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The Equity E.O.: Building A Regulatory Infrastructure of Inclusion

Olatunde C.A. Johnson*

Among his first acts, President Biden signed Executive Order 13,985 to advance “Racial Equity and Support for Underserved Communities Through the Federal Government.” Alongside an order directing regulatory review to include “social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations” and an ambitious infrastructure plan, this Equity E.O. signals a new engagement of the administrative state in proactively promoting racial equity and other dimensions of inclusion. The outlines of the infrastructure initiative are still emerging, but what appears key is its conceptualization of infrastructure as extending beyond roads and buildings to the social and human capital—including technological access and caregiving—that enables connection to opportunity and full thriving for all Americans. Crucially, the proposed infrastructure plan also directs investments into communities that were intentionally excluded from or harmed by federal government programs, for instance, communities cut off from economic opportunity by the construction of federally-funded highways or redlined out of federally-backed housing loan programs. The Equity E.O. may seem technocratic in comparison, as it is big on process and short on concrete initiatives and new money, but, alongside the other initiatives, it has potential to prompt serious examination of the role of the administrative state in the formation and maintenance of racial and other



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forms of inequality and to lead to creative rethinking of the structure and design of federal programs across a range of domains.

Specifically, the Equity E.O. requires the White House and federal agencies to take a “systematic approach to embedding fairness in decision-making” and to examine and “redress inequities in their policies and programs that serve as barriers to equal opportunity.” The E.O. grounds itself in this particular moment in which “converging economic, health, and climate crises have exposed

and exacerbated inequities, while a historic movement for justice has highlighted the unbearable human costs of systemic racism.” The E.O. also asserts a value of “equal opportunity,” which it claims is integral to American democracy. Though not explicitly, the E.O. finds itself linked to a growing recognition in policy and in the broader culture of the role of 20th century administrative programs in advancing *inequity*—how, for instance, New Deal and postwar programs contributed to racial segregation and wealth disparities with effects that endure today.

Three aspects of the Equity E.O. are noteworthy. First, it announces an affirmative and proactive role for federal agencies in addressing inequities. Implicitly, this acknowledges that antidiscrimination is not a sufficiently robust norm to advance meaningful inclusion on its own. This aspect of the E.O. builds on the approach of “equality directives” in federal statutes and regulations that require

agencies and grantees to take affirmative steps to further inclusionary goals, such as integrated housing or public transit, to serve communities of color effectively.¹ Though the order offers a narrow definition of “equity” (deploying terms such as “fair” and “impartial” that sound in procedural fairness), it also articulates the robust goal of “full participation”—a more capacious norm of social inclusion and citizenship.

Second, the E.O. announces the obligation to advance equity as the role of every federal agency. Its requirements thus stretch beyond traditional civil rights or social welfare agencies to allow investigation of the role that agencies in areas such as tax and business development play in perpetuating social inequality. More broadly, in requiring an accounting, it intends to make visible the disparity caused by government subsidies that are otherwise submerged or hidden in a veneer of neutrality.

Third, the E.O. appears to cover an expansive range of federal processes. Importantly, current equality directives focus on federal spending as a lever for promoting equity by state and local grant recipients. Federal delegation to local authorities contributed to pervasive denial of federal loans to black farmers and the segregation of public housing. The Equity E.O. invites examination of how civil rights agencies might be structured to improve complaint resolution, or how the design of tax and social welfare federal programs might increase the participation of underrepresented groups, or how the delegation of discretionary authority to local

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¹ See Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (2012) (describing “equality directives” in housing and transit).

structures contributes to discrimination in accessing federal programs.

Much remains unclear about how the E.O. will be implemented to achieve its asserted goals. The E.O. relies on the Office of Management and Budget (OMB) to work with agencies to develop assessments for measuring barriers to equity and full participation. How impacts will be measured, what will rise to the level of barriers, and the role of qualitative and quantitative assessments remains to be seen. Traditionally, impact analysis in civil rights law is often limited to a narrow assessment of impact geared towards proof of causation and countering an institution's justification for the disparate effect of the policy. The E.O., operating as it does outside of litigation and with the more comprehensive goal of "full participation," provides the possibility for a wider range of measures of systemic barriers. Commentators have already recommended that OMB adopt an equity scoring system, akin to the Congressional Budget Office's budget impact scoring systems. See Andre M. Perry & Darrick Hamilton, *Just as We Score Policies' Budget Impact, We Should Score For Racial Equity as Well*, BROOKINGS.EDU (Jan. 25, 2021).

Additionally, the E.O. does not yet articulate what will happen after barriers are identified. Rather, it charges agencies with recommending

the "policies, regulations, or guidance documents" necessary to advance equity. The lack of prescription is perhaps appropriate at this early stage. Optimistically, this might invite an innovative range of solutions, some within the domain of the agency and others that might require congress-

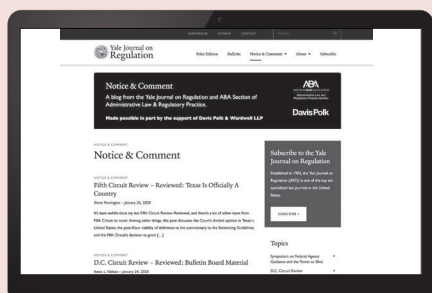
change. At a minimum, one would hope that the results of the agency self-assessments and proposed alternatives would be well publicized so as to invite input beyond agencies in determining next steps.

Finally, it is not fully clear yet how the White House and federal agencies will engage the public and affected constituencies in designing the assessment instruments, evaluating barriers and disparities, or in recommending new programs and policies to promote equity and full participation. The E.O. requires agencies to consult with historically underrepresented and underserved groups. Given longstanding problems with democratizing input, this process itself should be designed to be inclusive and to engage communities most affected by the policies. Normatively, this requires rethinking the nature of engagement and expertise. Practically, it means paying close attention to the structures for soliciting input and proactively reaching out to underserved groups and communities, perhaps with the assistance of federal agency regional offices.

The Equity E.O. is a promising initiative. With thoughtful and serious implementation, and meaningful engagement of affected parties, the E.O. might move federal agencies closer to the goals of full participation and equity that it announces. ○

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sional, executive, civic, or private sector action. The open-endedness of the E.O. in this regard, however, mirrors a weakness of the equality directive approach: that it is long on assessments and short on mandating specific policy or programmatic



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