REGULATORY REPARATIONS

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I. INTRODUCTION

> "Slavery and colonialism allocated rights and privileges on a racial basis, and they also entrenched economic, social and political inequalities along racial lines. Formal abolition of slavery and colonialism was by no means sufficient to undo these racial inequalities that were consolidated over centuries."[1]

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[1] James Reinl, *UN Revives Call for Slavery, Colonialism Payouts*, ANADOLU AGENCY (Oct. 30, 2019), https://www.aa.com.tr/en/world/un-revives-call-for-slavery-colonialism-payouts/1631218.

The theft of Black labor and land, and the systemic disenfranchisement and exclusion of Black Americans from full citizenship over the past 400 years has produced profound and enduring racial inequality that persists today. That inequality is intersectional, impacting financial mobility and housing, health care outcomes, carceral rates, education, community investment, and environmental justice.[2] Historically, this disenfranchisement and dispossession of Black Americans was created and recreated by the state, at all levels of government. At this moment, when the notion of reparations is receiving renewed attention once more, the administrative state should be called upon to make reparations for economic and noneconomic racial injustices it historically created and exacerbated.

Despite the urgency of this national reckoning with racial injustice, the Congressional political will to act swiftly toward tangible reparations efforts appears insufficiently strong to meet the demand. Reparations legislation has been introduced in the House of Representatives every year since 1989, with Rep. John Conyers as the lead sponsor every year until his death in 2019; in April of 2021 the House Judiciary Committee voted on the proposed bill for the first time.[3] The Commission to Study and Develop Reparation Proposals for African Americans Act would create a commission to *study* slavery and racial discrimination in America since 1619 and consider the possibility of reparations, but the Act includes no provisions that would automatically lead to direct payments or other economic reparations.[4] Were this legislation to advance, the Commission would be asked to "identify . . . lingering negative effects of slavery . . . on living African Americans and on society in the United States" and make recommendations to Congress for remedies.[5] This bill currently has 193

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[2] *See* Liz Mineo, *Racial Wealth Gap May Be a Key to Other Inequalities*, HARV. GAZETTE (June 3, 2021), https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities/; Press Release, House Comm. on the Judiciary, House Judiciary to Hold Historic Markup of H.R. 40, Legislation to Study and Develop Slavery Reparations Proposals (Apr. 9, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4499; *see also* Jamila Taylor, *Racism, Inequality, and Heath Care for African Americans*, CENTURY FOUND. (Dec. 19, 2019), https://tcf.org/content/report/racism-inequality-health-care-african-americans/?agreed=1.

[3] Commission to Study Reparation Proposals for African Americans Act, H.R. 3745, 101st Cong. (1989); *see* Press Release, House Comm. on the Judiciary, *supra* note 2.

[4] Commission to Study and Develop Slavery Reparation Proposals for African Americans Act, H.R. 40, 117th Cong. (2021).

[5] *Id.*

sponsors and has advanced out of committee.[6] As of the time of this writing, however, it has not proceeded further.

Within the executive branch, however, some movement has occurred. On January 20, 2021, President Biden issued an Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.[7] In that order, he acknowledged the need for a comprehensive assessment of barriers to equity throughout the executive branch.[8] Particularly, the Order states that "each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups."[9] This undertaking has the potential to create a baseline from which to measure remedial efforts within each agency, and also to provide data that this Article identifies as a precondition for regulatory reparations. The Order did not, however, mandate any specific actions or commit to implementing recommendations, so it remains to be seen when and how the administration will follow through.[10] Once agencies have evaluated where they are culpable for contributing to racial discrimination, they must have a corresponding obligation to dismantle the barriers they have created and engage in actively antiracist regulatory efforts.

In this Article, I discuss theories of reparations and situate existing efforts at legislative and administrative reparations within those frameworks. In doing so, I seek to identify gaps in the effectiveness of those solutions. I propose that whereas in some instances the administrative state may be an appropriate vehicle for delivering reparations, it is also a culpable actor in its own right and owes reparations for the harm it has committed. Particularly, changes to procedural requirements in rule development and finalization would create opportunities to better systematically account for and address past discrimination by administrative agencies.

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[6] *See H.R.40*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/40?q=%7B%22search%22%3A%5B%22hr40%22%2C%22hr40%22%5D%7D&s=1&r=1 (last visited Oct. 30, 2021).

[7] Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 14, 7,009 (Jan. 20, 2021).

[8] *See id.* at 7009–10.

[9] *Id.* at 7009.

[10] *See id.* at 7009–12.; *see also* Tiffany D. Atkins, *These Brutal Indignities: The Case for Crimes Against Humanity in Black America*, 66 HOW. L. REV. (forthcoming 2022) (manuscript at 50) (on file with author).

The notion of reparations delivered through the administrative process is not new. However, in instances where administrative agencies have had the opportunity to redress past racial wrongdoing, they have typically done so in either an adjudicative context, or in the development and implementation of new substantive programs targeting historically harmed communities.[11] The proposals in this Article are not intended to replace those forms of reparations, but to suggest additional ways to leverage the regulatory process across the board to begin remediating past harms while also proactively preventing future discriminatory administrative action. As a complement to other targeted efforts that agencies may make, in this Article I propose the following "horizontal" changes to the default rulemaking procedures under the Administrative Procedure Act ("APA") and other statutes governing the rulemaking process:

- Require agencies to review their previous regulations and other decisions to determine which historical actions by the agency created a disparate impact on minority communities and measure that impact.

- Create a petition process, similar to the rulemaking petition process that currently exists, to request agency review of the racial impacts of an earlier decision, and to request agency action to redress harm.

- Clarify that an agency's decision to review (or not review) a decision in response to a citizen petition is subject to a non-de minimis standard of judicial review, as is the agency's proposal to redress harm if the agency issues one.

- Add a presumption that a rulemaking process that does not consider both the impact of the proposed rule on minority communities *and* the impact created by earlier agency decisions about the same or similar substantive issues is inherently arbitrary and capricious.

- Extend cost-benefit analysis in rulemaking to explicitly account for the regulatory impact on communities beyond individualized metrics such as home valuation and health costs. This would include valuation metrics like community cohesion, aesthetic integrity, and the value of remediating past discriminatory effects.

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[11] *See, e.g.*, American Rescue Plan Act of 2021, Pub. L. 117-2 (Mar. 11, 2021) (providing funds for USDA to distribute as debt relief for Black farmers and other "socially disadvantaged farmers and ranchers"); Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (directing communities receiving federal housing funds to assess systemic barriers to integrated housing and prepare a plan to improve racial equity in housing).

II. REPARATIONS FRAMEWORKS

Broadly, reparations can be defined as:

> [A]n attempt to obtain restitution for the wrongs inflicted through slavery and segregation and persisting through the current landscape of racial discrimination in America . . . . premised upon a principle of compensation: those who have inflicted an injury must compensate those who have suffered the injury in an amount appropriate to the wrong inflicted.[12]

Over several decades, reparations scholars have identified various approaches to theorizing and categorizing reparations, as well as various allocations of primary responsibility for implementing reparations, to identify the most culpable or best-situated sources of restitution.[13] An overview of the theoretical goals of reparations allows us to see where and how the regulatory process can help achieve those goals when the culpable source is the administrative state itself.

A. Theories of Reparations Compensation

A theory of reparations as compensation calls for economic remuneration for the effects of slavery and subsequent economic subjugation of Black Americans. For example, compensatory reparations might consist of a combination of "individual and collective public benefits that simultaneously builds wealth and eliminates debt among Black citizens."[14] This could be delivered in whole, or in part, as cash payments to individual households. As proponents of cash reparations point out, the United States has previously created economic reparations programs for other groups. Therefore, despite arguments about logistical

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[12] Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 22 (2004) [hereinafter *Tulsa Reparations*].

[13] *See, e.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429 (1998); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003) [hereinafter *Repairing the Past*].

[14] Rashawn Ray & Andre M. Perry, *Why We Need Reparations for Black Americans*, BROOKINGS INST.: POL'Y 2020 (Apr. 15, 2020), https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans/.

difficulties, it could be done if the political will were there; we would need only determine how much and to whom it is owed.[15]

One potential approach to the measurement of economic reparations owed to Black Americans would be the value of unpaid labor extracted from enslaved people and transferred to white households and institutions. Prior to the Civil War, slavery generated one-third of the income for white households in the agricultural south, largely through forced labor of enslaved people in tobacco and cotton production.[16] Enslaved people accounted for the largest financial asset class nationwide in the pre-war economy, "worth more than all of America's manufacturing, all of the railroads, [and] all of the productive capacity of the United States put together."[17] Reparations could be measured, therefore, in part as the unjust enrichment of white America and the United States economy as a result of 250 years of slavery.

Alternatively, or in tandem, reparations could be measured by the lost value of broken promises made by the government to formerly enslaved people after the Reconstruction. This measurement would attempt to compensate descendants of enslaved people for, in part, the "forty acres and a mule" promised by General William T. Sherman and rescinded by Andrew Johnson.[18] Adjusted for inflation and interest and

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[15] *See* Prof. William Darity's remarks on past cash payments for survivors of atrocities, internment, tragedies such as 9/11. William Darity, Jr., *Why Reparations are Needed to Close the Racial Wealth Gap*, N.Y. TIMES (Sept. 24, 2021), https://www.nytimes.com/2021/09/24/business/reparations-wealth-gap.html. *See also generally* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998) (discussing the different views regarding the reparations for Japanese Americans).

[16] Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

[17] Ta-Nehisi Coates, *For the Slavery\Civil War\Reconstruction Buff in You*, ATLANTIC (June 9, 2014), https://www.theatlantic.com/entertainment/archive/2009/06/for-the-slavery-civil-war-reconstruction-buff-in-you/18983/ (citing a lecture by David Blight on Southern antebellum culture and slavery). Blight estimates that by 1860, there were approximately four million enslaved people in the United States, representing three and a half billion dollars in wealth for enslavers, which adjusted for inflation would be seventy-five billion dollars of unjust enrichment for enslavers. *Id.*

[18] *See* Patricia Cohen, *What Reparations for Slavery Might Look like in 2019*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/business/economy/reparations-slavery.html (discussing studies of valuation of the land promised to enslaved people). *See generally* William Darity, Jr., *Forty Acres and a Mule in the 21st Century*, 89 SOC. SCI. Q. 656 (2008) (discussing programs of reparations for black Americans and the history of the phrase "forty acres and a mule").

divided among currently living descendants of enslaved Black Americans, one estimate would place the value of the broken promise at roughly $80,000 owed per descendant of enslaved people; other estimates vary.[19]

Another potential measurement of what is owed would be the racial wealth gap. Using the wealth gap as a lens for reparations attempts to capture the harms of both slavery and subsequent systemic racial discrimination from a contemporary standpoint. As measured by the 2017 Survey of Consumer Finances, the racial wealth gap is staggering: Black household wealth is less than 15% of white households, by both median and mean.[20] This gap reflects disparities in income, home ownership, access to favorable credit, and intergenerational asset transfer.[21] Moreover, white wealth remains more stable in times of economic uncertainty, largely due to white access to investment vehicles that either retain value during recession, rebound in value quickly, or experience countercyclical growth.[22] When adjusted for home ownership, or for education levels, the gap remains.[23]

For most families who own their home, that home represents their largest financial asset,[24] so broader trends in real estate valuation and credit access exacerbate the wealth gap. Home values reflect a system of valuation and appraisal that bakes historical inequities of redlining into both the sale price of a home and the ability to access credit based on home

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[19] Cohen, *supra* note 18 (citing studies by William Darity & Kristen Mullen and others); *see also* Thomas Craemer, *International Reparations for Slavery and the Slave Trade*, 49 J. BLACK STUD. 694, 698–99 (2018) (discussing alternate methodology for valuing cash reparations based on current value of agricultural land).

