INTRODUCTION

Equity and Administration: A Symposium

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ABSTRACT

Amid pivotal debates about the administrative state's powers and procedures, another group of debates has arisen around the substance of administrative power. Bruising election cycles, charges of foreign conspiracies, a worldwide pandemic, and heightened social tensions have raised fundamental questions: Which rights should governments protect? Who should benefit from government programs and why?

President Joe Biden offered one answer to those questions on his first day in office.[1] His administration has been working to "embed equity into all aspects of Federal decision-making."[2] One preamble to an equity-related executive order asserted that action is necessary to address "systemic racism in our Nation's policies and programs" so that the government "can support and empower all Americans."[3] The policy attempts to balance certain scales by identifying and benefiting groups of people who have faced past discrimination.

And this, in turn, has raised concerns about the executive branch unilaterally ensconcing one particular notion of equity into the apparatus of the administrative state. Expert administration is one of the main pillars allegedly upholding the legitimacy of the modern administrative state.[4] Public-spirited, non-ideological civil servants with years of extensive training in specialized fields were to have broad discretion to set policy for the nation within their fields of expertise. Major normative attempts to redirect the efforts of those civil servants may create tension with the policy recommendations they might otherwise make. Such

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1. *See, e.g.*, Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7009 (Jan. 20, 2021).

2. *See*, Executive Order 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 88 Fed. Reg. 10825 (Feb. 22, 2023).

3. *Ibid.*

4. *See, e.g.*, Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017) ("Anti-administrativists fail to recognize that the key administrative state features that they condemn, such as bureaucracy with its internal oversight mechanisms and expert civil service, are essential for the accountable, constrained, and effective exercise of executive power.").

deviations would undermine the case that expert judgment is the basis of those officials' authority.

Are these contemporary policy proposals on "equity" intended to advance the Declaration of Independence's own creedal recognition that all of us "are created equal"[5] and thus "would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness?"[6] Earlier drives for equal justice under the law have been supplanted by debates about what "equality" means. Perhaps we should only with caution indulge the supposition that good administration can be maintained without a commitment to the earlier conception of equality under the law.

We organized this symposium to help sort through these pressing and fundamental debates. We posed this question to some of the top thinkers about equity, equality, and regulatory policy: *what is (or should be) the relationship between administration and equity*?

Their responses, in the pages that follow, are a thoughtful, wide-ranging, collection of essays.

On the relationship between racial "box-checking" and the administrative state, Scalia Law's David E. Bernstein tells the story of where the ubiquitous demographic survey categories came from and describes how "the classifications reflected in those boxes are the product of an obscure bureaucratic process that reflected a combination of amateur anthropology and sociology, interest group lobbying, incompetence, inertia, lack of public oversight, and happenstance."[7] He questions whether the government should retain its official racial classification system given that no significant controversy attended the fact that "in January 2021, the US had a Catholic president, a Catholic speaker of the House, six Catholic (and two Jewish) Justices on the Supreme Court, a Jewish Senate majority leader," and a multiracial vice president.[8]

Jonathan Berry, managing partner of Boyden Gray PLLC, also examines federal racial classification, writing, "Race is an objectively minor attribute of the human person, and foregrounding it diminishes the inherent and equal dignity of every human being and leaves our society degraded in the process."[9] Rather than serving to ensure equality for all, he finds that federal racial classification "enables and serves as a catalyst for the worst excesses of DEI" because it leads "to both more racial discrimination and less-effective governance."[10] He argues that advocates should file constitutional challenges against racial classifications by administrative agencies.

Ming H. Chen of U.C. Law San Francisco reflects on the equity-related executive orders[11] implemented by the Biden administration in the context of the recent

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5. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

6. Martin Luther King Jr., I Have a Dream (Aug. 28, 1963).

7. *See* David E. Bernstein, *Racial "Box-Checking" and the Administrative State*, 22 GEO. J.L. & PUB. POL'Y 377 (2024). (Internal quotations omitted).

8. *See id.*

9. *See* Jonathan Berry, *Curbing Racial Classifications*, 22 GEO. J.L. & PUB. POL'Y 385 (2024).

