Racial Justice and Administrative Procedure

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This article argues that commemorating the Administrative Procedure Act (APA) should involve accounting for the role it has played in both advancing and thwarting racial justice, as well as the role racial justice advocates have played in shaping its interpretation. The APA was not designed to advance racial justice; indeed, its provisions insulated some of the mid-twentieth century’s most racially pernicious policies from challenge. Yet racial justice advocates have long understood that administrative agencies could be a necessary or even uniquely receptive target for their efforts and the APA shaped those calculations. Along the way, racial justice advocates left their mark on administrative law, including an underappreciated role in administrative law’s participatory turn. Better understanding the interaction of racial justice and administrative procedure, I argue, would benefit historical and legal scholarship on race, administrative law, and their many underexplored yet consequential intersections.

The 2020 protests following the police killings of George Floyd and Breonna Taylor among others, spurred unprecedented attention to the intersections between race and administrative law.¹ Over three dozen related essays were published online in subsequent months by the Yale Journal on Regulation and the Regulatory Review. Entries came from giants of the field and relative newcomers.² The contributing scholars traced the roots of 

¹ This is not to ignore those who have long worked on race in substantive policy areas such as housing, transportation, education, and immigration.

administrative law to the United States’ history of violence and dispossession of Native peoples and its exclusion of Asian immigrants.\(^3\) They wrote trenchantly about how administrative law and the agencies it governs reproduce and exacerbate racial inequality.\(^4\) In these accounts, administrative law’s contributions to racial justice lie in the future: contributors posited ways to make administrative law, scholarship, and teaching more attentive to race and able to further racial justice (or, at least, to make these realms less racist).\(^5\)

While the current level of scholarly attention is new, advocates and ordinary people have long harnessed administrative law and administration to further racial justice. Indeed, those efforts predated the Administrative Procedure Act (APA), the subject of this symposium issue.\(^6\) Often, those efforts were only partially—or not at all—successful.\(^7\) Administration and the law that governs it reflect the racism of the society in which they exist; they do

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\(^{6}\) See infra Part I.

\(^{7}\) See infra Part II.
not transcend but are embedded within their social, political, and economic context. Racial justice advocates have had to creatively find ways to bend law to their ends, whether administered by an agency, interpreted by a court, or made by a legislature.\(^8\)

Telling the history of how advocates have leveraged administration and administrative law to advance racial justice is a necessary component of reckoning with the intersections of race and administrative law. Thus far, histories of administrative procedure do not emphasize race while those on race and administration do not emphasize procedure.\(^9\) There is also growing scholarship on administration’s role in the struggle for racial justice but little on how racial justice struggles shaped administrative law.\(^10\) The current conversation also focuses more on how administration exacerbates rather than creates opportunities to redress racial injustice.\(^11\)

Addressing these gaps is necessary to a full accounting of the intersection of race and administrative law. Most obviously, doing so can help fulfill the important project of analyzing how administrative law instantiates racism.\(^12\) Tracing the promises and limits of administrative law for racial justice advocates also helps draw comparisons within and across historical periods about the relative permeability of the judicial, executive, and legislative branches to such advocacy.\(^13\) Those efforts additionally reveal surprising examples of racial justice advocates moving administrative law in ways that have consequences for the field writ large. In other words, administrative law has been shaped by racial justice, and not only racist, projects.\(^14\)

This article surveys examples of the ways in which racial justice advocates have harnessed administration and administrative law.\(^15\) Doing so injects a historical perspective into unfolding conversations about race and administrative law today while bringing those conversations to bear on this commemoration of the APA’s 75th anniversary. Even this brief survey underscores the vital role that the APA and administrative procedure have played in the struggle for racial justice. That history also reminds that

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8. The scholarship on this subject is legion. Exemplary citations appear in the notes below. My contribution can be found in SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014) [hereinafter LEE, WORKPLACE CONSTITUTION].

9. See infra Part IV.A. Cf. Milligan & Tani, supra note 5 (suggesting that one reason administrative law scholarship has overlooked race is because of its focus on procedure rather than power).

10. See infra Part IV B.

11. See infra Part IV A.

12. See infra Part IV C.

13. See infra Part IV A.

14. See infra Part IV B.

15. The examples draw from my and other scholars’ work. They are meant to be suggestive rather than exhaustive.
administrative law has not only been an engine of racial oppression, even as it underscores the urgency of recent calls to make administrative law align with and better advance racial justice.

The article begins with several parts highlighting aspects of the history of race and administration, emphasizing the role of administrative law and the APA. Part I of this article argues that the APA’s usefulness in racial justice advocacy was accidental—the product of advocates’, organizations’, and regulated individuals’ creativity, not of legislative intent. Part II uses an array of examples drawn from my and other scholars’ work to demonstrate that racial justice advocates nonetheless had to contend with administrative procedure in the wake of the APA’s enactment. As it shows, the new landmark statute provided both a valuable tool and an injustice-preserving barrier to their efforts. Part III provides a brief case study of how one group used administrative procedure generally, and the APA in particular, to fight for more Black representation among broadcasters and in broadcasting during the Black Power era, helping to change administrative law along the way.

The article then steps back in Part IV to consider the implications of the preceding parts for historical and legal scholarship, as well as the larger project underway of reckoning with the intersection of race and administration. Part IV.A urges historians working on race and administration to focus on administrative procedure, not only substantive policy, and to attend to agencies’ resulting permeability relative to Congress and the courts. Doing so, I argue, will benefit historical and legal scholarship on race and administration. Part IV.B argues that racial justice advocates’ contributions to administrative law are important yet understudied. Paying more attention to them could shed new light on the history of administrative law and politics. That attention can also help ensure that administrative law’s debts to the efforts of Black activists and advocates are accounted for in the current conversation about race and administration. Part IV.C considers current proposals for measuring and remedying administrative agencies’ racial impacts, highlighting how a more robust history of race and administrative procedure and policy could aid those efforts. A brief conclusion follows.

I. THE APA: CIVIL LIBERTIES NOT CIVIL RIGHTS

On the day the APA went into effect, an article announced that the law “Gives New Safeguards to Civil Liberties.”16 Now, its author promised, “agencies in Washington were strapped into a new harness . . . to bar their

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treading on the constitutional rights of citizens.” 17 This reception was what the Act’s backers had hoped for, having touted it as a “‘bill of rights’ for the administrative state.” 18 In 1946, when the APA was enacted, executive branch advocacy was already a core plank of civil rights advocacy. Nonetheless, for all the APA proponents’ civil liberties talk, they were not imagining African Americans among those the Act would protect from, or give the ability to shape, federal administration.

By 1946, civil rights advocates had a well-established history of executive branch advocacy. As Megan Ming Francis has detailed, this involved direct lobbying of the White House for anti-lynching laws in the early 20th century. 19 But civil rights advocates also targeted administrative agencies. Kenneth Mack describes executive branch action to counter African Americans’ exclusion from New Deal employment programs. 20 Others contested federal public housing officials’ tolerance of segregated housing projects. 21 Prominent Black Americans challenged transportation segregation before federal agencies as well, as recounted by historian Mia Bay. 22 My own work has focused on civil rights advocacy challenging racial discrimination by unions before the National Labor Relations Board (NLRB) in the years before the APA’s enactment. 23

Nonetheless, the APA’s proponents did not have African Americans’ civil rights in mind when they promoted the act as protecting citizens’ constitutional rights. As Christopher Schmidt has shown, during the 1940s, the meaning of the terms “civil rights” and “civil liberties” was being reworked. 24 By 1946, when the APA was enacted, Schmidt argues that the terms were crystallizing into distinct categories. “Civil rights,” he contends, were newly associated with the struggle for racial equality only. 25

17. Id.
21. Id. at 960-61.
23. LEE, WORKPLACE CONSTITUTION, supra note 8, at 42-52.
25. Id.
were distinguished from “civil liberties,” which now referred solely to rights such as speech, association, and due process.26

The APA grew out of the civil liberties, not civil rights, tradition. The Act resulted from the American Bar Association’s (ABA’s) concern in the 1930s about the growth of administrative power during the New Deal.27 The ABA during that period was an all-white organization.28 Though it created a Committee on Civil Liberties in the late 1930s to temper its conservative image, that committee – true to Schmidt’s taxonomy – focused on political freedoms rather than racial equality.29 Supporters of the New Deal greatly tempered the ABA’s proposal over subsequent years, such that the APA bore little similarity to it.30 Nonetheless, the Congress that enthusiastically enacted the APA was a graveyard for any legislation that might advance racial equality.31 The law would not have passed, let alone passed with Southern Democrats’ support, were it seen as a tool in the Black freedom struggle.