[20] Lisa J. Dettling, et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, FED. RSRV. (Sept. 27, 2017), https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm.

[21] *Id.*

[22] *Id.*; *see also* CONG. BUDGET OFF., THE DISTRIBUTION OF HOUSEHOLD INCOME, 2018 36–37 (Aug. 2021), https://www.cbo.gov/system/files/2021-08/57061-Distribution-Household-Income.pdf (noting that income inequality has increased over all income measures over the past forty years); Moritz Kuhn et al., *Income and Wealth Inequality in America, 1949-2016* 3–4 (Opportunity & Inclusive Growth Inst., Working Paper No. 9, June 2018), https://www.minneapolisfed.org/research/institute-working-papers/income-and-wealth-inequality-in-america-1949-2016.

[23] William Darity et al., *What We Get Wrong About Closing the Racial Wealth Gap*, SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY 6, 12 (Apr. 2018), https://insightcced.org/wp-content/uploads/2018/07/Where-We-Went-Wrong-COMPLETE-REPORT-July-2018.pdf.

[24] *Id.* at 26.

equity, including for maintenance.[25] Neglect of infrastructure and community assets in historically Black neighborhoods compounds inequality in home valuation; in recent years, loss of Black-owned homes to foreclosure and a spike in landlord-owned housing stock has compounded the effects even further.[26] Home valuation is also tied to perceptions of neighborhood schools, which themselves are infused with racial bias.[27] And so the gap grows.

But closing the homeownership gap would not close the wealth gap without concurrently addressing many other metrics. Individual household economic metrics only capture one piece of racial economic disparities—valuation of Black-owned businesses, farms, and other income-producing assets also reflects systemic inequity. Black-owned firms and small businesses have less access to equitable financing terms and report discouragement from seeking financing at higher rates than white-owned businesses.[28] Additionally "a lack of wealth or startup capital contributes to lower rates of small business ownership among minorities, in turn enabling the racial wealth gap to persist."[29] Access to banking services in lower income neighborhoods has also declined in recent years, compounding difficulties when linking small businesses with local lenders and creating long term financial relationships.[30]

This description has not yet begun to account for the ways in which economic disparities ripple outward to other opportunity costs, health disparities, loss of enjoyment, violence against Black people through

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[25] *See* RICHARD ROTHENSTEIN, THE COLOR OF LAW 96–97 (2017) (explaining how redlining, racially discriminatory lending, and undervaluation of homes in predominantly Black neighborhoods affected Black Americans).

[26] *See, e.g.*, Carlos Garrity et al., *The Homeownership Experience of Minorities During the Great Recession*, 99 FED. RES. BANK ST. LOUIS REV. 139 (2017); Gillian B. White, *The Recession's Racial Slant*, ATLANTIC (June 24, 2015), https://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725/ (estimating that the 20-year effect of the recession on Black wealth will leave Black households 40% poorer than had the recession not occurred).

[27] *See* Kimberly A. Goyette et al., *This School's Gone Downhill: Racial Change and Perceived School Quality Among Whites*, 59 SOC. PROBS. 155, 155 (2012).

[28] Mels de Zeeuw & Brett Barkley, *Mind the Gap: Minority-Owned Small Businesses' Financing Experiences in 2018*, CONSUMER & CMTY CONTEXT, Nov. 2019, at 13, 13, 18, https://www.federalreserve.gov/publications/files/consumer-community-context-201911.pdf.

[29] *Id.*

[30] Claire Kramer Mills et al., *Growing Pains: Examining Small Business Access to Affordable Credit in Low-Income Areas*, 1 CONSUMER & CMTY. CONTEXT 22, 22–23 (2019).

policing and incarceration,[31] and other metrics that can be traced back to historic and contemporary racial discrimination. Looking to the complexity of current economic disparities reveals the need to pair individual restitution with concurrent systemic reparations. Compensation for direct economic losses alone would require payments and programs that entail some combination of lost wages, damages, education benefits, student debt forgiveness, down payment or home improvement assistance, business grants for Black business owners, and more. This complexity also highlights the challenges in identifying any one best method for effectuating reparations through litigation or legislation standing alone, and the need for multipronged solutions.

B. Tort Theory & Limits of Reparations Litigation

In the absence of legislative momentum to implement a federal system of reparation by statute, descendants of enslaved people have brought suit in various forums, under various legal theories, seeking restitution and compensation for the harms of slavery.[32] Suing government or private actors in tort could have found purchase, in theory.[33] However, governmental immunity barred many plaintiffs' claims against the government, and statutes of limitations and causation issues thwarted claims against private actors.[34] Suits based in a tort theory but brought under Title VI of the Civil Rights Act have also been largely unsuccessful due to limits on private rights of action, as well as issues with standing.[35] The limits of plaintiffs' success in remedying past harms or securing guarantees against future harm through reparations litigation speak to the need for a complementary solution in administrative law.

A tort theory of reparations recognizes enslaved people and their descendants as the injured parties, and identifies potential responsible parties as institutions that perpetuated slavery and survive today, such as "corporations, other private institutions such as universities and colleges, and state and federal governments."[36] Some reparations scholars have

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[31] *See* COMM'N OF INQUIRY ON SYSTEMIC RACIST POLICE VIOLENCE, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON SYSTEMIC RACIST POLICE VIOLENCE AGAINST PEOPLE OF AFRICAN DESCENT IN THE U.S. (2021).

[32] *See* Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 83, 84 (2004).

[33] *Id.* at 103–104.

[34] *See id.* at 106–107.

[35] *See, e.g.*, Cato v. United States, 70 F.3d 1103, 1106, 1108–10 (9th Cir. 1995).

[36] *Tulsa Reparations*, *supra* note 12, at 22.

promoted a tort theory of reparations as "an ideal vehicle for framing discussions about moral culpability."[37] As elsewhere in tort law, a tort theory of reparations would require a close connection between the past harm suffered by plaintiffs and the relief sought from a defendant who caused the harm.[38] Corrective justice theory as conceptualized elsewhere adds onto the tort theory of reparations by identifying a "duty to repair," and seeking to hold the right remediator responsible for the losses for which repair is sought.[39] Where the harm is potentially traceable to a combination of wrongdoers (*i.e.*, individual enslavers as well as the arms of government that perpetuated slavery), corrective justice gives weight to the idea that even without an articulated duty to Black descendants of enslaved people, the federal government may be the right remediator.[40]

Despite the theoretical arguments for a tort theory of reparations, however, reparations suits sounding in tort tend to be dismissed on various standing grounds or for lack of a cognizable claim.[41] For example, in *Cato v. United States*, a plaintiff brought suit seeking, among other remedies, damages for the intergenerational harms resulting from slavery.[42] Her claims were based on a variety of asserted causes of action, including the Thirteenth Amendment and the Federal Torts Claims Act.[43] Cato argued that her claim ought not to be time barred, analogizing the circumstances of Black people to those of Native Americans who were able, in limited

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[37] Brophy, *supra* note 32, at 86.

[38] *Id.* at 87.

[39] *See, e.g.*, Jules L. Coleman, *The Practice of Corrective Justice,* 37 ARIZ. L. REV. 15, 30 (1995) (defining corrective justice as "the principle that one has a duty to repair the wrongful losses for which one is responsible").

[40] *See id.* at 28–29. While this duty falls on the most culpable actors in a corrective justice framework, in the reparations context that duty may converge with the duty of the government as the "least-cost" avoider, under an economic theory of tort, to make repair; conceptually, those approaches converge where the government is both the least-cost avoider of the harms of slavery and also the representative of the many enslavers and individual profiteers of slavery whom that government privileged. *See also Tulsa Reparations, supra* note 12, at 23 ("Where the state has condoned the wrong in the very document constituting it as a polity the state is rightly regarded as the principal target for suit."). *But see* Mary Urban Walker, *Making Reparations Possible: Theorizing Reparative Justice*, *in* THEORIZING TRANSITIONAL JUSTICE, (Claudio Cordetti et al. eds., 2015) (arguing that corrective justice is an imperfect and partial lens for reparations, but one that can lead to "one implementation of reparative justice within a certain institutional framework under certain political conditions").

[41] Brophy, *supra* note 32, at 84 (collecting reparations cases dismissed on standing grounds or due to failure to state a claim).

[42] 70 F.3d 1103, 1105, 1111 (9th Cir. 1995).

[43] *Id.* at 1107–108.

circumstances, to bring claims for land confiscated by the federal government in violation of treaty rights.[44] The Ninth Circuit distinguished those circumstances finding that, unlike the duty created by treaties with Native American tribes, the United States had not assumed any fiduciary duty to Black descendants of slaves.[45] Implicit in the court's reasoning was an adoption of some form of tort theory of reparations that would require a particularized duty, and breach from which plaintiff could trace her harm, within a statute of limitations.[46] In the absence of a finding of a more general corrective "duty to repair," however, the court dismissed her claim.[47]

Subsequently, in *Slave Descendants Litigation*, a consolidated set of cases brought by descendants and representatives of enslaved people, plaintiffs sued private companies who benefitted financially from enslaved peoples' labor.[48] Defendants included insurance companies who had insured the value of enslaved people with enslavers as the beneficiaries; banks that had secured loans using enslaved people as collateral; and railroad and shipping companies that had transported enslaved people.[49] The suit sought replevin, restitution, an accounting, disgorgement of profits, and damages.[50] The Seventh Circuit upheld dismissal of claims by all plaintiffs, other than those representing the estate of enslaved people, on the grounds that there was an insufficient causal connection between defendants' wrongdoing and the financial harm suffered by plaintiffs a century later.[51] In this regard, the court's application of a traditional economic lens precluded a corrective approach that would have considered that defendants' wrongdoing gave rise to a corresponding duty to repair.[52]

Additionally, the court in *Slave Descendants Litigation* dismissed the remaining tort claims based on the statute of limitations, declining to extend equitable tolling.[53] The court reasoned that plaintiffs could have sought recourse through litigation in the years shortly after the Civil War

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[44] *Id.*

[45] *Id.* at 1108.

[46] *Id.* at 1106–107, 1109.

[47] *See id.* at 1105, 1109–11.

[48] *In re* Afr. Am. Slave Descendants Litig., 471 F.3d 754, 756–57 (7th Cir. 2006) [hereinafter Slave Descendants Litigation].

[49] *Id.* at 757–58, 760.

[50] *See id.* at 757, 759–61.

