# ARTICLES

## INCLUSIVE AGENCY DESIGN

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*For many people who interact with federal agencies in matters like housing, employment, health, education, benefits, and consumer issues, the federal apparatus is not well-designed. This widens the justice gap and undermines the mission and stated goals of these agencies. Design thinking from the access to justice movement can be used to address both structural and procedural access gaps in the administration of justice by federal agencies.*

*This Article is the first to introduce an access to justice framework—an emphasis on essential elements of access to justice that have emerged as crucial in work done with communities and advocates to change state courts to narrow the justice gap—as guidance for the reform of federal administrative agencies. This Article identifies three types of problems for agencies that can be remedied through intentional access to justice design: a disconnect between the agency mission and its current functions; a breakdown between the agency and the people who are affected by agency action; and a deterioration of trust among those affected by agency action that is born from incomplete information. Then, drawing from a variety of federal laws and regulations, including some newly proposed, this Article examines how these essential elements of access to justice are already being used or referenced in federal administrative agency design and where such elements can be fully embraced to establish a more inclusive and accessible administrative state.*

*Framing reforms in this way—for consideration and use by numerous entities, including the agencies themselves and their stakeholders—offers a roadmap for policymakers and advocates to achieve a necessary administrative agency overhaul. This approach offers an*

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*essential opportunity to design and build agencies that are more inclusive, and thus more likely to realize agencies' goals, improve people's justice system outcomes, and increase the overall legitimacy of law and government in the lives of the people.*



## INTRODUCTION

Design can create culture. In *Representing Justice: Invention, Controversy, and Rights in the City-States, and Democratic Courtrooms*, Judith Resnik and Dennis Curtis explore the iconography of justice and how architectural choice often mirrors understandings of the role of justice in people's lives.[1] Through their visual tour of justice spaces across the world, the authors examine how, and if, we legitimize justice in communities through design choices. Here, the nondescript and hard-to-find offices where administrative adjudications occur offer a stark contrast to the lofty marble courthouses often a few blocks

1. JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN THE CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

away.[2] The authors wonder if this cloaking of the administrative process weakens development of democratic norms in administrative justice.[3] This Article picks up the thread and continues to imagine which design elements, both structural and procedural, might strengthen these democratic norms.

The federal administrative system is both central to people's everyday lives and yet highly removed from the people it affects. The result is a vast bureaucracy that is seen as, and in many cases is, removed, elite, and mostly punitive. While administration and its accompanying agencies are found at all levels of government, this Article focuses on the federal administrative system.[4] This disconnect between the government and those it serves adds to our current democracy crisis where people do not trust the government and do not feel secure in the rule of law.[5] While there have been calls for a new New Deal or other major restructuring of the administrative state, so far the larger discussion has not centered around the experience people have with the government.[6]

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2. *Id.* at 317 (describing buildings where administrative adjudication takes place as "anonymous institutional facilities . . . impoverished not only visually . . . and spatially . . . but also in terms of the salaries paid to the judges, the structural protections to insulate judges from oversight, the even greater lack of lawyers for litigants, and the high volume of the proceedings.").

3. *See id.* at 317–318; *see*, *e.g.*, Christopher B. McNeil, *The Public's Right of Access to "Some Kind of Hearing": Creating Policies that Protect the Right to Observe Agency Hearings*, 68 LA. L. REV. 1121, 1122–23 (2008) (discussing generally the procedural differences between court trials and administrative adjudications, especially procedures for creating access and participation).

4. Federal agencies interact with state and local agencies on many matters, especially in the types of matters focused on here: housing, employment, health, education, benefits, and consumer protection. State agencies are also central to these matters, and many of these principles can and should be applied to state administrative agencies as well. However, given the current national discussion about if and how federal agencies should function, this Article focuses solely on federal agencies.

5. *See*, *e.g.*, Brian D. Feinstein, *Identity-Conscious Administrative Law*, GEO. WASH. L. REV. (forthcoming 2022) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787704 ("Existing administrative structures to connect agencies to the public are ill-suited for this task. These measures—which range from notice-and-comment rulemaking to greater presidential control—are intended to enhance agencies' popular responsiveness. In practice, however, they often privilege powerful and unrepresentative voices, thus moving policy away from popular preferences. Poorly designed participatory mechanisms may even reduce the administrative state's perceived democratic legitimacy." (footnotes omitted)); *cf. Rule of Law Index: Country Insights, United States*, WORLD JUSTICE PROJECT, https://www.worldjusticeproject.org/rule-of-law-index/country/2020/United%20States/Regulatory%20Enforcement/ (last visited Feb. 12, 2022) (indexing factors about United States regulatory enforcement levels).

6. *See* MICHAEL GRUNWALD, THE NEW NEW DEAL: THE HIDDEN STORY OF CHANGE IN THE OBAMA ERA 9–12 (2012) (comparing President Obama's Recovery Act to the New Deal); *see also* Nathan Rott & Scott Detrow, *Reaching Back to the New Deal, Biden Proposes a Civilian*

An access to justice framework—a framework explored in this Article and born from work by communities and advocates to reform the state courts—can provide guidance for administrative reform. Access to justice reformers originally set about trying to understand, document, and reform systemic policies and practices that led to very different justice experiences depending on whether a person had legal representation. Over time, access to justice advocacy has broadened to address a range of problems stemming from unequal access to just resolution of legal problems.[7] Drawing from the rich history of access to justice reforms in state courts, this Article develops a typology of principles that can be used to frame administrative reforms and notes where such thinking is already being used in federal administration and where it can be expanded.[8] Hallmarks of these principles include a community-focused design that recognizes and values the variety of non-lawyers needed for institutions to best address justice problems and equitable data collection that provides analysis of program outcomes.[9]

This Article proceeds through four main parts. First, it reviews the literature in the access to justice and administrative law fields to draw out theoretical connections. Then, it identifies three common problems in administrative justice and provides examples of each. Third, the Article

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*Climate Corps*, NAT'L PUB. RADIO (May 11, 2021, 5:00 AM), https://www.npr.org/2021/05/11/993976948/reaching-back-to-the-new-deal-biden-proposes-a-civilian-climate-corps (analogizing the roles of President Biden's Civilian Climate Corp to the New Deal's Civilian Conservation Corp in using government to improve people's lives); Binyamin Appelbaum, *A New Deal, This Time for Everyone*, N.Y. TIMES (May 3, 2021), https://www.nytimes.com/2021/05/03/opinion/biden-new-deal.html (focusing on how the new New Deal policies would benefit genders). For more on the specific racial failures of the New Deal, see IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005).

7. Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, 148 DÆDALUS, Winter 2019, at 177 (giving a history of access to civil justice throughout the twentieth century and beyond).

8. "Although traditional methods of delivering justice—through formal or customary courts, police, and lawyers—are critical to ensuring peaceful and stable societies, they are not enough. These methods alone cannot help people resolve all of their day-to-day justice issues . . . Legal empowerment places the power of law in the hands of the people. It helps people exercise their rights and pursue remedies in any and all areas affected by laws and policies, such as within administrative agencies where food aid is distributed, legal identity documents are obtained or environmental regulations are enforced." STACY CRAM, SUMAIYA ISLAM, TEMITAYO O. PETERS, JENNIFER TSAI & BETSEY WALTERS, TRANSPARENCY, ACCOUNTABILITY & PARTICIPATION NETWORK, ADVOCACY: JUSTICE AND THE SDGS 6 (Stacey Cram & Temitayo O. Peters eds., 2016).

9. *See infra* Part III.

synthesizes best practices developed through the access to justice movement in state courts and maps out the main guiding principles behind those practices. Once this access to justice framework is established, the Article turns to current and proposed administrative reforms and connects the principles from the access to justice literature to these legislative and regulatory reforms. The Article focuses on areas where agencies interact with unrepresented or underserved people through informal adjudications, regulatory guidance, and other determinations that can help people solve their justice problems and address unmet needs.[10] Notably, this Article takes as its focus the less-studied perspective of the beneficiaries of administrative action, both direct beneficiaries and the larger group of regulatory beneficiaries that benefit from agency policies and procedures.[11] It concludes by acknowledging some practical and political hurdles to such design reform while still encouraging innovation.

Applying design principles to administrative law introduces a host of tensions—but the main one to address here derives from this project's questioning of the common assumption in the literature that administrative law's legitimacy lies solely in its legal framework, including procedural reform from the top-down. Instead, this Article posits that the administrative system can be legitimized through inclusive design that allows for effective implementation. Though the politics of policy are always present, the agency itself should be designed to include and work with the public to have the widest base of information and feedback necessary to solve problems. Legal frameworks and constraints are a floor, not a ceiling. Legitimacy with the public requires inclusive design. Designing an agency from the lived experience of the general public, a bottom-up approach, is in many ways antithetical to the top-down, hyper-politicized approach of Washington, D.C.[12]

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10. Legal Services Corporation "defines the justice gap as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs." *See* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017). Its 2017 report on the justice gap draws from a survey of the unmet needs of "approximately 2,000 adults living in households at or below 125% of the Federal Poverty Level." *Id.*

11. *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 402–03 (2007).

12. William Eskridge noted this tension in the development in the law. *See* William Eskridge, *Public Law from the Bottom Up*, 97 W. VA. L. REV. 141, 142–43 (1994). Administrative law continues to wrestle with this tension. *See also* Neil Komesar & Wendy Wagner, *Essay: The Administrative Process from the Bottom Up: Reflections on the Role, If Any, for Judicial Review,* 69 ADMIN. L. REV. 891, 894 (2018).

## I. REVIEW OF THE LITERATURE

Some of the problems facing policymakers today stem from a vast administrative apparatus that has developed through scholarly and political theorizing that did not focus on the underserved communities and people who directly and indirectly encounter the system as beneficiaries.[13] While administrative law scholarship has focused largely on constitutional power, the Administrative Procedure Act (APA), and common law developments that aim to enshrine certain doctrinal accountability mechanisms throughout the agencies, this is not how administrative law is often experienced by underserved communities.[14] Administrative law needs to embrace the experience of its users, particularly its historically underserved users, and structure itself in a way that is reasonable from their perspective.[15] That perspective requires developing design tools that make it easy for people to use their government agencies to get the help they need. The type of assistance needed ranges from the seemingly mundane (literal assistance accessing agency offices and their various proceedings); to the more substantive (providing outreach, education, representation, and other tools that can help people navigate these often complex yet absolutely essential proceedings); to the broader (collecting and making accessible data on the work of administrative agencies and the outcomes of that work on people's lives).[16]

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13. *See* Bijal Shah, *Toward a Critical Theory of Administrative Law,* YALE J. ON REGUL. NOTICE & COMMENT BLOG (2020), *as reprinted in* 45 ADMIN. & REGUL. L. NEWS, Summer 2020, at 10, 10 (arguing that "projects that focus on how administrative law touches on the human experience are often deemed 'exceptional' (that is, marginal to administrative law), and their relevance devalued on these grounds.").

14. And, as discussed by Jeremy Kessler and Charles Sabel, this sort of authority-deference view of administrative law seems increasingly indefensible in our uncertain era. *See* Jeremy Kessler & Charles Sabel, *The Uncertain Future of Administrative Law*, 150 DÆDALUS, Summer 2021, at 188, 188–90.

15. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 314 (2017) ("[I]nstitutional authority is something built by successful public engagement through time."). For more on why access to justice principles applied to administrative design reform is particularly relevant to underserved communities, see Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L. J. 1807, 1807, 1811–13 (2017) (describing and criticizing the narrow application of suspect class analysis in the courts and arguing that administrative agencies provide an important, and constitutional, avenue of protection for vulnerable populations).

16. *See* Resnik & Curtis, *supra* note 1, at 318, n.157 (reviewing the lack of available data and the lack of adequate funding for the Administrative Conference of the United States (ACUS) to "permit[] it to survey and report regularly on all of the adjudicatory practices of agencies.").

Recent administrative law scholarship has begun to pierce the top-down hierarchy of administrative law and theory and consider how underserved communities experience administrative law. Bijal Shah lays out the need for administrative law to engage with critical theory, stating that "administrative law lacks a fundamental examination of its own contribution to subordination and marginalization" and pointing out that many areas of administrative design are "ripe for a richer critical perspective."[17]

Administrative law scholarship has also begun to consider administrative structure as an aspect of civil rights in administrative practice.[18] Scholars advancing a theory of administrative constitutionalism look at how agencies use their regulatory power to breathe life into constitutional rights.[19] Elaborating on this theory, Gillian Metzger points to how the "construction" of the administrative state itself is an act of applying constitutional principles.[20] Metzger addresses the burgeoning scholarly attention to administrative structure while also discussing the reluctance of courts to engage with agency structure when reviewing agency action.[21] Additionally, Lisa Bressman has argued for a more focused attention on arbitrariness in administrative law as a source of legitimizing administrative structure.[22]

These theoretical turns include recent assessment of how agency structure, agency action, and judicial review of agency action affect underserved communities. Brian Feinstein describes identity-conscious measures throughout several financial regulatory bodies and encourages these measures to overcome the shortcomings of administrative law's long-standing focus on "neutral" participatory measures.[23] Bertrall Ross argues for courts to apply a heightened deference to agency action that furthers protection of suspect

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17. *See* Shah, *supra* note 13, at 10–11.