II. HARNESSING ADMINISTRATIVE PROCEDURE TO ADVANCE RACIAL JUSTICE AFTER THE APA

The APA was not designed to advance racial justice. Nonetheless, over subsequent decades, civil rights advocates made use of administrative procedure, both under and around the APA, to try to counter racist practices of government agencies and those they regulated. The APA both facilitated and thwarted that work.32

26. Id.
27. GRISINGER, supra note 18; Reuel E. Schiller, The Era of Deference, 106 MICH. L. REV. 399, 421-25 (2007) [hereinafter Schiller, Deference].
30. GRISINGER, supra note 18, at 60-61.
32. Racial justice advocates’ use of the APA thus shares similarities with prior and subsequent efforts to use a seemingly inhospitable U.S. Constitution to advance racial justice. See, e.g., Dorothy Roberts, Foreword: Abolition Constitutionalism, 133 HARV. L. REV. 1, 10-11 (2019) (drawing on antebellum abolitionists’ arguments that the Constitution was anti-slavery to argue that it can be used to abolitionist ends today). It is also a reminder that as scholars turn their attention to how public law systematically distributes power, we should not lose sight of the role that agency on the part of the governed plays in contesting and shaping that distribution. See, e.g., Jonathan S. Gould & David E. Pozen, Structural Biases in Structural Constitutional Law, 97 NYU L. REV. 59 (2022); Maggie Blackhawk, Federal Indian Law as Paradigm Within Public Law, 132 HARV. L. REV. 1787 (2019); Daryl J. Levinson, The Supreme Court Term 2015 Foreword: Looking for Power in Public Law, 130 HARV. L. REV. 33 (2016).
Perhaps the most significant provisions of the APA were those that excepted large swaths of government activity from its coverage. The APA’s provisions for rulemaking and adjudication, for instance, excepted military functions. The provisions for rulemaking also excepted all matters relating to public property, loans, grants, benefits, or contracts while those for adjudications relaxed procedural protections when public benefits were involved. Further, unless Congress indicated in a regulatory statute that adjudications should be “on the record after opportunity for an agency hearing” the APA required almost no procedures at all. Thanks to these exceptions, as Joanna Grisinger observes, under the APA, “[t]he vast majority of administrative action would continue to be handled informally.”

As a result, civil rights advocates challenging racist federal practices in the first decades of the APA were often shunted by that law into the frequently fruitless realm of informal negotiation. This was particularly true for cooperative federalism programs in housing, welfare, and education. As Joy Milligan has shown in devastating detail, persistent efforts by the NAACP and its chapters to press federal housing officials to prevent government funds from being used to build segregated housing and neighborhoods during the 1940s, 50s, and 60s went nowhere. When it came to funding segregated schools, Milligan shows, civil rights advocates seem to have found the relevant agency officials so hostile to their claims that they focused their energies on the White House and Congress instead. Civil rights organizations had more success arguing that public assistance should not be denied on the basis of race.

Once Title VI of the Civil Rights Act of 1964 was enacted, more APA-mediated pathways for protest opened even in these cooperative funding areas. Title VI barred recipients of federal funding from denying benefits of,

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34. 5 U.S.C. §§ 553(a)(2), 556(d).
35. 5 U.S.C. §§ 554(a), 555.
36. GRISINGER, supra note 18, at 61.
37. Judicial review was also limited by caselaw all but precluding challenges to the government’s funding decisions. Milligan, Plessy Preserved, supra note 20, at 950-51.
38. Id. at 970-73, 983, 989, 992-93, 995.
41. For the argument that Title VI left some interactions between that statute and the APA ambiguous in a way that meant that, by the late 20th century, claims that policies had disparate racial impacts were caught in a limbo between the two laws, see Ceballos et al., supra note 5.
excluding from, or discriminating in their programs on the basis of race. 42
Civil rights groups flooded the federal agency that funded schools and hospitals with Title VI complaints. 43 If the government decided to act on the complaints, the recipient was due a formal adjudication under the APA. 44 While it took some prodding, the federal government all but eliminated hospital segregation in the late 1960s, relying heavily on civil rights advocates’ efforts. 45 Title VI also intersected with the APA to generate pathbreaking administrative hearings in the early 1970s finding that the type of de facto school segregation common outside the South violated Title VI. 46 In the case of housing, however, the courts had to drag agencies into enforcing Title VI. 47

Elsewhere in the administrative state, advocates made use of administrative procedure without needing to wait for Title VI. In the mid-1950s, just as the NAACP challenged school segregation in the federal courts, it also lodged a coordinated litigation campaign attacking discrimination in the Gulf Coast oil industry before the NLRB. 48 The NAACP’s goal was not only to break discrimination in the companies and unions charged but to convince the NLRB that racial discrimination was an unfair labor practice under the NLRA. 49 Those 1950s complaints failed to accomplish the NAACP’s goal. 50 But in the early 1960s, the NAACP made use of the procedures required for formal adjudications under the APA to convince the Board to adopt the NAACP’s interpretation of the labor law. 51 The NAACP and civil rights allies also filed complaints about discriminatory broadcasters with the FCC.

42. 42 U.S.C. § 2000(d).
45. SMITH, supra note 43, at 93-99, ch. 4, especially 118, 128-30 (describing local civil rights activists’ key role in lodging Title VI complaints against hospitals and investigating their subsequent compliance efforts).
46. See, e.g., Flow of U.S. Cash to Jim Crow School System Is Dried Up, PHILA. TRIB., Mar. 13, 1971, at 28 (describing education experts’ belief that the termination of funding ordered for the Wichita school district would “have a far-reaching effect in other northern districts”).
47. Milligan, Plessy Preserved, supra note 20, at 1001-02. That is likely in part because the APA’s exceptions continued to apply. As discussed below, in the late 1970s the federal housing agency voluntarily subjected itself to the APA’s procedures for rulemaking when promulgating policies otherwise excepted by the APA. See infra note 147.
48. LEE, WORKPLACE CONSTITUTION, supra note 8, at 101-02. The NLRA required that unfair labor practice orders and representation petitions be decided on the record of a hearing. NLRA §§ 9(b), 10 (b)-(c).
49. LEE, WORKPLACE CONSTITUTION, supra note 8, at 101-02.
50. Id. at 106.
51. Id. at 153. This complaint was also brought by the NAACP. Id. at 138-39.
These had little effect in the 1950s but advocates made use of the APA’s provisions to achieve more tangible outcomes in the 1960s.\(^{52}\)

In the 1960s and 70s, civil rights advocates pioneered new uses of the APA’s procedures to urge a wide array of agencies to adopt rules requiring regulated entities to ensure equal employment opportunities. As a general matter, Section 553 of the APA required agencies engaging in rulemaking to provide notice to the public about the policy change it was considering, an opportunity for public comment on the proposed changes, and an explanation of its ultimate policy choice (called “notice-and-comment” rulemaking).\(^{53}\) Initially, the APA’s notice-and-comment procedures were little used. During the 1960s, however, public administration put new emphasis on notice-and-comment rulemaking.\(^{54}\)

Racial justice advocates helped generate this transformation. They petitioned agencies for rules, taking advantage of the APA’s public comment provisions to drown agencies in everything from technical legal briefs to mass comments.\(^{55}\) They also brought agencies to court under the APA if they failed to act or declined to adopt the rules advocates called for.\(^{56}\) While advocates’ efforts failed to win rules at most agencies, they succeeded in securing such rules at the FCC.\(^{57}\) Subsequently, Black, Latinx, and women’s organizations used the rules to diversify the workforces of broadcasters, many of whom were too small to be covered by other employment discrimination laws.\(^{58}\)

After the APA’s enactment, racial justice advocates transformed it into a useful, if not foolproof, tool. Indeed, as the next Part explains, the FCC’s...
equal employment rules combined with its growing solicitude toward challenges to the licenses of discriminatory broadcasters set the stage for an innovative racial justice campaign that also presented a novel issue under the APA.

