019) (arguing that the view that administrative procedures ensure administrative legitimacy and accountability is "overdrawn and harmful"). *See generally id.*

481 Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. § 1701 et seq.) (governing much of the BLM's discretionary authority).

"vague notions of how to programmatically execute those preferred policies at the agency level";[482] reason-giving requirements could usher in more equitable execution of the law. Likewise, Professor J.B. Ruhl and attorney Kyle Robisch have argued that environmental protection agencies avoid "costly and time-consuming impact assessment procedures" required by the National Environmental Policy Act[483] (NEPA).[484] Reinforcing NEPA provisions requiring detailed environmental impact statements and assessments[485] and procedural requirements governing BLM's leasing decisions could enhance the agency's consideration of collateral consequences for Native women prior to approving leases in rural locations.

Finally, disaggregating conflated civil immigration and criminal procedures—that is, reseparating the "crim" from the "imm" in the "crimmigration" system—could constrain the breadth of administrative discretion that fosters intensified law enforcement at the expense of accuracy and deteriorated administrative due process.[486] Options include delimiting the role of bureaucratic actors by reducing the authority of each to engage in both immigration and criminal enforcement roles, reducing the overlap of discretionary immigration and criminal-enforcement decision-making (again, by allowing administrators to work only in one context or another), and disentangling immigration and criminal-enforcement procedure by restricting the immigration bureaucracy's involvement in criminal enforcement, reducing the role of criminal law enforcement personnel in the immigration system,

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[482] Washington, *supra* note 201, at 743–44 (referring to policies that protect tribes or, contrarily, maximize domestic energy sources).

[483] 42 U.S.C. §§ 4321–4347.

[484] J.B. Ruhl & Kyle Robisch, *Agencies Running from Agency Discretion*, 58 WM. & MARY L. REV. 97, 104 (2016).

[485] *See* Shah, *President's Fourth Branch, supra* note 47, at 541 (offering solutions for reinforcing NEPA's environmental-impact-statement requirements); Mario Atencio, Hazel James-Tohe, Samuel Sage, David J. Tsosie, Ally Beasley, Soni Grant & Teresa Seamster, *Federal Statutes and Environmental Justice in the Navajo Nation: The Case of Fracking in the Greater Chaco Region*, 112 AM. J. PUB. HEALTH 116, 118–19 (2022) (discussing how NEPA can be applied to ensure that agencies incorporate Indigenous views on environmental impacts, particularly by BLM in regards to oil leases); *see also* W. Watersheds Project v. Schneider, 417 F. Supp. 3d 1319, 1324, 1334–35 (D. Idaho 2019) (arguing that the BLM artificially minimized environmental harms under NEPA based on a claim brought by four different environmental groups challenging fifteen NEPA Environmental Impact Statements); Bruce M. Pendery, *BLM's Retained Rights: How Requiring Environmental Protection Fulfills Oil and Gas Lease Obligations*, 40 ENVTL. L. 599, 608 (2010) (noting that BLM has to comply with NEPA's requirements for environmental assessments); *see also id.* at 637–40 (noting several other statutes under which the BLM is required to prevent environmental harms).

[486] *See supra* notes 186–97 and accompanying text.

and limiting the funneling of noncitizens that engage with criminal enforcement personnel into deportation proceedings. These approaches could stem the harmful amplification of bureaucratic discretion across immigration and criminal law enforcement. Note that these suggestions do not entail confronting legislative and jurisdictional redundancy overall, which has some benefits;[487] rather, they focus on separating the processes of two administrative systems, immigration and criminal, whose pathways and goals do not and need not overlap, as a matter of law.

B. Shifting Incentives from the Bottom Up (Executive and Administrative Action)

Presidents can foster change by playing a leadership role via executive orders and other directives that encourage agencies to make ground-level shifts in administration. Agencies, too, may make policy after the passage of legislation[488] in order to improve their exercise of discretion[489] without, or perhaps even in spite of, external, political directives.[490]

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[487] *See supra* notes 307–12 and accompanying text.

[488] *See* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 5 (2001).

[489] Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 452–53, 483–84 (2002) (arguing that agencies themselves should supply the standards guiding and limiting their own policymaking discretion).

[490] *See* Magill, *supra* note 72, at 859–60 (noting that agencies "routinely 'self-regulate'" by "adopt[ing] rules, guidelines, and interpretations that substantively limit their options" even "when no source of authority requires them to do so," thereby "*voluntarily* constrain[ing] their discretion" (emphasis in original)).

As to the former, President Joe Biden has issued statements that "direct Federal agencies to put *people* at the center of everything the Government does"[491] and that emphasize policies centering racial equality, representative diversity,[492] and environmental justice.[493] A number of President Biden's executive orders have also been distilled by the White House Office of Management and Budget—an important clearinghouse for regulatory activity—into guidance on how to "more completely and transparently articulate burdens and associated costs experienced by the public when accessing essential public benefits programs."[494]

Agencies, for their part, have freedom to decide how to spend their appropriated funding.[495] Moreover, they may exercise discretion with relative independence from legislative coalitions and

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[491] *See, e.g.*, *Fact Sheet: Putting the Public First: Improving Customer Experience and Service Delivery for the American People,* THE WHITE HOUSE (Dec. 13, 2021) [hereinafter WHITE HOUSE, *Putting the Public First*], https://perma.cc/F8VZ-L7BY (describing Executive Order No. 14,058, "Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government") (emphasis in original).

[492] *See, e.g.*, Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021); Exec. Order No. 14,058, 86 Fed. Reg. 71357 (Dec. 16, 2021); WHITE HOUSE, *Putting the Public First*, *supra* note 491 ("The Biden-Harris Administration is committed to ensuring an effective, equitable, and accountable Government that meets the needs of its people."); Memorandum on Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States, 86 Fed. Reg. 7485 (Jan. 29, 2021); Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 29, 2021).

[493] *See* Ayo Aladesanmi, *EPA Creates New Environmental Justice Office*, REGUL. REV. (Dec. 12, 2022), https://perma.cc/WX5E-SHF2 (noting that "the Biden Administration recently added a new institutional process for the consideration of environmental justice issues"); *see, e.g.*, Exec. Order No. 13,990, 40 Fed. Reg. 1500 (Jan. 20, 2021); *Fact Sheet on President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government*, THE WHITE HOUSE (Jan. 27, 2021), https://perma.cc/T67Y-Q94H ("The order formalizes President Biden's commitment to make environmental justice a part of the mission of every agency . . . .").

[494] Memorandum from Shalanda D. Young, Dir. of the White House Off. of Mgmt. & Budget, and Dominic J. Mancini, Deputy Adm'r of the White House Off. of Info. & Regul. Affs., to Heads of Exec. Dep'ts & Agencies, Improving Access to Public Benefits Programs Through the Paperwork Reduction Act (Apr. 13, 2022) (available at https://perma.cc/CK85-9HLF) (citing Executive Order 14058, "Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government," and Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," as among the justifications for the memorandum).