[51] *Id.* at 759–60, 762–63.

[52] *Id.* at 759–60, 763.

[53] *Id.* at 758–59, 762–63.

because northern courts would have been hospitable to plaintiffs' claims.[54] The court also identified the harm as slavery itself, rather than its vestiges or intergenerational impact.[55] On that basis they found, glibly, that the clock began running on the claim once formerly enslaved people were free to sue after Emancipation because "it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system."[56]

A similarly restrictive approach to equitable tolling doomed a suit seeking reparations stemming from the Tulsa massacre of 1921, in which white citizens of Tulsa murdered roughly 300 Black residents; displaced or incarcerated nearly 10,000; and burned swaths of Black-owned homes and businesses that made up what had been known as Black Wall Street.[57] Some of the white rioters were deputized and acting under color of law; others were part of the National Guard.[58] Eighty years later, Oklahoma convened a commission to study the massacre and recommended reparations.[59] When survivors and descendants of survivors brought suit for negligence as well as Constitutional violations, however, the Tenth Circuit determined that their claim was barred by the statute of limitations.[60] Plaintiffs asserted promissory estoppel, in part because the city of Tulsa promised to make restitution, first in 1921 and again in 1999.[61] They also argued that prior to the commission report that came out in 2001, they did not have knowledge of the full culpability of the city and state governments.[62] The court reasoned that the statute of limitations started to run when plaintiffs knew that the injury had occurred, regardless of their knowledge of the culpability of state actors.[63] This narrow reading of the reach of tort law to assign and enforce a duty to repair, taken together

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[54] *Id.* at 762.

[55] *Id.* at 759–62.

[56] *Id.* at 762.

[57] TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, 11–14 (2001), *available at* https://digitalcollections.tulsalibrary.org/digital/collection/p15020coll6/id/452; *Tulsa Reparations*, *supra* note 12, at 17.

[58] *Tulsa Reparations*, *supra* note 12, at 17.

[59] TULSA RACE RIOT, *supra* note 57, at ix, xiii.

[60] Alexander v. Oklahoma, 382 F.3d 1206, 1211 (10th Cir. 2004).

[61] *Id.* at 1212–13.

[62] *Id.* at 1215–16.

[63] *Id.* at 1216.

with the preceding cases, "extinguished practically all hope of African American redress through litigation."[64]

Efforts to sue under other statutes for reparations for slavery or discrimination under Jim Crow laws have also generally failed on standing grounds.[65] In the administrative law context specifically, Title VI of the Civil Rights Act of 1964 prohibits racial discrimination by federal agencies or by any recipient of federal funding, creating one avenue for civil rights litigants.[66] However, it does not create a private right of action for plaintiffs seeking to challenge regulations that create disparate racial impacts.[67] This forecloses an alternative statutory approach for plaintiffs who would otherwise perhaps use Title VI litigation as a means to seek recovery from governmental defendants for structural racial discrimination that could otherwise be framed under a tort theory of reparations.[68]

Overall, litigation has been unsatisfactory as a method to vindicate widespread racial discrimination and seek reparations. As noted above, it has provided limited access to remedies because of courts' construction of substantive and procedural gaps in common law tort and statutory causes of action. Second, as a general matter, litigation is largely only a means to address past harm, without also addressing the other components of reparations such as a guarantee of non-repetition.[69] Litigation reparations,

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[64] ERIC K. YAMAMOTO ET AL., RACE, RIGHTS & REPARATIONS: LAW & THE JAPANESE AMERICAN INTERNMENT (2d ed. 2013).

[65] *See* Eric J. Miller, *Representing the Race: Standing to Sue in Reparation Lawsuits*, 20 HARV. BLACKLETTER L. J. 91, 94–100 (2004).

[66] 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[67] *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 284–87 (1978).

[68] *See, e.g.*, Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1306–307 (2020) (noting that courts have rejected Title VI claims in cases seeking compensation for racial harms stemming from discriminatory highway construction). Environmental justice plaintiffs frustrated by the limits of Title VI private enforcement and other litigation strategies have proposed suit in public nuisance, or under state law under a public trust theory, with little success. *See* Mandy Garrells, *Raising Environmental Justice Claims through the Law of Public Nuisance*, 20 VILL. ENVTL. L. J. 163, 167–68 (2009).

[69] Through consent agreements or structural injunctions, litigation can of course produce a promise from defendants in a particular action not to repeat conduct, and even to implement structural change. However, the inability to reach beyond the particular defendants to the larger systems creates an outer limit to the scope of non-repetition that litigation can guarantee.

even if attainable, would nevertheless provide an incomplete solution because of the burden litigation places on individuals to use their resources to vindicate their rights. Spreading that burden out in a class-action suit would possibly ameliorate that burden, but identifying a class broad enough to obtain widespread structural reparations as a remedy would be a significant hurdle.[70] And as with all litigation solutions, even if plaintiffs are successful, and even if they obtain injunctive relief that benefits others in the future, they first endured harm.[71] Lastly, litigation under any single legal theory is "insufficiently multidimensional to effectively unravel the racism that has woven itself into the fabric, systems, and structures . . . or to proactively guard against the ongoing influence of racial bias."[72]

C. Reparations as Legislative Repair

A more structural legislative approach to reparations would have greater capacity than a litigation approach to compensate past harm, craft structural relief, and commit to future racial equity. Legislative reparations could be viewed through a framework of reparations-as-repair, which would ground any reparations system in a notion of "social healing through justice."[73] Eric Yamamoto has proposed a framework of (1) recognition, (2) responsibility, (3) reconstruction, and (4) reparations as conditions for group healing.[74] In his construction, recognition of the historical roots of injustices inflicted by one group against another, and the scope and nature of those injustices, is the first necessary step.[75] Then, he posits, the harming party must take responsibility for the harm by acknowledging their wrong, and the benefits they derived from discrimination.[76] Taking responsibility leads to efforts to atone through apology and efforts to change the structures that resulted from discrimination in the reconstruction process.[77] He identifies reparations as the final step, rather than the process as a whole, in which the harming

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[70] Where other class actions for reparations have succeeded, it has been through settlement or consent agreement. *See, e.g.*, D'Amato v. Deutsche Bank, 236 F.3d 78 (2d Cir. 2001).

[71] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[72] Archer, *supra* note 68, at 1305.

[73] *See* Erik K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 3 (2007).

[74] *Id.* at 48.

[75] *Id.*

[76] *Id.*

[77] *Id.*

party may make financial repayment and other structural investments to make the wronged group whole.[78]

Robert Kuehn's taxonomy of environmental justice also has the potential to inform a systems approach to reparations for racial discrimination more broadly.[79] He adds to previous environmental justice frameworks by categorizing environmental justice into four components: (1) distributive justice; (2) procedural justice; (3) corrective justice; and (4) social justice.[80] Like Yamamoto's first three steps, this approach measures how systems require efforts to repair past harms rather than merely avoiding new ones; the fourth category of social justice shares many features with Yamamoto's conception of reparations as social healing. Distributive justice could be viewed as a result of successful reconstruction under Yamamoto's framework, as it entails "equitable distribution of the burdens resulting from . . . threatening activities or of the . . . benefits of government and private-sector programs."[81] Kuehn's taxonomy also prompts us to consider how reparations might reflect and achieve procedural justice. Procedural justice occurs when decision-making processes include democratic access to information and public participation; evaluating procedural justice "requires looking not just to participation in a process but to whether the process is designed in a way to lead to a fair outcome."[82] As a component of reparations, procedural justice would take one step further and evaluate past inequitable outcomes in considering the design of future procedures, adding an expectation that procedural fairness includes a remedial component.

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[78] *Id.*

[79] Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681, 10681–82 (2000).

[80] *Id.* at 10681.

[81] *Id.* at 10684. "Distributive justice concerns are also reflected in complaints under Title VI of the Civil Rights Act of 1964 alleging that a recipient of federal financial assistance has unlawfully created, through an environmental program or decision, a 'disproportionate burden' or 'disparate impact' on a racial class." *Id.* Given the limits of Title VI to provide litigative redress, it is fitting to revisit the promises of Title VI when considering the value and scope of additional legislative solutions.

[82] *Id.* at 10688. The proposals for reparations review and regulatory reparations emphasize the need for procedural justice in the administrative rulemaking process and elsewhere in administrative agency solicitation of input by Black communities and stakeholders. Those proposals, though, would be best achieved in tandem with a legislative solution that embedded reparations principles into the APA and in any amendments to agencies' enabling legislation. Procedural justice is not a component of reparations that needs to be situated in one part of a solution or another; it should be incorporated as a goal throughout all components of the development and execution of a reparations framework. *See* discussion *infra* Parts II, III.

Corrective justice is the third dimension in Kuehn's taxonomy, which mandates fairness in the enforcement of the law between marginalized and privileged groups.[83] Sharing characteristics with tort theories of compensation and the earlier conceptions of corrective justice in tort law, this measurement "involves not only the just administration of punishment to those who break the law, but also a duty to repair the losses for which one is responsible."[84] A structural approach to reparations using this framework would ensure that procedural mechanisms hold harming parties accountable for slavery and discrimination, and block those parties from reaping benefits from their past racially discriminatory conduct.[85]

The final measurement, according to Kuehn, is social justice, which situates environmental justice as a component of "larger problems of racial, social, and economic justice and helps illustrate the influence of politics, race, and class on an area's quality of life."[86] This final component could be viewed as the end goal of Yamamoto's last step in his framework—making repairs to achieve intersectional social justice and social healing.[87] It is, in part, this intersectional lens that makes this taxonomy useful as a framework for evaluating systemic reparations.

Kuehn's and Yamamoto's frameworks also overlap with concepts of reparations in international law, in which reparations are prescribed in response to "gross violations of international human rights law and serious violations of international humanitarian law."[88] When that harm is attributable to the state, it must be "proportional to the gravity of the violations and the harm suffered."[89] The United Nations identifies five categories of reparations: (1) restitution, (2) compensation, (3) rehabilitation, (4) satisfaction, and (5) guarantees of non-repetition.[90] The UN reparations framework guides the UN's response in the aftermath of crimes against humanity, genocide, and other atrocity crimes, or when

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[83] *Id.* at 10693.

[84] *Id.*

[85] *Id.* at 10694.

[86] *Id.* at 10699.

[87] Yamamoto, *American Reparations Theory*, *supra* note 73, at 3.

[88] G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violates of International Humanitarian Law (Mar. 21, 2006).

[89] *Id.*

[90] Tendayi Achiume (Special Rapporteur), Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, U.N. Doc. A/74/321 (Aug. 21, 2019).

overseeing the transition out of a repressive regime.[91] Considering the political, economic, and physical violence perpetrated against Black Americans under the color of domestic law, this approach is appropriate for considering what would be necessary to begin making reparations for slavery and racial discrimination in the United States.[92]

Reparations analysis in international law contemplates redressing harm in the aftermath of human rights violations both on an individual and community-wide scale through economic, systemic, and procedural means.[93] The final three components of rehabilitation, satisfaction, and guarantees of non-repetition are critical to how this framework proposes redress of systemic, long term governmental violations of civil rights against a subset of its people.[94] The lens of international human rights law is a useful one through which to evaluate the strengths and weaknesses of our current legal mechanisms to provide comprehensive redress and cautions us to adopt an approach that simultaneously considers past and future harms. A guarantee of non-repetition, in particular, is only likely achievable through a comprehensive, structural legislative solution that commits the government to a long-term course of corrective action.