III. THE APA AND BLACK-OWNED BROADCASTING

In 1969, accusations of racism greeted a Senate Subcommittee considering a bill that would make it harder for a newcomer to win a federal broadcast license away from an incumbent. The leader of a new organization called Black Efforts for Soul in Television, or BEST, noted that there were zero Black-owned television stations in the entire country. The bill, he charged, would lock in White-only TV ownership. The bill’s sponsor cited his record on civil rights and urged that “the one thing I don’t want you people to do is . . . say this is a racist bill.” In response, a group of 20 BEST members attending the hearing chanted “it is, it is”! BEST’s public charges of racism helped kill the bill. When the FCC achieved the bill’s incumbent-protecting ends by administrative means, BEST had to use administrative law, not chanting, to stop it. In the process, BEST not only helped change the face of broadcasting but also caused the D.C. Circuit to confront a novel issue under the APA, one that remains unsettled to this day.

It might seem surprising that a militant Black organization targeted the FCC, but in the late 1960s, TVs were power. Television was ubiquitous: a majority of American families reported adjusting their eating and sleeping habits to accommodate the nearly six hours a day they spent with their TVs on. This cultural transformation knew no color line: televisions were found in nearly 90 percent of African American households. As currently owned and staffed, however, TV broadcasters were seen as intensifying racial injustice. The highly regarded Kerner Commission, assembled by President Johnson to diagnose the cause of the late 1960s urban uprisings, blamed television: by overlooking “the degradation, misery, and hopelessness of living in the ghetto,” as well as Black “culture, thought, or history,” TV

60. Id.
61. Id.
62. H. Joost Polak, To License or Not to License, PITT. PRESS, Nov. 14, 1971, at 275 (noting that the bill’s sponsor withdrew it “when it came under fire from blacks as too protective”).
63. Citizens Commc’ns Cir. v. FCC, 447 F.2d 1201, 1210 (1971) (describing the FCC’s new policy as “administratively ‘enact[ing]’ what the [Senate] bill sought to do”).
64. The FCC Creates Some Static, NEWSWEEK, Mar. 17, 1969, at 80. This paragraph and the next borrowed from Lee, Workplace Constitution, supra note 8, at ch. 8.
65. Id. at 80.
programming fed Black “alienation and intensif[ied] white prejudices,” the Commission’s staid liberals opined.\(^66\) BEST’s agenda aligned with the Commissioners’ diagnosis. BEST was organized to “improv[e] the position of minority groups in media ownership, access and coverage.”\(^67\) Thanks to its activism, industry insiders observed that “[t]he tide of black revolution has begun to beat against the television establishment.”\(^68\)

BEST’s activism was not confined to legislative lobbying; instead, it primarily pursued administrative action. Indeed, BEST came to oppose the 1969 bill because of its efforts to dislodge incumbent broadcast licensees during FCC licensing proceedings. In an early effort to block the license renewal of a Washington, D.C. television station, BEST charged that the station’s staff was mostly White, half its Black employees worked in custodial positions, and its programming “misrepresented blacks and the idea of blackness in a derogatory and insulting manner.”\(^69\) In order to proliferate such challenges, BEST trained citizen groups in major U.S. cities to monitor local stations and file petitions like its challenge to the Washington, D.C. station’s license.\(^70\) In another force-multiplying strategy, it sponsored a conference on how new local cable TV franchises could produce a more diversely owned broadcast ecosystem.\(^71\) BEST then sent the Black local officials in attendance off to urge the FCC to promulgate regulations facilitating this outcome.\(^72\) BEST also joined a host of other organizations working on behalf of marginalized communities to insist that broadcasters diversify their hiring under the FCC’s newly adopted equal employment rules.\(^73\)

BEST’s administrative advocacy quickly led it to also make use of the APA and administrative law. Around the time of the Senate hearing, news broke that the FCC was considering issuing a policy that would protect an incumbent broadcaster when a newcomer made a bid for its license. BEST asked the district court to enjoin the FCC from issuing its policy and require

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\(^67\) Brief for Petitioners at 4, Citizens Commc’ns Ctr. v. FCC, No. 24,471 (D.C. Cir., June 11, 1971) (quoted in Comment, Implications of Citizens Communications Center v. FCC, 71 COLUM. L. REV. 1500, 1507 (1971)).


\(^69\) Id.

\(^70\) Id.

\(^71\) Tom Bradley, Report to the People, SOUTHWEST NEWS, Mar. 11, 1971.

\(^72\) Id.

\(^73\) LEE, WORKPLACE CONSTITUTION, supra note 8, at ch. 8. BEST’s strategy, which bridged local and federal, legislative and administrative advocacy, bears resemblance to activists’ efforts in the same period to turn South African apartheid into a domestic civil rights issue. See generally Joanna Grisinger, "South Africa is the Mississippi of the World": Anti-Apartheid Activism through Domestic Civil Rights Law, 38 L. & HIST. REV. 843 (2020).
the agency to engage in notice-and-comment rulemaking on the subject.\textsuperscript{74} BEST also petitioned the FCC directly to initiate such a rulemaking.\textsuperscript{75} Instead, the district court dismissed BEST’s complaint,\textsuperscript{76} while the FCC rejected BEST’s petition,\textsuperscript{77} and issued its policy without any notice or public input.\textsuperscript{78} When BEST asked the agency to reconsider, arguing that it violated the APA to issue the Policy Statement without following notice-and-comment procedures, the agency stood pat.\textsuperscript{79}

BEST sought judicial review of its dismissed complaint and petitions, using the APA and administrative law to preserve its ability to challenge TV’s all-White broadcasting.\textsuperscript{80} BEST argued that, substantively, the FCC’s new policy violated the Federal Communications Act’s requirements for comparative hearings.\textsuperscript{81} Previously, when judging between an incumbent licensee and a new applicant in what were called “comparative hearings,” the FCC had considered both applicants but favored incumbents.\textsuperscript{82} Then in 1969, the FCC denied an incumbent a license in a hearing that involved multiple new applicants and indicated that it would no longer give incumbents such a heavy thumb on the scale.\textsuperscript{83} Broadcasters’ outraged reaction led to the proposed 1969 bill and Senate hearings at which BEST testified. The FCC, in its 1970 Policy Statement, went one step further than restoring incumbents’ preexisting advantage. Going forward, if an incumbent could prove that it had “been substantially attuned to meeting the needs and interests of its area” and had not evidenced “serious deficiencies,” it would retain its license.\textsuperscript{84}