[495] "[A]fter Congress authorizes and appropriates funds, the ultimate allocation decisions—who gets what money—are almost always made by the bureaucracy." Berry & Gersen, *supra* note 336, at 1007–08; *see id.* at 1008 (arguing that most earmarks are not "legally binding on the agencies") (citing 2 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 3 (3d ed. 2004)).

the President.[496] Sometimes agencies will even regulate in ways they describe "as made necessary by congressional failure to act,"[497] which allows them to take advantage of gridlock and polarization to create their own policy.[498] Furthermore, agencies might "self-regulate" to guard against hostile changes to their own policies by current or future political leaders, under the protection of the "*Accardi* principle"[499] or by using tools that allow agencies "to entrench policy choice[s] in the future."[500]

This Section argues that both political leaders and bureaucrats themselves might seek to alter the administrative emphasis on self-preservation, the pursuit of efficiency, and resource conservation in order to offset administrative subordination. Under certain circumstances, presidentialism could ensure that bureaucratic discretion is exercised to benefit minority communities (with the caveat that presidential administration sometimes leads to poor policy[501]). As a result of a commitment to environmental justice,[502] for example, the President might direct agencies to rejigger funding in order to improve hazardous-waste siting determinations.[503]

The rest of this Section offers ideas for both presidentialism and endogenous agency action that prioritize both employing adequate information and implementing necessary process to counter the inequitable enforcement of law. Note that agency

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[496] Indeed, there is not necessarily "a link between agency design and political responsiveness." Berry & Gersen, *supra* note 336, at 1006–07 (critiquing various aspects of empirical studies meant to demonstrate that institutional design shapes how responsive agencies are to the political branches); *id.* at 1011–12; Krause & Douglas, *supra* note 495, at 281 (suggesting that agencies are not necessarily "'hardwired' by the structural design choice made by politicians"); *see also* George Krause & James W. Douglas, *Institutional Design Versus Reputational Effects on Bureaucratic Performance: Evidence from U.S. Government Microeconomic and Fiscal Projections*, 15 J. PUB. ADMIN. RSCH. & THEORY 281, 281 (2004) (suggesting that agencies are not necessarily "'hardwirded' by the structural design choice made by politicians"); *see also id.* at 302 (finding that variations in political insulation do not necessarily affect isolated or short-term bureaucratic exercises of discretion); Bijal Shah, *Beyond OIRA for Equity in Regulatory Process*, REGUL. REV. (Mar. 16, 2022), https://perma.cc/7Z64-L67U. Even bureaucrats squarely within the executive hierarchy have been shown to resist presidential directives, particularly in the immigration context. Shah, *President's Fourth Branch*, *supra* note 47.

[497] Metzger, *Agencies, Polarization*, *supra* note 218, at 1758.

[498] *Id.* at 1757–58.

[499] *Accardi v. Shaugnessy*, 347 U.S. 260 (1954) (holding that federal administrative agencies are obliged to follow their own regulations, policies, and procedures).

[500] Magill, *supra* note 72, at 889.

[501] *See supra* notes 225, 260, and accompanying text. *See generally* Shah, *Statute-Focused Administration*, *supra* note 140.

[502] *See supra* note 493.

[503] *See supra* note 454.

self-regulation, in particular, may work better as a means for disincentivizing institutionalism when paired with some of the legislative structural changes discussed in the previous Section.

1. Prioritizing accurate information to reduce bias.

The President has shown an interest in improving the quality of administrative analysis to encourage regulatory equity and inclusion.[504] Building on this concern, the President could discourage, and agencies themselves could resist, the institutional preference for rote efficiency by prioritizing the gathering and use of accurate information. For instance, in situations where high-level agency pressure to use information proxies is significant, such as in the overlap of immigration benefits distribution and national security,[505] strong leadership from a President who is sympathetic to the concerns of racial and religious minorities and noncitizens may be required to make space for bureaucrats to go against institutional expectations to put national security interests first.[506]

In addition, agencies themselves could initiate the gathering of varieties of information. For example, this could involve the more intentional implementation of statutory requirements,[507] including by the EPA, to better uphold law governing the protection of children from pesticides.[508] Agencies could also acquire ubiquitous and situated knowledge[509] through approaches like negotiated rulemaking.[510] This approach could be reinforced by the implementation of "various monitoring mechanisms to assure

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[504] For instance, "President Biden's executive order on 'Modernizing Regulatory Review,' and the accompanying proposed revisions to the White House Office of Management and Budget Circular A-4, offer some opportunities for updating benefit-cost analysis" to the benefit of marginalized communities. Shah, *A Critical Analysis*, *supra* note 14, at 1053 n.303 (citing Exec. Order No. 14094, 88 Fed. Reg. 21879 (Apr. 11, 2023); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, PROPOSED CIRCULAR A-4, REGULATORY ANALYSIS (Apr. 6, 2023)).

[505] *See, e.g.*, *supra* notes 146–48 and accompanying text (noting the administrative reliance on noncitizens as proxies to enforce antiterrorism measures); *supra* notes 157–71 and accompanying text (considering the use of arrest records as proxies for unlawful immigration); *supra* notes 171–73 and accompanying text (explaining that the omission of minor criminal activity is used as a flag for deportation).

[506] *See supra* note 492 and accompanying text.

[507] *See generally* Shah, *Statute-Focused Administration*, *supra* note 140 (advocating for a statute-centered approach to administration in lieu of implementation that privileges executive priorities).

[508] *See supra* notes 240–52 and accompanying text.

[509] *See supra* note 175 and accompanying text.

[510] *See* Havasy, *supra* note 109, at 821–23 (advocating for this approach as a means to better incorporate affected parties into the notice-and-comment process).

compliance" with agency self-regulation.[511] For example, agencies could utilize guidance and memoranda to instruct frontline officials to reduce immigration profiling[512] and restrict the use of subpar data, including in the context of pesticide and environmental safety regulation, in order to justify oversight and enforcement that costs less.[513] In addition to improving regulatory outcomes for vulnerable people, these approaches would support the bureaucracy's technocratic values.

2. Augmenting process to improve fairness and accessibility.

Agencies curtail process in the name of efficiency.[514] This Section suggests that the executive branch implement procedure to reduce administrative subordination. Additional procedure could function as a precommitment device[515] that, in this case, improves access and outcomes for vulnerable communities. Enhanced process could be implemented while keeping an eye on governmental burden and resource constraints, to some degree.

