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How Agencies Can Better Regulate for Racial Justice

Olatunde C. Johnson



The federal government should promote racial equity assessments, equity planning, and audits.

On his first day in office, President Joseph R. Biden signed an [executive order](#) to advance racial equity throughout the federal government by taking a “systematic



approach to embedding fairness in decision-making,” redressing inequities, and advancing equal opportunity in agency policies and programs.

This order is an important step. President Biden’s executive order [promises](#) new, proactive engagement by the administrative state to promote racial equity and other dimensions of inclusion in agency programs. But federal administrative agencies have [played](#) a key role in structuring racial segregation and sustaining racial inequality in housing, health care, access to transit, and wealth. President Biden’s executive order does not, however, lay out specifics, leaving it to agencies and the Office of Management and Budget to give shape to the aspirations of the executive order.

Commentators have [offered](#) a range of promising ideas, including [retooling](#) or abandoning cost-benefit analysis to advance racial justice and equity considerations, [scoring](#) policies and regulations for their impact on racial equity, and [disaggregating](#) agency data by race, ethnicity, and gender, among other characteristics, to help agencies better understand the impact of programs and regulations on particular communities.

Here are three additional ideas to consider.

First, agencies should formalize, strengthen, and require racial equity assessments for governmental entities that receive federal grants.

The current regulatory approach to advance transit justice provides a model. For the past decade, the U.S. Department of Transportation has [required](#) states and localities operating large public transit programs to [assess](#) the racial impacts of their transit changes. The Transportation Department also [requires](#) adopting nondiscriminatory alternatives and including communities of color in its transit decisions.

The Federal Highway Administration has similar rules. These measures, which [implement Title VI of the Civil Rights Act](#) and other federal statutes, [stem](#) from longstanding activism to correct the Transportation Department’s exclusionary funding of mass transit and highway development programs. Federal funding has [excluded](#) Black residents from opportunity-enhancing resources and employment and [destroyed](#) Black neighborhoods to create the interstate highway system. It also

concentrated the effects of pollution and other environmental harms in Black neighborhoods and **shaped** patterns of segregation.

Activist groups have **challenged** transit decisions for inadequate equity assessments, resulting in federal action to halt changes. The equity assessment approach **emphasizes** that transit agencies must now affirmatively collect and evaluate equity impacts prior to implementing an agency action. At the same time, it requires bottom up participation by community groups, **functioning** as a site of democratic and reparative engagement by communities that have long been excluded from transit planning. For example, community groups recently **used** the state transit planning process to redress an interstate highway's harm to Black communities in Syracuse, New York.

But equity assessments are a start, not an end. Its ability to redress and prevent racial inequity by those entities that receive federal grants depends on the quality of the assessment and the vigor of government enforcement. Both can be strengthened and refined. Indeed, on the urging of environmental and transit groups, the Transportation Department has **invited** comments to strengthen and clarify its equity assessment guidance—potentially providing lessons for other agencies going forward.

Second, agencies should create a default equity plan that all federal grant recipients can adopt.

Law professor **Kristen Underhill** and I **offer** this approach to address inequities in the distribution of COVID-19 vaccines. COVID-19 **devastated** communities of color, leading to significantly higher rates of disease and death. But in the initial stages of the vaccine's rollout, white communities **demonstrated** a markedly higher take-up of COVID-19 vaccines than communities of color. Some reasons for this disparity **are** distinct to vaccines. For instance, communities of color may **hold** a deep and justified medical mistrust. Moreover, new and emerging medical technologies are typically **adopted** by the most economically advantaged.

In addition, low-income communities of color **faced** structural impediments to obtaining the vaccine, including lack of a stable connection to the internet to schedule vaccine appointments and a lack of access to transit needed to get the



vaccine. In that context, the Centers for Disease Control and Prevention (CDC) and U.S. Department of Homeland Security should have encouraged specific approaches to state and local vaccine distribution to increase vaccine access by low-income communities and communities of color. For instance, federal agencies could have encouraged walk-in vaccinations in hard-hit communities or encouraged states and localities to locate vaccination sites near public transit or in communities most affected. A default equity plan could have embodied those design choices.

A default equity plan is particularly useful given the speed necessary to roll out a vaccine during a pandemic. But the general approach—an agency using its expertise to encourage specific equitable practices—has value even in non-emergency situations. Housing rules, for instance, [require](#) entities receiving federal funds to further fair housing. A default equity plan could require that grant recipients adopt specific practices that the U.S. Department of Housing and Urban Development (HUD) has found to advance fair housing. For instance, HUD could require [regional housing mobility plans](#) for voucher recipients, inclusionary zoning, and source of income antidiscrimination legislation.

Of course, agencies could revise their default equity plans as they gather more information. Grant recipients could, with specific justifications, opt out of specific requirements in a default equity plan. And whether an agency can mandate or recommend default equity plans would [depend](#) on an agency's statutory authority.

Third, each agency should conduct an equity audit to examine the structure and design of its rules and programs.

Seemingly race-neutral design choices in programs and regulations can [have](#) a racial component. For example, when determining vaccine distribution priorities, the CDC [omitted](#) certain categories of front-line workers that contained a substantial amount of people of color. Inattention to these design choices is not neutral. It is a choice.

The U.S. Department of Treasury's recent [proposal](#) to use facial recognition software for tax filings—despite the technology's well-documented [failures](#) to recognize Black and Asian faces—provides another example of how seemingly race-neutral policies can harm communities of color. The Treasury Department [abandoned](#) its proposal after receiving public criticism, but key elements of the existing U.S. tax structure



still [compound](#) racial disadvantage.

Disaster relief programs [provide](#) another example of discriminatory design because they favor wealthier homeowners and compound economic and racial inequality in relief areas. A recent report has [suggested](#) changes to the structure of federal disaster relief provided by the Federal Emergency Management Agency. Similarly, all federal agencies should undertake regular audits to uncover and address how their programs and policies embed racially inequitable design choices.

All three suggestions I have advanced here—racial equity assessments, default equity plans, and agency equity audits—would, if implemented more broadly today, come at a time when the U.S. Supreme Court [threatens](#) to curb agency power. But that is another advantage of this approach: All three are permitted by existing statutes, such as [Title VI](#) and the [Stafford Act](#).

Adopting these three ideas would move the government closer toward realizing the aspirations of President Biden’s executive order, helping to embed racial and other forms of equity as a priority in agency practice.



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[This essay is part of a seven-part series titled *Race and Regulation*.](#)

Tagged: [Equity](#), [Executive Order](#), [federal agencies](#), [Race](#), [Racial Justice](#)