\textsuperscript{74} Comment, Implications of Citizens Communications Center v. FCC, 71 Colum. L. Rev. 1500, 1507 (1971).
\textsuperscript{76} Citizens Commc’ns, 447 F.2d at 1203-04.
\textsuperscript{77} Petitions Filed by BEST, 21 F.C.C.2d at 355.
\textsuperscript{80} BEST was represented by lawyers at the Citizens Communications Center, which was also a party to the case.
\textsuperscript{81} Citizens Commc’ns, 447 F.2d at 1203 n.2.
\textsuperscript{82} For instance, in Hearst Radio, Inc., the FCC found that an incumbent’s proven track record of acceptable service outweighed a superior application by a newcomer. Hearst Radio, Inc. (WBAL), 15 F.C.C. 1149 (1951). This practice of hearing both applications traced to Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 330 (1945) (finding that the FCC had to hear both mutually exclusive applications for a license before granting the license to either).
\textsuperscript{83} WHDH, Inc., 16 F.C.C.2d 1, 9-10 (1969) (indicating that the FCC would no longer consider an incumbent’s past performance unless it “exceed[ed] the bounds of average performance” because “the public interest is better served when the foundations for determining the best practicable service, as between a renewal and new applicant, are more nearly equal at their outset”).
\textsuperscript{84} Pol’y Statement, 22 F.C.C.2d at 425.
The newcomer could try to prove the incumbent did not meet this standard, but would not have a chance to establish its own merits as a licensee in a comparative hearing unless the incumbent failed to meet this preliminary test of minimum adequacy. 85 The Communications Act, BEST argued to the D.C. Circuit, required that a comparative hearing be held. 86

BEST’s argument that the FCC’s new policy violated the Communications Act succeeded in keeping the door open to newcomers’ challenges. In the D.C. Circuit’s pungent words, the FCC’s 1970 Policy Statement “runs smack against both statute and case law.” 87 Both, the Court held, required the agency to “conduct one full comparative hearing” deciding among competing applications. 88 Broadcasters were livid, returning to Congress for an “all-out push to build protective legal walls around their valuable” licenses, ones that would “blunt a growing wave of troublesome” challenges from groups such as BEST. 89 Instead, however, the FCC’s licensing policy, with the help of the D.C. Circuit, bent the other direction. 90 Not only did the FCC not erect the walls incumbents sought, but the agency began weighing minority ownership as a factor in favor of new applicants in its comparative hearings. 91 While change came slowly, by 1976, there were enough Black-owned broadcasters to form their own trade association. 92

BEST also charged that the FCC should not have issued its new policy without providing the notice-and-comment procedures required by APA Section 553. 93 There was a hitch, however. Among the APA’s many exclusions was a provision excepting from the requirements of notice-and-comment rulemaking “interpretative rules, general statements of policy, or rules

85. Id. at 428. This was what the 1969 bill that was the subject of Senate hearings would also have done. Citizens Commc’ns, 447 F.2d at 1210.
86. Citizens Commc’ns, 447 F.2d at 1203-04.
87. Id. at 1211; see also id. at 1213 (“[I]n a renewal proceeding, a new applicant is under a greater burden to ‘make the comparative showing necessary to displace an established licensee.’ But under Section 309(e) he must be given a chance”) (quoting Ashbacker Radio, 326 U.S. at 332).
88. Polak, supra note 62.
89. T.V. 9 v. FCC, 495 F.2d 929, 936-38 (1973) (relying on C.C.C. v. FCC to find that the FCC should award merit in favor of granting license to applicants that demonstrate minority ownership and participation in management).
91. National Association of Black Owned Broadcasters, About NABOB, http://nabob.org/about-nabob [https://perma.cc/3V8B-BUE6] (last visited Dec. 31, 2021) (noting that there were 30 members of NABOB when it was founded, representing more than a four-fold increase in the number of Black-owned broadcasters since BEST’s 1969 testimony that there were zero in television and only 7 in radio).
92. Citizens Commc’ns, 447 F.2d at 1202 n.2, 1204 n.5. Note that, while such review would be available pursuant to the APA § 706, in this case petitioners relied on the Communications Act provisions entitling it to the D.C. Circuit’s review. Id. at 1202 n.2 (citing 47 U.S.C. § 402(a)).
of agency organization, procedure, or practice.” The FCC had labeled its action a “Policy Statement,” thus seemingly taking advantage of this exception. But BEST argued that, labels aside, the FCC’s action was not, in fact, the sort of “general statement[] of policy” excepted from the APA’s notice-and-comment requirements. BEST’s APA challenge fit with its goal of “generally presenting a public voice in proceedings before the FCC.”

BEST’s litigation promised not only to harness the APA to challenge the “supreme racist[s]” of broadcast television but also to highlight newly salient issues in administrative law. Thus far, no one had paid much attention to the parameters of the APA’s exception for general statements of policy. The Court of Appeals for the D.C. Circuit had no published decisions on the issue circa 1970. That court had decided a case in the 1950s involving the line between an “interpretative rule” and a rule subject to notice-and-comment procedures. The D.C. District Court had also opined twice on the scope of “rules of agency organization, procedure or practice.” But the only appellate decision addressing the scope of general statements of policy was the Third Circuit’s 1969 decision in Texaco v. FPC, and it had done so only in dicta. Such a claim was certainly not yet an arrow in public interest lawyers’ quiver.

BEST’s FCC petition for reconsideration and court challenges thus opened a new front in public interest litigation and contributed to the formulation of an emerging precept of administrative law. One might think that the

94. 5 U.S.C. § 553(b)(A) (emphasis added).
95. Pol’y Statement, 22 F.C.C.2d.
96. Citizens Commc’ns, 447 F.2d at 1202 n.2.
99. Gibson Wine Co. v. Snyder, 194 F.2d 329, 331-32 (D.C. Cir. 1952) (finding challenged rule an interpretation of a regulation and thus excepted under 553(b)(A)).
100. Nat’l Motor Traffic Ass’n v. U.S., 268 F. Supp. 90, 95-97 (D.D.C. 1967), aff’d per curiam, 393 U.S. 18 (1968) (finding that agency action in question implemented a statute and thus, while procedural, had to comport with notice-and-comment procedures); Seabord World Airlines, Inc. v. Gornowski, 230 F. Supp. 44, 46 (D.D.C. 1964) (finding challenged rule subject to notice-and-comment requirements because, while “directed to the Post Office personnel, [it] substantially affects outside parties” and therefore “has the force of prescribing a course of conduct . . . with which the plaintiff is required to comply”).
101. Texaco v. FPC, 412 F.2d 740, 742-45 (3d Cir. 1969) (reasoning that FPC order was not a general statement of policy because it was not included in a compendium of general policy statements and imposed rights and obligations but noting that the court was precluded from considering this argument because its review was limited to arguments on which the agency had relied and the agency had not relied on the policy statement exception). Cf. Columbia Broad. Sys., Inc. v. U.S., 316 U.S. 407 (1942) (holding prior to the APA’s enactment that an FPC action was a reviewable order under the Communications Act and not an unreviewable statement of general policy as claimed by the agency).
102. Notably, the plaintiff in the single federal decision on the subject was Texaco. Texaco, 412 F.2d at 742-45.
absence of caselaw on the question was because notice-and-comment rulemaking had been rare before the late 1960s. But agencies' use of policy statements was not new. As a result, another intriguing possibility is that agencies' shift to notice-and-comment rulemaking in some areas heightened parties' awareness of the possible applicability of Section 553's requirements to other, more longstanding types of agency action. Regardless, these shifts meant that the scope of the APA's exceptions from notice-and-comment rulemaking, and thus BEST's court challenge, were newly consequential.

