

# ESSAY

## CONSTRUCTING CITIZENSHIP: EXCLUSION AND INCLUSION THROUGH THE GOVERNANCE OF BASIC NECESSITIES

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*While income inequality has become an increasingly central focus of public policy debate and public law scholarship, systemic inequality and exclusion are produced not just by disparities in income but also by more hidden and pernicious background rules that systematically disadvantage and subordinate certain constituencies. This Essay focuses on a particularly crucial—and often underappreciated—site for the construction and contestation of systemic inequality and exclusion: the provision of, and terms of access to, basic necessities like water, housing, and healthcare. We can think of these necessities as “public goods,” which carry a greater moral and political importance as foundational goods and services that make other forms of social, economic, or political activity possible and thus carry a greater moral and political importance. Drawing on historical and contemporary accounts, this Essay argues that the administration of these essential public goods represents one of the major ways in which law and public policy construct systemic forms of inequality and exclusion. This Essay identifies a set of “exclusionary strategies,” including bureaucratic exclusion, privatization, and fragmentation, through which law constructs*

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*such inequality via the maladministration of public goods. Relatedly, this Essay argues that promoting equality and access requires a more inclusionary approach to the administration of these public goods, for example by expanding the authority and accountability of public-goods administrative bodies and by exploring greater forms of direct public provision. Finally, this Essay situates this notion of public goods governance within a larger discussion of equality and democracy.*

## INTRODUCTION

As many scholars and commentators have noted, America is in the grips of a long-term crisis of economic inequality. Despite growth in productivity and private-sector profits, wages have been largely flat, and most Americans have barely recovered to precrisis levels of personal wealth. The exception, of course, is at the very top of the income scale, where wages and wealth have skyrocketed.<sup>1</sup> But as clashes over healthcare, housing, and water indicate, a central dimension of our inequality crisis involves not just familiar questions of wages, income, taxes, and redistribution but also many Americans' ability to even access the basic necessities of life. Consider the following policy battles of the last few years:

- Despite the Trump Administration's failure to repeal the Affordable Care Act, the new tax plan and proposed budget included provisions aimed at significantly defunding Medicaid, while various administrative maneuvers by the Department of Health and Human Services (HHS) have simultaneously undermined the stability of the Affordable Care Act's approach to subsidizing greater health-insurance coverage.<sup>2</sup>

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1. See Facundo Alvaredo et al., World Inequality Lab, World Inequality Report 2018, at 78 (2018), <https://wir2018.wid.world/files/download/wir2018-full-report-english.pdf> [<https://perma.cc/T3NL-JAB8>] (describing the "upsurge of top incomes" from the 1980s to the present). The amount of empirical literature documenting the income-inequality crisis has exploded in recent years. See generally, e.g., Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer trans., 2014) (detailing an expansive research effort to examine wealth and income inequality in Europe and the United States since the eighteenth century); Branko Milanovic, *Global Inequality: From Class to Location, from Proletarians to Migrants* (World Bank Dev. Research Grp. Poverty & Inequality Team, Policy Research Working Paper No. 5820, 2011), <https://ssrn.com/abstract=1935799> (on file with the *Columbia Law Review*) (discussing the modern income-inequality crisis in terms of wage differentials between unskilled workers in rich and poor countries and the interaction between such wage differentials and the political issue of migration). Many of these studies suggest that the midcentury period of high and broadly inclusive economic growth in the United States and Europe may well have been a historical anomaly and that today's inequality crisis places the United States more in line with the political economic dynamics of the pre-New Deal and prewar eras. See generally, e.g., David Singh Grewal & Jedediah Purdy, *Inequality Rediscovered*, 18 *Theoretical Inquiries L.* 61 (2017).

2. See, e.g., Nicholas Bagley, *Cutting Off the Cost-Sharing Payments*, *Incidental Economist* (Oct. 12, 2017), <https://theincidentaleconomist.com/wordpress/cutting-off->

- Under Secretary Ben Carson, the Department of Housing and Urban Development (HUD) has stalled the implementation of two key Obama-era regulatory policies aimed at combatting economic segregation, delaying the implementation of the “Affirmatively Furthering Fair Housing” (AFFH) Rule and suspending the implementation of the “Small Area Fair Market Rent” (SAFMR) Rule.<sup>3</sup>
- With the city placed under emergency management in the face of municipal bankruptcy, state-appointed officials in Flint, Michigan, changed the city’s water supply but failed to treat the new supply with anticorrosion agents. This caused a catastrophic lead-poisoning crisis and tainted the predominantly African American city’s drinking water.<sup>4</sup> This environmental-, economic-, and racial-justice crisis has been echoed in other municipalities such as Detroit and Baltimore. State and federal authorities’ failure to provide robust environmental-justice enforcement has

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the-cost-sharing-payments/ [https://perma.cc/8YBV-P4BX] (describing how the end of the Affordable Care Act’s cost sharing will lead to “unpredictable and unhappy consequences”); Josh Dawsey & Paul Demko, Trump Will Scrap Critical Obamacare Subsidies, *Politico* (Oct. 12, 2017), https://www.politico.com/story/2017/10/12/trump-obamacare-subsidy-243736 [https://perma.cc/5LVM-G96V] (describing the Trump Administration’s proposal to terminate “cost-sharing” payments that are critical to the Affordable Care Act’s system for incentivizing private insurers to expand coverage); Dylan Scott, Trump’s Health Care Budget, Explained, *Vox* (Feb. 12, 2018), http://www.vox.com/policy-and-politics/2018/2/12/17005294/trump-health-care-budget-explained [https://perma.cc/FK46-LKHF] (describing the various ways in which the Administration’s current budget undermines vital healthcare programs). See generally Nicholas Bagley, Legal Limits and the Implementation of the Affordable Care Act, 164 *U. Pa. L. Rev.* 1715, 1729–35 (2016) (describing the repercussions of terminating cost-sharing payments for the healthcare sector more broadly).