Limits on legislative reparations have been political rather than institutional—Congress could reach further than it has considered doing, but majoritarian interests have opposed sweeping reparations litigation.[95] On one hand, views toward reparations in the abstract have become more

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[91] *See id.* at 13. *See generally* U.N. Secretary General, Forward, Framework of Analysis for Atrocity Crimes (2014), https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

[92] *See* Ann Spain Bradley, *Human Rights Racism*, 32 HARV. HUMAN RIGHTS J. 1, 9 (2019) ("Racial discrimination is antithetical to the central tenants of international human rights law, which aim to advance the cause of human dignity. The prohibition against racial discrimination is a recognized preemptory norm in international law, expressed in the United Nations Charter . . . and in customary international law.").

[93] *See generally* Atkins, *supra* note 10 (discussing the charge of genocide against the United States on the grounds of economic genocide, political repression, and police violence).

[94] *See generally id.* (arguing that America's treatment of Black people constitute a crime against humanity under international law). Congress has previously resisted adopting such a designation. In her scholarship Professor Tiffany Atkins explains why a more honest Congressional assessment would accept responsibility for human rights violations and crimes against humanity.

[95] *See* Theodore R. Johnson, *Reparations Won't Start with Congress. A President Needs to Do That*, POLITICO MAG., (June 21, 2019), https://www.politico.com/magazine/story/2019/06/21/reparations-hearing-2020-candidates-congress-227194/.

favorable.[96] On the other hand, cash payments to descendants of enslaved people have failed to gain the support of a majority of Americans, with only 20% of Americans currently in favor of cash reparations.[97] Both at the national level and in state and local governments, legislators appear to balk at the potential challenges and blowback of giving direct financial payments to Black Americans, limiting the utility of legislative reparations to achieve restitution and compensation.[98] Pushback from reparations opponents reflects a perennial challenge: reparations will require "sacrifices from, and perhaps the approval of, that segment of the population most adamantly opposed to reparations."[99] The lack of political buy-in for individual reparations has resulted in most legislative proposals aiming to effectuate reparations through structural legislative means, but without a primary goal of distributing direct cash payments.[100] Additionally, most legislative reparation attempts only partially incorporate responsibility and rehabilitation (or corrective justice).[101]

Legislation or a legislative resolution apologizing on behalf of the parties, including the government, who benefitted from slavery and racial discrimination would be a step toward responsibility, especially if coupled with admissions of particular allocation of responsibility for enumerated harms. Over the past twenty years, some states and localities have adopted resolutions apologizing or expressing regret for their complicity in

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[96] Eugene Scott, *Support for Reparations Has Grown. But It's Still Going to Be a Hard Sell for Congress*, WASH. POST, (April 15, 2021, 6:14 PM), https://www.washingtonpost.com/politics/2021/04/15/support-reparations-has-grown-its-still-going-be-hard-sell-congress/.

[97] Katanga Johnson, *U.S. Public More Aware of Racial Inequality but Still Rejects Reparations: Reuters/Ipsos Polling*, REUTERS, (June 25, 2020, 7:03 AM), https://www.reuters.com/article/us-usa-economy-reparations-poll/u-s-public-more-aware-of-racial-inequality-but-still-rejects-reparations-reuters-ipsos-polling-idUSKBN23W1NG. As of the 2020 Reuters/Ipsos poll, one in ten white Americans favored reparations paid out of federal funds, as did half of Black Americans. *Id.*

[98] *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93(3) HARV. L. REV. 518, 528–29 (1980).

[99] *Tulsa Reparations*, *supra* note 12, at 15.

[100] *See, e.g.*, Johnson, *supra* note 95; Scott, *supra* note 96.

[101] *See* Marc Medish & Daniel Lucich, *Congress Must Officially Apologize for Slavery Before America Can Think About Reparations*, NBC NEWS (Aug. 30, 2019, 4:30 AM), https://www.nbcnews.com/think/opinion/congress-must-officially-apologize-slavery-america-can-think-about-reparations-ncna1047561.

slavery.[102] Others have considered apologizing but declined to do so.[103] Efforts at issuing official apologies through legislation are met with mixed results, perhaps out of fear of creating a moral or legal duty to do more.[104] Resistance to apology may also be a response to the defensive posture that no one currently alive enslaved anyone and, therefore, there is no longer a responsible party who should be directly accountable. Regardless of the reason, a legislative approach to reparations that does not include an accounting of responsibility and a commitment to corrective justice is incomplete (and incompatible with an assurance of non-repetition).

In 2009, the House of Representatives and the Senate each put forth a resolution apologizing for slavery and for the legacy of Jim Crow Laws.[105] However, no joint bill resulted from those resolutions.[106] Additionally, although the resolutions acknowledged the "fundamental injustice, cruelty, brutality, and inhumanity" inflicted upon Black Americans, they did not promise tangible corrections or concrete steps to be taken by the government.[107] Rather, they called for a "recommitment" to the notion of equality, and asked the American people as a whole to "work toward eliminating racial prejudices, injustices, and discrimination . . . ."[108] The resolutions not only failed to include steps to correct the harm, they expressly stated that no claim for redress could be based upon the admission of wrongdoing: "nothing in this resolution authorizes, supports, or serves as a settlement of any claim against the United States."[109]

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[102] *See* Angelique M. Davis, *Apologies, Reparations, and the Continuing Legacy of the European Slave Trade in the United States*, 45(4) J. BLACK STUD. 271, 272 (2014); Yamamoto, *American Reparations Theory*, *supra* note 73, at 2. An example of legislation that would comprehensively address the many facets of reparations is the Harriet Tubman Community Reinvestment Act, introduced in the Maryland state legislature. H. B. 1201, 2020 Leg., 441st Sess. (Md. 2020). The bill would create a commission made of diverse stakeholders to oversee a system of direct compensation for descendants of enslaved people, including tuition and mortgage assistance. *See id.* It would also call on private businesses and institutions who benefitted from slavery to assist in providing compensation. *Id.*

[103] *See, e.g.*, *No Apology: Tennessee House Votes to Express "Regret" for Slavery*, JOHNSON CITY PRESS, https://www.johnsoncitypress.com/news/local-news/no-apology-tennessee-house-votes-to-express-regret-for-slavery/article_62fc3bd7-68ba-5d0e-b749-ca575165428a.html (last updated June 24, 2020).

[104] *See, e.g.*, S. Con. Res. 26, 111th Cong. (2009).

[105] H.R. Res. 194, 110th Cong. (2008); S. Con. Res. 26, 111th Cong. (2009).

[106] *See* Medish & Lucich, *supra* note 101.

[107] *See* H.R. Res. 194; S. Con. Res. 26; Davis, *supra* note 102, at 271–82.

[108] *See* H.R. Res. 194; S. Con. Res. 26.

[109] H.R. Res. 194; S. Con. Res. 26. Several state-level apologies included similar disclaimers preempting any basis for seeking reparations. Davis, *supra* note 102, at 279.

By preventing Black Americans from using the resolutions as the basis to seek any actual right of redress, the resolutions "serve to absolve White Americans, state governments, and the federal government for their role in these horrors and allow them to continue to benefit from systemic racial inequality in the United States."[110] In the various frameworks for reparations that call for an apology or atonement, part of the value ascribed to apology is that it includes accountability from the wrongdoer, the one who owes the apology.[111] The government cannot force the American people to forswear their prejudices, but they could commit to taking responsibility for the ways in which government action explicitly created and continues to create racial harm, and promise to begin the processes of reconstruction and reparation.

The debate over whether to apologize through legislative means remains ongoing. The Commission, in the 2021 bill introduced in the House, stated it would "study and consider a national apology,"[112] but not commit to it. As one explanation of the rationale for a national apology, "[a]pologizing is not just about making the wronged party feel better or whole. It is an act of self-correction: The apologizer is declaring that in spite of what was done, they are no longer that type of person—or nation."[113] We cannot say that we are no longer that nation, but we also should not wait until we can honestly say that to begin trying to make amends. An apology may be symbolic, but it becomes "powerful when combined with corrective actions that convert the apology into an act of atonement."[114] A national apology should not be thought of as a precursor to reparations, but as part of a comprehensive whole, pursued in tandem, and as part of a promise about the kind of nation we would hope to become.

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[110] Davis, *supra* note 102, at 279.

[111] The importance of an apology and acknowledgement of wrongdoing as a component of reparations can also be seen in the litigation context. *See Cato*, 70 F.3d at 1105–106 (seeking, in addition to compensation, "acknowledgment of the injustice of slavery in the United States and in the 13 American colonies between 1619 and 1865, as well as of the existence of discrimination against freed slaves and their descendants from the end of the Civil War to the present" and an apology on behalf of the United States).

[112] Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 117th Cong. (2021).

[113] Medish & Lucich, *supra* note 101.

[114] Tuneen E. Chisolm, *When Righteousness Fails: The New Incentive for Reparations for Slavery and Its Continuing Aftermath in the United States*, 24 U. PENN. J. L. & SOC. CHANGE 195, 203 (2021); *see also* YAMAMOTO, RACE, RIGHTS & REPARATIONS, *supra* note 64 ("[A]cknowledgements . . . must entail significant changes in institutional structures, public attitudes, and economic support for those still hurting—lest the danger of empty apologies, all words and no action, or 'cheap grace.'").

In the absence of a meaningful legislative apology, a reparations review coupled with regulatory reparations could begin to execute on such a promise.

Despite the slow movement toward interest convergence around truly comprehensive legislative reparations, there may perhaps be, in this historical moment, enough convergence to make passage of legislation enabling administrative reparations politically palatable. As noted above, when reparations are framed as they are in a Title VI claim, as a matter of civil rights equality, interest convergence accelerates.[115] However, any system of horizontal administrative reparations will have to compensate for the gaps in assorted litigative and legislative strategies to achieve a holistic approach to reparations.

III. REGULATORY REPARATIONS GROUNDWORK

The framework for regulatory reparations that this Article proposes is structural in nature and blends several of the above discussed theoretical approaches. As a set of horizontal proposals spanning administrative agencies and the regulatory process, this approach is not intended as a substitute for other legislative solutions to provide compensation to individuals, or as an enhanced means to access private rights of action against private actors. Regulatory reparations would emphasize the need for accountability for past administrative harm, public recognition of that accounting, specific inclusion of a responsibility to remediate through future rulemaking, and a commitment to not repeat past structural patterns of discrimination. Where corrective justice builds in part on the tort theory of reparations by identifying a "duty to repair,"[116] a system of regulatory reparations would situate much of that duty in the administrative state itself, not as a means by which to repair the harms of past individual actors but the harms the administrative apparatus itself has inflicted.