How to delineate the boundary of the APA’s exception for general statements of policy was unclear. The APA did not define the term. A dissenter from the FCC’s denial of BEST’s petition for reconsideration noted (likely based on BEST’s papers) that the term had been defined in a 1941 report by the Attorney General in the extended lead up to the APA’s enactment. When an agency’s policies had “become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems,” the report instructed, an agency might issue a policy statement to bring that to the public’s attention. In the dissenter’s estimation, that meant that excepted statements could only set out policies already established by adjudications or rulemakings for which “procedural safeguards exist[ed] to protect the public.” The FCC claimed in its rejection of BEST’s petitions that its statement fit this definition because it followed “to a substantial degree [] long established precedent.” The dissenting commissioner disagreed, however. Far from restating precedent, he argued, the FCC had set out an entirely new approach to comparative hearings, one of which

103. See supra note 54.
104. Indeed, the FCC in rejecting BEST’s rulemaking petition, contended that it was not required to proceed by notice-and-comment rulemaking for this policy statement, just as it had not in the long line of policy statements by which it was preceded. Petitions Filed by BEST, 21 F.C.C.2d at 356 (1970). This also underscores that the turn to notice-and-comment rulemaking did not occur only in new areas of agency responsibility. See supra note 55. See also Michael Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 Mich. L. Rev. 520, 527 (1977) (noting that the FCC had “long made extensive use of policy statements”).
105. See, e.g., Pickus v. U.S. Bd. of Parole, 507 F.2d 1107, 1107-08, 1112-14 (D.C. Cir. 1974) (deciding prisoner challenge to longstanding Board of Parole rules and finding rules should have been promulgated via notice-and-comment rulemaking).
107. Quoted in Pol’y Statement, 24 F.C.C.2d at 387 (Johnson, C., dissenting).
108. Id.
109. Petitions Filed by BEST, 21 F.C.C.2d at 355 (1970). See also Pol’y Statement, 24 F.C.C.2d at 384 (describing the statement as merely “a unified expression of policies largely formulated in earlier adjudicatory cases”).
"no communications lawyer or even FCC Hearing Examiner would have dreamed." 110

Another approach would be to define the category of rules that had to be promulgated via notice-and-comment, something the APA also failed to do. The D.C. District Court had approached the problem from this direction in a 1967 opinion on a different exception. The court turned to the Attorney General’s Manual on the APA, issued in 1947 but still considered an authoritative source on interpreting the APA. That Manual, the judge noted, distinguished the APA’s excepted rules from “substantive rules” that had to be promulgated via notice-and-comment. 111 Substantive rules, according to the Manual, were those “issued by an agency pursuant to statutory authority and which implement the statute” as well as “have the force and effect of law.” 112

The FCC picked up on this approach in its initial rejection of BEST’s petition. According to the FCC, precisely because its statement had mostly recapped prior decisions, it had not changed “substantive law” such that it should have been promulgated via notice-and-comment procedures. 113 On BEST’s petition to reconsider, the dissenting FCC member disputed the agency’s conclusion. He agreed (again, likely parroting BEST’s own argument) with its test: rules that “affected a change in substantive legal rights” had to be issued via notice-and-comment procedures. 114 He disagreed with the FCC’s application, however. The FCC had reimbursed a newcomer’s costs in an already underway comparative challenge after issuing its policy statement. The reimbursement, the dissenter argued, demonstrated the agency recognized that its statement had “effected a substantive change in our comparative renewal standards.” 115 The FCC, perhaps worried about the force of this argument, added a new justification in its denial of BEST’s petition to reconsider. The FCC now argued that whether or not the statement “expressed policies largely formulated in earlier adjudicatory cases” was irrelevant. 116 The agency suggested, albeit somewhat cryptically, that what

110. Pol’y Statement, 24 F.C.C.2d at 388 (Johnson, C., dissenting).
111. Nat’l Motor Traffic, 268 F. Supp. at 96-97 (finding a rule of agency procedure that was issued pursuant to, and implemented, a statute was thus substantive and required notice-and-comment procedures).
112. ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 (1947), quoted in Nat’l Motor Traffic, 268 F. Supp. at 97 n.7. Interestingly, no one seems to have looked to the other places the APA distinguished between law and policy. See Blake Emerson, “Policy” in the Administrative Procedure Act: Implications for Delegations, Deference, and Democracy. 97 CHICAGO-KENT L. REV 101 (2022).
113. Petitions Filed by BEST, 21 F.C.C.2d at 355.
114. Pol’y Statement, 24 F.C.C.2d at 387 (Johnson, C., dissenting).
115. Id. at 388.
116. Id. at 384.
mattered was that “it is only a policy statement—subject to full reargument in individual cases.”

In the end, BEST’s influence on the resolution of this question was indirect only. The D.C. Circuit declined to reach BEST’s APA claim, having invalidated the Policy Statement, reversed the denial of BEST’s petition for reconsideration, and remanded the matter to the FCC on the Communications Act grounds. The court could not help itself, however, from penning a lengthy footnote indicating its sympathy with BEST’s position. Adopting the FCC dissenter’s position, the court opined that “the issue . . . turns on whether the [Policy Statement] effected a substantive change in the Commission’s comparative renewal standards.” The court agreed that the FCC had seemed to acknowledge as much when, upon issuing its Policy Statement, the FCC reimbursed the new applicant for costs it had incurred in its comparative challenge. “[T]he Commission’s suggestion that it can do without notice and hearing in a policy statement what Congress failed to do” when the 1969 bill “died in the last Congress,” the court further chastised, “is, to say the least, remarkable.”

From here, the path of influence is speculative but discernible. In 1974, the D.C. Circuit issued its first holding on the scope of the policy statement exception to notice-and-comment rulemaking. The lengthy discussion of the issues involved was befitting of this novel but important question. The court addressed many of the issues raised in BEST’s case, albeit coming to a conclusion closer to the FCC’s. Like the FCC dissenter and likely BEST,

117. Id. at 384. The FCC had noted policy statements remained subject to contestation during future hearings in its denial of BEST’s initial rulemaking petition as well. Petitions Filed by BEST, 21 F.C.C.2d at 356 (1970). It used this fact, however, to distinguish between rules subject to notice-and-comment requirements, which “definitively control[]” in future hearings and policies announced in adjudications or statements, which parties remained free to contest in future hearings. Id. at 356. The fact that the policy remained open to challenge, in other words, was a consequence, not a cause, of it being a policy statement. See also Pol’y Statement, 24 F.C.C.2d at 384 (stating that because the policy statement was not a rule, “consequently” it remained open to challenge in future actions). Cf. Arthur Earl Bonfield, Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the A.P.A., 23 ADMIN. L. REV. 101, 121 (1971) (describing FCC Senate testimony in 1965 that distinguished policy statements from “formal rules” on the grounds that they lacked the “force of law” and did not “determine future proceedings”).

118. Citizens Commc’ns, 447 F.2d at 1204.
119. Id. at 1204 n.5.
120. Id. at 1204 n.5.

122. PGE v. FPC, 506 F.2d 33, 36-40 (D.C. Cir. 1974) (laying out general principles, which were then further elaborated in the five pages of the opinion applying those principles to the case at hand).
the court reasoned that a defining feature of a substantive rule was that it “establishes a standard of conduct which has the force of law.” 123 But it adopted a definition of a general statement of policy in line with the FCC’s. The court drew on the 1947 Attorney General’s Manual, not his 1941 Report, for its definition. The Report had adopted the retrospective, recapping of precedent approach of the FCC dissenter. The Manual, in contrast, defined policy statements as those that “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” 124 The key difference between a proper policy statement and a “substantive rule,” the D.C. Circuit opined, was that whereas the latter would be binding in a future action, the agency “must be prepared to support the policy [laid out in the former] just as if the policy statement had never been issued.”125

The 1974 decision would seem far removed from BEST’s petition. The agency involved was the Federal Power Commission, not the FCC; the petitioner was not a Black-led organization but a major gas and electric utility. 126 Read a little closer and a throughline emerges, however: the author of this novel disquisition on the subject, it turns out, was a member of the panel that decided BEST’s case.127 While BEST would not directly trigger the first holding on the subject, it did spur the D.C. Circuit’s first engagement with the issue and primed the author of its first holding for his consequential opinion. Indeed, one is left wondering whether BEST’s case served as a negative example that informed the court’s choice of a prospective, open to future challenge approach to defining and delineating a general statement of policy.