3. See Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 *Fed. Reg.* 683 (Jan. 5, 2018) (issuing formal notice extending the deadline for localities to submit their fair housing plans under the AFFH rule until October 2020); Alana Semuels, Trump Administration Puts a Hold on Obama-Era Desegregation Effort, *Atlantic* (Aug. 30, 2017), https://www.theatlantic.com/business/archive/2017/08/trump-hud/538386/ [https://perma.cc/3H3Y-J7A7] (describing the halt to the SAFMR rule); see also Kriston Capps, The Trump Administration Just Derailed a Key Obama Rule on Housing Segregation, *CityLab* (Jan. 4, 2018), https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746 [https://perma.cc/DP4C-DMVG] (describing the delay to the AFFH rule).

4. Merrit Kennedy, Lead-Laced Water in Flint: A Step-By-Step Look at the Makings of a Crisis, *NPR* (Apr. 20, 2016), http://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis (on file with the *Columbia Law Review*); see also Nikhil Anand, The Banality of Infrastructure, *Soc. Sci. Research Council: Items* (June 27, 2017), http://items.ssrc.org/the-banality-of-infrastructure [https://perma.cc/2ENF-45QY] [hereinafter Anand, Banality of Infrastructure] (detailing the circumstances precipitating the Flint water crisis).

further exacerbated these challenges—and these failures have only accelerated under the new Administration.<sup>5</sup>

We can think of the various necessities at issue in these policy battles, and other vital goods like education, as “public goods.” The concept of public goods is conventionally understood in economic terms, referring to nonrival and nonexcludable goods marked by high sunk costs with increasing returns to scale, such that they are likely to be undersupplied by ordinary market competition. But we can think of provisions like healthcare, education, water, and housing as examples of public goods in a broader moral and political sense—basic necessities, the essential inputs that make possible social and economic well-being.<sup>6</sup> Communities’ immediate well-being, long-term economic opportunity, and social inclusion depend in large part on their ability to access these necessities. Differential access to these public goods thus represents a particularly troubling and pernicious form of inequality.

While the themes of this Essay are inspired by and in conversation with a wide range of scholars whose work represents a revived interest in law, inequality, and political economy,<sup>7</sup> this Essay builds upon a simple concept: The ways in which society governs and administers basic necessities and public goods like water or housing represent a key battleground in our current debates over social and economic exclusion and inequality. Precisely because of their importance, these goods create a unique kind of vulnerability. Actors that can control or condition the provision of and access to these goods and services can, in effect, construct systematic forms of inequality and exclusion, exacerbating systemic racial and economic inequities. Such access can be conditioned by a variety of oft-hidden legal and policy structures, from the practices of public bureaucracies to the scope of local jurisdictional bounds. Conversely, equitable and inclusionary governance of these goods and

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5. See, e.g., Resignation Letter from Mustafa Santiago Ali, Assistant Assoc. Adm’r for Env’tl. Justice, EPA, to Scott Pruitt, Adm’r, EPA (Mar. 8, 2017), <https://www.documentcloud.org/documents/3514958-Final-Resignation-Letter-for-Administrator.html> [<https://perma.cc/HX3S-4MM9>] (describing the underfunding and systematic weakening of the EPA’s Office of Environmental Justice); Talia Buford, Has the Moment for Environmental Justice Been Lost?, *ProPublica* (July 24, 2017), <https://www.propublica.org/article/has-the-moment-for-environmental-justice-been-lost> (on file with the *Columbia Law Review*) (describing the failures of previous administrations of both parties to invest in a more powerful institutional enforcement of environmental justice issues).

6. See *infra* section I.A.

7. See, e.g., David Singh Grewal, *The Laws of Capitalism*, 128 *Harv. L. Rev.* 626, 653–61 (2014) [hereinafter Grewal, *Laws of Capitalism*] (reviewing Piketty, *supra* note 1) (suggesting the importance of renewed attention to the legal construction of modern capitalism); David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, *Law & Contemp. Probs.*, no. 4, 2014, at 1, 19–23 (describing a wave of legal scholarship revisiting questions of inequality and the legal construction of markets).

services is critical to dismantling these structural inequalities and promoting a more inclusive and equitable social and economic order.

Public goods thus represent a site at which law and public policy have the power to construct systematic, structural forms of inequality and exclusion. The production, provision, and governance of public goods represent a crucial front line in the legal construction of the privileges and immunities of citizenship, understood here not as a matter of constitutional doctrine but as a matter of lived reality.<sup>8</sup> By manipulating the terms of access to these goods, service providers and background legal rules can construct exclusion or inclusion—and in so doing, effectively *construct citizenship*. Thus, law and policy implicitly demarcate the boundaries of the polity, the scope of who belongs, and the privileges and substantive goods such membership affords.

This Essay develops this way of thinking about public goods, inequality, and administration in three main parts. Part I develops a normative and theoretical account of how the exclusionary administration of public goods and basic necessities can produce systemic, structural exclusion. While many public law debates about public goods and necessities have often emphasized the importance of recognizing these needs as socioeconomic rights,<sup>9</sup> this Essay approaches the question not from a top-down, thick philosophical account of rights but rather from a bottom-up exploration of existing forms of—often unequal—provision. Rarely are these goods the product of a single governmental or monopolistic provider; often, they involve a range of actors, public and private, large and small, who collectively are responsible for guiding the provision of and access to basic goods. Public goods are thus shaped by an existing “infrastructure of provision.”<sup>10</sup> If the decisions of these various public

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8. The term “privileges and immunities of citizenship” is obviously a loaded one in constitutional history and doctrine, invested with potentially expansive meaning by the Framers of the Fourteenth Amendment yet restricted early on in its life by Supreme Court doctrine. See *Slaughter-House Cases*, 83 U.S. 36, 73–79 (1873). As is well known, the hydraulics of constitutional law channeled the pressure to define these privileges and immunities to other doctrinal terrain, notably the Equal Protection and Due Process Clauses. The original neutering of the Privileges and Immunities Clause has created no small amount of frustration across the political spectrum in the state of Fourteenth Amendment jurisprudence. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting) (accusing the Supreme Court of employing “a different approach to rights that it favors”). In this project, I deliberately evoke that term in the context of non- or subconstitutional questions about economic regulation and institutional design to highlight the moral repercussions of these debates.