Building on the understanding that agencies should recognize the burdens and costs of administration experienced by the public,[516] Presidents could encourage administrative procedure that better engages marginalized viewpoints.[517] In addition, agencies have significant flexibility to make procedural choices. This includes whether to engage in rulemaking or adjudication to develop policy,[518] as long as both options are made available to the agency by a statutory grant of authority.[519] Agencies also have a "spectrum of procedural alternatives"[520] available to them when pursuing either informal rulemaking[521] or informal adjudication.[522]

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511 Magill, *supra* note 72, at 885–86 (noting that "[a] self-regulatory rule might allow field offices to make the decision whether to bring enforcement actions, or, conversely, it might allow (only) the central office to make such decisions").

512 *See supra* notes 146–54 and accompanying text.

513 *See supra* notes 240–57 and accompanying text (discussing regulatory failures that have plagued the EPA as a result of using low-quality data).

514 *See supra* Part I.A.2.

515 Kysar, *supra* note 449, at 520 (noting that "scholars have categorized legislative rules of procedure as precommitment devices").

516 *See supra* note 494 and accompanying text.

517 *See generally* Shah, *Statute-Focused Administration*, *supra* note 140.

518 *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974).

519 *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 684 (D.C. Cir. 1973).

520 Verkuil, *supra* note 179, at 284.

521 *Id.* (citing United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973)).

522 *See supra* note 180 and accompanying text.

First, agencies might infuse notice-and-comment rulemaking with efforts to incorporate the ubiquitous and situated knowledge[523] of communities that are particularly vulnerable to the regulatory matter at issue and relatively powerless to influence it.[524] Two ways to offset industry domination include the proactive identification of key stakeholders and the involvement of proxy representation to ensure attention to underserved interests.[525] These interventions should occur at both the investigatory and analytic stages; as to the former, an agency might endeavor to reach out to voices that have conventionally been sidelines in the rulemaking process, and as to the latter, an agency might expand its repertoire of tools for managing and analyzing information to better evaluate qualitative data that may have previously been dismissed despite its relevance to the agency's deliberations. This augmentation of the notice-and-comment process could be coupled with limitations in the comment period or somewhat selective outreach to conserve time or bureaucratic effort.

Second, self-regulatory measures might include facilitating higher-quality adjudicatory processes that both allow for the gathering of better information and require detailed rationalization for decisions. Agencies sometimes "limit their procedural freedom by committing to afford additional procedures, such as hearings, notices, and appeals, that are not required by any source of authority."[526] In addition, executive orders, regulatory action, or more informal agency communication like guidance and memoranda might be harnessed to reinforce reason-giving requirements[527] and improve the separation between distinct procedural paradigms.[528] (Executive orders, guidance, and memoranda allow for greater flexibility, albeit less permanence, unless these changes are entrenched in the bureaucracy over time and thus made resistant to political pushback or shifts in presidential leadership.) For example, added process and enhanced justification could improve procedure and outcomes for noncitizens that are

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523 *See supra* note 175 and accompanying text.

524 *See supra* notes 173–79 and accompanying text.

525 Jim Rossi & Kevin Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1, 42–49 (2023); *see also* Nina A. Mendelson, *Public Engagement, Equity, and Executive Order 14094*, YALE J. ON REGUL.: NOTICE & COMMENT (June 7, 2023), https://perma.cc/6XK5-N525.

526 Magill, *supra* note 72, at 859–60.

527 *See supra* notes 481–89 and accompanying text.

528 *See supra* notes 486–88 and accompanying text.

mired in national security reviews[529] or impacted by the criminal legal system.[530] These improvements may also lead to more measured decision-making and safer policies for Indigenous communities impacted by FERC's and BLM's energy and environmental review.[531]

Finally, agencies could slow the trend toward prioritizing the government's interests in *Mathews v. Eldridge* administrative due process calculations,[532] particularly in adjudications with implications for national security.[533] This could be accomplished by invigorating those aspects of the calculation that emphasize the petitioner's interest[534] and the government's interest in accurate information and determinations. This should not run afoul of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[535] if initiated by the President or agencies themselves, rather than courts.[536] That having been said, courts should not defer reflexively to agencies' own assessments of what constitutes adequate process under *Mathews v. Eldridge*,[537] or even limit their intervention in administrative due process.[538] Reducing judicial review could exacerbate administrative deprivations of due process, particularly against vulnerable communities impacted by antiterrorism measures.[539]

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[529] *See supra* notes 182–86 and accompanying text.

[530] *See supra* notes 186–97, 314–19 and accompanying text.

[531] *See, e.g.*, *supra* notes 197–200 and accompanying text (discussing the impact of subpar review of gas and hydropower pipeline projects on Indigenous cultural properties); *supra* notes 201–07 and accompanying text (discussing the impact of "expedited environmental review" on the creation of energy boomtowns that contribute to the subjugation of Native women).

[532] *See supra* notes 233–40 and accompanying text.

[533] *See supra* note 239 and accompanying text.

[534] Hausman, *Failure of Immigration Appeals*, *supra* note 292, at 1214 (suggesting this intervention in the immigration context without recommending specific procedures).

[535] 435 U.S. 519 (1978).

[536] *See id.* at 557 (holding that it is unconstitutional for courts to expect agencies to engage in procedure beyond what is required by the APA, unless Congress or agencies themselves require it in other statutory or regulatory sources of authority). In *Vermont Yankee* and a later case, the Supreme Court held "that the judicial augmentation of rulemaking requirements 'imposes on agencies an obligation beyond the [APA]'s "maximum procedural requirements."'" Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1124 (2021) (alteration in original) (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 100 (2015)).

[537] *See* Shah, *A Critical Analysis*, *supra* note 14, at 1046 n.268.

[538] *See id.*

[539] *See supra* notes 237–40 and accompanying text.

C. Championing Discrete Agencies and Functions

"Large," complex agencies,[540] as well as conflicting and conflated intra- and interagency mandates, structures, and interests, create problems that have been overlooked in conversations about the impact of institutional structure.[541] This Section advocates for changes to institutional design to grapple with these concerns. This includes a partial dismantling of the national security apparatus and reconstruction of welfare-oriented agencies in purposeful ways.[542]

First, this Section argues that agency subcomponents should be granted a measure of independence from umbrella agencies in order to reduce the muddling of values caused by competing agency and subcomponent missions. In doing so, this Section cautions against perpetuating, let alone duplicating, large agencies like the FSA and DHS, which have multiple subcomponents that both compete for resources and whose missions are overwhelmed by the mandates of their parent agencies. Rather, it suggests that the construction and maintenance of smaller and more discrete agencies might allow complicated problems impacting vulnerable communities to be broken into their component parts and handled with care by distinct, expert exercises of discretion that are not buried under layers of hierarchy and stymied by a dearth of funding.