18. *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

19. *See* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897–98 (2013) [hereinafter Metzger, *Administrative Constitutionalism*] (reviewing the many sources of law that form a body of "administrative constitutionalism" that expands on constitutional mandates and norms while arguing for a broad conception of this account, which includes an agency's structure itself).

20. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010) (further describing features of administrative constitutionalism).

21. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1363–70 (2012).

22. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 462 (2003) ("[W]e have become so fixated on the concern for political accountability lately that we have overlooked an important obstacle to agency legitimacy: the concern for administrative arbitrariness.").

23. Feinstein, *supra* note 5.

classes because of the institutional strengths of the administrative state to address civil rights.[24] Otalunde C.A. Johnson describes the development of "inclusive regulation[s]" that agencies use to implement civil rights goals like inclusion and equality.[25] Cristina Ceballos, David Engstrom, and Daniel Ho directly challenge administrative law's racial blind spot, detailing when and how "civil rights and administrative law diverged" and stressing the urgent need to fix this divergence.[26] This is a vital focus for administrative law.

Modern agency design can use principles and tools developed from access to justice work to further legitimize agencies. An access to justice approach is reflected in Prentiss Cox and Kathleen Engle's recent proposal for a "Student Borrower Protection Agency" to resolve particular and systemic problems in agency design;[27] Diane Thompson's review of participatory measures built into the structure of the Consumer Financial Protection Bureau (CFPB);[28] scholarly proposals for requiring disparate impact assessment across agencies;[29] and recently proposed legislation to address

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24. *See* Ross, *supra* note 15 (using the Obama-era Department of Education proposed regulation that would have required states to equalize funding to poor schools to continue receiving federal money to exemplify the constitutional and institutional argument to defer to agency interpretations of statutes that protect suspect classes); *see also* Title I—Improving the Academic Achievement of the Disadvantaged—Supplement Not Supplant, 81 Fed. Reg. 61,148 (Sept. 6, 2016) (to be codified at 34 C.F.R. pt. 200).

25. Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1779–86 (2017) (discussing as examples of the "inclusive regulatory" techniques that were challenged as agency overreach: a Department of Education "Dear Colleague" letter clarifying that gender identity will be considered "as a student's sex for purposes of Title IX"; Equal Employment Opportunity Commission guidance that "an employer's reliance on arrest and conviction status as the basis of an employment decision may in some instances violate Title VII"; and a 2015 Department of Housing and Urban Development "rulemaking delineating the Fair Housing Act's requirement that federal agencies and grantees affirmatively further fair housing.").

26. Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1779–86 (2017) (discussing as examples of the "inclusive regulatory" techniques that were challenged as agency overreach: a Department of Education "Dear Colleague" letter clarifying that gender identity will be considered "as a student's sex for purposes of Title IX"; Equal Employment Opportunity Commission guidance that "an employer's reliance on arret and conviction status as the basis of an employment decision may in some instances violate Title VII"; and a 2015 Department of Housing and Urban Development (HUD) "rulemaking delineating the Fair Housing Act's requirement that federal agencies and grantees affirmatively further fair housing.").

27. Prentiss Cox & Kathleen Engle, *Student Loan Reform: Rights Under the Law, Incentives Under Contract, and Mission Failure Under ED*, 58 HARV. J. ON LEG. 357, 360, 414 (2021).

28. Diane Thompson, *Pay Attention! Regulatory Advocacy, the CFPB and Marginalized Communities*, 82 MONT. L. REV. 343 (2021).

29. Ceballos, Engstrom & Ho, *supra* note 26, at 370, 457–60.

racism in public health through the creation of a new sub-agency within the Centers for Disease Control and Prevention (CDC).[30]

This recent turn in scholarship has produced a recognition of innovations in administrative practice that call for greater inclusion in administrative processes. While public participation in agency proceedings has been a long-standing focus for many, including the Administrative Conference of the United States (ACUS), technological advances have ushered in the possibility of more direct participation, which has opened exploration into who has been missing from the conversation.[31] Beyond technology, the overdue conversation about who is left out of justice reform efforts and why is becoming more centered in scholarship.[32] Legislators recognize this in practice and have introduced bills that incorporate structure for inclusivity in mission, voice, data, and design.[33] While this work and its legislative results captures a sense of a shifting design theory underway, the literature lacks an overarching typology of which particular elements in administrative design are most likely to lead toward more multi-racial democratic norm formulation and ultimately increase access to justice for historically underserved communities.[34] Administrative law scholars and federal policymakers do not tend to look closely to state court reforms for inspiration, yet state advocates and state court administrators lead the way on access to justice. Administrative agencies can more intentionally heed the lessons from

30. *See, e.g.*, Anti-Racism in Public Health Act of 2020, S. 4533, 116th Cong. (2020).

31. For more on the history of the Administrative Conference of the United States' (ACUS') focus on these issues, see Michael Herz, *ACUS—and Administrative Law—Then and Now*, 83 GEO. WASH. L. REV. 1217, 1248–49 (2015); Administrative Conference of the United States, *Panel 1: Identifying Underserved Communities*, *Forum on Underserved Communities and the Regulatory Process*, YOUTUBE (Nov. 3, 2021), https://youtu.be/KGsl93XmarA.

32. *See* Stephanie House-Niamke & Adam Eckerd, *Institutional Injustice: How Public Administration Has Fostered and Can Ameliorate Racial Disparities*, 53 ADMIN. & SOC'Y 305, 305, 314–16 (2021).

33. *See, e.g.*, Anti-Racism in Public Health Act of 2020, S. 4533, 116th Cong. (2020) (requiring comprehensive action from the Centers for Disease Control and Prevention that would incorporate a diverse array of perspectives in its policy decisions and would encourage public participation through representation in staffing and intentional regionality).

34. This Article uses the term "underserved communities" to remain in line with statutes like Dodd-Frank, which builds on the use of the term in the Community Reinvestment Act and the Community Development Financial Institutions Fund to reference low-income communities and specifically communities of color. Recent Biden Administration executive orders use the term "underserved communities" as well. *See* Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021) (defining "underserved communities" as "populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life . . . ."). For more on the specific terminology history in financial regulation, see Thompson, *supra* note 28, at 351–355.

these advocates to re-think administrative structure and procedures to better reflect these foundational principles.

### *A. What is an Access to Justice Framework?*

The access to justice movement is large and siloed.[35] Like administrative law scholarship, it tends to be oriented around specific substantive areas and particular institutions and processes.[36] This Article takes as its starting point the access to justice movement that has sprung from study and reform of state court processes. This movement has coalesced around reforming state court policies and procedures to bolster the courts as a place to solve problems.[37] Rebecca Sandefur, a leading sociologist in this area, defined access to justice as "a perspective on the experiences that people have with civil justice events, organizations, or institutions. It focuses on who is able or willing to use civil law and law-like processes and institutions (who has access) and with what results (who receives what kinds of justice)."[38] In other words, the goals of the access to justice movement are to empower people to use legal resources to solve problems, reform legal resources to fairly respond to and manage conflict, and repair harm.[39] To translate into administrative law terms, one could ask: does a person with an administrative justice need have a real shot at getting the assistance or benefit the agency is meant to provide?[40]

The access to justice movement has focused on documenting the need for reform; opening pathways for representation through increased services for self-represented people and expanding the right to counsel for people to have legal representation when necessary; and collecting data to show how the proposed reforms and interventions affect the outcomes for people using the

35. *See* Lauren Sudeall, *Integrating the Access to Justice* Movement, 87 FORDHAM L. REV. ONLINE 172 (2019) (suggesting that viewing the legal system as one large entity will help identify obstacles to justice and how to address those obstacles); *see also* David Udell, *Building the Access to Justice Movement*, 87 FORDHAM L. REV. ONLINE 142 (2019) (attempting to identify common themes that run through the access to justice problem and reform agendas).

36. *See, e.g.*, Udell, *supra* note 35 (examining the unifying themes and goals of the access to justice movement).

37. *See* Sudeall, *supra* note 35.

38. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 339 (2008).

39. *See id.*

40. *See* REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 7 (2014) [hereinafter SANDEFUR, ACCESSING JUSTICE] (describing the types of problems people experience).

courts to address justice needs.[41] Understanding people's experience with the law, making knowledge of law and how to use it widely available through clear and predictable processes, and prioritizing reforms that emphasize access are key to this movement.[42] The results are clearly positive: goals are being met and the outcomes are improving.[43]

Using an access to justice framework can create real change that improves the lives of underserved people. A recent example of an access to justice approach to administration is seen with the temporary shift in focus of student financial aid verification processes.[44] Operating from the Biden Administration's stated commitment to addressing inequities in federal administration, and noting the difficulties that low-income and other underrepresented students have had in obtaining the necessary documents for verification, the Department of Education announced temporary changes to this verification process by focusing on identity theft rather than the more punitive-seeming focus of requiring the poorest students to prove their need.[45] This shift in focus means that the most onerous document-gathering required by verification has been temporarily waived.[46] Such a policy would not have come about without an approach by the agency to gather and respond to the difficulties beneficiaries have with agency interaction.

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41. Deborah Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L. J. 1227, 1228 (2014) ("Millions of Americans lack any access to justice, let alone equal access. Over four-fifths of the poor's legal needs and two- to three-fifths of the legal needs of middle-income Americans remain unmet.").

42. For example, Namati is a legal empowerment organization dedicated to "building a movement of people who know, use, and shape the law." *What We Do*, NAMATI, https://namati.org/what-we-do/ (last visited Feb. 12, 2022).

43. Expanding access to justice improves outcomes for people. *E.g.*, N.Y.C. HUM. RES. ADMIN., OFF. CIV. JUST., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR THREE OF IMPLEMENTATION IN NEW YORK CITY 27 (2020), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2020.pdf (announcing the overwhelming success of New York City's pilot program to provide counsel to income-eligible tenants facing eviction).

44. *See* U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER CHANGES TO 2021–2022 VERIFICATION REQUIREMENTS (2021) [hereinafter DEAR COLLEAGUE LETTER] (showing the changes in the student financial aid verification process that were made in July 2021).

45. *See, e.g.*, *id.*

46. *See id.* Richard Cordray, Chief Operating Officer of the Federal Student Aid, effectuated this shift by implementing an inclusive design perspective. *See* Danielle Douglas-Gabriel, *Federal Student Aid Head Richard Cordray Talks Student Loans: 'We Intend and will Hold the Servicers Accountable.'*, WASH. POST (June 11, 2021, 6:00 AM), https://www.washingtonpost.com/education/2021/06/11/cordray-lays-out-loan-servicing-plans/.

### *B. Definitions: Access, Justice, and Design Justice*

When pivoting to administrative law theory and scholarship, it can be tempting to view these ideas of access purely as functions under the legal rights granted by the Constitution, the APA, and various common law doctrines that make up the sources of administrative law. Indeed, there is some overlap when it comes to policies and procedures that address notice, opportunities to be heard, and making rules understandable. However, access to justice is broader and affects more institutional action than a possible due process claim might challenge.[47] While due process includes similar principles as access, and access to justice is, at its core, a constitutional principle, the access to justice interventions examined here approach these issues from the perspective and experience of the citizen, not from the current judicial starting point assuming minimal constraints on agency action. Due process claims stem from a legal source by which to challenge agency action, with its attendant legal elements. Procedural due process claims require a legally cognizable interest,[48] and this legal framework has been used to limit its application to agency action.[49] In contrast, an access to justice framework for agency structure can bring administrative law back to its roots: founded in constitutional assurance of fair treatment under the law, procedural and substantive due process, and separation of powers. Organizing agency structure through an access to justice lens will allow policymakers to design a more representative—and therefore legitimate—administrative state from the beginning.[50]

Access to justice eludes a concise definition in the literature, but there are clear hallmarks of what animates the movement for access to justice.[51]

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47. *See* Rhode, *supra* note 41, at 1235–38 (describing doctrinal limits of a due process clause analysis when addressing access to justice needs).

48. *See* Paul v. Davis, 424 U.S. 693, 696–97 (1976).

49. *See, e.g.*, Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1460–61 (1988).

50. Access to justice design can codify due process rights from an ex ante approach rather than from an ex post challenge. Gillian Hadfield has noted the economic consequences of a lack of attention to people's legal needs ex ante: "That failure arose from reliance on complex legal rules . . . failure of our ex-ante legal advice markets . . . has now precipitated millions of crises . . . with huge demands for back-end legal assistance in renegotiation of mortgages and management of foreclosure and bankruptcy processes." Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L. J. 129, 133 (2010).

51. While access to justice is a problem for and throughout all parts of American society, researchers have documented that the problems are experienced more acutely by certain communities. According to the Institute for the Advancement of the American

Responding to the justice gap crisis that revealed the great majority of low-income Americans (86%) struggled with civil justice problems and received little or no help with these problems from legal institutions—legal aid lawyers and state court advocates led the charge to reform state court processes.[52] Access to justice literature studies the resources available to low-income and under-resourced Americans: the institutions themselves; the physical location and design of physical spaces; the diversity of people who make up the institution; and the history and budgeting of the institution.[53] The literature addresses courts (most prominently state courts) but also law schools, bar associations, and other institutions within the legal ecosphere.[54] Moreover, the literature considers the availability of structures and processes used by the institution that allow citizens a voice in agenda-setting, a venue to tell their story, an equal opportunity to representation, an ability to understand the rules being applied, and a recognition in the data.[55] Finally, access to justice researchers are building a collection of evidence-based reform interventions to address these identified resource problems.