9. See *infra* section I.A.

10. I am indebted to Professor Cary Franklin for first articulating this analytical lens. See Cary Franklin, *Infrastructures of Provision* 32 (unpublished manuscript) (on file with the *Columbia Law Review*) (explaining how the creation and maintenance of “largely non-governmental infrastructures of provision” are “regular feature[s] of American law”). Franklin explains how hostile regulations and state statutes reducing access to abortions in the United States effectively narrow the force of the abortion right itself, undermining the vehicles through which the right is administered without directly attacking the formal

and private actors largely dictate the extent of access to basic necessities, then securing more equitable access requires legal regimes that can address the currently inequitable, on-the-ground “infrastructure of provision.” As Part I suggests, this orientation toward regulating private actors who condition the terms of access to basic necessities has a deep history in law and public policy debates. This history is particularly evident in the emergence of the “public utility” tradition of regulation in the late nineteenth century and similar efforts to secure nondiscriminatory access to basic necessities through the creation of civil rights enforcement regimes in the mid- to late twentieth century.<sup>11</sup>

With Part I having sketched out the importance of focusing on the regulation and administration of basic necessities, Part II explores how the governance of these necessities can be a central driver of inequality. Using two illustrative examples—recent battles over water and housing—Part II identifies three common strategies of exclusionary governance that systematically disadvantage minority and poorer communities without denying access outright. First, *bureaucratic exclusion* arises when policymakers deliberately make the process of accessing or enrolling in vital services difficult for a specific subset of the population.<sup>12</sup> Bureaucratic exclusion is a prominent strategy for restricting access to many key public goods, including housing protections or the social safety net. Second, *privatization* transfers the financing and control of these goods from public hands to private operators and financial investors, introducing problematic revenue-generating incentives and shrouding the goods from greater public accountability.<sup>13</sup> Third, *fragmentation* limits putative equal access regimes through decentralization and the imposition of state or local jurisdictional boundaries.<sup>14</sup> Here, while everyone can access public goods like public schools, the imposition of jurisdictional boundaries defines the “public” to whom these goods are actually accessible.

These three strategies are subtler than direct denial of access; they represent a kind of “second-order” exclusion operating through background rules that govern the terms of access to public goods and necessities. Each of these exclusionary dynamics has been discussed in different scholarly literatures.<sup>15</sup> Yet it is crucial to view these exclusionary techniques as part of a common “exclusionary playbook”: a set of tools

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legal status of the right. See *id.* at 7–16. As this Essay suggests, the idea of “infrastructures of provision” has a much wider applicability beyond reproductive rights and indeed beyond formal constitutional rights altogether. See *infra* Part I.

11. See *infra* section I.C.

12. See *infra* section II.B.1.

13. See *infra* section II.B.2.

14. See *infra* section II.B.3.

15. Such discussion includes familiar debates in poverty law about welfare bureaucracies, the local-government-law discussions of the pathologies of fragmentation, and the public law debates about privatization. See *infra* Part II.

that can be deployed, often as substitutes and complements to one another, to enact systemic and subtle forms of exclusion and inequality that operate particularly on racial, gender, and class lines. These techniques are, in effect, a way of *conditioning citizenship*, restricting who can access the full benefits, economic opportunities, and social membership afforded to others.

Part III sketches out what a more inclusionary governance regime for public goods would look like. Again using water and housing as illustrative examples, Part III identifies three particular strategies for *inclusionary* administration of public goods, responding to the exclusionary strategies explored in Part II. First, to counter the problems of bureaucratic exclusion, privatization, and fragmentation, an inclusionary public-goods regime requires expanded enforcement authority for regulators and government providers themselves.<sup>16</sup> With expanded authority to reach across municipal boundaries, for example, or to reassert public control over pressures to privatize, governmental actors can ensure inclusionary access. Second, this expanded authority must be accompanied by a greater investment in the institutional designs that promote greater governmental accountability.<sup>17</sup> As Part II indicates, governmental authority that is itself unaccountable represents a major barrier to access. Greater accountability and countervailing power within government agencies will be essential in holding these actors to their stated mission of providing access on fair and equal terms. Third, given the difficulties of ensuring access and provision through regulatory oversight of private actors, renewed attention should be paid to direct public provision through public utilities and public options.<sup>18</sup>

Finally, Part IV links the discussions in this Essay to more recent debates over inequality, political economy, democracy, and constitutionalism.

#### I. PUBLIC GOODS, CITIZENSHIP, AND THE CONSTRUCTION OF (IN)EQUALITY

While we are used to thinking about inequality in terms of income and redistribution, disparities in access to basic necessities and key public goods represent a crucial way in which structural inequality and exclusion is constructed. To tackle this form of exclusion, we need two things. First, we need a more capacious way of conceptualizing public goods, going beyond conventional economic understandings to instead focus on the range of goods that are essential for human well-being. Second, we need to focus our attention on the realities of who controls and governs these goods. Under this approach, achieving inclusion turns on reforming these modes of governing access to necessities. These shifts in turn

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16. See *infra* section III.A.

17. See *infra* section III.B.

18. See *infra* section III.C.

can inform a set of legal and institutional reforms, which can produce a more inclusive approach to the governing of basic necessities.

Part I begins to develop this framework. Section I.A begins by addressing briefly the ongoing debate over socioeconomic rights and constitutionalism. These questions of access to basic necessities like healthcare or housing have often been framed in the context of socioeconomic or human rights instruments. While a full exploration of these literatures is beyond the scope of this Essay, section I.A provides an overview of these debates and suggests that we might gain more traction by shifting from a focus on courts to a focus on political institutions and administrative governance. Section I.B then offers a conceptual analysis of how to reframe our definition of public goods along these broader moral and political lines. Section I.C illustrates how this moral and political understanding of public goods has animated historical battles to promote inclusion and equality.