Second, this Section proposes clear delineation between intra- and interagency functions whose overlap intensifies enforcement interests that reduce the process and options available to vulnerable people. In doing so, it advocates for the separation of administrative functions in matters of enforcement and adjudication both across and within agencies in order to constrain the expansion of the enforcement mandate. Notably, the latter of these suggestions is essentially formalist in that it advocates for a stricter separation of functions, in contrast to current doctrine and convention that enables significant overlap among those who

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[540] *See supra* note 267 and accompanying text (defining "large" agencies as consisting "of multiple subcomponents that have unique mandates and an attendant, complicated structure").

[541] *See supra* Part I.C.

[542] Calls to abolish law-enforcement-oriented agencies, while not the subject of this Section, are similarly focused on the concerns of marginalized communities. *See, e.g.*, Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J.F. 130, 133–36 (2019) (advocating for the possibility of abolishing the DHS subcomponent, ICE, due to injustice in ICE's enforcement of immigration law and penalties).

perform administrative functions that are at odds with each other within the same agency.[543]

1. Maintaining distinct agencies to reduce mission conflicts.

Centralization has benefits,[544] including that it builds capacity and motivation to implement the law in a manner that furthers core missions of the administrative state, such as national security. Professor Peter Bils has argued that Congress should "consolidate authority within one agency" if "agencies have similar policy preferences," in part because this approach "takes advantage of returns to scale."[545]

However, the history of agencies like the FSA[546] and current dynamics within DHS[547] suggest that centralization overwhelms, in some cases, the fragile mandates and the nuanced exercise of discretion by subcomponents with orthogonal interests. Indeed, large, politicized agencies that serve as an umbrella for expert subcomponents with distinct missions may undercut these smaller subcomponents both structurally and substantively. This Section surmises that subcomponent agencies should be placed in large, umbrella agencies only when the overarching mandates of both the large and the subcomponent agencies are conceptually similar, particularly to the extent both are benefits- or enforcement-minded.

Conversely, in situations where agencies' mandates are at odds, it may be better for Congress to delegate distinct policymaking authority to each agency.[548] Recall that decentralization may lead to fairer bureaucratic treatment of minorities.[549] This Section suggests that establishing—or at least maintaining—small, discrete agencies, especially in the face of crises that compel Congress to consolidate administrative structures, could improve the regulation of marginalized communities. Indeed, "legislators should design institutions that motivate effective use of expertise

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543 *See supra* note 319 and accompanying text (citing and discussing *Withrow*).

544 *See supra* notes 307–12 and accompanying text.

545 Peter Bils, *Policymaking with Multiple Agencies*, 64 AM. J. POL. SCI. 634, 634 (2020); *see also id.* at 635 (arguing that "authority should be consolidated within one agency if the agencies have similar ideologies and that consolidation improves agency effectiveness").

546 *See supra* notes 268–78 and accompanying text.

547 *See supra* notes 278–85 and accompanying text.

548 Bils, *supra* note 545, at 635 ("[I]f the agencies have sufficiently different ideologies, then it is optimal for Congress to split authority to improve information acquisition.").

549 *See supra* notes 346–47 and accompanying text.

within agencies," and one of the "limited number of mechanisms" to accomplish this aim is "splitting authority across multiple agencies."[550]

Former California Supreme Court Justice Mariano-Florentino Cuéllar and Professors Dara Cohen and Barry Weingast have suggested that had FEMA been incorporated into agencies like DOJ or Health and Human Services, with more similar mandates and competencies, FEMA's disaster-relief efforts[551] might have been more successful.[552] Indeed, Congress attributed some of FEMA's failures in New Orleans to the dilution of its mission by DHS's overarching mandates. As a result, in the wake of Hurricane Katrina, Congress identified FEMA as a distinct agency under DHS and redefined its primary mission.[553] Congress also "designated the FEMA Administrator as the principal advisor to the President, the Homeland Security Council, and the Secretary of Homeland Security for all matters relating to emergency management in the United States."[554] These actions suggests that Congress sought both to infuse FEMA with some independence from DHS and to temper DHS's influence on FEMA by obligating the incorporation of FEMA's goals at the highest levels of executive branch and DHS leadership.

Likewise, the failures of the HIG to develop and implement noncoercive interrogation methods reveal the limits of centralized federal institutions. One commentator has argued that this example illustrates the need for direct presidential intervention to change agency policies.[555] Indeed, HIG's shortcomings resulted from its placement within an agency, the FBI—and in addition, due to HIG's position within a network of agencies—for which coercive interrogation methods are a cornerstone of their standard operating procedures.[556] Had the HIG been stood up as an independent body, akin to other small, expert agencies,[557] it may have

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[550] Bils, *supra* note 545, at 634.

[551] *See supra* notes 220–25 and accompanying text (discussing the institutional factors that contributed to FEMA's poor disaster-relief response to Hurricane Katrina).

[552] Cohen et al., *supra* note 279, at 742 ("[The] structural problems associated with DHS . . . made things worse.").

[553] Post-Katrina Emergency Management Reform Act, Pub. L. No. 109-295, 120 Stat. 1394 (2006).

[554] *History of FEMA*, FEMA, https://perma.cc/V5MN-J75W; *see supra* note 284 and accompanying text.

[555] *See* Knowles, *supra* note 286, at 264.

[556] *See supra* notes 285–88 and accompanying text.

[557] *See, e.g.*, Neil H. Buchanan & Michael C. Dorf, *Don't End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 CORNELL L. REV. 1, 21–23 (2016) (describing why Congress concluded that the U.S. Federal Reserve must have independence as an

been able to overcome institutional pressure to maintain conventional, coercive enforcement techniques.

In addition, the humanitarian mission of USCIS, once part of the DOJ Immigration and Naturalization Service, is now buried by the national security mandate of DHS.[558] Removing USCIS from the DHS hierarchy, while ensuring that it is properly funded—or allowing the agency to revert back to a position within a larger, well-resourced agency that has a strong mission of justice, such as DOJ—might improve the exercise of immigration discretion that is otherwise overwhelmed by competing, exclusionary interests.

Finally, decentralizing decision-making within agencies may also reduce administrative subordination. For example, empirical "results suggest that compliance bias,"[559] which is a significant matter of environmental justice,[560] "can be curbed not just by investing in the political capacity of communities but also by modifying agency decisionmaking structures."[561] This can be accomplished, in particular, by "decentralizing authority"[562]—that is, by shifting decisions regarding the implementation of the Clean Air Act from higher-level bureaucrats to front-line compliance officers in order to reduce emphasis on reducing costs and improve enforcement on behalf of communities vulnerable to environmental injustice.

2. Isolating functions to improve intra- and interagency tensions.

Institutional pressure biases administrative adjudication against individual interests.[563] In addition, the quality of and

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expert agency to serve its functions); David Schoenbrod, *Politics and the Principle that Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL'Y 239, 272 (2002) (describing the role of the EPA and OSHA as expert agencies).