Considerations of justice itself, though not always separated from access, typically revolve around the results or outcomes from an interaction with such an institution.[56] Here, the literature tends to be concerned with whether the interaction was fair and equitable from the perspective of the person seeking help, whether their justice needs were met, whether procedures were

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Legal System in its most recent report, "the following groups stand out as most vulnerable: lower income, women, multiracial and Black Americans, younger and middle-aged, and those living in urban and rural environments." *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, JUSTICE NEEDS AND SATISFACTION IN THE UNITED STATES OF AMERICA 8 (2021) [hereinafter IAALS].

52. LEGAL SERVICES CORP., THE JUSTICE GAP REPORT: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017).

53. *See* Rhode, *supra* note 41, at 1242–56 (laying out a roadmap of reforms across multiple institutions and approaches).

54. Erika J. Rickard, *The Role of Law Schools in the 100% Access to Justice Movement*, 6 IND. J. L. & SOC. EQ. 240, 240–41 (2018) (arguing that law schools can take a leading role in closing the gap in the justice system).

55. For one example of this work, see Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the De-regulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1316, 1318 (2021).

56. Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 878 (2004) (discussing the incomplete notions we have of "justice" and stressing the need for an objective measure of justice that is outcome-driven and goes beyond procedural dispute resolution to include education, outreach, transactional assistance, and other preventative measures).

followed, and whether the substantive law was adequate.[57] Burgeoning scholarship is expanding the justice notion further to encompass the variety of justiciable problems and outcomes that people face and where they either do not recognize, or care to use, legal institutions as a means of resolution.[58] Under this conception, justice is linked to an inequality in outcomes to justiciable problems, regardless of the legal framework.[59]

Design justice is an approach to disrupting malignant institutions through a focus on inclusivity and intersectionality.[60] Design thinking requires curiosity and empathy for how individuals experience an institution and necessitates using the lived experiences of those who interact with the system to map the interactions between the institution and the individual.[61] Finally, design thinking is collaborative at its core; this collaboration includes stakeholders working together to identify systemic problems and imagine interventions that disrupt the reproduction of oppressive outcomes.[62]

Access to justice scholarship also emphasizes that a critical part of the puzzle involves extra-judicial work in connecting people and communities to the justice frameworks that underlie many of life's critical problems: securing housing, providing employment and educational opportunities, increasing positive health outcomes, and building financial security.[63] People with

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57. *See* Rebecca L. Sandefur, *What Do We Want?*, 87 FORDHAM L. REV. ONLINE 158, 158 (2019) ("Legal justice in these concrete relationships means all parties fulfilling their obligations under the law . . . [r]ight now . . . many . . . do not have access to the remedies that the law says it provides. It is those remedies that secure the goods people want . . . ").

58. *See* Emily S. Taylor Poppe, *Institutional Design for Access to Justice*, 11 U.C. IRVINE L. REV. 781, 791–92 (2021).

59. *See* Tom Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 27–28 (2007).

60. *See* SASHA COSTANZA-CHOCK, DESIGN JUSTICE: COMMUNITY-LED PRACTICES TO BUILD THE WORLDS WE NEED 23 (2020) (defining design justice as a "framework for analysis of how design distributes benefits and burdens between various groups of people . . . focus[ing] explicitly on the ways that design reproduces and/or challenges the matrix of domination."); *see also* Margaret Hagan, *Participatory Design for Innovation in Access to Justice*, 148 DÆDALUS, Spring 2019, at 120 (2019) (exploring human-centered design as it applies to access to justice interventions and reflecting many of the design justice principles discussed above). *See, e.g.*, LEGAL DESIGN LAB, https://www.legaltechdesign.com/ (last visited Feb. 12, 2022).

61. Poppe, *supra* note 58, at 799 ("Without better institutional design, it is unlikely that the problem of inequalities in access to justice will be understood or addressed systemically.").

62. *See* Hagan, *supra* note 60, at 122.

63. When analyzed through a public health lens, these administrative justice outcomes are commonly referred to as "social determinants of health." *See Social Determinants of Health*, HEALTHY PEOPLE 2030, U.S. DEP'T OF HEALTH AND HUM. SERVS., https://health.gov/healthypeople/objectives-and-data/social-determinants-health (last visited Feb. 12, 2022)

justice problems in these areas do not differentiate between court hearings and administrative hearings; statutes, regulations, and guidance; court personnel and front-line bureaucrats.[64] The access to justice movement is similarly applicable to administrative agencies, as it has been to courts, because people experience the justice system through courts and agency action in many of the same ways.

### *C. Interactions with Other Justice Movements*

Although this Article draws most heavily from the access to justice movement in the states that focus on state court reform, others might consider the access to justice movement more broadly as a coalition of related movements that advocate for either access or justice for certain vulnerable groups.[65] Examples of movements within this general coalition might include the self-represented advocacy group,[66] the right to counsel movement,[67] the legal empowerment movement,[68] the plain language movement,[69] the holistic legal services movement,[70] medical-legal partnerships,[71] the bar exam reform movement,[72]

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(defining social determinants of health as "the conditions in the environments where people are born, live, learn, work, play, worship, and age that affect a wide range of health, functioning, and quality-of-life outcomes and risks"); *see also* SANDEFUR, ACCESSING JUSTICE, *supra* note 40.

64. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1290 (2016) ("[F]rom a legal standpoint, for most poor respondents there is little difference between the . . . systems. Court is court. The law is the law. Lawyers are lawyers. Judges are judges.").

65. Udell, *supra* note 35, at 145–46.

66. *See generally* SELF-REPRESENTED LITIGATION NETWORK, https://www.srln.org/ (last visited Feb. 12, 2022).

67. *See generally* NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, http://civilrighttocounsel.org/ (last visited Feb. 12, 2022).

68. *See generally Legal Empowerment*, ROBERT & HELEN BERNSTEIN INST. FOR HUM. RTS., https://www.law.nyu.edu/centers/bernstein-institute/legal_empowerment (last visited Feb. 12, 2022).

69. *See generally* Cynthia Adams, *The Move Toward Using Plain Legal Language*, AM. BAR ASS'N (2016), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/writing/the_move_toward_using_plain_legal_language/.

70. *See generally Holistic Defense, Defined*, BRONX DEFENDERS, https://www.bronxdefenders.org/holistic-defense/ (last visited Feb. 12, 2022).

71. *See* Daniel Atkins, Shannon Mace, Elena DeBartolo & Megan Sandel, *Medical-Legal Partnerships and Healthy Start: Integrating Civil Legal Aid Services into Public Health Advocacy*, 35 J. LEGAL MED. 195 (2014).

72. *See, e.g.*, Michael Frisby, Sam Erman & Victor D. Quintanilla, *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores*, SSRN (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793272.

the fines and fees movement,[73] criminal justice abolition and reform advocates,[74] legal education reform advocates,[75] and many others.[76] These movements share goals of designing institutions that better disrupt systems of discrimination and oppression and creating systems that solve, rather than add to, people's justice problems. It is these shared goals and the lessons learned from these movements that can be brought to discussions about federal administrative structural reform.

## II. ADMINISTRATIVE JUSTICE GAPS

Why this call to focus federal administrative agencies and the larger administrative system directly on access to justice elements? Years of deregulation and, most recently, an outright assault on democratic norms have significantly undermined the general public's view of the administrative state; this general lack of public support can weaken the justice work of the agencies.[77] There are structural and design problems throughout the administrative state, including the physical locations and accessibility of agency offices and meetings; how we choose who leads and staffs agencies; who influences agencies; what is being researched by agency staff; and how data is being collected and analyzed. These design problems are similar and related to the legitimacy problems that administrative law scholars have long debated. However, an oft-ignored foundational problem is how fundamentally disconnected these agencies are from their intended beneficiaries—the people's interests the agencies serve. Even in cases where the President or Congress established the agency to solve policy problems, years of reforms and political swings in the Executive Branch have divorced the underlying mission from daily agency operations. Internal structures within the agency can create cultural disconnects from underserved beneficiaries of agency mission. Applying an access to justice framework can help agencies diagnose mission and cultural disconnects and build structures that can reform how agencies can reflect a more inclusive approach to policy and enforcement.

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73. *See generally* THE FINES AND FEES JUSTICE CENTER, https://finesandfeesjusticecenter.org/ (last visited Feb. 12, 2022).

74. *See generally* RAM SUBRAMANIAN, LAUREN-BROOKE EISEN, TARYN MERKL, LEILY ARZ, HERNANDEZ STROUD, TAYLOR KING ET AL., BRENNAN CTR. FOR JUST., A FEDERAL AGENDA FOR CRIMINAL JUSTICE REFORM (2021).

75. *See generally* Rickard, *supra* note 54.

76. There are, of course, movements related to justice and courts that generate access to justice-related reforms as part of their larger advocacy goals—groups like Black Lives Matter, #MeToo, and many more.

77. For more on attacks on reputation as a symptom of structural deregulation, see Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 612, 620–22 (2021).

Before analyzing where access to justice principles could be useful to administrative agency design, some line-drawing about the types of agencies relevant to this first foray are in order. As mentioned above, access to justice advocates are concerned with the ability of underserved communities to use the justice institutions that, in theory, should help solve their problems and address unmet needs but cause significant harm in practice. Some substantive areas where underserved communities and civil justice issues interact with administrative agencies include housing, employment, education, family, consumer finance, and health.[78] Many of these substantive areas are governed by both state and federal laws and institutions. Access to justice principles play a role in both federal and state administrative systems. However, this Article focuses on the federal administrative state in part because the current Administration has exhibited the political will to explore such interactions.[79]

This Article explores current and proposed agency design elements in the following agencies: the CFPB, the Federal Trade Commission (FTC), the Department of Education, the CDC, the Department of Housing and Urban Development (HUD), and the Department of Justice (DOJ). While not a definitive list of agencies that interact with underserved communities, this focus is used to frame existing and proposed design tools that improve the general public's, and especially underserved communities', interactions with federal agencies to address their unmet justice needs. At different points in recent history, these agencies have led or otherwise wrestled with innovations in structure to do exactly this.

But first, an examination of some of the distinct gaps in access to justice seen with the current administrative system.[80] This Article develops three types of problems for agencies that can be remedied through intentional access to justice design: a disconnect between the agency mission and its

78. This list is not exhaustive and represents a starting point for a framework that can be expanded across administrative agencies.

79. *See* Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021); OFF. OF MGMT. AND BUDGET, STUDY TO IDENTIFY METHODS TO ASSESS EQUITY: REPORT TO THE PRESIDENT (2021) [hereinafter OMB REPORT], https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf (presenting the findings of the Office of Management and Budget's investigation into the federal government's racial equity policies, as ordered by Executive Order 13,985).

80. *See* OMB REPORT at 7009 (presenting the findings of the Office of Management and Budget's investigation into the federal government's racial equity policies, as ordered by Executive Order 13,985). DEAR COLLEAGUE LETTER, *supra* note 44. This same agency had done quite strong civil rights work with campus sexual assault. However, even with that Dear Colleague letter, there is debate as to whether the Department of Education acted too top-down and exclusionary in developing its guidance. This project highlights design structures that encourage inclusive and democratic agency culture, even if specific policies might at times be criticized.

current functions; a breakdown in understanding between the agency and those affected by agency action; and a deterioration of trust due to incomplete information among those affected by agency action.

### *A. Mission Disconnect – A Separation of Mission from Function*

A disconnect between an agency's mission and its function on the ground can happen over time from shifting executive priorities, such as a deregulatory executive using discretion to refrain from enforcing statutory and regulatory directives that would support the agency mission. In essence, the problem is that the agency no longer does what it was established to do. Recently termed "structural deregulation" by Jody Freeman and Sharon Jacobs, this disconnect is dangerous and stealthy—"it is death by a thousand cuts."[81] While some would argue that this is precisely how the constitutional system is set up for accountability in administrative law—that the executive is accountable to the public for how it uses (or fails to use) its discretion to enforce regulation[82]—this executive control model refers to substantive regulation and must remain cabined by outer bounds of an agency's mission.[83] Also, an executive control model assumes perfect information symmetry, in that the voters are given the information needed to judge whether an executive is merely exercising discretion within customary bounds or sabotaging regulation entirely.[84]

Economic instability is a driver of justice problems, including housing insecurity and debt collection. During COVID-19, economic crimes including fraud and corruption have increased. Fraud prevention requires public education, complaint processes with transparent resolution, outreach and training at the local level, and trust in government to act on fraud, whether through regulation or litigation or both. The CFPB was designed to champion these values. Much of the agency's statutory design reflects best principles championed by access to justice advocates. The deregulatory response to fraud through non-enforcement at the CFPB under Trump-appointee Kathy Kraninger

81. Freeman & Jacobs, *supra* note 77, at 586 (proposing legislative and judicial solutions to strengthen agencies against future structural deregulation).

82. *Cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248, 2251, 2252, 2323 n.306, 2331–35, 2337–39 (2001).