A. *From Courts to Governance: Socioeconomic Rights Revisited*

Ordinarily, we might expect to approach questions of access to basic necessities through the frame of constitutional, socioeconomic rights. Indeed, questions about access to basic necessities have often animated efforts at reviving or furthering judicially defended socioeconomic rights in various forms, albeit with little success in American constitutional law.<sup>19</sup> We might view that failure to constitutionalize socioeconomic rights as a historically contingent one.<sup>20</sup> But rather than focusing in a

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19. The Supreme Court's hesitance has been well documented: The Court has declined to consider wealth a suspect class under equal protection doctrine and has declined to view education, housing, and welfare as fundamental rights. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding that, by differentiating based on wealth, the Texas school system did not "operate to the peculiar disadvantage of any suspect class"); *Lindsey v. Normet*, 405 U.S. 56, 73–74 (1972) (finding that while "decent, safe, and sanitary housing" is important, those in need of it do not amount to a suspect class); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (holding that welfare classifications with "some 'reasonable basis'" do not violate equal protection principles merely because they result in inequality (quoting *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911))). For the classic defense of robust judicial protection of socioeconomic rights, see generally Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7 (1969). For a more recent comparison of the protection of socioeconomic rights under various judicial regimes in the context of the contemporary inequality crisis, see generally Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 *U. Chi. L. Rev.* 369 (2018).

20. As some historians and legal scholars have pointed out, the narrow election of Richard Nixon enabled him to appoint four Supreme Court Justices. See, e.g., Cass Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* 108, 153–54 (2004). Afterward, the political climate shifted as the New Deal and Great Society eras gave way to the Reagan–Clinton era of retrenchment, and support for expansive government economic intervention narrowed. See generally Daniel T. Rodgers, *Age of Fracture* (2011) (chronicling the resurgence of free-market economics during the 1970s and beyond).



narrow way on courts and constitutional doctrine, scholarship on socioeconomic rights has tended to shift focus to how law can help spur political branches like legislatures or agencies to promote greater access to basic necessities.

Thus, comparative constitutional law scholars have suggested that socioeconomic rights can be protected by a shift to “weak-form” judicial review, in which courts are not expected to vindicate individualized rights on demand but instead operate to spur legislatures to act—an approach that to some is better suited given the complexities around goods like healthcare, education, or housing.<sup>21</sup> International human rights law has similarly emphasized the need for legal mechanisms that prompt political branches to expand access to basic necessities.<sup>22</sup> More recently, a

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21. See Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 *Int'l J. Const. L.* 391, 405 (2007). Whether or not such judicialized and constitutionalized review of socioeconomic rights does in fact increase on-the-ground access to basic necessities is a matter of some dispute. Some scholars have suggested that it does little to actually change the level of funding and public investment in basic goods. See, e.g., Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 *J.L. & Econ.* 713, 714–17 (2017). Others argue that weak-form judicial review is important but insufficient to overcome the larger trends toward growing inequality today. See Dixon & Suk, *supra* note 19, at 397–98.

22. For example, under the International Covenant for Economic, Social, and Cultural Rights—and its various interpretations by treaty bodies—the international community has settled on the “4-A” framework to realize equal access to social and economic necessities like housing, water, and healthcare. This framework suggests that policymakers emphasize: (1) *availability*—is there sufficient water or housing stock?; (2) *accessibility*—is the necessity available in a nondiscriminatory manner, including physical, economic, and geographic accessibility?; (3) *acceptability or quality*—is the good provided at a level of quality that is acceptable to community members?; and (4) *adaptability*—is the good and its provision tailored to particular local and cultural contexts? This framework is further emphasized by the United Nations Committee on Economic, Social and Cultural Rights (CESCR), in particular its General Comments 13, 14, and 19, which map out frameworks for realizing rights to education, health, and social security, respectively. See U.N. ESCOR, Committee on Economic, Social and Cultural Rights, General Comment No. 19: The Right to Social Security, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsjZZVQdrCwLm0yy7YCiVA9YY61Z8YHJWla0qOfZ9fbBAjHL%2fLI5gllsqSBbczFKYIRCH3h0ggclCkMpkxITz7NI9wE> [<https://perma.cc/5H9T-8UMS>]; U.N. ESCOR, Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1nkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDjMCOy%2b9t%2bsAtGDNzdEqA6SuP2r0w%2f6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL> [<https://perma.cc/8A5W-6F9G>]; U.N. ESCOR, Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999), <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW%2bKyH%2bnXprasyMzd2e8mx4cYID1VMUKXaG3jw9bomilKKS84HB8c9nIHQ9mUemvt0Fbz%2f0SS7kENyDv5%2fbYPW AxMw47K5jTga59puHtt3NZr> [<https://perma.cc/9JU5-WCBV>]; see also Mads Holst Jensen et al., *Danish Inst. for Human Rights, The AAAQ Framework and the Right to Water: International Indicators for Availability, Accessibility, Acceptability and Quality* 26–36 (2014), [https://www.humanrights.dk/files/media/dokumenter/udgivelser/aaaq/aaaq\\_](https://www.humanrights.dk/files/media/dokumenter/udgivelser/aaaq/aaaq_)

revived literature on “constitutional political economy” argues that such claims for equality and inclusion are more powerful operating outside of the courts, not motivating legal claims but rather framing social movement advocacy and pressure on political branches to affirmatively promote inclusion and equality.<sup>23</sup>

The argument developed in this Part and the rest of this Essay pushes these conversations further. As we will see in this Part, we should understand public goods in a broad moral and political context—a more capacious understanding than a specific individual rights claim. But by focusing on the day-to-day governance of necessities (such as through public utilities or the rise of civil rights and public accommodations enforcement), we can pursue these broader moral aspirations outside of the courts, through more far-reaching and flexible policy tools than judicial doctrine.<sup>24</sup> And as we will see below and in Part II, these