The first necessary step toward a system of regulatory reparations would be a comprehensive effort to take stock of past regulatory harms, situated within the broader context of a full reckoning of sweeping, systemic, deeply embedded, intergenerational, racial injustices. A reparations review within administrative law would begin to achieve the

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[115] *See Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689, 1704–706 (2002).

[116] *See, e.g.*, Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 30 (1995) (defining corrective justice as "the principle that one has a duty to repair the wrongful losses for which one is responsible").

goals of recognition of the wrongs inflicted and acknowledgment of the responsibility administrative agencies bear.[117] A truly honest accounting must "resist the inclination to bandage over and move on."[118] As Nikole Hannah Jones cautions: "when it comes to truly explaining racial injustice in this country, the table should never be set quickly: There is too much to know, and yet we aggressively choose not to know it."[119]

A. Reparative Regulatory Review

One significant structural effect of this proposal would be the creation of a uniquely comprehensive horizontal requirement for some form of regulatory review across the executive branch agencies. The APA does not have a provision requiring periodic regulatory review.[120] It also does not specify a process by which agencies should measure the effect or usefulness of longstanding rules.[121] Broad, horizontal regulatory review is partially under the purview of the Office of Information and Regulatory Affairs ("OIRA") and the Office of Management and Budget ("OMB"), and periodically a creature of executive orders.[122] The Regulatory Flexibility Act of 1980 required all agencies to form a plan for periodic regulatory review, but only for those rules deemed to have a "significant impact on small entities."[123] However, there is no uniform requirement in any horizontal statute requiring review of the substance of historical rules, their efficacy, or their racial impacts.

Some agencies have sunset provisions within their own procedural rules, or as a requirement for a subset of their rules, as a statutory

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[117] *See* YAMAMOTO, RACE, RIGHTS & REPARATIONS, *supra* note 64, at 48.

[118] Nikole Hannah-Jones, *What Is Owed*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html.

[119] *Id.*

[120] *See* Administrative Procedure Act, Pub. L. 79–404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559).

[121] *See id.*

[122] *See, e.g.*, Regulatory Planning and Review, Exec. Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) ("Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct."); Improving Regulation and Regulatory Review, Exec. Order 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) ("[A]gencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome.").

[123] Regulatory Flexibility Act, Pub. L. 96–354, 94 Stat. 1,164 (1980) (codified as amended at 5 U.S.C. §§ 601–612).

requirement, or in response to executive orders on regulatory review.[124] Executive orders across many administrations and both political parties have directed agencies to consider or conduct some form of regulatory look back.[125] The Obama administration obligated agencies to engage in regulatory review to streamline rules, weed out or amend rules not working as intended, and evaluate rules to identify any that were overly burdensome.[126] One order required agencies to create a preliminary plan and process for periodic regulatory review,[127] but without giving clear, standardized requirements for what that would look like, or how to determine which rules met the criteria.[128] On the other hand, another order directed all agency heads to ensure transparency and democratic access to agency procedures, which would also apply to regulatory look back efforts.[129]

The requirement in Biden's Executive Order follows on the heels of the Trump administration's own efforts at regulatory reform, which focused on reduction of regulations through a rigid requirement for agency review.[130] In 2017, all administrative agencies were directed to identify rules for repeal, focusing primarily on reducing compliance costs.[131] The "two-for-one" policy established a principle that for any rule an agency elected to issue, they were to eliminate two[132]—an order that showed a lack of understanding of the regulatory process and APA requirements. Additionally, agencies were to create task forces to review rules and propose repeals or modifications in line with the Trump regulatory

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[124] *See, e.g.*, DHHS Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5,694 (Jan. 19, 2021) (requiring retrospective review of agency rules every ten years to determine if they are functioning as intended).

[125] *See, e.g.*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Reducing Regulation and Controlling Regulatory Costs, Exec. Order 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

[126] *See* 76 Fed. Reg. 3,821 (Jan. 21, 2011).

[127] *Id.*

[128] *See* Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. REG. ONLINE 57, 60–62 (2013) (cautioning that under the patchwork of Obama executive orders "retrospective review will remain a periodic and unsystematic fancy rather than a serious, ongoing part of regulatory policymaking.").

[129] *See* Advancing Racial Equity and Support, *supra* note 7 (Biden executive order); Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,685 (Jan. 26, 2009) (Trump executive order).

[130] *See* Reducing Regulation and Controlling Regulatory Cost, Exec. Order 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

[131] *Id.*

[132] *Id.*

agenda.[133] While it is somewhat unclear to what extent those task forces pushed rules for repeal onto agency priority lists, it does appear that the Trump Order had the effect of slowing the promulgation of new regulations while agencies searched for historic rules to roll back.[134] One unintended outcome may be that if agencies successfully undertook some sort of review process, either under Obama or under Trump, an inventory of agency rules would already be in place. Another potential benefit would be that to the extent agencies have run a retrospective cost-benefit analysis on existing regulations, that information could potentially inform a reparations review baseline understanding of the costs borne by marginalized communities in particular, and as a proportionate cost of historical regulations.[135]

A "reparations review" would bridge many of the gaps in the current patchwork of federal regulatory review by applying to all agencies and requiring interagency cooperation to develop common metrics for the review process. While this may seem like an unmanageably vast undertaking, historians and critical race theory scholars have already undertaken much of the groundwork for such a review.[136] In tracing the legacy of slavery, Reconstruction, and the many tentacles of Jim Crow laws, such scholars have illuminated the systemic racism perpetuated in part by administrative regulations.[137] Additionally, many agencies with histories of discrimination or facially evident regulatory racial impacts are already subject to targeted obligations to account for and redress overt harms, and they have begun to catalog and quantify their discriminatory effects.[138]

As mentioned above, the first step toward such a review was proposed in the first days of the Biden administration.[139] The Biden

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[133] Enforcing the Regulatory Reform Agenda, Exec. Order 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017).

[134] *See* Binyamin Appelbaum & Jim Tankersley, *The Trump Effect: Business, Anticipating Less Regulation, Loosens Purse Strings* (Jan. 1, 2018) (claiming that "since January 2017, federal agencies have delayed, withdrawn or made inactive nearly 1,600 planned regulatory actions").

[135] I further discuss ways to leverage cost-benefit analysis in a system of regulatory reparations *infra* Part III.B.

[136] *See supra* Part I.

[137] *See id.*

[138] *See, e.g.*, Glenn Thrush, *HUD Aims to Help Black Homeowners*, N.Y. TIMES (May 28, 2021), https://www.nytimes.com/2021/05/28/us/biden-housing-budget.html.

[139] *See* Advancing Racial Equity and Support, *supra* note 7.

Executive Order creates a scaffold by which such a review process could be centralized and overseen within the executive branch and across all executive branch agencies. First, the Order identifies the Domestic Policy Council ("DPC") as the lead entity in coordinating broad inter-agency efforts to identify and remove barriers to equal opportunities within government programs and begin to "embed equity principles, policies, and approaches across the Federal Government."[140] It then requires the OMB to study methods for assessing equity in agency programs and policies and to report on best practices for data collection and evaluation for use across agencies.[141] Additionally, it creates an Interagency Working Group on Equitable Data ("Data Working Group") to assess gaps in datasets collected by various agencies, particularly due to the lack of disaggregation of data by race and other demographic variables.[142]

This is, cautiously, a positive step toward a reparations review. However, creating another government agency or body to undertake preliminary steps has the potential to become empty wheel spinning without forward movement and concrete benchmarks. Currently, the Order lacks a time frame for actual reparative action.[143] The deadlines within the Executive Order are merely means by which to identify methods of data collection or to create reports on the current agency capacity to compile data, all precursors to the actual task of reparations review.[144] On the other hand, it is likely worth some delay for the trade-off of potentially ending up with a horizontally uniform approach to agency measurement of regulatory racial impact. This process of taking stock deliberately and consistently across agencies is a necessary first step because, going forward, the information developed from this assessment would form the baseline by which agencies would measure their progress toward reparations. Without a consistent approach to measuring past harm, comparisons across agencies would be less meaningful, and measuring progress when rules from multiple agencies intersect in their impact would be more difficult to model.

The Order would require OIRA and OMB to work in conjunction with agency heads to develop best practices for assessing equity in agency

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *See id.*
[144] *Id.*

policies and programs.[145] However, the proposal in this Article goes further and would require interagency development of shared practices for measuring past racial harm from historical regulatory schemes. The distinction is that the current process being undertaken is focused primarily on evaluating *contemporary* equality in access and participation in agency programs; a system of reparations would also seek to measure *past* injuries and, to the extent possible, quantify the economic and noneconomic harm done.

One challenge that will likely arise is that, in conducting a review of historical racial impacts in the context of a current rulemaking or adjudicative process, agencies would have to be aware of the discriminatory effect of their own previous decisions and the decisions of other agencies. Another concern would be cooperation across agencies to measure, and allocate responsibility for, past harm. As one scholar has noted, "[b]ecause no individual regulatory agency is likely to possess the holistic worldview or resources necessary to rationalize the overall corpus of federal regulations, reliance upon individual agencies to conduct retrospective reviews is likely to lead to suboptimal results."[146] For reparations review to fully account for structural racial discrimination, there must be a horizontal review in place in addition to the "vertical" review that would occur within each agency to avoid siloing.[147] Much in the way that OIRA currently exercises horizontal oversight over agency rulemaking to ensure consistency with the Uniform Regulatory Agenda,[148] some centralization would be necessary under this proposal. It remains to be seen whether any of the entities identified in the Executive Order would have sufficient coordination ability to identify opportunities for intersectional review.

Whatever body is selected to exercise horizontal reparations review oversight would need to ensure that where regulatory schemes

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[145] *Id.*

[146] Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265, 283 (2015).

[147] Other scholars have recognized the need for horizontal oversight when arguing for a more robust system of regulatory lookback in other contexts. *See, e.g.*, MICHAEL MANDEL & DIANA G. CAREW, PROGRESSIVE POL'Y INST., REGULATORY IMPROVEMENT COMMISSION: A POLITICALLY VIABLE APPROACH TO U.S. REGULATORY REFORM 14 (2013) (proposing establishment of an independent Regulatory Improvement Commission that would review existing regulations and receive public input on rules that had become unworkable).

[148] *FAQ*, OFF. OF INFO. & REGUL. AFFS. https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp (last visited Oct. 26, 2021).

administered by different agencies have intersectional effects, those agencies are examining those rules contemporaneously for the best and most complete outcome. For example, if the Department of Education were reviewing student lending regulations and identifying disparate impacts on Black and minority borrowers,[149] they would likely find that the disparate impact of student lending rules intersects with other financial regulations. How, for example, might student debt loads create compounded disparities elsewhere in lending standards? Under the Fair Housing Act, do larger amounts of student debt affect access to favorable mortgage rates under the First Homebuyer program?[150] Are there disparate impacts in mortgage lending that are traceable in part to disparate effects on Black borrowers due to student loan regulation? If agencies submit their plans for reparations review to a central oversight body, that entity may help identify spaces where interagency coordination is needed so that those rules can be examined contemporaneously and may also help flag rules that on their face may not appear to implicate race.[151]

A final mechanical caveat is that such a comprehensive review would likely encounter pushback from agencies as an incursion on agency discretion to prioritize their agenda, and as requiring a substantial diversion of agency staff and funding away from prospective rulemaking. At the outset, the role of the President here would be to reaffirm that this reflects the unified agenda of the executive branch and to commit support to agencies to simultaneously pursue their review and their new rulemaking. The Order does require allocation of funding to support this effort, though it does not specify an amount or a pool of funds from which support would be drawn.[152] Another more basic—and linked—challenge is, of course, lack of personnel to conduct reviews and communicate with

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[149] *See, e.g.*, Adam Looney et al., *Who Owes All That Student Debt? And Who Would Benefit if It Were Forgiven?*, BROOKINGS INST. (Jan. 28, 2020), https://www.brookings.edu/policy2020/votervital/who-owes-all-that-student-debt-and-whod-benefit-if-it-were-forgiven/ (finding that Black student loan borrowers default at five times the rate of white borrowers).