A few months later, the D.C. Circuit issued a second opinion, one that struck even closer, and was more hospitable, to BEST. The court focused not on prospectivity or amenability to challenge but on the core position animating BEST’s claim: the importance of the public having a say in the rules that would impact their lives in significant ways. 128 Putting a different gloss on the early cases, one similar to BEST’s own, the court found them to hold that “agency action cannot be a general statement of policy if it substantially affects the rights of persons subject to agency regulations.”129 Instead, “the

123. PGE, 506 F.2d at 38-39.
124. Quoted in id. at 38 n.17.
125. Id. at 38-39.
126. Id.
127. Citizens Commc'ns, 447 F.2d (noting Judge MacKinnon was a member of the panel); PGE, 506 F.2d at 34 (noting opinion authored by Judge MacKinnon).
128. This is reflected in BEST’s brief quoted supra note 7 and in the FCC dissenter’s charge that the commissioners, by refusing to engage in notice-and-comment rulemaking, “closed our ears and minds to the['] pleas' of representatives of ‘minorities, the poor, and the disadvantaged.’” Pol'y Statement, 24 F.C.C.2d at 389 (Johnson, C., dissenting).
129. Pickus, 507 F.2d at 1112.
interested public should have an opportunity to participate... before rules having such substantial impact are promulgated.”130 In the case at hand, the court found (much as BEST had argued regarding the FCC’s statement) that the policy changes were “calculated to have a substantial effect on ultimate... decisions” and thus had to be issued via notice-and-comment.131 Once again, a judge from BEST’s case joined the opinion.132 The case was close to BEST’s in another respect: it was brought by incarcerated individuals not a corporation.133 Their attorneys, like BEST’s, also traveled in the burgeoning world of D.C. public interest lawyers, raising the possibility that they had shared arguments and strategy.134

The panel from BEST’s case produced two, in some ways irreconcilable, approaches to distinguishing excepted policy statements from substantive rules subject to notice-and-comment requirements.135 One aligned with aspects of BEST’s position, focusing on practical effects and emphasizing the value of public participation. This was a narrower approach to the exception, one likely to find that more agency policies should have been issued via notice-and-comment procedures. The other allowed agencies greater latitude to use policy statements. Following the FCC’s approach, it held that as long as an agency indicated that a policy was open to challenge in a future action, it was irrelevant whether anyone, as a practical matter, would be likely to contest it rather than obey. One was generated by marginalized members of the public, the other by an energy company. As the D.C. Circuit developed precedent on this issue in the coming years, the approach that protected an agency from a regulated industry’s challenge survived; the one that protected incarcerated individuals and might have protected BEST did not.136

130. Id. at 1112.
132. Pickus, 507 F.2d at 1108; Citizens Commc’ns, 447 F.2d at 1202.
133. Pickus, 507 F.2d at 1108.
135. Asimow, supra note 104 at 523.
136. Parsing out whether the D.C. Circuit’s choice of a broader policy statement exception benefitted or hurt racial justice advocates on balance is a tricky calculation. One consideration is the likelihood that racial justice advocates and their allies will hold power within agencies. When they have, agencies’ ability to issue policy statements without jumping through the hoops of notice-and-comment rulemaking has advanced racial justice. Indeed, during the 1960s, the Department of Health, Education, and Welfare’s Office of Civil Rights (OCR) and the Equal Employment Opportunity Commission (EEOC) used policy statements to advance school desegregation and workplace equality. See, e.g., Blake Emerson, The Public’s Law: Origins and Architecture of Progressive Democracy 131-39 (2019). Yet, weighing this consideration requires more than assessing if Democrats or Republicans are most likely to win the White House. First, party is not always destiny. During the 1950s to 1970s, Republicans at the NLRB proved more willing to adopt anti-discrimination policies than Democrats while the FCC adopted its most aggressive equal employment policies during the Nixon administration. See generally Lee, Workplace Constitution, supra note 8, at chs. 5, 7-9. Second, even if having a Democratic President leads to more
Nonetheless, BEST’s challenge helped crack open the courts’ consideration of the distinction, elucidate the distinction’s stakes, and inform, whether by positive or negative example, the courts’ foundational opinions on the subject.

IV. IMPLICATIONS

The history presented above suggests three benefits of examining the intersection between the APA and race, each of which are developed briefly in what follows. First, it demonstrates the importance of administrative procedure, not only administrative policy, to histories of the struggle for racial justice. As indicated above, administrative procedure has a mixed record, both enabling and thwarting that struggle. Second, it shows that racial justice advocates have played an important role in shaping the history of administrative procedure. Third, it suggests some of the factors for—and challenges of—assessing the APA’s racial legacy.

A. Administrative Procedure and the Struggle for Racial Justice

Administrative procedure, not only administrative policy, has played an important if mostly overlooked role in the struggle for racial justice. Racial justice allies in agencies and offices with a civil rights mandate, the same may not be true of industry regulators such as the FCC. Indeed, OCR and the EEOC issued their guidelines during the same period that the FCC was resisting civil rights advocacy. See, e.g., Jason Webb Yackee & Susan Webb Yackee, A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J. Pol. 128 (2006) (documenting industry actors’ outsized influence on regulations and correlating that influence to their commenting activity). On the other hand, as was the case with the FCC’s comparative hearing policy statement, agencies may listen to industry when issuing policy statements too. In that case, industry has the exclusive not merely predominant voice and notice-and-comment rulemaking is the only way to ensure that the public also gets a say. See, e.g., Nina A. Mendelsohn, Regulatory Beneficiaries and Informal Agency Policymaking, 92 CORNELL L. REV. 397 (2007) (arguing that debates over agency use of policy statements have overlooked the way these actions preclude regulatory beneficiaries from participating in and securing judicial review of policymaking). Of course, an agency that ignores the public’s voice when it can may discount that voice when it is forced to listen. Just as for business, however, the levers of administrative law can hold an agency that does so to account or at least delay things until a more favorable political moment. For a present-day example, see civil rights organizations’ actions around HUD’s disparate impact regulation. Compl., Nat’l Fair Hous. All. v. Carson, No.3:20-ev-07388 (N.D. Cal. Oct. 22, 2020), at para. 16 (arguing that HUD failed to adequately respond to comments submitted by civil rights groups when it promulgated its September 24, 2020 disparate impact rule); Reinstatement of HUD’s Discriminatory Effects Standard, 86 Fed. Reg. 33590 (proposed on June 25, 2021) (issuing notice of proposed rulemaking to recodify its 2013 disparate impact rule in light of federal district court injunction staying implementation of the 2020 disparate impact rule).
Administrative procedure’s record on this count is mixed. On the one hand, aspects of administrative procedure have disparately and negatively impacted those fighting for racial justice and thus protected racially discriminatory policies. On the other hand, administrative procedure has, at times, created novel—or at least essential—avenues for racial justice advocacy.

The APA helped preserve the New Deal welfare state as what one scholar has termed a systematic policy of affirmative action for White Americans.\(^{137}\) There is growing scholarship on how administrative procedure today perpetuates racial inequality.\(^{138}\) But the important histories of race and administration have thus far focused primarily on the substance of administrative policy.\(^{139}\) To the extent that these scholars discuss procedure, it tends to be around issues of justiciability of substantive legal claims.\(^{140}\) A welcome exception is the article by Ceballos, Engstrom, and Ho, which “grapple[s] with race and racism’s more concrete doctrinal roots within the APA.”\(^{141}\) They focus on the last decade of the 20th century, however.\(^{142}\) Historians of administrative procedure, for their part, have done important work excavating the origins of the APA and its judicial legacy but have not focused on its implications for racial justice.\(^{143}\)

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138. See supra notes 2-5. See also Ceballos et al., supra note 5, at 9 nn.23-25 (collecting sources).