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international\_indicators\_2014.pdf (on file with the *Columbia Law Review*) (applying a variation of the 4-A framework to the water context); Office of the U.N. High Comm’r for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, U.N. Doc. HR/PUB/06/12, at 27–28, 31, 34–35, 38 (2006), <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> [<https://perma.cc/STE8-G9VL>] (using 4-A concepts such as “accessibility” in defining the rights to food, housing, health, and education); Katarina Tomasevski (Special Rapporteur on the Right to Education), Preliminary Report of the Special Rapporteur on the Right to Education, Submitted in Accordance with Commission on Human Rights Resolution 1998/33, U.N. Doc. E/CN.4/1999/49, at 15, 18–26 (Jan. 13, 1999), [http://repository.un.org/bitstream/handle/11176/223172/E\\_CN.4\\_1999\\_49-EN.pdf](http://repository.un.org/bitstream/handle/11176/223172/E_CN.4_1999_49-EN.pdf) [<https://perma.cc/DHP2-PWTV>] (describing the 4-A framework as an analytical scheme to “portray the complexity of governmental obligations corresponding to the right of education”); Sital Kalantry et al., Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR, 32 *Hum. Rts. Q.* 253, 273–79 (2009) (applying the 4-A framework to the right to education).

23. See, e.g., Ganesh Sitaraman, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* 3–18 (2017) (arguing that the able functioning of national constitutions is dependent on the wealth distribution of the governed population); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 *U. Pa. J. Const. L.* 419, 487, 493–503 (2015) (arguing that “reform aimed at building countervailing organization, as well as more familiar election law and lobbying reform,” is better suited for checking “the role of wealth” in politics than “an expanded role for the judiciary”); Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, and the Constitution of Opportunity*, in *Wealth* 45, 60–63 (Jack Knight & Melissa Schwartzberg eds., 2017) (arguing for a return of American constitutional debate to “the political branches,” which in the past “were crucial fora in which most important constitutional conflicts and deliberations unfolded,” instead of exclusively in the courts). For a further discussion of this revival and its limits, see *infra* Part IV.

24. This approach shares much with the emerging literature on the history of the administrative state, particularly those studies that emphasize how economic equality and racial and gender-based inclusion have often depended on the creation of administrative institutions and the creative deployment of regulatory tools. The rich new literature on “administrative constitutionalism” has documented how regulatory agencies historically have been central players in battles over socioeconomic rights; agencies themselves have served as central arenas for tensions and clashes between social movements, bureaucrats, and elected officials, with each invoking a mix of moral aspiration, constitutional

administrative contexts are in fact the immediate battleground where questions of access and inclusion are actually determined.

B. *Toward a Moral and Political Conception of Public Goods*

Literatures on socioeconomic rights, human rights, and constitutional political economy thus share a common shift from a narrow focus on the vindication of socioeconomic rights in court to a broader focus on how socioeconomic rights can be framed as political claims, shaping policymaking, political narrative, and administrative governance. Alongside this expanded view of legal institutions capable of vindicating socioeconomic rights, we also need to broaden the conventional economic notion of public goods to conceptualize both their moral value and the political power dynamics surrounding their provision.<sup>25</sup> In doing so, we can think of public goods as those goods and services that generate positive “spillovers,” enabling significant and widespread downstream uses in different kinds of life projects and pursuits.<sup>26</sup> The value of the public good then is not just intrinsic; it is in the wide range of life opportunities and human well-being that is enabled by those goods. Amartya Sen has conceptualized this kind of human empowerment as a focus on “capabilities”—those inputs that enable human flourishing.<sup>27</sup> These capabilities are both normative—they make

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principles, bureaucratic policymaking, and more. See, e.g., Sophia Z. Lee, *The Workplace Constitution from the New Deal to the New Right* 193–211 (2014) [hereinafter Lee, *Workplace Constitution*] (exploring the evolution of equal employment rights through battles over the hiring and promotion practices of regulatory agencies like the Federal Communications Commission and the Federal Power Commission); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 *Va. L. Rev.* 799, 801–06 (2010) [hereinafter Lee, *Race, Sex, and Rulemaking*] (discussing “administrative constitutionalism” as administrative actors interpreting the Constitution to ascribe and proscribe rights to different groups); Gillian E. Metzger, *Administrative Constitutionalism*, 91 *Tex. L. Rev.* 1897, 1903–09 (2013) [hereinafter Metzger, *Administrative Constitutionalism*] (outlining the larger development of scholarly interest in this subfield of administrative constitutionalism); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 *Yale L.J.* 314, 374–79 (2012) (arguing that rights language used in the administration of public assistance served as a function of the state’s power). See generally Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (2012) (examining postwar administrative reforms and the role of the judiciary in legitimizing administrative law in national governance).

25. The ideas in this section draw on and extend my earlier discussion of infrastructure and the public utility idea. See K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 *Cardozo L. Rev.* 1621, 1628–47 (2018) [hereinafter Rahman, *New Utilities*].

26. See generally Brett M. Frischmann, *Infrastructure: The Social Value of Shared Resources*, at xi–xiii (2012) [hereinafter Frischmann, *Infrastructure*] (defining this “demand-side” view of infrastructure).

27. The capabilities approach has generated a vast literature. For Sen’s classic accounts, see generally Amartya Sen, *Development as Freedom* (1999); Amartya Sen, *The Idea of Justice* (2009). For other notable scholarship on the capabilities approach, see

freedom and opportunity real and possible—and empirical—they are discernible goods and services, and their provision serves as a metric for economic development and progress.<sup>28</sup>

While capabilities theorists tend to take an affirmative, aspirational view of those goods that enhance human flourishing, there is an additional critical, negative dimension to defining public goods. The very importance of these foundational goods and services leaves end users vulnerable to the whims of service providers. The actors with control over the provision of and terms of access to social and economic necessities can possess arbitrary power over end users by virtue of this very control.