[558] *See, e.g.*, *supra* notes 182–86 and accompanying text (discussing how the pressures of "national security review" have led to systematic bias against Muslim petitioners to USCIS); *supra* notes 171–73 and accompanying text (discussing the impact of criminalization on USCIS naturalization decisions); *supra* note 283.

[559] Konisky & Reenock, *supra* note 16, at 507.

[560] *See supra* notes 228–32 and accompanying text.

[561] Konisky & Reenock, *supra* note 16, at 507.

[562] *Id.* at 518 (concluding that "decentralizing authority to regulatory officers in agencies could result in fewer cases of deliberate nondetection of compliance," and, more specifically, that "moving the location of compliance determinations away from high-ranking officials with incentives to overreport compliance may result in fairer—although not necessarily fair—treatment of communities hosting regulated firms").

[563] *See supra* notes 291–96 and accompanying text.

access to fair process are overwhelmed by the joining and subsequent amplification of enforcement mandates across agencies, as well as by the existence of prosecutorial and adjudicatory functions within the same agency.[564] One way to improve these dynamics is, as suggested by the robust literature on an internal or administrative separation of powers, to engender "a balanced relationship among" institutional actors within the executive branch.[565]

This Section suggests that reducing the burden of institutional loyalty could improve agency subcomponents' abilities to achieve their unique public interest mandates, including within the confines of administrative adjudication. In addition, it submits that reinforcing a separation of functions between bureaucrats from different agencies who work closely together, and perhaps even between administrators who perform different functions within the same agency, could offer some breathing room for priorities that might otherwise be overwhelmed by the amplification of enforcement mandates. Note that the set of recommendations in this Section is self-consciously formalist, given its underlying critique of the consolidation of administrative power.[566]

Regarding the problem of institutional allegiance among administrative adjudicators, the APA's protection of their decisional independence is qualified, at best.[567] One solution, a "central panel of independent federal ALJs," might "protect impartial agency adjudication, avoid constitutional problems, and allow agencies an appropriate degree of policy control."[568] In keeping with this proposal, designating both immigration judges and the BIA as separate and independent adjudicatory bodies might reduce the impact of the institutional preference for exclusion[569]

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564 *See supra* Part I.C.2.

565 *See* Shah, *Intra-Agency SOP*, *supra* note 20, at 2–3 (citing Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Jon D. Michaels, *Of Constitutional Custodians and Regulator Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV., 227, 235 (2016)).

566 *See* David Yassky, *A Two-Tiered Theory of Consolidation and Separation of Powers*, 99 YALE L.J. 431, 435–36, 435 n. 30 (1989) (discussing and distinguishing formal and functional approaches).

567 *See* Emily Bremer, *Introduction to Our Symposium on the Decisional Independence of Administrative Adjudicators*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 14, 2022), https://perma.cc/A278-7NYU ("Myriad forces have combined to undo . . . decisional independence of administrative adjudicators.").

568 Levy & Glicksman, *Restoring ALJ Independence*, *supra* note 260, at 100.

569 *Supra* notes 324–26 and accompanying text.

and, thus, lessen the pressure on adjudicators to give preference to the agency over the noncitizen in administrative appeals.[570]

As to issues associated with the overlap or conflation of functions, a lack of separation of functions may influence bureaucrats to favor enforcement interests—either those of another agency[571] or their own.[572] Therefore, creating stronger boundaries between functions[573] may benefit the quality of each and improve process and outcomes for marginalized communities. It may be easier to distinguish between conflated interagency functions than to establish strong boundaries between conflicting intra-agency functions. However, both would require agency self-regulation and the establishment of clear guidance.

Consider the conflation of immigration and criminal enforcement that happens as a result of the conscription of DHS personnel into DOJ prosecutions. Ending the policies by which DHS officials are given pseudo-Assistant U.S. Attorney status[574] and excluding Border Patrol agents from any kind of role in criminal prosecution[575] could be accomplished by informal means, including interagency memoranda. Once these functions are separated, in that immigration agents are pulled back into the fold of DHS and their involvement in DOJ criminal prosecution is reduced, the influence of criminal enforcement norms on immigration policy might be reduced. In addition, the broader placement of DHS attorneys and DOJ EOIR immigration judges in the same governmental immigration-enforcement apparatus could be improved by infusing the immigration adjudication system with more independence from institutional mandates and governmental priorities, as noted above.[576]

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[570] *See supra* notes 290–96 and accompanying text (discussing favoritism toward the government's interests by administrative judges in immigration appeals).

[571] *See supra* notes 313–19 and accompanying text (discussing the conflation of criminal and immigration enforcement resulting from an overlap between the functions of DOJ prosecutors and DHS immigration enforcement officials).

[572] *See supra* notes 324–26 and accompanying text (noting the drawbacks for petitioners of the fact that both immigration adjudicators and prosecutors of immigration cases before the DOJ immigration courts are situated in DHS).

[573] *See* Morrison, *supra* note 181, at 103–04 (discussing how Congress has imposed restrictions on administrative agencies to alleviate some due process concerns following the Supreme Court's *Withrow* holding); *supra* note 319 and accompanying text (discussing decisions that allow an overlap of functions in agencies).

[574] *See supra* notes 314–16 and accompanying text.

[575] *See supra* notes 316–17 and accompanying text.

[576] Scholars, advocates, and immigration judges themselves have advocated for the designation of immigration courts as independent from the DOJ. Shah, *supra* note 261, at 643–44 (citations omitted).

Finally, when conflicting functions—for instance, the adjudication and prosecution of deportation proceedings against noncitizens[577]—coexist in the same agency, maintaining physical and cultural differentiation between the two could prove more onerous. The solution may require the separation of USCIS from DHS,[578] although somewhat more modest measures to infuse informal immigration adjudication with a level of decisional independence more commonly found in ALJs[579] might help. Government-provided counsel,[580] a solution raised by many immigration advocates, could hold off the impetus to deport as well. In the event that these types of measures are not feasible, for political or other reasons, agency self-regulation of the impartiality of immigration adjudicators could help reduce institutional pressures on those adjudicators.

CONCLUSION

This Article theorizes and illustrates that agencies sometimes subordinate the interests of minorities to values that maintain and grow the bureaucracy. More specifically, it finds that by prioritizing public interest values (such as efficiency), agencies may, in fact, perpetuate systemic bias in the administrative state. Finally, this Article brings to bear insights from positive political theory to explore changes to institutional design that could foster more accessible and equitable administrative process and outcomes.

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577 *See supra* notes 320–23 and accompanying text.

578 *See supra* note 558 and accompanying text.