139. See, e.g., sources discussed supra Part II.

140. See, e.g., supra note 37. This observation is not intended to fault scholars for their policy focus, which makes sense for work primarily concerned with substantive outcomes and with assessing administrators’ role in producing that marginalization. Instead, I hope to invite scholarship on how administrative procedure fed or created means to challenge marginalization. A notable exception is scholarship on immigration. See, e.g., MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 88-90 (2014) (noting how Congress’s decision to except immigration law from the APA left deportation decisions in the realm of agency discretion); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRATION AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (paying careful attention to how agencies, courts, immigrants, and their lawyers shaped administrative procedure at the turn of the twentieth century).

141. Ceballos et al., supra note 5, at 10.

142. Id. at 42-43. For works that focus on race and institutional structures, see, e.g., PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 9 (2008) (arguing that racism led Congress to create institutional structures that bifurcated race and labor “leading to conflicts instead of intersection”); EMERSON, supra note 136, at ch. 4 (examining how different institutional features led to administrative processes that advanced or thwarted racial justice during the New Deal and Second Reconstruction).

143. See generally, e.g., DANIEL ERNST, TOQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014); GRISINGER, supra note 18; Schiller, Deference, supra note 27; Schiller, Rulemaking’s Promise, supra note 54; Schiller, Administrative Polity, supra note 121. But see ANNE KORNHAUSER, DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVITHIAN, 1936-70, 65-64, 79-82 (2015) (describing how, during the New Deal, some liberals favored administrative procedures that would facilitate African Americans’ representation and participation, and discussing the ways in which the APA responded to those concerns). Again, this is not intended as a criticism; these scholars’ work fills an important gap between legal histories that ignored administration
As demonstrated above, the APA systematically excluded challenges to racial discrimination as soon as the statute was enacted in 1946. The APA, remember, excepted the social welfare programs that defined the New Deal state from the procedural requirements of notice and comment rulemaking.144 Those programs were responsible for building core aspects of present-day structural racism.145 If the APA had not categorically excepted those programs, then federal housing officials, for instance, would have had to undertake notice-and-comment rulemaking in setting their policies. They would have had to provide the NAACP an opportunity to participate and explained why they rejected its arguments that the agency’s support for segregated housing was illegal.146 Further, the rulemaking process would have created a more viable path to court for the NAACP.147 Instead, as Milligan describes, NAACP lawyers were limited to submitting legal briefs to housing officials in the unfulfilled hope for a response.148 The APA’s exceptions thus had a critical racial impact. At a pivotal moment in government redistribution of wealth, the APA foreclosed mechanisms for civil rights advocates to participate in the formulation of those policies and to hold officials accountable for their choices.

At the same time, other aspects of administrative procedure helped make agencies an available, essential, and at times uniquely successful means for advancing racial justice. In some instances, administrative procedure provided advocates access to the governing institution most receptive to their claims. As described above, in the mid-20th century, civil rights advocates used the access provided by the APA’s procedures to win workplace


144. See supra Part II.


146. 5 U.S.C. § 553; U.S. v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252-53 (1977) (holding that the agency failed to adequately respond to major issues raised by commenters). This argument is ahistorical insofar as it assumes racial justice advocates would have made use of the APA’s notice-and-comment rulemaking provisions at a time when they were little used. Those advocates’ creative use of administrative law’s levers in this and later periods, combined with their pioneering use of those provisions in the 1960s discussed above in Part II suggest, however, that such an assumption is not far-fetched.

147. These procedures would not have guaranteed a different substantive outcome, of course. In 1979, the Department of Housing and Urban Development adopted regulations requiring it to conduct notice-and-comment rulemaking when setting policies excepted by the APA from those procedural requirements. 24 CFR Sec. 10.1. The fact that racial justice advocates actively participate in the resulting rulemakings down to the present day suggests that they nonetheless find such participation rights meaningful. For a present-day example of racial justice advocates using this right to participate in precisely this way, see supra note 136.

148. See supra Part II.
antidiscrimination policies that exceeded those enacted by Congress and implemented by the courts. As I have shown in other work, those procedures also helped advocates reach agencies that proved uniquely receptive to their most expansive interpretations of the equal protection clause; neither Congress, the White House, nor the Supreme Court were willing to go as far.

Even when agencies have not proved especially receptive to racial justice advocates’ claims as compared to the other branches, administrative procedure has nonetheless played an essential role. For BEST, the FCC was certainly not the most receptive branch. Indeed, the agency adopted a policy change that was dying in Congress due to BEST’s accusations that it was racist, then rejected BEST’s petition to reconsider that policy. The courts proved most receptive to BEST’s claims that the policy was illegal. Nonetheless, the APA and parallel procedural protections in the Federal Communications Act were what allowed BEST to involve the D.C. Circuit. The APA, then, was a key part of a multi-institutional strategy that successfully kept a door cracked open to Black-owned broadcasters.

Better understanding administration’s permeability to racial justice advocates relative to the courts and Congress could enrich both historical and legal scholarship. As I have argued elsewhere, attention to how administrative law and procedure channeled racial justice advocacy out of the courts and into administrative agencies can revise historians’ causal claims about the Black freedom struggle. Likewise, the widely divergent accounts of agencies’ responsiveness to racial justice advocates described in Part II underscore the need for historians of administration to develop a more comprehensive assessment of how agencies understood and lived up to the APA’s participatory mandate. Meanwhile, a better accounting of how administrative procedure aided and thwarted racial justice advocates could enrich scholarship weighing the opportunities and hurdles administrative procedure

149. See supra Part II.
150. LEE, WORKPLACE CONSTITUTION, supra note 8, at 150-53; Lee, Race, Sex, and Rulemaking, supra note 55, at Parts III-IV.
151. See supra Part III. Similarly, the NAACP’s decision to advocate initially before the NLRB not the courts in the 1950s was both enabled by administrative procedure and required by administrative law. LEE, WORKPLACE CONSTITUTION, supra note 8, at 101-02.
153. For instance, we do not have an agency-side account of agencies’ reception of the APA’s participatory mandates to parallel Schiller’s account of the courts’ participatory turn in the late 1960s. See supra note 54.
provides to racial justice advocates today. It could also contribute to legal scholarship exploring public law’s structural biases and how they have changed over time.

As scholars seek to better understand the history of race and administration, the account provided here indicates the importance of attending not only to substantive policy but also administrative procedure and the APA. It also reminds that administrative procedure has not only thwarted the struggle for racial justice but also at times provided an important vehicle for pursuing that fight. A richer account of these complexities would benefit both historical and legal scholarship.

B. The Struggle for Racial Justice and Administrative Procedure

Neither administrative law scholars nor historians have paid much attention to how racial justice advocates have shaped administrative law. An exception that may prove the rule is the D.C. Circuit’s 1966 decision in United Church of Christ v. FCC, which has received some, but arguably not enough, attention. The decision recognized civil rights advocates’ standing to intervene in the FCC’s licensing decisions. That standing ultimately resulted in the D.C. Circuit invalidating the FCC’s renewal of a Mississippi television station whose racist programming was the subject of longstanding complaints. More generally, it helped open administrative procedures that had been cozy affairs between industry and regulators to public participation and judicial scrutiny. The decision was pursued at great risk and cost: just three years earlier, local civil rights leader Medgar Evers, who had pushed


155. Gould & Pozen, supra note 32, at 7 (noting that “the same constitutional arrangement can be structurally biased in one period but not in a later period, or vice versa, if external developments change its practical or factional implications across the periods”); Maggie Blackhawk, Equity Outside the Courts, 120 COL. L. REV. 2037 (2020) (tracing the “hydraulic” process through which the task of delivering equity’s particular exceptions to general laws has migrated historically among Congress, courts, and administrative agencies, rendering different institutions the most hospitable to minority claimants). For exemplary work at the intersection of these institutional and historical projects, see Paul Frymer, Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85, 97 AM. POL. SCI. REV. 483 (2003). The variety historians have already revealed in the same mid-century period, however, provides a caution against making overly sweeping judgments about the relative permeability of agencies, courts, and Congress.