This negative problem of unchecked power—what republican theorists label “domination”<sup>29</sup>—is, like the capabilities concept, both normative and empirical. Arbitrary power is a normative problem that undermines freedom in exactly the inverse way that access to public goods can enable freedom. If the positive moral benefits of public goods and infrastructure motivate the call for more equitable and democratic governance of those goods, then the danger of domination and exclusion arising from users’ vulnerability to providers yields an even more urgent motivation for public policies that can ensure fair and equal access and check providers’ exercise of power.<sup>30</sup> Furthermore, just as

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Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 70–86 (2000) (defining and commenting on a set list of capabilities); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *Ethics* 287, 316–21 (1999) (applying the capabilities approach to the notion of democratic equality). Frischmann himself has explicitly linked his view of infrastructure to the capabilities approach. See, e.g., Frischmann, *Infrastructure*, *supra* note 26, at 246; Brett M. Frischmann, *Capabilities, Spillovers, and Intellectual Progress: Toward a Human Flourishing Theory of Intellectual Property* 10–22 (Cardozo Law, Faculty Research Paper No. 442, 2014), <http://ssrn.com/abstract=2500196> (on file with the *Columbia Law Review*).

28. On the operationalization of the capabilities approach to measure social progress and shape development strategies, see generally Sabina Alkire, *Valuing Freedoms: Sen’s Capability Approach and Poverty Reduction* (2002); Sabina Alkire, *Choosing Dimensions: The Capability Approach and Multidimensional Poverty* (Chronic Poverty Research Ctr., Working Paper No. 88, 2007), <http://ssrn.com/abstract=1646411> (on file with the *Columbia Law Review*); Human Development Index (HDI), United Nations Dev. Programme: Human Dev. Reports, <http://hdr.undp.org/en/content/human-development-index-hdi> [<https://perma.cc/GD3S-HEDP>] (last visited Aug. 7, 2018).

29. See, e.g., Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* 8–10 (2015); John P. McCormick, *Machiavellian Democracy* 145 (2011); Philip Pettit, *Republicanism: A Theory of Freedom and Government* 21–27 (1997); Patchen Markell, *The Insufficiency of Non-Domination*, 36 *Pol. Theory* 9, 11–12 (2008). For an earlier attempt at synthesizing Progressive Era thought with contemporary theories of power and freedom, see K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 *Contemp. Pol. Theory* 41, 50–59 (2017) [hereinafter Rahman, *Democracy Against Domination*].

30. As a normative matter, the turn to governance, contestation, and checks and balances in response to domination is a core element of classic republican political theory, whether applied to the problem of arbitrary public power of the state or, as we shall see below, the arbitrary private power of market actors. For more on this, see *supra* note 29.

some have converted the capabilities view of public goods into empirical diagnostics to assess social progress, so too can this focus on vulnerability and domination offer an empirical, diagnostic approach: mapping *existing* institutions and entities that control access to public goods and tracing the ways in which those goods are provided on unequal or undemocratic terms.<sup>31</sup>

The on-the-ground administration and provision of public goods, with their concomitant disparities in power and access, represent a crucial site at which inequality, exclusion, and subordination are constructed. This shift—from a narrow focus on income and redistribution to the ways in which income inequities are themselves products of, and magnified by, background legal rules—is crucial.<sup>32</sup> Inequality and subordination are often the result of larger structural conditions that place individuals in subordinated positions in which they lack power, resources, and opportunities. But those structures are not “natural”; rather, they are the product of accumulated human choices, individual decisions, and background rules.<sup>33</sup> Thus, income inequality itself reflects the accumulation of legal rules enacted by political actors operating in the background; it is through law that these seemingly natural “market forces” are constructed.<sup>34</sup> These inequities are manifest not only along economic dimensions but also along racial and gendered lines, intersecting, exacerbating, and further codifying existing social disparities.<sup>35</sup> Combatting structural inequality thus requires attention to

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31. This idea of using the concepts of domination and arbitrary power, especially over basic goods, as an empirical strategy for identifying often-hidden forms of vulnerability is echoed by a range of scholars investigating systemic and structural forms of injustice. See, e.g., Iris Marion Young, *Responsibility for Justice* 52–59 (2011) (arguing that economic and social structures create constraints on individual freedom and opportunity by placing individuals in structurally unjust positions); Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *Yale J.L. & Feminism* 1, 8–10 (2008) (defining “vulnerability” as a way to diagnose structural inequalities); Sheila R. Foster, *Vulnerability, Equality and Environmental Justice: The Potential and Limits of Law*, in *The Routledge Handbook of Environmental Justice* 136, 136–48 (Ryan Holifield, Jayajit Chakraborty & Gordon Walker eds., 2018) (using the idea of vulnerability analysis to diagnose environmental harms). This diagnostic view is also an important implication of Franklin’s work. See Franklin, *supra* note 10.

32. See generally K. Sabeel Rahman, *Constructing and Contesting Structural Inequality*, 5 *Critical Analysis L.* 99 (2018) (tracing the history of legal and political decisions that have contributed to structural inequality).

33. Young, *supra* note 31, at 52–59. As Professor Iris Marion Young argues, structural domination arises “when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to . . . develop[] and exercis[e] capacities available to them.” *Id.* at 52.

34. See, e.g., Grewal, *Laws of Capitalism*, *supra* note 7, at 655. As Grewal argues, “A detailed study of these legal foundations is essential to understanding the institutional structure of capitalism.” *Id.* at 656.

35. There is a rich, growing literature on the dynamics of racial capitalism. Part of this literature is historical excavation, documenting the interconnection between the rise

“predistribution” as well as redistribution, altering what Professor Joseph Fishkin has deemed the “opportunity structure”<sup>36</sup>: initial background rules of political economy that allocate power, opportunity, and position and construct economic and social hierarchies.<sup>37</sup> Public goods are a key component of that opportunity structure.

C. *Inclusionary Public Goods: Some Lessons from History*

This focus on public goods and basic necessities as a key site for constructing exclusion and inclusion animates much of the history of struggles for economic, racial, and gender equality. Crucially, these struggles have also gained traction in part by challenging the existing power of private actors to condition access to necessities and in part by building public administrative regimes through which the vulnerable could secure equitable access.<sup>38</sup> These histories underscore the points raised in sections I.A and I.B: Public goods are moral and political categories, not just economic ones, that are often vindicated through a range of governance regimes that arise in close dialogue with social movements and public narratives rather than through formal claims in court. While a full recounting of these histories is beyond the scope of this Essay, two trajectories—the rise of “public utility” regulation in response to the inequities of late-nineteenth-century industrialization, and the fight for racial and gender-based inclusion through civil rights and public accommodations law—serve to illustrate three critical themes: (1) the importance of access to necessities for inclusion and equality; (2) the dangers posed by providers wielding unchecked and unaccountable control over the terms of access to those necessities; and (3) the need to develop new legal regimes to ensure access.