83. *See id.* at 2270, 2290, 2323, 2340, 2351. The scholarly support for executive control of agencies is often traced back to Kagan and assumes good faith actions to trumpet agency achievements for political purposes.

84. Freeman & Jacobs, *supra* note 77, at 616, 619–20, 651 (explaining that limiting public access to certain information is a form of structural deregulation).

exemplified the type of mission disconnect described above.[85] The Trump Administration weakened mechanisms internally through its appointment of deregulatory directors who slowed enforcement actions, increasing opportunities for corruption and fraud.[86] Ultimately, consumers suffered from this lack of enforcement.

There are other, perhaps even unintentional ways that mission disconnect can occur. Mission disconnect can also happen through the layering of court decisions on top of shifting executive priorities to move daily agency action far from the original mission and design of the agency. Common law interpretation of statutory authority can then create constraints that undercut the agency's mission itself. The recent decision in *AMG Capital Management, LLC v. FTC*[87] weakened regulatory oversight of fraudulent actors in the consumer marketplace.[88] There, the Supreme Court held that the long-standing understanding of the FTC's authority to secure monetary relief for defrauded consumers exceeded the authority granted to the agency by Congress.[89] The combined effect of a weakened regulatory landscape and a formalist Supreme Court ruling makes it harder for the FTC to get money back in people's pockets after they suffer fraud—in this case, deceptive payday loans.[90] This mission disconnect leaves defrauded consumers with fewer avenues of recourse.[91]

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85. Interim Director Mick Mulvaney immediately replaced founding Director Richard Cordray in 2017. Director Kraninger was appointed in December 2018. Emily Sullivan, *Senate Confirms Kathy Kraninger as CFPB Director*, NAT'L PUB. RADIO (Dec. 6, 2018, 2:17 PM), https://www.npr.org/2018/12/06/673222706/senate-confirms-kathy-kraninger-as-cfpb-director.

86. Christopher L. Peterson, DORMANT: THE CONSUMER FINANCIAL PROTECTION BUREAU'S LAW ENFORCEMENT PROGRAM IN DECLINE, 3, 4, 7 (2019), https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf; *see also* STAFF OF H. COMM. ON FIN. SERVS., 116TH CONG., SETTLING FOR NOTHING: HOW KRANGINER'S CFPB LEAVES CONSUMERS HIGH AND DRY 7, 21 (2019).

87. 141 S. Ct. 1341 (2021).

88. *Id.* at 1347 (noting the effect of these enforcement actions on people's wallets: "[i]n fiscal year 2019, for example, the Commission filed 49 complaints in federal court and obtained 81 permanent injunctions and orders, resulting in $723.2 million in consumer redress or disgorgement").

89. *Id.* at 1352.

90. *See also* Luke Herrine, *Consumer Protection after Consumer Sovereignty*, L. AND POL. ECON. PROJECT 41 (2021) (reframing consumer protection as "a series of tools that allow a community to [appoint representatives to] determine the values any given market ought to further and to experiment with ways to ensure that the market lives up to those values").

91. Mission disconnect could also encroach on Congress's Article I powers when taken to the extreme. Freeman & Jacobs, *supra* note 77, at 631–32.

A final example of how mission disconnect can develop is drawn from studies of public enforcement at both state and federal levels.[92] Here, with consumer protection enforcement against fraud, underserved communities are the beneficiaries of robust enforcement strategies.[93] When the CFPB greatly stepped back its enforcement activities under the direction of the Trump Administration leadership, state attorneys general (AGs) publicly vowed to step in and try to fill this enforcement gap.[94] The state AGs were successful with their plan to increase enforcement, with some states increasing enforcement in this area by double or even triple digit percentages.[95] However, public compensation, that is, returning money to harmed consumers' pockets, was down over the same time period.[96] This type of mission disconnect can go unnoticed when enforcers do not ask about and track effective outcomes data.

### *B. Culture Disconnect – A separation of the agency and the people it serves*

Agencies are collections of people who implement policy, and, as such, the policies are a natural outgrowth from the people consulted and listened to at the agency. It matters immensely who those people are and how connected they are to the populations they assist. When the agency is not designed to hear from diverse stakeholders, poor policy can result. In the regulation of student loans, for example, the design of the Department of Education treated student borrowers as any private creditor would treat any borrower in default.[97] The Department of Education's creditor-focused structure arose directly from the interests of those at the table. It undercut the student borrower's experience with what should be a very different type of loan—a government support to encourage people, often young people, to invest in their education.[98]

The aftermath of the CDC's response to the COVID-19 pandemic also spotlighted the dire need for attention to how agencies create culture, especially how to keep agency culture and resulting policy aligned with the agency's mission through collaboration and planning. As the New York

92. *See* Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37 (2018); Amy Widman, *Protecting Consumer Protection: Filling the Federal Enforcement Gap*, 69 BUFF. L. REV. 1157 (2021).

93. *See* Cox, Widman & Totten, *supra* note 92, at 41–47 (explaining how Unfair or Deceptive Acts or Practices laws protect consumers from fraud in the marketplace).

94. Widman, *supra* note 92, at 1182–86 (describing state reactions to federal underenforcement and various public announcements to fill the gap).

95. Widman, *supra* note 92, at 1179.

96. Widman, *supra* note 92, at at 1179–80.

97. *See* Cox & Engle, *supra* note 27, at 360, 366, 380–82, 386, 395, 404 (2021).

98. *See* Cox & Engle, *supra* note 27 at 378–82, 385–93.

Times pointed out, the CDC's response was too insular to see all dimensions of the pandemic, which meant the federal response was not as nimble as that of outside groups who collaborated with experts beyond public health to see the interconnectedness of policy problems.[99] Speaking about how best to address infection control, the head of the independent COVID Rapid Response Working Group pointed out that "[t]his is not a public-health problem, or even a medical one . . . [i]t's an issue of organizational capacity."[100] The Times concluded "[t]he C.D.C. is not equipped to identify organizational issues, let alone resolve them."[101] Further, according to agency staff and partners, "[s]ome of these problems come down to politics, but most are a result of flaws in the agency's very foundation."[102]

### *C. Trust Disconnect – A loss of faith in government*

The public's distrust for institutions is growing. In the federal arena, this has been made explicit through the public's reaction to public health regulations meant to address COVID-19.[103] The trust deficit is a natural outgrowth of repeated instances of a disconnect between the mission and the culture of a given agency. Recent findings from the Pew Research Center indicate that trust in government is low, with under a third of Americans reporting that they trust the government "to do the right thing" all or most of the time.[104] Moreover, a majority of Americans (55%) say that "government should be doing more to solve [people's] problems."[105]

The lack of transparent and responsive data collection and dissemination is a large part of the trust disconnect. A great majority (84%) of Americans think trust can be restored and specifically point to "more disclosure of what the government is doing" as a key mechanism.[106] The Trump Administration directed internal agency actions to decrease disclosure of

99. *See* Jeneen Interlandi, *Can the C.D.C. be Fixed?*, N.Y. TIMES MAG. (June 16, 2021), https://www.nytimes.com/2021/06/16/magazine/cdc-covid-response.html.

100. *Id.* at 2.

101. *Id.*

102. *Id.* at 4.

103. Marianne Udow-Phillips & Paula M. Lantz, *Trust in Public Health is Essential Amid the COVID-19 Pandemic*, 15 J. HOSP. MED. 431, 431–33 (2020).

104. CARROLL DOHERTY, JOCELYN KILEY, NIDA ASHEER & CALVIN JORDAN, PEW RSCH. CTR., AMERICANS SEE BROAD RESP. FOR GOV'T; LITTLE CHANGE SINCE 2019, 27 (2021).

105. *Id.* at 16.

106. LEE RAINIE, SCOTT KEETER & ANDREW PERRIN, PEW RSCH. CTR., TRUST AND DISTRUST IN AMERICA 11, 14 (2021) ("People's confidence in key institutions is associated with their views about how those institutions handle important information.").

government action through removal of data from public websites,[107] deactivating or otherwise ignoring internal offices that collect or disseminate agency data to the public,[108] and, most vividly, by undercutting the Inspector General system of agency oversight.[109] These actions came on top of other systemic disconnects between government work and public knowledge, born from an often scattered and technical system of agency reporting.[110]

## III. DESIGNING THE INFRASTRUCTURE TO MEET PEOPLE'S NEEDS: LESSONS FROM THE ACCESS TO JUSTICE MOVEMENT

The access to justice community has theorized and studied a collection of best practices as indicators of an accessible court system. Mapping and tracking design practices are a start toward building a more inclusive and responsive regulatory system. Many of these ideas about design have percolated up throughout the regulatory system, but they have not been systematically organized in the literature.[111] By building an administrative infrastructure for study and dialogue based on access to justice, agency and other federal leadership can better incorporate and track if and where agencies meet their access to justice goals.[112] These practices can also be used prospectively to guide Congress when it approaches agency structure and design by providing a map of design tools that could better address how a given policy problem is met on the ground. In some situations, agencies can build these design practices from their current delegations. What follows is an attempt to map concrete design practices learned from the access to justice movement in light of three foundational elements of the movement in the state courts: assessment, voice, and data.

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107. Louise Lief, *Universities Race to Safeguard Government Data Under Trump*, COLUM. JOURNALISM REV. (Mar. 7, 2017), https://www.cjr.org/politics/government-data-preservation-trump.php.

108. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014).

109. Freeman & Jacobs, *supra* note 77, at 588–89, 603, 619–20, 625, 654 n.391 (describing attacks on the offices of Inspector Generals as a form of structural deregulation).

110. *See FOIA: Examining Transparency Under the Trump Administration: Hearing before the H. Comm. on Oversight and Reform*, 116th Cong. (2019).

111. For example, Massachusetts has a state law that sets a baseline for access to justice for all agency adjudications. *See* 3 MASS. GEN. LAWS ch. 30A § 10–11 (1977).

112. *See* LEGAL AID INTERAGENCY ROUNDTABLE, ACCESS TO JUSTICE IN THE AGE OF COVID-19 (2021), https://www.justice.gov/ag/page/file/1445356/download (providing examples of how an improved administrative infrastructure can lead to reflection and innovation).

### *A. Assessment: Recording the Landscape*

Good design processes are contingent on acquiring knowledge through comprehensive assessment of unmet legal needs, community resources, agency capacities, the legal environment, and more.[113] The work must begin with an assessment of the institution's mission in light of barriers encountered by intended beneficiaries.[114] Assessment can go further by incorporating strategic planning that draws from community needs to reflect and focus the agency's mission.

Ongoing assessment can strengthen organizational capacity. Many access to justice best practices incorporate assessment throughout the court process. States have formed Access to Justice Commissions to lead these assessment activities.[115] According to the American Bar Association, the main charge of an Access to Justice Commission is "to expand access to civil justice at all levels for low-income and disadvantaged people in the state by assessing their civil legal needs, developing strategies to meet them, and evaluating progress."[116]

A key component of the Commissions' work is scoping the presence and absence of laws and practices to expand and improve access to justice and tracking the need for reform. The importance of planning and assessment to enhance access to justice is also echoed in the United Nations Sustainable Development Goals Project, specifically when addressing a justice plan in relation to Sustainable Development Goal 16.[117] According to this toolkit, understanding the legal framework is the first step to assessing where there are gaps in access to justice.[118]

The Justice Index, a resource created by the National Center for Access to Justice at Fordham Law School, is a leading source of information about

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113. *See, e.g.*, Costanza-Chock, *supra* note 60, at 6–7.

114. For an example of a logic model applied to strengthen and align a program's goals with its outcomes, see MALORE DUSENBERY, URBAN INST., REFINING THE VICTIMCONNECT LOGIC MODEL (2020).

115. Access to Justice Commissions can be formed by state courts, state bar associations and foundations, or a hybrid of these stakeholders. *See* MARY LAVERY FLYNN, AM. BAR ASS'N, ACCESS TO JUSTICE COMMISSIONS: INCREASING EFFECTIVENESS THROUGH ADEQUATE STAFFING AND FUNDING, A REPORT COMPILED FOR THE ABA RESOURCE CENTER FOR ACCESS TO JUSTICE INITIATIVES 12 (2018).

116. Resource Center for Access to Justice Initiatives, *Definition of an Access to Justice Commission*, AM. BAR ASS'N (June 2014).

117. *See Goal 16: Promote Just, Peaceful and Inclusive Societies*, SUSTAINABLE DEV. GOALS, UNITED NATIONS, https://www.un.org/sustainabledevelopment/peace-justice/ (last visited Feb. 12, 2022); STACEY CRAM, SUMAIYA ISLAM, TEMITAYO O. PETERS, JENNIFER TSAI, & BETSY WALTERS, TRANSPARENCY, ACCOUNTABILITY & PARTICIPATION NETWORK, ADVOCACY: JUSTICE AND THE SDGS 12, 19 (Stacey Cram & Temitayo O. Peters eds., 2016).