579 *See* Kent Barnett, *Regulating Impartiality in Agency* Adjudication, 69 DUKE L.J. 1695, 1741–42 (2020) (suggesting that a "separation of functions is especially important for non-ALJ adjudicators" in order to reduce their financial interest in cases).

580 *See* Hausman, *Failure of Immigration Appeals*, *supra* note 292, at 1212–13.

APPENDIX

The main body of this Article introduced several examples of discretionary agency behavior governed by institutional priorities that have led to harm against minority and vulnerable groups. For both presentation and analytic purposes, this Appendix provides a comprehensive visual overview of the research underlying this Article. This accessible typology offers a general description of institutional behaviors; a notation of the regulatory areas and agencies in which these behaviors occur; an account of specific examples of agency action, as well as the institutional motivations behind and the harm resulting from each; and potential institutional responses that could disincentivize the behavior (and therefore, ameliorate its impact).

Typology A presents bureaucratic behavior driven by an institutional interest in efficiency. Typology B features bureaucratic behavior motivated by an institutional interest in conserving resources. Typology C shows bureaucratic behavior influenced by overwhelming or conflicting mandates from large umbrella agencies on subcomponents, across agencies engaged in enforcement efforts, or due to bureaucrats serving different functions within the same agency.

A. Responding to the Problems of Efficiency

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Using information proxies	Antiterrorism	Department of Justice (DOJ)	Using Muslim identity as a proxy for international terrorist connections[581]	Target potential "threats" more directly and quickly[582]	More prosecution and intense punishment of citizens under international (as opposed to domestic) terrorism laws[583]	Inducement by the legislature: provide funding incentives to encourage agency to identify more accurate data prior to application and enforcement of antiterrorism law[584] Agency self-regulation: prioritize the gathering and use of accurate information to better determine who is subject to the consequences of antiterrorism law, which may require presidential administration[585]

[581] *Supra* Part I.A.1.
[582] *Supra* Part I.A.1.
[583] *Supra* Part I.A.1.
[584] *Supra* Part II.A.1.
[585] *Supra* Part II.B.1.

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Using information proxies	Antiterrorism	Department of Homeland Security (DHS) / Immigration and Customs Enforcement (ICE)	Using undocumented immigrants as proxies for terrorists[586]	Target potential "threats" more directly and quickly[587]	Disproportionate deportation and punishment of noncitizens[588]	Inducement by the legislature: provide funding incentives to encourage agency to identify more accurate data prior to application and enforcement of antiterrorism law[589] Agency self-regulation: prioritize the gathering and use of accurate information to better determine who is subject to the consequences of antiterrorism law, which may require presidential administration[590]
Using information proxies	Immigration	DHS / ICE	Using employed immigrants as proxies for undocumented immigrants in communities with unemployed citizens[591]	Enforce citizenship laws against wider swathes of noncitizens[592]	Disproportionate deportation and punishment of noncitizens[593]	Inducement by the legislature: provide funding incentives to encourage agency to identify more accurate data to determine undocumented status[594] Agency self-regulation: prioritize the gathering and use of accurate information to better enforce the consequences of immigration law, which may require presidential administration[595]

[586] *Supra* Part I.A.1.
[587] *Supra* Part I.A.1.
[588] *Supra* Part I.A.1.
[589] *Supra* Part II.A.1.
[590] *Supra* Part II.B.1.
[591] *Supra* Part I.A.1.
[592] *Supra* Part I.A.1.
[593] *Supra* Part I.A.1.
[594] *Supra* Part II.A.1.
[595] *Supra* Part II.B.1.

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Using information proxies	Immigration	DHS / ICE	Using immigrants engaged in advocacy as proxies for undocumented immigrants[596]	Enforce citizenship laws in a more targeted manner[597]	Disproportionate deportation and punishment of noncitizens[598]	Inducement by the legislature: provide funding incentives to encourage agency to identify more accurate data to determine undocumented status[599] Agency self-regulation: prioritize the gathering and use of accurate information to better enforce the consequences of immigration law, which may require presidential administration[600]
Using information proxies	Immigration	DHS / ICE	Using arrest records as proxies for criminal behavior that marks a noncitizen for priority removal[601]	Conserve enforcement dollars by using arrest records, which are inexpensive and accessible; immigration agencies that make decisions based on arrests can intensify their immigration enforcement efforts by combining forces with criminal law enforcement[602]	Disproportionate deportation and punishment of noncitizens who have been engaged with the criminal legal system (regardless of whether they were charged with, let alone convicted of, a crime)[603]	Inducement by the legislature: provide funding incentives to encourage agency to identify more accurate data to determine undocumented status[604] Agency self-regulation: prioritize the gathering and use of accurate information to better enforce the consequences of immigration law, which may require presidential administration[605]

596 *Supra* Part I.A.1.
597 *Supra* Part I.A.1.
598 *Supra* Part I.A.1.
599 *Supra* Part II.A.1.
600 *Supra* Part II.B.1.
601 *Supra* Part I.A.1.
602 *Supra* Part I.A.1.
603 *Supra* Part I.A.1.
604 *Supra* Part II.A.1.
605 *Supra* Part II.B.1.

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Using information proxies	Immigration	DHS / U.S. Citizenship and Immigration Services (USCIS)	Using the omission of minor criminal behavior on an application for naturalization as an indication that a noncitizen is unfit for citizenship status[606]	Efficiently prioritize noncitizens for access to citizenship[607]	Disproportionately negative impact on communities of color, who are more vulnerable to policing, which amplifies the discriminatory results of deportation decisions[608]	Inducement by the legislature: provide funding incentives to encourage agency to identify more accurate data to determine eligibility for citizenship[609] Agency self-regulation: prioritize the gathering and use of accurate information to distribute the benefits of immigration law more accurately, which may require presidential administration[610]
Using information proxies	Notice-and-comment rulemaking (cutting across regulatory areas)	Agencies with informal rulemaking authority	Using data and analysis as proxies for expertise and institutional legitimacy to the exclusion of voices often marginalized during the rulemaking process[611]	Screen comments more easily given the rise in commenting due to automation, repetitive commenting, and improvements in access to online comment submissions[612]	Exclusion of vulnerable communities, who may not have technocratic language or data analysis at their disposal, but who are impacted by ongoing or potential regulation[613]	Agency self-regulation: infuse notice-and-comment rulemaking with efforts to gather and incorporate situated knowledge into its deliberation[614]

606 *Supra* Part I.A.1.
607 *Supra* Part I.A.1.
608 *Supra* Part I.A.1.
609 *Supra* Part II.A.1.
610 *Supra* Part II.B.1.
611 *Supra* Part I.A.1.
612 *Supra* Part I.A.1.
613 *Supra* Part I.A.1.
614 *Supra* Part II.B.2.