[150] According to the Federal Reserve, 20% of the reduction in homeownership rates is due to student loan debt. Alvaro Mezza et al., Fed. Rsrv., *Can Student Loan Debt Explain Low Homeownership Rates for Young Adults?*, CONSUMER & CMTY. CONTEXT, Jan. 2019, at 2, 3. The impact of student loan debt disparities does indeed have spillover effects beyond home ownership into other areas requiring financial access. *Id.* ("[H]igher student loan debt early in life leads to a lower credit score later in life, all else equal.").

[151] Where agencies fail to identify a facially race-neutral rule as having a racially disparate impact, that gap could be partially filled through the petition process described *infra* Part II.B.

[152] *See* Advancing Racial Equity and Support, *supra* note 7.

other agencies. While acknowledging the reality of finite agency resources, this Article considers what might be accomplished with a robust, sincere, and well-funded commitment to reparations.

B. Citizen Petitions for Reparations Review

Next, I propose that agencies clarify their procedures for citizen petitions to specifically identify and publicize an avenue for citizen petitions to request that agencies undertake reparations review of a specific rule or other agency action. The reparations review contemplated earlier would be a massive undertaking for agencies, as discussed, and would require significant resource allocation of time and personnel. As agencies scan the horizon to prioritize which regulations and regulatory areas to address first, they should welcome broad democratic participation in setting that agenda.[153] One overarching principle of a systems framework for reparations that accounts for procedural justice is that whatever measures are used to evaluate past racial harm must be measures developed through a process that meaningfully includes stakeholders.[154] Procedural justice in regulatory reparations must begin at the reparations review stage, and must include meaningful opportunities for public input that intentionally and deliberately prioritize the input of Black communities.

The APA currently gives any "interested person the right to petition for the issuance, amendment, or repeal of a rule."[155] This right has been read expansively to reach not only rules that would be subject to the notice and comment process, but also interpretive rules, guidance, and other informal agency pronouncements.[156] The existing citizen petition process

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[153] There is significant literature advocating for democratization and outreach throughout existing portions of the rulemaking process and in administrative law more broadly. This proposal reflects a similar belief in expanding access and input, but the benefit of expanding the petition process is distinct from that of encouraging more participation in notice and comment. *See* Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265, 288 (2015) (discussing value of citizen petitions in encouraging regulatory lookback); Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321 (2010).

[154] *See, e.g.*, John Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, 73 IND. L. J. 903, 952–56 (1998).

[155] 5 U.S.C. § 553(e) (2021).

[156] *See* U.S. DEPT. OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 38 (1947).

under the APA would arguably already create an avenue by which stakeholders could prompt an agency to review a historical rule.[157] Additional clarity, however, about the availability of the petition process to trigger reparations review could be beneficial. Intentional outreach to communities of color encouraging participation would be beneficial as well.

In the pursuit of procedural justice, this proposal draws on the scholarship proposing a system of collaborative governance, which emphasizes the benefits of a less adversarial, more synergistic relationship between regulated entities and agencies.[158] A collaborative governance model would prompt "agencies to use public participation and collaboration much differently, much more, and much earlier in the policy process,"[159] and would be best served here by an accessible, streamlined way for citizens to petition for reparations review. In the context of reparations, collaborative governance would situate communities of color as the primary stakeholders who are in the best position to identify areas in need of reparations review that agencies do not independently flag.[160] Not all rules will require a searching critique to identify disparate impacts; some agencies will not be ferreting out unforeseen racial impacts but will rather be confronted with rules that "barely concealed efforts to harm various marginalized groups."[161]

This proposal, if enacted through legislative means, would also give guidance to agencies and courts about the standard of review when citizens petition for review of a rule's racial impact. Currently, under APA § 555, when agencies receive a petition to begin rulemaking, they are only

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[157] Bull, *supra* note 153, at 288.

[158] *See, e.g.*, Bull, *supra* note 153, at 287; Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 10 WIS. L. REV. 297 (2010) [hereinafter Bingham, *Next Generation*]; Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder Voice*, 2009 J. DISP. RESOL. 269 (2009). *See also* Steven J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, 1 J. L. AND POL'Y FOR INFO. SOC'Y 59, 61 (2005) (examining public participation in the rulemaking process other than through the comment stage of rule development).

[159] Bingham, *Next Generation*, *supra* note 158, at 344.

[160] *See generally* Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000) (identifying the benefits of relevant stakeholder input in rulemaking).

[161] *See, e.g.*, Bernard Bell, *Race and Administrative Law*, YALE J. REGUL. (Aug. 10, 2020), https://www.yalejreg.com/nc/race-and-administrative-law-by-bernard-bell/.

obliged to consider that request within a "reasonable time."[162] Once they have decided whether to undertake rulemaking, they must give a "brief statement of their grounds for denial."[163] Courts rarely overturn agencies when they decline to begin rulemaking in response to a citizen petition—that decision about agency resources and priorities can typically be justified by ample internal agency considerations, and therefore is generally unlikely to fail arbitrary and capricious review.[164] While review of an agency's response to a citizen petition is currently highly deferential to agency priorities,[165] the requirement for reparations review, coupled with the presumption that racial impact is a relevant factor in rulemaking discussed *infra* Part III.A., should move the arbitrary and capricious needle toward a "hard look" standard of arbitrary and capricious review. Ideally, agencies will take their regulatory reparations obligations seriously, but if they cut corners in responding to citizen petitions for reparations review, a "hard look" standard would strengthen plaintiffs' challenge to their decision upon judicial review.

C. Complementarity with Reparative Administrative Programs

The reparations review groundwork would, consistent with the requirement in the Biden Executive Order, require agencies to evaluate whether underserved communities experience barriers to access of agency programs and services.[166] Reviewing historical and current targeted "vertical" programs within agencies in conjunction with a horizontal, cross-cutting reparations review would improve delivery of regulatory reparations through those programs by identifying opportunities to coordinate across agencies.

Take, for example, efforts to redress decades of racism within the US Department of Agriculture ("USDA"). Farming, farmland use and ownership, and access to government farm supports have long been means for building and consolidating white rural wealth.[167] Formed in 1862,

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[162] 5 U.S.C. § 555(b) (2021).

[163] *Id.* § 555(e).

[164] *See id.* § 555(d).

[165] *See* Administrative Conference of the United States, *Final Petitions for Rulemaking Recommendation*, Admin. Conf. Rec. 2014-6 (Dec. 5, 2014), https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Recommendation%2520%255B12-9-14%255D.pdf.

[166] *See* Advancing Racial Equity and Support, *supra* note 7.

[167] *See* John Pender, *Rural Wealth Creation*, U.S. DEP'T OF AGRIC., (Mar. 2012), https://www.rd.usda.gov/sites/default/files/rd-ERR131.pdf.

USDA deemed itself the "people's agency," and its primary initial purposes were to support an agrarian society through education and research on farming practices.[168] Historically, USDA has administered numerous statutes that divested agricultural land from nonwhite people and transferred it to white farmers.[169]

USDA's effort over the past year to forgive Black farmers' debt illustrates the complexities of designing a vertical reparative structure within existing agency programming that addresses both past and ongoing racial harm. Post-Reconstruction theft of Black-owned land dispossessed many Black farmers, and partition and sale of heirs' property accelerated the loss of Black-owned rural land.[170] USDA has acknowledged a long history of racial bias in lending and that its policies have contributed significantly to shrinking acreage and profitability for Black farmers.[171] As a partial response, USDA earmarked four billion dollars of assistance in Covid relief funds for forgiveness of USDA loan debt held by Black farmers.[172] Part of the rationale for the debt forgiveness is that poor loan terms and unequal access to lending has put Black farmers in a significantly worse financial position than white farmers,[173] and addressing the debt balances would be one step toward USDA regulatory reparations.

Black farmers have pointed out, however, that wiping out past debt alleviates only part of the problem without a commitment and strategy to level the playing field for current and future lending.[174] In 2020, 37% of Black applicants for USDA grant funds for land and equipment purchases had grants approved, compared to 71% of white applicants—roughly half the rate of approval.[175] Additionally, they withdrew their grant

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[168] *USDA Celebrates 150 Years*, U.S. DEP'T OF AGRIC., https://www.usda.gov/our-agency/about-usda/history (last visited Oct. 24, 2021).

[169] *See* Morrill Act, 7 U.S.C. § 321 (1862); Dawes Act, 25 U.S.C. § 331 (repealed 2000).

[170] *A 'Game Changer' Law May Help Black Farmers Secure Threatened Land Legacies*, FOODTANK (Aug. 2021), https://foodtank.com/news/2021/08/a-game-changer-law-may-help-black-farmers-secure-threatened-land-legacies/.

[171] *See* Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999) (agreeing to a compensation structure to repay Black farmers who had experienced discrimination in USDA lending).

[172] Ximena Bustillo, *'Rampant Issues': Black Farmers Are Still Left out at USDA*, POLITICO (July 7, 2021), https://www.politico.com/news/2021/07/05/black-farmers-left-out-usda-497876.

[173] *Id*.

[174] *Id*.

[175] *Id*. 7% of Black applicants were approved, while 71% of applicants were approved. *Id.*

applications at a significantly higher rate: 38% of Black applicants withdrew their request compared to 22% of white applicants.[176] This suggests a two-fold issue within the grant program: (1) criteria favoring the categories of farms most often farmed by white farmers, and (2) a continuing problem with lack of communication and assistance for applicants to help them identify grants for which they are eligible and successfully apply. The sort of application complexity and lack of outreach by local offices that frustrated access to the *Pigford* settlement funds continues to be an issue with access to current programs.[177] Reparations in this context would require not only forgiving past loans but also retooling lending programs and procedures that are recreating the same disparate conditions now and in the future. The proposed system of reparations review would hopefully identify opportunities like this to craft broader reparative solutions across silos, not only across agencies but within agencies.

One challenge with previous efforts under *Pigford I* and *Pigford II* is that changes at the agency level still require communication and buy-in from the county level offices where loan decisions are made in the first instance.[178] Those offices' decisions drove much of the racially disparate lending over the decades leading up to *Pigford*, such as delaying loans until after farm season, requiring additional supervision of Black farmers' use of their assistance, or issuing loans on unfavorable terms.[179] A successful program to remediate past harm while promising non-repetition of that harm would need to either remove much of the subjectivity from local offices or require significantly increased oversight of local decision-makers. To identify that need, a reparations review would need to look beyond substantive agency regulations to identify intersectional racial impacts between the agency at the federal level and its corresponding state and local counterparts.