118. CRAM, ISLAM, PETERS, TSAI, & WALTERS, *supra* note 117, at 22.

policies and procedures used by state courts to increase access to justice.[119] The Index tracks and promotes expert-endorsed best practices across five substantive areas—attorney access, self-represented access, language access, disability access, and fines and fees—and relies on many policy benchmarks ("indicators") which underline the importance of assessment of the state's justice system landscape.[120] For example, the Justice Index asks:

> Does the state:
>
> "[f]und a full-time equivalent staff position in the court system . . . to coordinate and oversee [access to justice] programs throughout the state[?]".
>
> "[p]ost online a strategic action plan, adopted or updated in the past five years, describing the State's plan to reach the . . . goal of 100% meaningful access to justice[?]";
>
> "[r]eview in past 12 months, the state's progress on the strategic action plan, post the findings on-line, and update the plan in response[?]"; and
>
> "[p]rovide both written and on-line options for SRLs to rate the ease of use and effectiveness of court services and incorporate this information in the design and delivery of services?"[121]

Similar assessment indicators appear in other sections of the Justice Index, including the language access benchmark that includes "a periodic needs assessment" with ongoing monitoring and evaluation and surveys of all stakeholders; evaluation of "the effectiveness of individual interpreters"; and tracking of the "quality and availability of language services."[122]

In the area of disability access, the Justice Index includes multiple benchmarks that go beyond the floor of evaluation and assessment required by the Americans with Disabilities Act, such as tracking whether states "periodic[ally] update . . . the one-time self-evaluation required under the ADA[.]"[123]

Reviewing the Justice Index indicators and other sources of policy guidance for state courts allows us to unearth a set of elements that foster strong assessments. Key among these elements is that assessment needs to review both (1) the unmet needs of the community,[124] and (2) the current

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119. For more information on the Justice Index, its methodology, and the rankings, see *The Justice Index*, NAT'L CTR. FOR ACCESS TO JUST., https://ncaj.org/state-rankings/2021/justice-index (last visited Feb. 12, 2022).

120. *Id.*

121. *Self-Representation*, *The Justice Index*, NAT'L CTR. FOR ACCESS TO JUST. https://ncaj.org/state-rankings/2020/self-representation (last visited Feb. 12, 2022).

122. *Language Access*, *The Justice Index*, NAT'L CTR. FOR ACCESS TO JUST., https://ncaj.org/state-rankings/2020/language-access (last visited Feb. 12, 2022).

123. *Disability Access*, *The Justice Index*, NAT'L CTR. FOR ACCESS TO JUST., https://ncaj.org/state-rankings/2020/disability-access (last visited Feb. 12, 2022).

124. Unmet needs studies are not generally linked to elements of assessment, but arguably there should be more linkage between the two. Understanding more about the

practices and policies in place. Further, assessment needs to be ongoing, public, and conducted with dedicated paid staff in conjunction with community representatives. Moreover, interventions and practices need to be monitored and evaluated for effectiveness.[125]

### *B. Voice: Increasing Participation in Agency Policy Formation and in Agency Legal Proceedings*

Another lesson from access to justice work in state courts is that the general public, especially people from underserved communities, needs a voice in the ongoing regulatory work of agency assessment and agenda-setting, as well as in their own individual claims for relief to protect their interests.

Promotion of voice in assessment and agenda-setting will require the institution to build new communication pathways into communities.[126] For example, the Justice Index tracks whether a state has "concluded a formal process in [the] past 12 months of consulting with key stakeholders on [access to justice] issues, including but not limited to: the judiciary, the bar, low-income communities, civil legal aid bar, and social services providers[.]"[127]

This type of "best policy" should be designed into the institutions—courts and agencies—themselves. In the civil justice arena, statewide Access to Justice Commissions provide such a pathway for collaboration and voice among stakeholders of justice institutions, including members of the public.[128] Some of these collaborations are particularly wide-ranging and ambitious, like the Justice For All pilot program in Suffolk County, New York. There, the New York State Permanent Commission on Access to Justice worked with local leaders and community members to fully recognize and address the range of justice gaps in this one community.[129] And beyond who has a voice in problem identification and agenda-setting, the Justice For All example also highlights the physical and regional components to voice.

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justice needs and gaps that people experience will allow for deeper assessment as to whether the structures are performing as intended and which interventions are most necessary and effective. *See, e.g.*, IAALS, *supra* note 51, at 16, 32, 56.

125. *See* THOMAS M. CLARK & PAULA HANNAFORD-AGOR, NAT'L CTR. FOR STATE CTS., MEASURING THE IMPACT OF ACCESS TO JUSTICE PROGRAMS: AN ASSESSMENT TOOL FOR FUNDERS AND POLICYMAKERS 11–12, 16, 21–22 (2020).

126. This principle can address the "timely" factor of access to justice interventions explored in Emily Poppe's recent scholarship. *See, e.g.*, Poppe, *supra* note 58, at 795.

127. *Self-Representation*, *supra* note 121.

128. FLYNN, *supra* note 115, at 13 ("Many commissions have also reached out more broadly [for membership], to the business community, law schools, civic organizations, social services, legislative and administrative branches, the faith community and client representatives.").

129. FLYNN, *supra* note 115, at 17.

The physical location of the collaborations has a direct effect on who is included. Suffolk County's Justice For All program expanded its collaboration to a local public library to maximize legal resources to all community members.[130] This comprehensive recognition of the variety of non-lawyers needed to design representative institutions that solve people's justice problems, plus an understanding of the need to be proximate and available to all within the community, is a key lesson from the access to justice movement.[131]

Beyond the aspect of voice that involves participating in assessment and agenda-setting, using one's voice in the context of access to justice also enables one to participate in proceedings that affect one's rights and interests. Here too, there are a variety of legal assistance models, ranging from information and advice to assistance and representation. In individual proceedings, the civil right to counsel movement has been an integral part of the access to justice policy agenda in the state courts, amplifying people's voice in state court proceedings through expanding the types of matters in which a person has a dedicated right to legal representation. The right to counsel movement has had tangible successes.[132] Research detailing improved outcomes for people with legal representation provides evidence of the value of this intervention.[133] This evidence, in combination with other factors (organizing initiatives, a national coordinating effort, an evolving political environment that reflects increased concern about the high volume of evictions in our society, the increased needs generated by the pandemic, and the call for racial justice), has resulted in legislative expansions providing counsel for people facing eviction, debt collection, and other civil justice state law issues.[134] The right to counsel movement and its successes provide an

130. FLYNN, *supra* note 115, at 17.

131. *See also* MICH. JUST. FOR ALL TASK FORCE, STRATEGIC PLAN AND INVENTORY REPORT, 3, 21 (2020) (highlighting the diverse coalition of the Justice for All Task Force and its success in building strong community relationships to develop permanent infrastructure).

132. For an overview of successes increasing access to legal representation from the work done by right to counsel advocates, see *All About the Right to Counsel for Evictions in NYC*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (May 7, 2021), http://civilrighttocounsel.org/major_developments/894.

133. For studies showing outcomes of legal aid on housing stability, see Jessica Steinberg, *In Pursuit of Justice: Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. POVERTY L. & POL'Y 453 (2011); PUB. JUST. CTR., JUSTICE DIVERTED: HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY RENT COURT (2015); LEGAL AID SOC'Y OF CLEVELAND, RIGHT TO COUNSEL: ANNUAL REPORT TO CLEVELAND CITY COUNCIL AND COURTESY REPORT TO CLEVELAND MAYOR'S OFFICE (2021).

134. *See* NAT'L COAL. FOR A CIV. R. TO COUNS., http://civilrighttocounsel.org/ (last visited Feb. 12, 2022) (listing up-to-date statuses of state legislation providing counsel for civil justice needs).

example of how the access to justice advocates have increased voice in legal matters in state courts.[135]

As evidence of the role of legal representation as an element of access to justice, the Justice Index tracks the number of civil legal aid attorneys available to represent people living below 200% of the federal poverty line (whether funded by civil right to counsel laws or other means). Additionally, the Justice Index tracks the growth of civil right to counsel laws through various policies that authorize and track pro bono work across the bar and provision of unbundled legal services.[136] Legal aid and civil right to counsel policies, in combination with improved policies for people with limited English proficiency, people with disabilities, and self-help litigants, underline that the approach to assuring voice for individuals in the state courts has been and is multi-dimensional. The administrative apparatus and its stakeholders would benefit from looking deeply at where they can build similar policy innovation and expand within those institutions.

### *C. Data: Understanding and Communicating Outcomes*

Data collection is critically important to assuring that agencies provide access to justice. Access to justice advocates map and track institutional structure to measure need, justice system satisfaction, outcomes, and other dimensions of justice in underserved communities[137] and in the broader public.[138] This work relies on data, and filling in data gaps remains a key challenge for access to justice advocates.[139] We need to understand more about who experiences justice problems in specific areas of law and if, how, and how frequently the problems are resolved.[140] Additionally, we need to

135. The recent advocacy around deregulating unauthorized practice of law presents another model to increase representation in certain types of civil justice matters. *See, e.g.*, NAT'L CTR. FOR ACCESS TO JUST., "WORKING WITH YOUR HANDS TIED BEHIND YOUR BACK": NON-LAWYER PERSPECTIVES ON LEGAL EMPOWERMENT (2021), https://ncaj.org/sites/default/files/2021-06/NCAJ%20Working%20With%20Your%20Hands%20Tied%20Behind%20Your%20Back.pdf.

136. *The Justice Index*, *supra* note 119.

137. *See The Justice Index*, *supra* note 119; *see also* ALAINNA LYNCH, JEFFREY SACHS, & HELEN BOND, IN THE RED: THE US FAILURE TO DELIVER ON A PROMISE OF RACIAL EQUALITY 9 (2021).

138. WORLD JUST. PROJECT, *Atlas of Legal Needs Surveys*, https://worldjusticeproject.org/our-work/research-and-data/atlas-legal-needs-surveys (last visited Feb. 12, 2022).

139. James Gamble & Amy Widman, *The Role of Data in Organizing an Access to Justice Movement*, 87 FORDHAM L. REV. ONLINE 196, 196–97 (2018) (discussing the specific types of data gaps and the architecture needed to address them).

140. *Id.*

standardize that data across jurisdictions.[141] Furthermore, we need to understand much more about how people fare before and after their interactions with justice institutions, what leads them to these institutions, and whether these interactions result in a better quality of life or social justice—perhaps the most challenging issue.[142]

The access to justice movement has developed best practices around data, including developing data collection needs from the communities themselves; understanding the difference between inputs, outputs, and outcomes of civil justice interactions; developing common standards for measuring these different types of interactions; encouraging disaggregation of data to better understand how interactions and outcomes vary among different populations; and making data accessible and transparent.[143]

Knowledge can also be generated through trainings, education, and outreach. In each of these areas, knowledge dissemination goes both ways between the institutions and the communities. For example, the Justice Index tracks whether state courts train judges, staff, interpreters, and other justice workers on particular areas that affect access.[144] Law school clinics, legal aid organizations, bar associations, and others lead "know your rights" trainings and other community education programs for legal stakeholders and community members.[145] Communities are empowered to lead in the access to justice movement, and the community organizations and outreach practices that fueled the civil right to counsel movements in cities like New York and San Francisco exemplify the centrality of movement-building from the ground up as a best practice in promoting access to justice.[146]

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141. *See id.;* Louise Lief, *Universities Race to Safeguard Government Data Under Trump*, COLUM. JOURNALISM REV. (Mar. 7, 2017), https://www.cjr.org/politics/government-data-preservation-trump.php (statement of Chuck Lewis, founder of the Center for Public Integrity) ("The methodology of data gathering is key.").

142. Gamble & Widman, *supra* note 139.

143. *See* NAT'L CTR. FOR STATE CTS., COURT STATISTICS PROJECT, DATA GOVERNANCE POLICY GUIDE 1–2 (2019) (describing best practices on data governance); AM. ACAD. OF ARTS & SCI., MEASURING CIVIL JUSTICE FOR ALL: WHAT DO WE KNOW? WHAT DO WE NEED TO KNOW? HOW CAN WE KNOW IT? 12–14 (2021) (providing information on the need and structure of data).

144. *The Justice Index*, *supra* note 119.

145. *See, e.g.*, Civil Liberties Defense Center, *Know Your Rights*, https://cldc.org/know-your-rights/ (last visited Feb. 12, 2022) ("Learn what your constitutional rights are and how they apply to protest, direct action and demonstration.").

146. *See, e.g.*, *Documentary: Our Rights! Our Power! The Right to Counsel (RTC) Campaign to Fight Evictions in NYC!*, VIMEO (Sept. 11, 2020), https://vimeo.com/457047852.

## IV. CURRENT ADMINISTRATIVE LAW REFORMS

Thus far, this Article has drawn examples and principles from the access to justice movement to bring context to a typology of reform elements that can inform federal agency design. These elements stem from the view that intentional focus on how we frame and design administrative agencies could offer "inclusive regulation" that better responds to our current democracy crisis.[147] Inclusive regulatory innovations are currently scattered throughout the agencies and readily map to the established access to justice principles discussed above.[148] Research and recommendations proposed by ACUS also contain elements of these principles.[149] This section journeys through statutes, regulations, executive orders, court rules, and other recommendations, including some proposed, to highlight how these principles are currently being explored, even in smaller ways. Connecting these proposals under a theoretical umbrella of access to justice can help to guide holistic reform of the administrative state toward the goal of inclusive and accessible justice.