158. See generally id. at ch. 4.

159. But see Elizabeth Magill, Standing for the Public: A Lost History, 95 VA. L. REV. 1131, 1159 (2009) (arguing that the court inadvertently helped inter an alternate and arguably broader basis for public standing in agency proceedings).
the station for better coverage, was murdered in his driveway. Sidney Shapiro, writing in 2006, observed that administrative law scholars “only dimly appreciated” the decision’s impact. Since then, as scholarly debates have unfolded over the net impact and thus desirability of such participation and scrutiny, United Church of Christ has attracted some—but not much—attention. Further, while the civil rights claims animating the case are recognized, it has not been in the context of recognizing administrative law’s debt to those advocates’ courage and creativity.

United Church of Christ may be the tip of a submerged iceberg. Today, the policy statement exception to notice-and-comment rulemaking is possibly “the single most frequently litigated and important issue of rulemaking procedure in the federal courts.” As described in Part III, racial justice advocates played a previously unappreciated role in forging such challenges and demonstrating their utility to public interest, not only industry, litigants. Since then, challenges to agency policy statements have become a staple of public interest lawyering, though such claims hardly cut inevitably in favor of racial justice. More broadly, BEST’s challenge highlighted an issue that continues to vex courts and administrative law scholars.

Where else in administrative procedure are racial justice advocates’ legal innovations hidden? Recovering them could have multiple benefits. The inquiry raises intriguing questions about whether claimants’ racial justice ends ever caused administrative law to take a particular course. It is hard to

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160. This is not to suggest that he was murdered because of his FCC advocacy per se, but to indicate the dangerousness of civil rights advocacy generally in Jackson at the time. On Evers, see Michael Vinson Williams, Medgar Evers: Mississippi Martyr (2011).

161. Shapiro, supra note 52, at 940.

162. Shapiro’s article was itself an entry in those debates. Id. at 941–42 (connecting United Church of Christ to “hard look” review and arguing that although that “doctrine has turned out to be a mixed blessing for public interest and [*] environmental advocates because it is readily subject to misuse” its advantages nonetheless “counsel[] against scrapping the concept”).

163. See, e.g., Jud Mathews, Minimally Democratic Administrative Law, 68 ADMIN. L. REV. 605 (2016); Magill, supra note 159.


165. See, e.g., the ACLU and immigrant rights groups challenge to the Trump administration’s Remain in Mexico Program.

166. Texas v. EEOC, 933 F.3d 433 (5th Cir. 2019) (finding EEOC guidance limiting employers’ criminal background checks was a substantive rule and should have been issued via notice-and-comment rulemaking). But see, Amanda Agan & Sonja Starr, Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment, 133 Q. J. ECON. 191 (2018) (finding in a field experiment that employers were less likely to interview applicants with names likely to be interpreted to be of a Black person after employers were precluded from inquiring about applicants’ criminal histories).

overstate the ferment over racial justice and minority representation on television during the late 1960s when United Church of Christ was decided, racial justice advocates pioneered petitioning the FCC for notice-and-comment rulemakings, and first foisted the scope of the policy statement exception on the D.C. Circuit. Scholars have written about the Supreme Court’s unique response to race cases in the late 1950s and early 1960s. Might there be an administrative law analogue hiding in the papers of the D.C. Circuit’s judges? Further, even if the courts would have arrived at the same administrative law doctrines regardless of their racial justice implications, it still matters when and where it was racial justice advocates who did the work. For instance, doing so is important to getting right the emerging histories of liberal and left critiques of administration in this period.

Racial justice advocates helped identify and generate foundational doctrine regarding core aspects of modern administrative law. Reckoning with the intersection of race and administrative law should include recognizing their risks, ingenuity, and labor.

C. Assessing the APA’s Racial Legacy

Building a more robust history at the intersection of race and administrative law could have real world, not only academic, stakes. The two most ambitious calls for change that have emerged from the writing about race and administration since the 2020 protests are those for racial impact...
statements and reparations. The history of race and administration generally and of race and administrative procedure specifically would be valuable to both.

History can play an important role in determining racial impacts. Mehrsa Baradaran and C. Dylan Durham call for scoring monetary policy for its impact on the racial wealth gap. Ceballos, Engstrom, and Ho suggest requiring agencies to produce racial impact statements, akin to the environmental impact statements required by the National Environmental Policy Act—but without those statements’ pitfalls. If adopted, such statements would be mostly prospective. Nonetheless, if NEPA is the model, history could play a role as well. The racial impacts of past policy decisions, for instance, might inform decisions to extend or modify those policies. Racial impacts could also be incorporated into retrospective review of regulations, an increasingly popular agency undertaking. History could be essential to that project as well. This article also augments the possible subjects of such racial accountings by calling for work on race and administrative procedure in addition to that on substantive policies’ racial impacts. That effort could inspire a review of the racial impacts of the APA itself.

History would also be critical to efforts to repair the racial impacts of administration and administrative procedure. Olatunde Johnson recently took up the call for reparations to redress the kind of bureaucratic complicity in housing segregation described above, a project that would depend heavily

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171. These are hardly new ideas. 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, 1271 n.56, 1272 n.58, 1322 n.364 (2020) (collecting scholarship proposing racial impact assessments in criminal justice and other policy settings and extending them to federal highway projects); REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES (Michael T. Martin & Marilyn Maquinto eds., 2007).


174. See, e.g., COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL JUSTICE GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 8-9 (December 10, 1997) (noting that “the question of whether agency action raises environmental justice issues is highly sensitive to the history or circumstances of a particular community or population” and counseling that agencies should recognize historical factors that “that may amplify the natural and physical environmental effects of the proposed agency action”).


176. While changing the APA or its current interpretations would have to be undertaken by Congress or the courts, the Administrative Conference of the United States could assess the law’s racial impacts.
on good history.\textsuperscript{177} Even while reparations remain aspirational, the history of policies’ racial impacts can be an important tool for those seeking to secure them. To make those assessments, however, scholars and advocates should attend not only to the policies themselves, but also the way administrative procedure facilitated and shielded them.\textsuperscript{178}

Deepening histories of race and administration, and of race and administrative procedure, would usefully inform current proposals for measuring, mitigating, and repairing administrative law and policy’s role in racial injustice.

CONCLUSION

Administration and administrative law, like the work of Congress and the courts, has been integral to sustaining White supremacy and thwarting racial justice. But just as advocates have managed at times to bend those latter institutions to racial justice ends, so have they been able to do so with administration and administrative law.

The history of using administrative advocacy to pursue racial justice is older than the APA. To the extent that the APA has contributed to those efforts, it has been due to the creative work of advocates, not the intentions of its drafters. As a result, historians should consider how administration and administrative law have provided advocates an important avenue for advancing racial justice, not only created barriers to its realization. Their efforts and successes should be tallied even as scholars continue to uncover administration’s and administrative law’s connections to racial subordination. A full accounting of race and administrative law also needs to consider how racial justice movements have contributed to administrative law. History can play an important role in taking stock of and remedying the racial impacts of administration as well. Those efforts should attend to the law that structures administrative action in addition to agencies’ substantive policy. If we do that work, perhaps by the time the APA turns 100 we will have a sharper and richer understanding of its racial legacy and of what needs to be done to atone.

\textsuperscript{177} Olatunde C.A. Johnson, \textit{AFFH and the Challenge of Reparations in the Administrative State}, REG. REV. (Oct. 26, 2020), https://www.theregrevue.org/2020/10/26/johnson-affh-challenge-reparations-administrative-state/ (arguing that housing regulations’ role in furthering racism should be the basis for responsive reparations and that requiring federal funding recipients to affirmatively further fair housing is not enough).

\textsuperscript{178} See supra Part II.