1. *Economic Inclusion and the Public Utility Tradition.* — The upheaval of industrialization in the late nineteenth century forced a dramatic reconceptualization of the normative dimensions of economic freedom and its implications for law and public policy. One of the key front lines

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of commercial and later industrial capitalism and slavery. See generally Sven Beckert, *Empire of Cotton: A Global History* (2014) (detailing the role of slave labor in the growth of cotton and thereby slave labor’s role in the creation of global capitalism and modern inequality); *Slavery’s Capitalism: A New History of American Economic Development* (Sven Beckert & Seth Rockman eds., 2016) (arguing that slavery—rather than the free market—played the primary role in key American innovations of the nineteenth century).

36. Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* 1–2 (2014) [hereinafter Fishkin, *Bottlenecks*].

37. Jacob S. Hacker, *The Institutional Foundations of Middle-Class Democracy, in* *Priorities for a New Political Economy: Memos to the Left* 33, 35 (Policy Network ed., 2011), [https://www.policy-network.net/pno\\_detail.aspx?ID=3998&title=The-institutional-foundations-of-middle-class-democracy](https://www.policy-network.net/pno_detail.aspx?ID=3998&title=The-institutional-foundations-of-middle-class-democracy) (on file with the *Columbia Law Review*) (“When we think of government’s effects on inequality, we think of redistribution . . . Yet many of the most important changes have been in what might be called ‘pre-distribution’—the way in which the market distributes its rewards in the first place.”).

38. See *infra* text accompanying notes 40–52.

for these debates was the struggle to ensure equal access to the new public goods and necessities of the industrial economy. These battles inform our contemporary efforts to diagnose problems of inequality and power and to respond by securing more equal access to modern necessities.

During this period of industrialization, the American economy was in the throes of a terrifying and painful transformation, not unlike the pressures faced today.<sup>39</sup> Industrialization created fabulous new advances and wealth. But it also created a deep upheaval, triggering social crises of poverty, inequality, poor health, pollution, and more. Many workers and communities suddenly found themselves struggling to survive, at the mercy of new forms of power.<sup>40</sup> For antitrusters and crusaders like Louis Brandeis, a key problem was that a variety of private actors, such as monopolies and trusts, had accumulated a degree of quasi-sovereign control over the economic vitality and well-being of individuals and communities; yet, these actors were not subject to the kinds of checks and balances and norms of public justification that would have accompanied equivalent exercises of *public* power.<sup>41</sup> Progressive Era critiques of the market system itself also raised this problem of economic power. On this view, as thinkers like Robert Hale and John Dewey suggested, what appeared to be impersonal “market forces” that, for example, drove wages down or prices up were in fact the cumulative result of thousands of microscale transactions and bargains, each of which took place under (legally determined) disparities of power.<sup>42</sup> Law constructed markets, and thus market forces were themselves amenable to public policy debate, critique, and reform.

Nowhere was this concern about unchecked private power more troubling than in the context of those goods and services that were basic necessities, foundational to social, economic, and political life. Industries like rail, transit, telecommunications, finance, and milk production combined two concerns in a particularly troubling configuration: the problem of concentrated private power and the problem of access to basic necessities. If private firms consolidated control over these necessities, this control could subject individuals to a kind of systemic subjugation or domination from which it would be very difficult to escape.<sup>43</sup> Public

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39. See Rahman, *Democracy Against Domination*, supra note 29, at 42 (noting the social and economic upheavals brought on by industrial capitalism).

40. For a longer discussion of Progressive Era legal and political thought as viewed through the lens of the outside control certain actors exercised over workers and communities, see *id.* at 50–59.

41. *Id.* at 43–46, 51, 57–59 (describing Progressive Era critiques of private power).

42. *Id.* at 43–46 (describing Progressive Era critiques of market structures).

43. See William J. Novak, *Law and the Social Control of American Capitalism*, 60 *Emory L.J.* 377, 393–97 (2010) [hereinafter Novak, *Law and Social Control*] (recounting Progressive Era fears of the consolidation of power in private business); William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in *Corporations*

utility reformers expressed an overarching moral and political concern with instances in which a necessity for social and economic inclusion and well-being was provided in a way that was inequitable and, more troublingly, subject to the arbitrary whims of powerful actors.<sup>44</sup> If everyone needs water to live but water is provided by a for-profit monopoly, then the communities dependent on that monopoly for basic sustenance could not in any meaningful sense be considered “free.” Thus, when individuals and communities are dependent on the benevolence and arbitrary will of private actors for basic survival, this is the essence of domination, of subjugation.

Policy battles over nineteenth-century urban infrastructure provide a powerful example of these themes: how private actors’ control of basic necessities created a threat to freedom, and how legal regimes needed to be developed to ensure access. Gas works, electricity, and streetcars—mainstays of modern urban infrastructure—were at the forefront of public utility politics in the late nineteenth century, motivating many of the leading Progressive Era actors. Thinkers and lawyers like Brandeis and politicians like Cleveland Mayor Tom Johnson saw municipalization and regulation of infrastructure as central to achieving a more equitable balance of power between private and public actors.<sup>45</sup> Their concern was not limited to gas and electric utilities. Rather, these were simply the most glaring examples of a wider concern about the potential for arbitrary power and abuse that arises when actors concentrate control over basic necessities upon which many depend but for which they lack alternative providers or other means to check providers’ arbitrary exercise of power. Thus, in the Progressive Era, state and city chartering of public utilities had become a widespread practice to regulate the provision of various goods and services, encompassing everything from transportation and telecommunications to milk, fuel, and banking.<sup>46</sup>

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and American Democracy 139, 139–54 (Naomi R. Lamoreaux & William J. Novak eds., 2017) [hereinafter Novak, Public Utility Idea] (describing the origins of public utility in legal thought in the late nineteenth century); see also Rahman, *New Utilities*, supra note 25, at 1632–34 (interpreting the public utility tradition as a response to concentrated private power and as an expression of an aspiration to economic freedom).