### *A. Assessment Reforms Addressing Mission Disconnect*

Agencies need to do much more work to scope out where structural or procedural gaps create hurdles for people they are intending to serve. Prioritizing assessment of policy outcomes is an important place to start. There are many forms of assessment already prescribed, but this Article attempts to make the case that assessment can be better tailored to understand how underserved communities experience agency action, particularly where the agency mission is meant to benefit these communities. The Government Performance and Results Modernization Act of 2010 (GPRA Modernization Act) requires agencies to engage in strategic planning in multiple forms.[150] One aspect of these plans

147. *See, e.g.*, Metzger, *Administrative Constitutionalism*, *supra* note 19, at 1901–03 (discussing the various challenges confronting a constitutional interpretation of agency structures although ultimately concluding that the virtues of continuing to highlight and address the separation of powers concerns embedded in understanding agency action as a constitutional practice outweigh the challenges); *see also* Johnson, *supra* note 25, at 1788 (showing "the emergence of new forms of 'inclusive regulation' that rely on carrots (grant making) . . . [and] (funding termination); encourage collaborative work with regulated actors and communities; engage states, localities, and communities in developing context-specific, evolving solutions rather than mandating 'top-down' solutions; and attempt to collapse traditional boundaries between agencies").

148. *See supra* Part II.C.

149. *About ACUS*, ADMIN. CONF. OF THE U.S., https://www.acus.gov/administrative-conference-united-states-acus (last visited Feb. 12, 2022).

150. *See* GPRA Modernization Act of 2010, 31 U.S.C. § 1101; U.S. EQUAL EMPL. OPPORTUNITY COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2018–2022 (2018) (providing a strong example of strategic planning).

includes developing and posting performance goals and performance indicators.[151] Scholars are proposing additional cross-agency assessment structures, like disparate impact assessment.[152] ACUS conducts assessments of particular agency practices as well, sometimes at the request of the agency itself[153] and other times due to recurring issues in administrative governance.[154] ACUS also recommends periodic agency review of regulation.[155] However, there has been little comprehensive focus on isolating examples of agency design that build meaningful assessment into the agency structure itself.[156] Agencies have not accounted publicly for any inclusive regulatory practices or efforts to hold grant programs accountable for inclusive decisionmaking beyond the minimum specified in the GPRA Modernization Act.

One regulatory example that reflects how agencies can successfully use assessment to spur and evaluate inclusive action in their grant programs is HUD's 2015 regulation affirming affordable housing.[157] The HUD rulemaking required program participants to evaluate and assess fair housing obstacles within their jurisdiction using the Assessment of Fair Housing procedures outlined in the regulation.[158] According to the agency, the rulemaking was meant to address "lessons learned in localities across the county, and with program participants, civil rights advocates, other stakeholders, and the U.S. Government Accountability Office all commenting that the [prior] approach was not as effective as originally envisioned" at assessing program goals affirmatively furthering fair housing.[159] The new procedures included "input about fair housing issues, goals, priorities, and the most appropriate uses of HUD funds" from "individuals historically excluded because of characteristics protected by the Fair Housing Act" as an "integral part of the new assessment."[160]

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151. GPRA Modernization Act of 2010, 31 U.S.C. § 1115.

152. OMB REPORT, *supra* note 79.

153. *See, e.g.*, ADMIN. CONF. OF THE U.S., SSA DISABILITY BENEFITS ADJUDICATION PROCESS: ASSESSING THE IMPACT OF THE REGION I PILOT PROGRAM 1 (2013).

154. *See, e.g.*, MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 9–17 (2018).

155. Adoption of Recommendations, 86 Fed. Reg. 36,075 (July 8, 2021).

156. We are at the very beginning stages of a comprehensive understanding of equity assessment. *See, e.g.*, OMB REPORT, *supra* note 79.

157. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015).

158. *Id.* at 42,273. This rulemaking sparked criticism of administrative overreach, despite being produced through proper procedures and within statutory authority. *See* Johnson, *supra* note 25, at 1785–86.

159. Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,272.

160. *Id.* at 42,273.

The Biden Administration has called for comprehensive equity assessment throughout the federal government.[161] Executive Order 13,985 calls for each agency to "assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs" and goes on to detail components of the assessment.[162] These details include "[p]otential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs . . . [and] taking advantage of agency procurement and contracting opportunities."[163] This is important signaling of the Administration's priorities, but agencies need input from the communities themselves to realize these potential barriers. In addition to hearing from communities, agencies must then set their agendas to respond to community needs, as exemplified by another reporting requirement within the Executive Order: "[w]hether new policies, regulations, or guidance documents may be necessary to advance equity in agency actions and programs[.]"[164]

Beyond agenda-setting, agencies must also assess their enforcement strategies. Because many of the agencies that underserved populations interact with enforce civil rights statutes, agencies should also monitor and assess how well these civil rights goals are met.[165] One type of structural design that might increase enforcement assessment is through statutory enforcement provisions that allow for other institutions to operate as a check on federal agency enforcement discretion through concurrent enforcement.[166] There are twenty-four federal statutes that allow for state enforcement concurrent with the federal agency enforcement.[167]

Another type of structural design responds to the mission disconnect example at the FTC explored in Part III.A. There, the FTC itself was attempting to keep to its mission through enforcement, including its strategic plan to combat fraud in underserved communities.[168] The Judicial Branch

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161. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7010 § 5 (Jan. 25, 2021).

162. *Id.*

163. *Id.*

164. *Id.*

165. For more on the dangers associated with unchecked administrative discretion, see Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 857–61 (2015).

166. *See* Amy Widman & Prentiss Cox, *State Attorneys General Use of Concurrent Public Enforcement Authority in Federal Consumer Protection*, 33 CARDOZO L. REV. 53, 53–54 (2011).

167. *Id.* at 53, 64–65.

168. *See* FED. TRADE COMM'N, COMBATTING FRAUD IN AFRICAN AMERICAN AND LATINO COMMUNITIES: THE FTC'S COMPREHENSIVE STRATEGIC PLAN (2016), https://www.ftc.gov/system/files/documents/reports/combating-fraud-african-american-latino-communities-ftcs-comprehensive-strategic-plan-federal-trade/160615fraudreport.pdf.

spurred the conditions for the disconnect through its narrow interpretation of statutory authority in this example.[169] Statutory amendments that would fill the gap created by doctrinal resistance to implied rights can shore up the connection between an agency's stated mission and the enforcement outcomes.[170] Assuming express statutory rights, a strong Inspector General might also capture ongoing mission disconnect, and legislative efforts are underway to strengthen this form of oversight of an agency's fulfillment of its mission.[171]

Building in statutory mechanisms to require ongoing assessment as to how well an agency's regulatory agenda and enforcement priorities conform to the mission of the agency mirrors the assessment process undertaken by access to justice reformers in state court systems. A complete picture of the administrative justice gap will require much more work, but it must begin with internal assessment and the Executive Order 13,985 sparks the right opening.

### *B. Voice Reforms Addressing Culture Disconnect*

To fully understand the administrative justice gap, and to implement inclusive regulation, agencies need input from a variety of sources. Although administrative agencies traditionally include mechanisms for people to come to the agency,[172] they must re-orient to consider and expand ways in which the agency can go to communities. Many aspects of current agency structure and procedures privilege certain communities toward providing input to agencies, which skews the agency's ability to assess and respond to access to justice problems.[173] By intentionally building pathways to communities underserved and marginalized by agency agenda-setting, agencies can expand the information upon which they rely to structure their processes, policies, and outcomes.

Engagement of underserved communities in administrative agenda-setting has been a growing area of administrative scholarship.[174] Agenda-

169. *See* AMG Cap. Mgmt. v. FTC, 141 S. Ct. 1341, 1352 (2021) (interpreting the words "permanent injunction" as not authorizing the FTC to obtain monetary relief).

170. For an example of such a statutory amendment, see Prentiss Cox & Christopher L. Peterson, *Public Compensation for Public Enforcement*, 39 YALE J. ON REGUL. 61, 128 (2022) (describing Congress' extension of the Security and Exchange Commission's statutory authority in response to restrictions imposed by the Court's decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020)).

171. *See* Securing Inspector General Independence Act of 2021, S. 587, 117th Cong. (2021).

172. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 553; Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

173. *See* Feinstein, *supra* note 5, at 13 (reviewing studies showing that open access provisions tended to be used by industry and higher income individuals).

174. For more on democratizing administrative notice-and-comment, see generally *Panel 3: Barriers Preventing Underserved Communities from Participating in Regulatory Policymaking*, ADMIN. CONF.

setting can be expanded within communities and across agencies by adopting a broad definition that includes "all the choices and opportunities that both agency officials and other participants in the regulatory process have about what problems agencies emphasize and what alternatives they consider."[175] Examples include encouraging promotion and flexibility of guidance that can connect those in government with those whose lives are being affected by the governance;[176] expanding roles for participation in the pre-rulemaking phase;[177] broadening consultative requirements;[178] and increasing the use of technology to engage more participants online.[179] The Biden Administration is acting on this goal through executive orders that mandate "increase[d] coordination, communication, and engagement with community-based organizations and civil rights organizations."[180] However, these public engagement tools generally remain "unstructured and ad hoc."[181]

Building pathways into communities is key. Agency design elements that help to establish communication with communities include statutory mechanisms that allow for input from people who are too often left without channels to reach policymakers. Examples of statutory and regulatory designs meant to connect people to policymakers include: expanding the role of legal aid in administrative proceedings, using ombudspersons as outreach, providing accessible complaint channels that are incorporated into agency priorities, expanding reach through technology and geography, and mandating representational staffing requirements.

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OF THE U.S. (Nov. 10, 2021), https://youtu.be/WkwZmbp4hsg; Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment*, THE LPE PROJECT (July 31, 2019), https://lpeproject.org/blog/reclaiming-notice-and-comment/ (describing instances of grassroots engagement in the notice-and-comment process and discussing the value of such engagement).

175. Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 97 (2016).

176. *See* NICHOLAS R. PARRILLO, ADMIN. CONF. OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 15 (2017).

177. *See also* SANT'AMBROGIO & STASZEWSKI, *supra* note 154, at 102–03 (commenting on the innovative collaboration between the Cornell e-Rulemaking Initiative and the Consumer Financial Protection Bureau (CFPB) and Department of Transportation under the Obama Administration to create the Regulation Room, an experiment in e-rulemaking).

178. *See* Feinstein, *supra* note 5, at 35.

179. *See* DANIEL A. FARBER, LISA HEINZERLING & PETER M. SHANE, AM. CONST. SOC'Y, REFORMING "REGULATORY REFORM": A PROGRESSIVE FRAMEWORK FOR AGENCY RULEMAKING IN THE PUBLIC INTEREST, 3–4 (2018).

180. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7,009, 7,011 § 8 (Jan. 25, 2021).

181. *See* SANT'AMBROGIO & STASZEWSKI, *supra* note 154, at 7.

In 2015, the Obama White House developed the Legal Aid Interagency Roundtable (LAIR), an interagency roundtable that brought the DOJ and other federal agency officials together to formalize a pathway for federal agencies to understand the civil justice issues faced by underserved communities and to partner with civil legal aid providers to identify areas where legal services can advance federal goals.[182] By bringing the voices and perspectives of the affected communities to the federal government in a systemized way, LAIR provided guidance as to how to advance agency missions by improving agency policies that affect access to civil legal aid, and thereby also increase legitimacy among the folks struggling with housing, family, education, and economic instabilities. As structured, LAIR was led through the DOJ and reported to President Obama.[183] Primary goals of LAIR were to raise awareness and improve upon collaboration between federal agencies and civil legal aid providers; "develop policy recommendations that improve access to justice in Federal, State, local, tribal, and international jurisdictions"; and assisting with "implementation of Goal 16 of the United Nation's 2030 Agenda for Sustainable Development."[184] Examples of these goals are chronicled in the White House Legal Aid Interagency Roundtable (WH-LAIR) Toolkit.[185]

Just one example from the WH-LAIR toolkit can illustrate how collaboration between agency officials and civil legal aid attorneys builds pathways into communities that allow for necessary input into agency agenda-setting and enforcement:

> While investigating mortgage loan modification companies, the FTC identified a company that appeared to target Spanish-speakers with fake mortgage assistance relief. To investigate further, the FTC needed to locate the targeted consumers. Because obtaining information from these consumers can prove difficult—some do not speak English fluently and may be reluctant to speak with federal law enforcement—the FTC contacted an attorney at Texas RioGrande Legal Aid who had filed complaints on behalf of her client, a consumer victimized by the company. The attorney helped the FTC obtain a sworn statement about how the company deceived consumers, which was critical to the FTC's law enforcement action against the mortgage company. Ultimately, a court halted the company's deceptive practices.[186]

182. Memorandum on Establishment of the White House Legal Aid Interagency Roundtable, 1 PUB. PAPERS 1178, 1178–79 (Sept. 24, 2015).

183. *Id.*

184. *Id.*

185. *The WH-LAIR Toolkit*, U.S. DEPT. OF JUST., www.justice.gov/atj/file/450451/download (last visited Feb. 12, 2022).

186. *Id.* at 9.