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Curtailing process	Immigration	DHS / USCIS	Curtailing process in national security review[615]	Gain efficiency in the face of pressure to stave off terrorism[616]	Systematic bias against Muslim applicants[617]	Inducement by the legislature: shore up agency reason-giving requirements to reduce the subordination of minorities to efficiency in the application of anti-terrorism law[618]
Curtailing process	Immigration	DOJ / Executive Office for Immigration Review (EOIR)	Allowing the criminal legal system to engage in immigration enforcement, immigration bureaucrats to participate in criminal prosecution, and the civil immigration system to act as a conduit for increasing the number of criminal cases[619]	Improve ease of and resources dedicated to both the enforcement of immigration consequences and the enforcement of criminal law against noncitizens[620]	Noncitizens accused of crimes may be ineligible for bail due to immigration detainers, are more vulnerable to accepting plea deals, and may be forced to accept immigration consequences, like deportation, as a mandatory term of plea agreements[621]	Inducement by the legislature: shore up agency reason-giving requirements to improve quality of and access to immigration and criminal process[622] Establishing discrete agencies and functions: delimit the role of bureaucratic actors by reducing the authority of each, reducing the overlap of discretionary immigration and criminal-enforcement decision-making, and disentangling immigration and criminal-enforcement procedure[623]

615 *Supra* Part I.A.2.
616 *Supra* Part I.A.2.
617 *Supra* Part I.A.2.
618 *Supra* Part II.A.2.
619 *Supra* Part I.A.2.
620 *Supra* Part I.A.2.
621 *Supra* Part I.A.2.
622 *Supra* Part II.A.2.
623 *Supra* Part II.C.2.

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Curtailing process	Energy justice	Federal Energy Regulatory Commission (FERC)	Relying on applicants' own cost-benefit analyses to evaluate the harms of gas and hydropower pipeline projects[624]	Allow agency to avoid expensive studies by relying on data funded by an outside stakeholder[625]	Encourages agency to evaluate the impact of a potential pipeline project on the Indigenous interests without involvement, let alone consent, from Native communities themselves[626]	Inducement by the legislature: financial incentives to encourage agencies to incorporate higher-quality data and shore up reason-giving requirements to reduce the negative impact of pipeline projects[627]
Curtailing process	Energy justice	Bureau of Land Management (BLM)	Engaging in approval of oil and gas leases after both consideration of only a narrowed group of projects and expedited environmental review[628]	Expand use of domestic energy sources and improve efficiency by curtailing the environmental review process[629]	Results in "energy boomtowns," which lead to a growth in male laborers that corresponds to a surge in sexual violence against Indigenous women and is more likely to increase socioeconomic inequality for Native women[630]	Inducement by the legislature: financial incentives to encourage agencies to incorporate higher-quality data and shore up reason-giving requirements to reduce the negative impact of oil and gas leases[631]

[624] *Supra* Part I.A.2.
[625] *Supra* Part I.A.2.
[626] *Supra* Part I.A.2.
[627] *Supra* Part II.A.2.
[628] *Supra* Part I.A.2.
[629] *Supra* Part I.A.2.
[630] *Supra* Part I.A.2.
[631] *Supra* Part II.A.2.

B. Offsetting the Cost of Resource Conservation

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Reducing financial and administrative burdens	Environmental justice	DHS / Federal Emergency Management Agency (FEMA)	Managing limited resources and funding by remaining highly cost-conscious in planning and allocating money for disaster relief[632]	Conserve resources and maintain the ability to put off decision-making until a future where more resources become available[633]	Failure to stave off severe risks and to evacuate many thousands of marginalized and low-income people in anticipation of Hurricane Katrina[634]	Incorporating subcomponents into large agencies with more similar mandates and competencies: place FEMA into an agency like DOJ or Health and Human Services[635]
Reducing financial and administrative burdens	Environmental justice	State environmental agencies	Exhibiting systematic non-detection and nonenforcement of environmental law against violations by corporations[636]	Conserve resources[637]	Harm to vulnerable, low-income communities particularly impacted by violations of environmental protection laws[638]	Decentralizing decision-making structures to enforce corporate compliance with environmental laws: shifting decisions regarding the implementation of the Clean Air Act from higher-level bureaucrats to front-line compliance officers to reduce emphasis on reducing costs[639]

[632] *Supra* Part I.B.1.
[633] *Supra* Part I.B.1.
[634] *Supra* Part I.B.1.
[635] *Supra* Part II.C.1.
[636] *Supra* Part I.B.1.
[637] S*upra* Part I.B.1.
[638] S*upra* Part I.B.1.
[639] *Supra* Part II.C.1.

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Reducing financial and administrative burdens	Environmental justice	State environmental agencies and the U.S. Department of Energy (DOE)	Locating commercial-waste facilities in poor, rural communities of color where land values are lower[640]	Cut agency costs by situating waste in lower-income communities[641]	Disproportionate impact of hazardous waste on poor and minority communities[642]	Inducement by the legislature: provide funding incentives to encourage agency to deprioritize cost of land and take into consideration harms of waste siting to vulnerable communities[643] Agency self-regulation: redirect legislative funding allocations to support costs of waste management that limits negative impact on minorities and poor communities,[644] which could benefit from presidential administration
Reducing financial and administrative burdens	Administrative adjudication (cutting across regulatory areas)	Agencies with adjudicatory authority	Prioritizing the agency's interests in the administrative due process calculus[645]	Conserve resources, reduce administrative burden, and benefit national security in certain contexts[646]	May exacerbate deprivations of due process, particularly against vulnerable communities impacted by antiterrorism measures[647]	Agency self-regulation: bolstering and applying those aspects of administrative process that prioritize the petitioner's interest and the government's interest in accurate information and determination[648]

640 *Supra* Part I.B.1.
641 *Supra* Part I.B.1.
642 *Supra* Part I.B.1.
643 *Supra* Part II.A.1.
644 *Supra* Part II.B (introduction).
645 *Supra* Part I.B.1.
646 *Supra* Part I.B.1.
647 *Supra* Part I.B.1.
648 *Supra* Part II.B.2.