The primary caveat here is that even with a successful reparations review that captures intersectional impacts across agencies, within

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[176] *Id*.

[177] *Id*.

[178] As Josh Galperin has noted in his study of USDA's local farm committees, an unusual structural feature is that the officials are elected, by the local agricultural community. Josh Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. 1, 16–19 (2020). In other words, the decision-makers are those chosen by the majority of local farmers, to distribute a finite pot of money among their neighbors. *Id*. This poses a challenge for federal oversight and compliance, as well as increasing the likelihood of bias.

[179] *See* Pigford v. Glickman, 185 F.R.D. 82, 85 (D.D.C. 1999).

agencies, and among federal agencies and their field offices, regulatory reparations may be challenged by stakeholders who oppose them. Right now, USDA's debt relief reparations effort has stalled due to opposition from white farmers.[180] Even though white farmers received almost all of the aid from the Covid relief bill, and continue to be eligible for USDA support, the effort to distribute the relatively modest amount of funding for Black farmers under the "Socially Disadvantaged" debt relief plan has engendered litigation.[181] White farmers have sued to stop the payouts, arguing that they are being racially discriminated against by not also being eligible for this funding for debt relief.[182] The class action plaintiffs argue that the definition of socially disadvantaged groups eligible for funding as "people of color" violates their equal protection rights by not including "white ethnic groups" that have historically experienced discrimination.[183] Whether anti-reparations litigation by white stakeholders will succeed where comparable litigation under Title VI by Black Americans has typically failed has yet to be determined.

IV. EMBEDDING REGULATORY REPARATIONS IN THE APA

For regulatory reparations to be a meaningful and ongoing commitment that reflects procedural justice, agencies should build reparative goals into the rulemaking process from start to finish. Ideally, this would entail Congressional action amending administrative procedural requirements, creating an obligation for all agencies to conduct racial impact analysis during rule development, and accounting for racial impacts as part of any final rule. While this would encounter the obvious challenge of obtaining legislative consensus, where other legislative reparations have yet to succeed, Congressional action is necessary to ensure greater longevity of this commitment. Executive orders and agency-by-agency regulations are "unacceptably vulnerable to changing political winds when the White House changes hands."[184] This Part proposes to embed regulatory reparations into administrative procedure horizontally, in two ways: (1) establishing a presumption that a rule is arbitrary and capricious if the issuing agency did not consider its racial

[180] Galperin, *supra* note 178, at 20–21.

[181] *Id.* at 25.

[182] Defendant's Response to Corey Lea's Motion for Permissive Joinder at 1, Miller et al. v. Vilsack, No. 4:21-cv-00595 (N.D. Tex., 2021).

[183] *Id.* at 4.

[184] Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph*?, 39 YALE L. & POL'Y REV. 1, 10 (2020).

impacts, and (2) broadening the regulatory cost-benefit analysis to include community-based benefits stemming from reparative regulatory efforts.

A. A "Hard Look" Review of Racial Impact Analysis

Establishing a presumption that agencies must consider racial impacts from their regulations and explain their reasoning for their rules to survive judicial review will force agencies to be more proactive in seeking opportunities to repair past racial harm. In rulemaking (and unmaking), this proposal would expand on the existing push, discussed elsewhere in this Article, to democratize the rulemaking process and bring voices of Black people and underrepresented groups to the table.[185] Additionally, it would strengthen the expectation that once agencies have conducted a reparations review, they must account for how they will use future rulemaking to respond to what they have found.

At the time of *Overton Park*, SCOTUS and the administrative state missed an opportunity to identify racial impact as a relevant factor that agencies must consider.[186] In that case, Tennessee state officials considered various possible routes for the soon-to-be-constructed I-40 highway through Memphis.[187] To the dismay of residents living near Overton Park, the route selected would have bisected the large park.[188] The Secretary of Transportation agreed to the route, which the Department of Transportation Act and the Federal Aid Highway Act only permitted upon a finding that there were no "feasible and prudent" alternative routes that would avoid disturbing public lands.[189] The agency's decision-making record was very thin and, when the decision was challenged in court, there was little contemporaneous information in the record memorializing what the agency did or did not consider.[190] Therefore, the Supreme Court determined there was an insufficient basis for finding that the agency "considered the relevant factors" sufficiently enough to conclude that the decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[191]

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[185] Shapiro, *infra* note 200.

[186] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[187] *Id.* at 406.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 408.

[191] *Id.* at 413–14, 416.

The decision is more typically remembered for the discussion in the opinion of each category of judicial review contemplated by APA § 706, but it also had an implicit secondary effect on judicial review of agency decision-making.[192] By failing to explicitly consider the racially disparate impact of possible routes for I-40, the Secretary of Transportation omitted considerations that could have been inherently "relevant factors" in agency decision-making. By not raising that omission in the opinion, the courts reviewing the administrative record implicitly approved of a "reasoned decisionmaking process" that was not race-cognizant. On judicial review, several subsequent courts citing *Overton Park* in highway routing cases have also permitted agencies to make regulations or adjudicative decisions without meaningfully considering racially disparate impacts, by declining to find their actions arbitrary and capricious.[193] Thus, in the absence of a statutory mandate specifically obligating the agency to consider the effects of their regulations on Black or underserved communities, an agency decision that ignores or gives minimal weight to racial equity concerns can pass muster under the APA.

A model for a horizontal requirement that agencies conduct racial impact analysis in rule development can be found within some existing regulatory schemes based on cooperative federalism. Consider the Clean Power Plan rule—environmental justice considerations were baked in from the beginning at two levels of the rulemaking process.[194] First, under a 1994 Executive Order on Environmental Justice, the Environmental Protection Agency ("EPA") is generally required to include an environmental justice analysis as part of their regulatory impact statement.[195] Second, the resulting final rule would have had downstream effects on racial impact analysis at the state level.[196] EPA, like many federal agencies, administers far-reaching statutes in conjunction with state-level partners who have the discretion to set their own rules about

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[192] Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record"*, 10 ADMIN. L. J. AM. U. 179, 194 (1996).

[193] *See, e.g.*, Coal. of Concerned Citizens against I-670 v. Damian, 608 F. Supp. 110, 127 (S.D. Ohio 1984); Nashvillians against I-440 v. Lewis, 524 F. Supp. 962, 998 (M.D. Tenn. 1981); Harrisburg Coal. against Ruining Env't v. Volpe, 330 F. Supp. 918, 926 (M.D. Pa. 1971).

[194] 84 Fed. Reg. 130 (July 8, 2019).

[195] Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 16, 1994).

[196] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,670 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

how to meet federal environmental targets. The Clean Power Plan rule directed state agencies tasked with implementing the plan to specifically account for how communities of color could access federal investments, receive the benefits of improvements, and directly benefit from job creation.[197] Additionally, the rule required states to evaluate whether their implementation plans would adversely impact poor and minority communities and create mitigation measures.[198] To do so, states would inherently have to make an effort to identify existing harms from pollution and climate change specifically for Black communities and other communities of color, and a strategy to directly address those harms. This is a comprehensive explicit requirement for state level agencies to consider racial impact analysis in a way that a horizontal federal requirement should emulate.

In order to ensure that agencies consider racial impact thoroughly and intentionally, broader input must be actively solicited during the rule development process and throughout the notice and comment process. If Black stakeholders are underrepresented in an agency's usual notice and comment process, then an agency should have an obligation to seek community input through whatever mechanisms produce a more racially inclusive process. As scholars have long noted, democratized comment procedures bring in voices that "counteract influential interests, provide overlooked data, and open the process to scrutiny of all affected individuals."[199] Agencies' preliminary assessment of the racial effects of a proposed rule would need to be part of the explanation of the proposed rule, to give the public a meaningful opportunity to evaluate the basis for an agency's analysis and weigh in during the notice and comment period.

Other efforts to increase participation in the notice and comment process have emphasized the value of having input from broad viewpoints, and from regulatory beneficiaries who are members of the general public

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[197] *Id.*

[198] *Id.*

[199] Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 UNIV. KAN. L. REV. 271, 288–89 (1992); *see also* Sidney Shapiro, *Administrative Procedures and Racism*, YALE J. ON REGUL. (Aug. 11, 2020), https://www.yalejreg.com/nc/administrative-procedures-and-racism-by-sidney-a-shapiro/ (proposing that agencies could be required to reach out to minority communities and bring them into the comment process to aid in agency decisionmaking).

as well as regulated entities and sophisticated parties.[200] The issue with encouraging participation generally, without creating an obligation on the agency's end to seek out information on the racial impact of rules, is that the agency's obligation to consider that information and explain the choices they made based on it only comes into play when people happen to have located the docket and placed compelling persuasive information into it.[201] In other words, leaving the onus on stakeholders to raise disparate impact arguments in the comment process suffers from some of the same limits as litigation—it depends on the efforts and capacity of individual members of the public to bring disparate impact information to the agency; thus, it is possible that even more compelling information is left unheard.

For example, the Food and Drug Administration ("FDA") proposed a rule that would require health care providers to include language about breast density as part of mammography results given to patients.[202] That language suggested that patients needed to follow up with their providers if they had low or high breast density that might impact the accuracy of a mammogram in locating cancer.[203] However, in developing the rule, FDA did not consider studies that revealed "some evidence that Black and Hispanic women respond differently than white women to certain mammogram-related messages."[204] Professor Bridget Dooling submitted those studies through the public comment process in order to get that evidence into the docket and trigger FDA's obligation to consider the unintended racial impact of the proposal.[205] She notes that for any researcher whose work includes evidence of racial disparities, they can use the comment process as an additional vector for their work to have impact on policy.[206] This is true, but it also reinforces the limits of the existing notice and comment process to ensure that all rules thoroughly consider racial impacts. In the absence of efforts by often-sophisticated parties, the

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[200] *See, e.g.*, Kuehn, *supra* note 79, at 10689 (recognizing the need to solicit underrepresented people and give their input meaningful consideration, in order to create a procedurally just process).

[201] *See id.* at 2000; *see also* Bridget C.E. Dooling, *Race and Regulation: Getting Evidence into the Record*, YALE J. REG. (Aug. 12, 2020), https://www.yalejreg.com/nc/race-and-regulation-getting-evidence-into-the-record/.

[202] Mammography Quality Standards Act, 84 Fed. Reg. 11,669 (proposed Mar. 28, 2019) (to be codified at 21 C.F.R. pt. 900).

[203] Dooling, *supra* note 202.

[204] *Id.*

[205] *Id.*

[206] *Id.*

agency would not have an independent obligation to seek out information on preexisting racial gaps or the possibility that a proposed rule would widen those gaps.