The Trump White House convened the roundtable only twice.[187] In May 2021, the White House issued a Memorandum reinvigorating LAIR with an immediate focus "on the impact of the COVID-19 pandemic on access to justice . . . . LAIR shall . . . address access-to-justice challenges the pandemic has raised and work towards identifying technological . . . solutions that both meet these challenges and fortify the justice system's capacity to serve the public and be inclusive of all communities."[188]

There are additional ways to increase community representation in agency work. The federal agencies currently contain a variety of limited ombuds roles.[189] Even in their limited setting, these roles have proven to be a method for engaging underserved communities with the work of the agency. As ACUS points out in its recent report, in which it calls for an expansion of ombuds roles, the ombuds model developed in earnest out of the civil rights era to emphasize "justice, equality, dissent, citizen rights, and 'alternatives to formal, authoritative, and bureaucratic processes.'"[190] These ombuds roles allow for an informal pathway toward conflict resolution between the agency and the public. Legislative best practices codify these roles;[191] however, many agency ombuds function as executive complaint handlers and are not legislatively designed. The federal government also employs advocate ombuds who represent specific groups in their complaints with agency action.[192]

An access to justice model design of an ombuds is seen with the CFPB Ombuds role created by the Dodd-Frank Act.[193] This model incorporates the main pillars of a strong ombuds role: independence, confidentiality, and impartiality.[194] Through choices about the reporting structure of the ombuds

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187. *See Legal Aid Interagency Roundtable*, DEP'T OF JUST., https://www.justice.gov/olp/legal-aid-interagency-roundtable (last visited Feb. 12, 2022) (noting that the Legal Aid Interagency Roundtable met on April 2, 2019 and February 21, 2020).

188. *See* Memorandum, Restoring the Department of Justice's Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable, 86 Fed. Reg. 27,793, 27,795 (May 18, 2021); *see also* LEGAL AID INTERAGENCY ROUNDTABLE, *supra* note 112.

189. *See* CAROLE S. HOUK, MARY P. ROWE, DEBORAH A. KATZ, NEIL H. KATZ, LAUREN MARX & TIMOTHY HEDEEN, A REAPPRAISAL—THE NATURE AND VALUE OF OMBUDSMEN IN FEDERAL AGENCIES 84–163 (2016) (report to ACUS) (providing case studies of federal agency ombuds).

190. *Id.* at 13.

191. AM. BAR ASS'N, STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES 18–19 (2004).

192. HOUK et al., *supra* note 189, at 37–38.

193. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1013(a)(5), 12 U.S.C. § 5493(a)(5).

194. Admin. Conf. of the U.S., Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,317 (Dec. 23, 2016).

office, a culture and practice of "not tak[ing] sides," and confidentiality safeguards including white noise machines, locked offices, and procedures for handling records, the CFPB serves as a strong example of an agency ombuds office that reflects the access to justice goal of increasing representation and voice in the administrative process.[195] As discussed in a report from ACUS, the CFPB ombuds office has generated tangible results highlighting systemic issues and promoting access to agency processes for all.[196]

Beyond the ombuds role, other robust complaint mechanisms can provide a pathway for the concerns of underserved communities to infuse agenda-setting, especially if the complaints are communicated to enforcers and used to guide their strategies.[197] In structuring complaint mechanisms in agencies, lawmakers and bureaucrats must center accountability and transparency to avoid complaints being slow-walked or set aside until limitations periods run. The CFPB's collection of personal stories by consumers dealing with credit, debt collection, student loans, and other financial matters is a particularly effective use of complaint processes and education.[198] These stories are published online and used to guide data collection and enforcement priorities at the agency.[199] The complaint architecture is designed well from an access to justice perspective, but, as with all agency structure, its effectiveness depends on leadership and culture at the agency to learn from it.[200]

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195. HOUK et al., *supra* note 189, at 89–90.

196. HOUK et al., *supra* note 189, at 97–99, 103, 105.

197. The CFPB acknowledges the role of complaints in agenda-setting but notes that the information gathered from complaints is incomplete. *See* CONSUMER FIN. PROT. BUREAU, SMALL BUSINESS REVIEW PANEL FOR DEBT COLLECTOR AND DEBT BUYER RULEMAKING app. B (2016) ("Data from consumer complaints regarding debt collection . . . inform the Bureau's work, but these data sources may provide an incomplete view of consumers' debt collection experiences. Consumer complaint data . . . reflect only the experiences of those consumers who contacted the Bureau . . . and therefore may not be representative of consumers' experiences generally."). To address this issue, the CFPB research staff survey consumers on their experiences with financial issues. *Id.*

198. *See Everyone Has a Story*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/consumer-tools/everyone-has-a-story/ (last visited Feb. 12, 2022); SANT'AMBROGIO & STASZEWSKI, *supra* note 154, at 57–58 (describing the CFPB's use of complaint hotlines).

199. *See* Thompson, *supra* note 28, at 363 (stating how "[e]ach of the offices . . . is expected to develop and communicate expertise on the experiences and views of the communities . . . [E]ach office . . . is positioned to build relationships with advocates and organizations interested in the needs of the community . . . and to serve as a conduit between those communities and the CFPB . . . .").

200. Under Director Kraninger's leadership, more could have been done to harness the community information gathered from the complaint mechanisms in place at the CFPB. *See*

Developing accessible technological pathways between underserved communities and federal programs will also increase the federal government's ability to provide equitable opportunities for communities to play an active role in agency action, from policymaking to adjudication to benefits. However, access to technology remains a hurdle, as does designing the technology to allow those most in need to access its potential.[201] Access to justice criteria that allow state courts to function more inclusively provide insights that also apply to administrative adjudication, especially as agencies confront the new challenges and opportunities presented by technology.[202] Some of these include: increasing available locations for people to access the Internet while maintaining privacy required for adjudication or other legal matters; making sure participants are clearly notified of the various hearing options available with clear processes to elect hearing format; publishing a short, easy to read guide for hearing participants to consult before and during the hearing; dedicating agency staff toward tech support and training, both for the adjudicators and the hearing participants; and surveying participants and keeping data as to the user experience and the decisional outcome.[203]

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RICHARD CORDRAY, DIANE E. THOMPSON & CHRISTOPHER PETERSON, WHITE PAPER ON IMMEDIATE ACTIONS THE CFPB CAN TAKE TO ADDRESS THE COVID-19 CRISIS 1–2 (2020), https://www.crreaproject.org/wp-content/uploads/2020/04/Cordray-et-al-White-Paper-on-CFPB-Response-to-COVID-19-Crisis-FINAL.pdf ("[T]he CFPB has a first-class consumer complaint response system that provides real-time information from consumers all over the country on what is happening in their lives. The CFPB should use it to learn from consumers what exactly is happening and make the answers publicly available.").

201. *See* REBECCA SANDEFUR, LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF US LEGAL TECHNOLOGIES (2019) (examining the variety of technologies available to people with access to justice problems and delineating some of the problems with these tools, including mismatched needs and tool services, issues stemming from tools that require large data capabilities, language and reading comprehension barriers, and Internet capability barriers).

202. Development of guidelines for agencies on these issues is currently underway. *See* FREDRIC I. LEDERER & CTR. FOR LEGAL & CT. TECH., DRAFT REPORT TO THE ADMIN. CONF. OF THE U.S., VIRTUAL HEARINGS IN AGENCY ADJUDICATION (2021). A complication is that many people, especially those in already underserved communities, lack access to the Internet. *See* Lisa Rein, *Fired and Defiant, Former Social Security Chief is Cut Off From Agency Computers*, WASH. POST (July 12, 2021, 8:32 PM), https://www.washingtonpost.com/politics/biden-social-security-fired/2021/07/12/b1837ec0-e324-11eb-b722-89ea0dde7771_story.html?case=fms ("The agency has been under pressure for months from lawmakers in both parties to return to serving the public in person after complaints from constituents who do not have access to the Internet."); *see also* Mike Jordan, *Black US Farmers Dismayed as White Farmers' Lawsuit Halts Relief Payments*, GUARDIAN (June 22, 2021, 3:15 PM), https://www.theguardian.com/us-news/2021/jun/22/black-farmers-loan-payments ("USDA is increasing its reliance on using [Internet] as a way to push out information, forgetting that a lot of people just don't have access.").

203. ACUS recently developed best practices for remote adjudications that include many of these practices as well. *See* Adoption of Recommendations, 86 Fed. Reg. 36,075, 36,084–85 (July 8, 2021).

Beyond the above design elements, statutory requirements that mandate representation can integrate underserved voices into all aspects of agency action: agenda-setting, rulemaking, adjudication, data collection, education, and grant-making.[204] Examples of such statutory mandates include the recently proposed Anti-Racism in Public Health Act, which would establish a National Center on Antiracism and Health and mandates that the person appointed as Director have "experience living in and working with racial and ethnic communities."[205] The Dodd-Frank Act similarly empowered a "Consumer Advisory Board" comprised of "experts in consumer protection, financial services, community development, fair lending and civil rights, and consumer financial products or services and representatives of depository institutions that primarily serve underserved communities and representatives of communities that have been significantly impacted by higher-priced mortgage loans" to advise and consult on the activities of the CFPB.[206]

Moreover, expanding and building pathways between federal agencies and communities requires considering geography and regionality.[207] As Brian Feinstein points out, there are a small number of geographic diversity mandates in federal agency design.[208] This dimension is reflected in proposed legislation. For example, the National Center on Antiracism and Health, first proposed in the Anti-Racism in Public Health Act of 2020, will "[e]stablish . . . at least 3 regional centers of excellence, located in racial and ethnic minority communities."[209]

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204. Recent debates over whether Congress can structure independent agencies with single heads that span administrations are related but separate from this discussion. *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2193, 2204, 2207 (2020) (Trump Administration firing of Obama-appointed head of the CFPB); Rein, *supra* note 202 (discussing how *Seila Law* precedent paved the way for the Biden Administration to fire the Trump-appointed heads of the Federal Housing Financial Agency and the Social Security Administration). Here, the focus is instead on Congress mandating representation of certain communities, regardless of term length.

205. Anti-Racism in Public Health Act of 2020, S. 4533, 116th Cong. § 320B(a)(1) (2020).

206. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5494(a)–(b).

207. See Jessica Bulman-Pozen, Our Regionalism, 166 U. PA. L. REV. 377, 394 (2018); Dave Owen, Regional Federal Administration, 63 UCLA L. REV. 58 (2016).

208. Feinstein, *supra* note 5, at 26 n.127 ("Four entities have geographic diversity mandates. *See* 12 U.S.C. § 244 (Board of Governors of the Federal Reserve System); 12 U.S.C. § 1427(b)(1) (Federal Home Loan Bank boards); 15 U.S.C. § 78cc (Securities Investor Protection Corporation); 47 U.S.C. § 396 (Corporation for Public Broadcasting).").

209. Anti-Racism in Public Health Act of 2020, § 320B(a)(2)(C).

### *C. Data Reforms*

The assessment and representation reforms discussed above are integrally connected to the need for uniform best practices in the collection and dissemination of data. Researchers commonly use administrative data, but the usefulness of this data can be limited.[210] While statutory authority often includes some aspect of mandated data-collection and reporting to Congress, statutory design can also strengthen how the type of data is noted in the dataset, how the data is collected, and how the data is reported. The Evidence-Based Policymaking Commission Act of 2016 is an important milestone in ongoing data collection reform efforts. With this legislation, Congress created the Commission on Evidence-Based Policymaking to "conduct a comprehensive study of the data inventory."[211] Results of the Commission's work led to the passage of the Foundations for Evidence-Based Policymaking Act of 2018,[212] which promotes many of the same data design and data practices seen with the access to justice data advocacy, including using data to support program evaluation[213] and facilitating pathways for people to provide input on how data is used and disseminated.[214]

Shoring up these principles through the lens of improving access to justice requires focusing on data that captures the extent of the administrative justice gap. This type of outcomes data is hard to gather and requires intentional collaboration with communities. The more the agency misses the mark with enforcement strategy or policy design, the more people lose trust in the government's ability or willingness to solve the problems it sets out to solve, the less likely people are to engage with research and assessment to understand the effectiveness or ineffectiveness of the agency interventions, the more ineffective data becomes, which all leads back to an inability to develop effective policy.

The Dodd-Frank Act exemplifies one best practice to disrupt this cyclical problem: placing research as a primary agency function and further specifying that the agency research and report on "experiences of

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210. NAT'L ACAD. OF SCIS., ENG'R, & MED., INNOVATIONS IN FEDERAL STATISTICS: PANEL ON IMPROVING FEDERAL STATISTICS FOR POLICY AND SOCIAL SCIENCE RESEARCH USING MULTIPLE DATA SOURCES AND STATE-OF-THE-ART ESTIMATION METHODS 31, 38, 40, 42, 44, 46, 48 (Robert M. Groves & Brian A. Harris-Kojetin eds., 2017).

211. OFF. OF MGMT. & BUDGET, COMPREHENSIVE DATA INVENTORY (2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/mgmt-gpra/comprehensive_data_inventory.pdf (last visited Feb. 12, 2022).

212. Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115-435, 132 Stat. 5529 (codified in scattered sections of 5 U.S.C. and 44 U.S.C.).

213. 5 U.S.C. § 312.