10. *See id.*

11. *See supra* notes 1–2.

U.S. Supreme Court ruling[12] that Harvard's race-based admissions policies violated the Equal Protection Clause. She writes that "the Biden administration's efforts to calculate costs and benefits in a way that emphasizes distributional effects suggests an avenue for progressive reform foreclosed by Constitutional or statutory litigation."[13] However, she raises separation of powers concerns when she notes in her conclusion, "For the sake of good government, one would rather that regulatory agencies work out the details of how to pursue equity on a small scale [. . .] Sweeping policy is the business of Congress, which lacks the regulatory expertise to sort out the fine-grained details of policy implementation."[14]

Also responding to the recent Harvard case, Patrick Henry College's Jesse Merriam predicts that the case does not signal the end of affirmative action because America's "commitment to civil rights has taken on a constitutional value" and its "commitment to diversity has taken on a sacred value," so "defeating affirmative action and DEI programs will require fundamentally altering the constitutional order."[15] He cautions against triumphalism in the wake of the decision on the legal right, against contempt for the legal left, and recommends general consternation at the prospect of more frequent ideological clashes and "the further denigration of our constitutional order."[16]

Taking another perspective, University of Virginia Law's Joy Milligan asks, "What kind of administrative state would we have, if the United States had been a true democracy earlier?"[17] She writes that having an administrative state is asking too little since the United States did not "meet even minimal standards for egalitarian democracy until the late twentieth century," leaving the Constitution and the government it established as illegitimate legacies of a time where they were designed and implemented "without the legitimate assent of the governed."[18] She concludes that efforts to pursue equity like the executive orders implemented by the Biden administration[19] are not ambitious enough because they do not address how the underlying institutions have shaped our society and, "We should question whether grafting a set of civil rights goals and structures onto a preexisting administrative state is the right approach."[20]

Finally, Boston College Law School's Bijal Shah critiques originalism and textualism using the lens of critical legal studies. She aims to integrate "the insights of critical theory into administrative law and the separation of powers" by questioning "originalism and textualism's claims of objectivity" and "their tendency

12. Students for Fair Admissions v. President & Fellows of Harvard College, 600 U.S. 181 (2023).
13. *See* Ming H. Chen, *Race and Regulatory Equity*, 22 GEO. J.L. & PUB. POL'Y 395 (2024).
14. *See id.*
15. *See* Jesse Merriam, *Why DEI Will Not Die*, 22 GEO. J.L. & PUB. POL'Y 409 (2024).
16. *See id.*
17. *See* Joy Milligan, *Beyond Equity: The Counterfactual Administrative State*, 22 GEO. J.L. & PUB. POL'Y 425 (2024).
18. *See id.*
19. *See supra* notes 1–2.
20. *See supra* note 17.

toward indeterminacy."[21] For example, she cites the trend in recent years for the U.S. Supreme Court to strengthen presidential control over administrative agencies as a sign that separation of powers formalism obscures latent value judgments and "is likely to harm individuals facing regulation and administrative adjudication."[22] Ultimately, she concludes that the formalist approach to constitutional interpretation "seems flawed, particularly to the extent it does not allow for the correction of imbalances of power between the branches or for responsiveness to threats of tyranny."[23]

All of these papers were presented during a series of webinars hosted by the C. Boyden Gray Center for the Study of the Administrative State.[24] Those webinar panel discussions were moderated by our friends Renée M. Landers of Suffolk University Law School and Kmele Foster from Founders Fund. The Center is thankful for all the webinar panelists, and especially for the authors in this symposium. Above all, we are grateful to have the opportunity to bring together such a wide-ranging group to think about some of the most important issues facing our country.

21. *See* Bijal Shah, *A Critical Take on Separation-of-Powers Formalism*, 22 GEO. J.L. & PUB. POL'Y 441 (2024).

22. *See id.*

23. *See id.*

24. Videos of the panels are available at https://administrativestate.gmu.edu/event/equity-and-the-administrative-state-webinars/ [https://perma.cc/858Y-UKGF].