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Relying on lower-quality data	Food safety	Environmental Protection Agency (EPA)	Failing to foreground the riskiest pesticides as required by statute in determining risk to children, choosing instead to focus on pesticides no longer in use or with low risk factors, and applying a less nuanced safety standard to determine pesticide risk to children, despite the fact that this is a departure from agency's usual standard[649]	Reduce the costs and administrative burdens of obtaining the data it needs to engage in additional pesticide review, evaluate the data effectively, and engage in analysis that requires several levels of administrative review[650]	Allows pesticide levels to remain at an unsafe level for children[651]	Inducement by the legislature: provide financial incentives to encourage agencies to incorporate higher-quality data to implement more rigorous pesticide review[652] Agency self-regulation: prioritize the gathering and use of accurate information to improve pesticide regulation[653]
Relying on lower-quality data	Environmental justice	EPA	Letting gas and oil companies themselves self-monitor methane leaks, which led to several deadly explosions, but nonetheless approving a pipeline project with similar risks[654]	Save costs associated with added oversight and gathering new data by relying on previously gathered information[655]	The new pipeline project will cut through communities that have long been impacted by environmental racism and injustice[656]	Inducement by the legislature: provide financial incentives to encourage agencies to incorporate higher-quality data to better determine riskiness of pipeline projects[657] Agency self-regulation: prioritize the gathering and use of accurate information during the pipeline project review process, which could benefit from presidential approval[658]

649 *Supra* Part I.B.2.
650 *Supra* Part I.B.2.
651 *Supra* Part I.B.2.
652 *Supra* Part II.A.1.
653 *Supra* Part II.B.1.
654 *Supra* Part I.B.2.
655 *Supra* Part I.B.2.
656 *Supra* Part I.B.2.
657 *Supra* Part II.A.1.
658 *Supra* Part II.B.1.

C. Managing the Drawbacks of Conflicting Institutional Priorities

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Allowing broader agency mandate to overshadow subcomponent mission	Immigration	DHS, DHS / USCIS	USCIS is influenced by its placement within DHS[659]	Stave off terrorism by using the benefits arm of the immigration system[660]	Slowed or even halted USCIS's benefits adjudication process for noncitizens deemed to be potential national security threats because USCIS's focus on the affirmative application of humanitarian immigration law is overwhelmed by DHS's national security mandates[661]	Establishing discrete agencies and functions or incorporating subcomponents into large agencies with more similar mandates and competencies: removing USCIS from the DHS hierarchy while ensuring that it is properly funded—or allowing the agency to revert back to a position within a larger, well-resourced agency that has a strong mission of justice, like DOJ[662]
Allowing broader agency mandate to overshadow subcomponent mission	Domestic and international law enforcement	FBI, FBI / High-Value Detainee Interrogation Group (HIG)	HIG is influenced by its placement within the FBI[663]	Leverage the FBI's structural competence and expertise in investigation, and from the clout associated with the FBI[664]	Excessive use of coercive techniques perpetuated by more established counterterrorism agencies due to HIG's placement within the FBI and its dependence on other agencies in the national-security space, making the agency unable to push back[665]	Establishing discrete agencies and functions: standing HIG up as an independent body, akin to other small, expert agencies[666]

659 *Supra* Part I.C.1.
660 *Supra* Part I.C.1.
661 *Supra* Part I.C.1.
662 *Supra* Part II.C.1.
663 *Supra* Part I.C.1.
664 *Supra* Part I.C.1.
665 *Supra* Part I.C.1.
666 *Supra* Part II.C.1.

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Allowing broader agency mandate to overshadow subcomponent mission	Environmental justice	State agencies	Agency heads and other high-level administrators, as compared to front-line decisionmakers, have incentives to engage in cost-saving measures and therefore direct lower-level bureaucrats to acquiesce to cost-reduction measures that ignore environmental law violations by noncompliant corporations[667]	Agency is more likely to meet certain cost-related metrics in reports to federal legislators[668]	Reduced corporate compliance with environmental protection mandates in vulnerable communities less likely to protest or otherwise less likely to incur costs to the government in response[669]	Modifying agency decisionmaking structures, in particular, by decentralizing decisions to enforce corporate compliance with environmental laws, may result in more just outcomes for those communities in which noncompliant firms are located[670]
Placing administrative appeals process in large agency	Immigration	DOJ / EOIR	EOIR Board of Immigration Appeals (BIA) is influenced by its placement in the same agency as first-line adjudicators (immigration judges)[671]	Access a deep pool of institutional expertise, and ensure agency-head oversight of both lower-level and appeals-level administrative adjudication[672]	Reduced probability of successful claims for immigrants because the BIA is not likely to reverse decisions when immigrants appeal, and far more often reverses decisions appealed by the government[673]	Establishing discrete agencies and functions: designating both immigration judges and the BIA as separate and independent adjudicatory bodies[674]

667 *Supra* Part I.C.1.
668 *Supra* Part I.C.1.
669 *Supra* Part I.C.1.
670 *Supra* Part II.C.1.
671 *Supra* Part I.C.2.
672 *Supra* Part I.C.2.
673 *Supra* Part I.C.2.
674 *Supra* Part II.C.2.

Generalized Agency Behavior	*Regulatory Area*	*Agency*	*Specified Agency Behavior*	*Benefits to Agency*	*Harms to Marginalized Community*	*Potential Institutional Fixes*
Conflating mandates across agencies	Immigration	DOJ, DHS / ICE	ICE immigration officials are deemed "Special Assistant U.S. Attorneys" prosecuting noncitizens in court in conjunction with DOJ[675]	"Fast tracking" criminal and deportation processes by allowing immigration personnel and process to substitute for criminal prosecutor and procedure[676]	Reduced process for noncitizens in the criminal and immigration contexts because of the conflation of both functions[677]	Establishing discrete agencies and functions: end the informal policies by which DHS officials are given pseudo-Assistant U.S. Attorney status[678]
Conflating mandates across agencies	Immigration	DOJ, DHS / Customs and Border Patrol (CBP)	Border Patrol agents handle misdemeanor criminal charges against noncitizens in court[679]	"Fast tracking" criminal and deportation process by allowing the immigration personnel to substitute for criminal prosecutor and procedure[680]	Reduced process for noncitizens in the criminal and immigration contexts because of the conflation of both functions[681]	Establishing discrete agencies and functions: exclude Border Patrol agents from any kind of criminal prosecutorial role via guidance or memorandum[682]
Conflating mandates within an agency	Immigration, national security	DHS / USCIS, DHS / ICE	DHS officials act as both adjudicators of asylum cases and counsel against noncitizens facing deportation in DOJ immigration courts[683]	By focusing on exclusion, DHS can better deploy its resources toward the national security, which was viewed to be of particular importance in the wake of 9/11[684]	Overwhelm USCIS's humanitarian asylum adjudication through DHS's broader mission of security, punitive enforcement, and exclusion[685]	Establishing discrete agencies and functions: separate USCIS from DHS and/or infuse informal adjudication with a level of decisional independence more commonly found in administrative law judges[686]

675 *Supra* Part I.C.2.
676 *Supra* Part I.C.2.
677 *Supra* Part I.C.2.
678 *Supra* Part II.C.2.
679 *Supra* Part I.C.2.
680 *Supra* Part I.C.2.
681 *Supra* Part I.C.2.
682 *Supra* Part II.C.2.
683 *Supra* Part I.C.2.
684 *Supra* Part I.C.2.
685 *Supra* Part I.C.2.
686 *Supra* Part II.C.2.