214. Open Government Data Act, 44 U.S.C. § 101 (2019).

traditionally underserved consumers."[215] We need to know more about how people's lives are affected by federal agency involvement to assess whether the policy interventions are successful. Ideally, a federally funded research and development center, perhaps at the National Science Foundation, should house this data.[216]

To center access to justice principles, agencies need leadership to prioritize and communicate these practices to incorporate underserved communities throughout the data design and collection process.[217] LAIR is set up to do much of this work. Identifying the outcomes mandated by congressional authority as connected to agency mission and transparently measuring and tracking these outcomes over time aligns with the United Nations Sustainable Development Goals and LAIR's work.[218] Moreover, agencies need to be held publicly accountable to those outcomes. Ongoing and transparent measurement of the agency's progress can and should be intentionally built into each agency's design.

Defining outcomes will involve humanizing costs. Ongoing racial impact statements, as used in state policymaking, can emphasize and reaffirm that costs borne by underserved communities need to be considered when setting policy agenda and tracking outcomes.[219] To do this, we must disaggregate

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215. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5493(b)(1)(F).

216. Nick Hart & Nancy Potok, *Modernizing U.S. Data Infrastructure: Design Considerations for Implementing a National Secure Data Service to Improve Statistics and Evidence Building*, DATA FOUND., https://www.datafoundation.org/modernizing-us-data-infrastructure-2020 (Jul. 2020). ("[T]he goal of aligning the data needs of potential users and decision-makers with timely . . . capacity and resources is attainable . . . . [R]esearchers and government staff have . . . produce[d] . . . evidence that informed major policy actions . . . [resulting in] improvements in economic mobility, public health, food safety, environmental quality, child welfare protections, and homelessness policy.").

217. To this end, the Biden White House recently directed the Office of Management and Budget to "propose procedures that take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities." Presidential Memorandum, Modernizing Regulatory Review, 86 Fed. Reg. 7223 § 2(b)(i)–(ii) (Jan. 20, 2021) (explaining how and why the costs of administrative data should not outweigh the benefits and should not harm underserved communities).

218. *See Goal 16: Promote Just, Peaceful and Inclusive Societies*, SUSTAINABLE DEV. GOALS, UNITED NATIONS, https://www.un.org/sustainabledevelopment/peace-justice/ (last visited Feb. 12, 2022).

219. *See* Ceballos, Engstrom & Ho, *supra* note 26, at 60–62; *see also* William Kennedy, Gillian Sonnad & Sharon Hing, *Putting Race Back on the Table: Racial Impact Statements*, 47 J. POVERTY L. & POL'Y 154, 154, 156–58 (2013) (racial impact statements inform officials on

data.[220] The Biden Administration is taking steps to strengthen data equity through a recent executive order proposing a racial equity interagency working group. The group will be designed to coordinate best data collection practices, including the disaggregation of data, to capture the outcomes of agency policies and programs across the diverse communities that the agency intends to benefit.[221] This is a vital first step.

The Anti-Racism in Public Health Act of 2020 also focuses on how we collect data with provisions that propose specific inclusive data collection procedures, including codified disaggregated data collection, reporting mandates,[222] and developed pathways for community voices in all aspects of data collection.[223]

Understanding enforcement strategies is yet another step toward measuring and tracking these strategies and their outcomes across communities.[224] Transparent complaint systems and open access to enforcement documents allow people to better understand how an enforcement agency is setting its enforcement priorities. The CFPB models this best practice through its online database of enforcement documents.[225] Adding disaggregated data to these repositories would increase representation and accountability even further.

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what is needed, and officials and researchers can use that information for better policymaking); Andre M. Perry & Darrick Hamilton, *Just as We Score Policies' Budget Impact, We Should Score for Racial Equity as Well*, BROOKINGS INST. (Jan. 25, 2021), https://www.brookings.edu/blog/the-avenue/2021/01/25/just-as-we-score-policies-budget-impact-we-should-score-for-racial-equity-as-well/.

220. VICTOR RUBIN, DANIELLE NGO, ANGEL ROSS, DALILA BUTLER & NISHA BALARAM, POLICYLINK, COUNTING A DIVERSE NATION: DISAGGREGATING DATA ON RACE AND ETHNICITY TO ADVANCE A CULTURE OF HEALTH, 5–6, 34 (2018).

221. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7010 (Jan. 25, 2021).

222. *See, e.g.*, Anti-Racism in Public Health Act of 2020, S. 4533, 116th Cong. § 320B(a)(2)(A)(i)-(iv); *id.* § 320B(a)(2)(D)(i)-(iv) ("Such data shall—(i) be comprehensive and disaggregated, to the extent practicable, by including racial, ethnic, primary language, sex, gender identity, sexual orientation, age, socioeconomic status, and disability disparities.").

223. *See, e.g.*, *id.* § 320B(a)(2)(C); *id.* § 320B(a)(2)(F)(i) ("[P]utting measures of racism in population-based surveys"); *id.* § 320B(a)(2)(G) ("Coordinate with the Indian Health Service and with the Centers for Disease Control and Prevention's Tribal Advisory Committee to ensure meaningful Tribal consultation, the gathering of information from Tribal authorities, and respect for Tribal data sovereignty.").

224. *See* Cox, Widman & Totten, *supra* note 92.

225. The CFPB website has a searchable database of all enforcement actions and their relevant documents. *See Enforcement Actions*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/enforcement/actions/ (last visited Feb. 12, 2022).

### *D. A Note About Permanence*

The above examples are inspiring, but there is a cautionary tale here as well. The Obama Administration made commitments to improving the federal government's role in access to justice with its creation of an Office of Access to Justice in the DOJ and its subsequent creation of the White House Legal Aid Interagency Roundtable. While these initiatives made a lot of real progress in a short time, the Trump Administration dismantled the Office of Access to Justice[226] and rarely convened the Roundtable, grinding Obama-era efforts to a halt.

Now the Biden Administration is re-animating and building upon the Obama-era commitments,[227] yet the design tools explored above need permanence to have the intended effect of creating an inclusive and responsive administrative apparatus for federal policy. While permanence seems antithetical to the administrative state, since one of its main purposes is to be nimble and flexible, the structure of agencies is a different matter. There, permanence is necessary and legitimate. Congress must be involved too, both in shoring up existing agencies and creating new agencies. Recently proposed legislation to revive the Office of Access to Justice in the DOJ could provide this institutional stability.[228] The DOJ and LAIR could then convene the agencies for the purpose of prioritizing and instituting these changes within their statutory authority.

Here is where the constitutional accountability debate returns at full speed.[229] While the current Biden Administration is supportive of playing an active role in implementing inclusive assessment, representation, and data practices, such design tools should not be entirely subject to executive prerogative. Congress would be a natural instigator of inclusive agency design through passing and amending agency enabling statutes. However, as Jody Freeman and Sharon Jacobs point out, the Supreme Court has recently been a strong proponent of presidential control of agencies, which could chill possible legislative action, too.[230] The Government

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226. Katie Benner, *Justice Department Office to Make Legal Aid More Accessible is Quietly Closed*, N.Y. TIMES (Feb. 1, 2018), https://www.nytimes.com/2018/02/01/us/politics/office-of-access-to-justice-department-closed.html.

227. Memorandum from the Att'y Gen. on Access to Just. to the Deputy Att'y Gen. (May 18, 2021), https://www.justice.gov/ag/page/file/1395271/download; *see also* Poppe, *supra* note 58, at 801 (proposing a revamped and broader Office for Access to Justice within the Department of Justice).

228. Office for Access to Justice Establishment Act of 2020, H.R. 9018, 116th Cong. (2020).

229. However, "agencies' lack of electoral accountability may be an advantage rather than a defect if we conceive of democratic accountability more broadly than merely standing for periodic elections." *See* SANT'AMBROGIO & STASZEWSKI, *supra* note 154, at 14.

230. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020); Freeman & Jacobs, *supra* note 77, at 633.

Accountability Office already plays a role in oversight of federal agencies on some of these metrics.[231] This could be expanded to include a comprehensive repository of inclusive design structures, where they are, where they are needed, and whether they are successful.

ACUS is another place to ground this work while shielding it from extreme partisan shifts. ACUS could act as a consultancy for public engagement in administrative agenda-setting;[232] this role could be expanded to promote the adjacent principles of assessment and promotion of inclusive data practices. Housing an access to justice review at ACUS would also provide some protection from aggressive deregulatory administration shifts.

An under-explored aspect of permanence lies in the culture of the agency itself.[233] Statutory architecture and agency design can only mandate so much, and internal signaling about importance may, in the end, carry substantial weight in moving agencies toward realizing any inclusive potential envisioned by these current examples. More detailed case studies are needed to better understand if and how agency culture frustrates even the best design practices.

## CONCLUSION

The main goal of this project is to map out a series of elements that define the state court access to justice movement and show how these elements would substantially increase fairness and inclusivity in the American administrative state if comprehensively embraced by the federal agencies. This is a rather coarse sweep through a variety of promising innovations. Of course, this is not to suggest a seamless overlap between the calls for access to justice in the state and in the federal agencies; in fact, federal administrative agencies contend with political and constitutional limitations that do not restrict state courts in the same ways. The hope, however, is that principles of access and justice that have been increasingly adopted in the state courts will be considered by the DOJ and the federal agencies themselves as a guide for their own internal structure and design.

One limitation of this project is that much of administrative practice is outside of traditional sources of codified law: constitution, statutes, regulations, and guidance. Any typology drawing from codified institutional design found in sources of laws can only capture a small view of how the

231. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-539, AGRICULTURAL LENDING: INFORMATION ON CREDIT AND OUTREACH TO SOCIALLY DISADVANTAGED FARMERS AND RANCHERS IS LIMITED (2019).

232. SANT'AMBROGIO & STASZEWSKI, *supra* note 154, at 9–17.

233. *See* Schlanger, *supra* note 108; Thompson, *supra* note , at 372 (describing how some research arms were housed separate from policymaking, and cross-pollination between the divisions was up to the particular director).

general public experiences administrative law. More work is needed to surface these experiences and develop best practices to respond to gaps in the architecture supporting agency action.

Political and bureaucratic challenges abound as well. Drawing again from lessons learned by the access to justice movement, there can be a sense of territoriality that results in pushback from gatekeepers who stand to lose a sense of power when specialized processes are made accessible to laypeople.[234] There are also jurisdictional issues, and the federal government can lead the way here. Through its granting programs, the federal agencies can model and incentivize best practices for its state and local partners.[235] Taking an intentional access to justice view of agency design will better prepare federal agencies to have the architecture needed to respond to crisis through their state and local partners in an effective manner.

Finally, partisan and racialized politics haunt any discussion of reform of administrative agencies. Reforming the administrative state to solve people's everyday problems, and specifically focusing on those who have been underserved by our government for so long, is not simply a design challenge.[236] But the current Administration appears receptive to re-thinking how we design our federal administrative institutions. Given this timing, developing a systematic view of best practices creates knowledge and surfaces priorities for future evolution of a representative and more just administrative state.[237]

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234. *See* Rhode, *supra* note 41, at 1239 (describing the resistance of lawyers and the organized bar to proposals to unbundle legal services or otherwise expand legal services providers beyond lawyers).

235. For example, the COVID rental assistance granted by the U.S. Department of Treasury Emergency Rental Assistance program struggled to reach its full impact as state and local partners were confronted with design challenges to distribute this money effectively. Case studies based on interviews with state and local administrators reveal access to justice design problems including difficulties "targeting vulnerable communities; engaging landlords; boosting program efficiency; and partnering with nonprofits." *See* CLAUDIA AIKEN, VINCENT REINA, JULIA VERBRUGGE, ANDREW AURAND, REBECCA YAE, INGRID GOULD ELLEN, ET AL., LEARNING FROM EMERGENCY RENTAL ASSISTANCE PROGRAMS, HOUS. CRISIS RSCH. COLLABORATIVE 6–7, 16, 18 (2021). In addition to these issues with community engagement, the studies also revealed that vague and shifting guidelines made the program ineffective.

236. *See* Otalunde Johnson, *An Opening: Advocating for Equity in a Polarized America*, POVERTY & RACE RSCH. J., Nov.-Dec. 2020, at 1, 1. This challenge is exemplified in pending litigation in Wisconsin and Tennessee on racism in United States Department of Agriculture subsidies. *See* Jordan, *supra* note 202; *see also* American Rescue Plan Act of 2021 § 1005, 7 U.S.C. § 1921.

237. *See* Rhode, *supra* note 41, at 1257 ("The challenge remaining is to learn more about what strategies work best, and to make them a public and a professional priority. If our nation is truly committed to equal justice under law, we must do more to translate that rhetorical aspiration into daily reality.").

Infrastructure must be transformed to capture and reflect the experience people have with regulatory decisionmaking. Through sustained commitment to intentional assessment, representation, outreach, and transparency in data, we must structure the federal government in such a way that the outcomes of people's interactions with regulatory bodies improve and people's vital needs are met by the programs designed to help them. The innovative policies, highlighted herein, provide new thinking about what is possible. But an administrative system rooted in and reflective of community will require a wholesale shift—we need more networks and less of a top-down approach. This will require deconstruction of an ingrained top-down structure; financial and political support for the development and adoption of equitable assessment tools; and intentional creation of new agency structure and norms that will foster a culture of networks. Intentionally designing for inclusive agencies will require commitment across institutions, but lessons learned from the state courts offer guidance.