If all agencies had to consider race during rule development to avoid the presumption that their rule was arbitrary and capricious, then the onus would be on the agency, as the party with greater capacity and manpower, to seek out information and review the existing literature and studies or to convene broader panels of experts to advise them. If an agency determined that a rule did not implicate any sort of racial disparity, they would still have to engage in reason giving—explaining what steps they took to evaluate racial impact, why they determined the proposed rule would not be discriminatory, and why the rule does not lend itself to any opportunity to remediate past harm with a nexus to the substance of the prosed rule.

As discussed above in Part II, the experience of plaintiffs attempting to bring reparations suits through litigation reveals a primary reason to develop a system of broad regulatory reparations as a complement to litigation—access to legal recourse is spotty.[207] Hurdles to plaintiffs bringing suit against agencies that fail to engage in regulatory reparations can be alleviated, however, if these presumptions attach in the rulemaking process. By creating a presumption that a rule that fails to consider racial impacts is arbitrary and capricious, this proposal shifts the burden among the parties and the court's scrutiny to a different point in time in the agency's process.

Plaintiffs can look to the contemporary explanations given by the agency, and if the agency did not solicit stakeholder input, consider racial impacts, and explain what they did with the information they received, plaintiffs can show that the presumption cuts against the agency. The burden would then shift to the agency to overcome the presumption. Without the presumption, in the absence of a statutory obligation to account for the racial impact, plaintiffs challenging agency rulemaking would likely have to prove that the rule created a disparate impact. Even then, they would come up against a highly deferential standard of review that would allow the agency to put forth any number of alternative reasons for their proposal. The proposal to embed racial impact analysis into agency rulemaking as a presumptively relevant factor levels the potential litigation playing field on judicial review, creating an additional layer of

[207] *See generally* discussion *supra* Part II.

procedural justice and a means by which to force corrective regulatory repair.

B. Reparative Cost-Benefit Analysis

A system of regulatory reparations must account for not only economic inequities and unequal access to administrative programs, but also damage to community cohesion, longevity and social capital. One way in which to begin to repair those harms is through a reimagining of the cost-benefit analysis conducted during rule development. In creating estimates of regulatory cost, we must think beyond the costs of rule compliance, or economic externalities, and attempt, however imperfectly, to measure the costs of our regulatory regimes on long-term community building for underserved communities. This corresponds to the need to account for those harms during the reparations review process.

Cost-benefit analysis, broadly, asserts the utilitarian function of ensuring that no regulation costs more than it saves. Depending on how costs and savings are framed in the rulemaking process, the cost-benefit analysis can be wielded to achieve favorable outcomes for Black communities, or unfavorable ones, as occurred under the Trump administration in EPA's Soot Rule.[208] Within the Soot Rule were provisions restricting the use of cost-benefit analysis to account for racialized harms from air pollution.[209] Instead, only those costs that were directly monetizable could be included in the agency's justification.[210] The changes to cost-benefit analysis were also intended to apply not only to rules about particulate pollution but to all other rules implementing the Clean Air Act, tying the agency's hands in the future when attempting to place value on environmental justice.[211]

This Article proposal's intent would, obviously, seek to require an opposite result. Additionally, the Soot Rule example exemplifies why this proposal would be most effective if implemented through legislative means. Buffering this shift in cost-benefit analysis to make it less susceptible to administrative turnover would ensure that the regulatory reparations process is not constantly changing directions. Certainty for

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[208] *See* Jean Chemnick, *Soot Rule Thrusts EPA into Spotlight on Race*, SCIENTIFIC AM. (June 12, 2020), https://www.scientificamerican.com/article/soot-rule-thrusts-epa-into-spotlight-on-race/.

[209] *Id.*

[210] *See id.*

[211] *See id.*

regulated entities and beneficiaries in how rules impacting them will be valued by the agency over time will likely have positive effects, particularly for stakeholders in the reparations process.

Current cost-benefit analysis creates potential procedural cover for "smuggling racism" into the regulatory process under a pretense of neutrality.[212] A primary critique of using cost-benefit analysis in regulation at all is that it embeds a series of value judgments into each step.[213] However, presented as objective economic data, it takes on a veneer of neutrality that disguises the various decision points regulators made along the way.[214] When economists tout cost-benefit analysis as a welfare-maximizing approach, the first implicit decision in the analysis is whose welfare will count and how it will be measured.[215]

Additionally, even as cost-benefit analysis is increasingly part of the rulemaking process, the methodology used varies agency-by-agency, and even rule-by-rule.[216] Cost-benefit analysis is required for rules that are "economically significant," though agencies may elect to use a cost-benefit framework for other rulemakings as well.[217] What is included on each side of the ledger, however, is a matter of agency discretion, subject to executive direction.[218] The artificial neutrality of quantitative valuation of rules is addressed and retooled in another recent Executive Order on Modernizing Regulatory Review, which charges agencies with assessing the "distributional consequences of regulations . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately

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[212] James Goodwin, *Cost Benefit Analysis is Racist*, CTR. FOR PROGRESSIVE REFORM, https://progressivereform.org/our-work/regulatory-policy/cost-benefit-analysis-racist/ (last visited Oct. 28, 2021).

[213] *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PENN. L. REV. 1553, 3–4 (2002); FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 8 (2004) ("The basic problem with narrow economic analysis of health and environmental protection is that human life, health, and nature cannot be described meaningfully in monetary terms; they are priceless.").

[214] *See, e.g.*, Kuehn, *supra* note 79, at 10690 (noting scholarship questioning "whether the use of risk assessment and cost-benefit analysis in environmental decision-making may prejudice peoples of color and lower income populations").

[215] *See* Ackerman & Heinzerling, *supra* note 213.

[216] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-714, FEDERAL RULEMAKING: AGENCIES INCLUDED KEY ELEMENTS OF COST-BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS' SIGNIFICANCE COULD BE MORE TRANSPARENT 29–32 (Sept. 12, 2014).

[217] *Id.* at 20.

[218] *See* Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

burden disadvantaged, vulnerable, or marginalized communities."[219] Through a community-based lens, the cost-benefit analysis can shift and become an additional tool to advance regulatory reparations. Whereas during previous administrations, cost-benefit analysis has often been used to achieve anti-regulatory ends, "[i]f it is to be a tool of policy evaluation worth supporting, we must embed it in political frameworks that make CBA just as prone to catalyzing regulation, as to derailing it."[220]

A more expansive approach to valuing noneconomic benefits in regulatory cost-benefit analysis is not an entirely novel proposal, and prior administrations have laid a foundation for what that might look like. Under the Obama administration, agencies were "directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible" and where appropriate "consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[221] Looking forward in the cost-benefit analysis toward a comprehensive reparations framework requires broadening the scope of both costs and benefits to include what Monica Bell has described as the intangible benefits of "safety, friendship, and dreams."[222]

A theory of reparations grounded in restitutionary principles, reparation, and social justice could inform our reimagining of cost-benefit analyses. In addition to the benefits a rule might accrue to Black households or businesses, what if we reimagined what might currently go on the ledger as a cost—losses to white people and established systems benefitting from wealth historically extracted from Black people—as instead a redistribution, with a corresponding beneficial value.

As a hypothetical example, consider a cost-benefit analysis of a proposed regulation that would restore access to participation in public housing for people convicted of drug offenses. Given the disparate racial impact of drug policy and criminal enforcement of drug laws, we know that such prohibitions on living in public housing also disparately impact

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[219] Modernizing Regulatory Review, 86 Fed. Reg. 7,223 (Jan. 20, 2021).

[220] Frank Pasquale, *Cost-Benefit Analysis at a Crossroads: A Symposium on the Future of Quantitative Policy Evaluation*, L. & POL. ECON. PROJECT (Sept. 27, 2021), https://lpeproject.org/blog/cost-benefit-analysis-at-a-crossroads-the-future-of-quantitative-policy-evaluation/.

[221] Improving Regulation and Regulatory Review, *supra* note 122.

[222] *See generally* Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. CR.-CL. L. REV. 704, 706 (2019).

Black communities. Under a purely economic approach to cost-benefit analysis, expanding access to public housing could have some direct economic costs, particularly those associated with ensuring an adequate amount of housing stock to meaningfully create access to that benefit and any administrative overhead costs incurred in enrolling new beneficiaries. Economic benefits to newly eligible people could be measured narrowly as the value of subsidized housing, and the avoided costs associated with homelessness.

But in quantifying the benefits, a community-based approach would look beyond the benefits to individual recipients and attempt to quantify the economic and noneconomic value for other beneficiaries. Those beneficiaries could include family members who would otherwise have to choose between remaining in public housing or seeking accommodations where they could cohabitate with their loved ones. Broader benefits at the community level would be those derived from stability—how do we quantify the value of long-term stable community membership broadly? The investments that people make in one another and their sense of civic belonging when they have housing security and longevity? How do we measure the benefit of feeling more deeply connected to community and therefore being more inclined to vote locally, to volunteer, or to build bonds? Taking it one step further, how would such a regulation impact the educational prospects for the children of new beneficiaries if housing, and therefore school districting, is more reliable? What is the value of ensuring that children are more likely to remain in one school from the start of the school year to the end, without disruption in their learning? Carried forward, how does that impact their likelihood of remaining in school, graduating on time, and finding stable employment?

The obvious objection to such an approach is that the ripple effects extend so far as to be too attenuated, no longer causally close enough to the regulation. However, this is the exact type of systems approach that is needed to counter the systemic effects of past discrimination. Intergenerational systemic racism got us here, thus, a long looking approach to repair its resulting harms is owed.

V. CONCLUSION

The administrative state owes reparations for past racist harms executed by administrative agencies. Regulatory reparations, as proposed, would complement other targeted efforts at reparations by embedding a systems approach to reparations within the administrative state. This

approach would alleviate some of the limitations of efforts to obtain reparations through litigation, particularly by shifting the enforcement burden to the government. It would also create accountability for the harms specifically caused by past administrative agency action, for which the government is the wrongdoer, effectuating the goals of a tort theory of reparations. Regulatory reparations could also result in greater public recognition of past harms and allocation and acceptance of responsibility than legislative efforts have had so far. Reparations review conducted by administrative agencies would result in a hopefully thorough accounting of racial harms caused by agency action as well as an explanation of the methods and information the agency relied on. Transparency in that process and responsiveness to citizen petitions for reparations review could create a pathway toward collaborative corrective justice.

Embedding consideration of past and future regulatory impacts on communities of color in agency rulemaking procedures would also serve as a promise to continue the work of reparations as an ongoing prospective administrative commitment. Within rulemaking, regulatory reparations would require agencies to consider past racial harms during rule development, identify opportunities to use rulemaking to redress those harms, and incorporate broad reparative goals in cost-benefit analysis. By creating horizontal changes in rulemaking procedures, this proposal attempts to guarantee nonrepetition of harm by treating reparations as an ongoing long-term obligation inherent across the executive branch. Once more, it is important to consider the forward-looking regulatory changes following regulatory review as only one component of a larger reparations framework. Additionally, and more fundamentally, regulatory reparations is a proposal situated within systems and structures that have produced and reproduced racist harm, and is therefore inherently inadequate. Requiring intentionality and a commitment to antiracism in our administrative procedures is a necessary, but deeply insufficient step toward reparations and racial justice.