44. See Novak, *Law and Social Control*, supra note 43, at 392–404 (arguing that progressives saw private ownership of widely used utilities as a danger to inclusion and equality, with public control of such utilities as the best solution); Rahman, *New Utilities*, supra note 25, at 1628–34 (“The problem of private power, then, is best understood as not just economic, but a political problem of domination—the accumulation of arbitrary authority unchecked by the ordinary mechanisms of political accountability.”).

45. See, e.g., Gail Radford, *The Rise of the Public Authority: Statebuilding and Economic Development in Twentieth-Century America* 73–77 (2013) (recounting the history of municipal experimentation with public utilities); Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* 130–52 (1998) (same).

46. See Novak, *Law and Social Control*, supra note 43, at 400 (“For progressive legal and economic reformers, the legal concept of public utility was capable of justifying state economic controls ranging from statutory police regulation to administrative rate setting to outright public ownership of the means of production.”); see also William Boyd, *Public*



While some have dismissed the public utility tradition as a failure of administrative rate-setting,<sup>47</sup> the emergence of public utility regulation represented a critical phase of state-building, as reformers and policymakers innovated the institutions, tools, and practices that would become the modern administrative state.<sup>48</sup> By the early twentieth century, public utility theorists had developed a “workable consensus” among courts and legislatures that businesses affected by the public interest were those that “met an important human need” and for which “some feature of the relevant market presented the risk of oppression.”<sup>49</sup> Necessity here functioned as a “broad concept,” evoking not just “bare survival” but broader “ideas of dependence, expectation, and reliance.”<sup>50</sup> For our purposes, the public utility framework is therefore evocative for two reasons. First, the ideas of necessity and power that animated public utility reformers continue to provide a way to diagnose problematic concentrations of power: Where private actors control the terms of access to basic necessities, their unchecked power is more troubling than it might be in other contexts. Second, the institutional responses of public utility reformers—particularly their creation of new regulatory regimes to ensure access—suggest a concrete way forward for today’s reformers seeking to secure access to basic necessities and impose checks and balances on providers.

Formally, the legal innovations of the public utility reformers operated primarily through legislative and administrative channels. But importantly, we can understand these reform battles over the legal infrastructure and governance of public goods as attempts to define the scope and meaning of the privileges and immunities of citizenship in an industrializing economy. Calls for public utility-style restraints on providers of basic goods featured in the larger politics of the Populist and Progressive movements, setting the stage for the New Deal itself.<sup>51</sup> Amid

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Utility and the Low-Carbon Future, 61 *UCLA L. Rev.* 1614, 1619–20 (2014) (“Public utility, in [the view of Progressive lawyers, legal realists, and institutional economists during the first half of the twentieth century], was an important and distinctive American innovation—an example of the ‘creative force of law’ aimed at using government to guide certain private businesses toward public ends.” (quoting Novak, *Law and Social Control*, supra note 43, at 399)).

47. See *Nebbia v. New York*, 291 U.S. 502, 536–37 (1934) (abandoning as unworkable the “affected by the public interest” test adopted in *Munn v. Illinois*, 94 U.S. 113, 150 (1877)).

48. William Novak’s work in recovering the historical public utility tradition is of central importance here. See, e.g., Novak, *Law and Social Control*, supra note 43, at 392–404; Novak, *Public Utility Idea*, supra note 43; see also Nicholas Bagley, *Medicine as a Public Calling*, 114 *Mich. L. Rev.* 57, 71–79 (2015) [hereinafter Bagley, *Medicine as a Public Calling*] (discussing the American tradition of public utility regulation, including the various attributes of “public callings”); Boyd, supra note 46, at 1636–51 (detailing the origins of the public utility tradition and the notion of the “public interest”).

49. Bagley, *Medicine as a Public Calling*, supra note 48, at 75.

50. *Id.* at 76.

51. See, e.g., Rahman, *Democracy Against Domination*, supra note 29, at 43–46 (outlining various Progressive Era critiques of turn-of-the-century market capitalism).

the concentrated power of railroads and finance, calls for their regulation or even public provision were central demands of nineteenth-century reform movements, from the Grangers to the Farmers Alliance to Progressive Era antitrusters. Indeed, the Populists themselves, while often dismissed as naïve or antediluvian reactionaries, argued for a surprisingly modern vision of regulatory governance, including public provision of credit through a “subtreasury” system and postal banking, and tight oversight of railroads, financiers, and communications infrastructure.<sup>52</sup>

These nineteenth-century debates thus are indicative of the enduring normative and legal challenges of ensuring access to basic necessities. The focus on these necessities highlights both the importance of the good in enabling downstream capacities and opportunities for end-users and the vulnerability of those end-users to potentially arbitrary, dominating control by the providers of the good or service.

2. *Governance and Inclusion in Civil Rights.* — Access to basic necessities also formed a central focal point in subsequent struggles for racial inclusion. Modern antidiscrimination law has at least some of its origins in many of the same common law discourses that informed public utility reformers. Debates about public callings, the rights of travelers, and the requirement for common carriage all represented attempts to ensure inclusion in the face of powerful private actors who controlled these necessities.<sup>53</sup> Due to the transportation revolution of the nineteenth century, hotels, inns, and modes of transit served as newly critical hubs of social and economic life—ones in which the privileges of access were routinely withheld from slaves, apprentices, and other excluded groups who did not enjoy the same protections as out-of-town travelers.<sup>54</sup> Backers of the Civil Rights Act of 1875 explicitly targeted these exclusions from basic necessities, requiring equal access to public accommodations and

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52. See Charles Postel, *The Populist Vision* 147 (2007) (outlining the efforts of the California Farmers' Alliance to secure federal ownership of transportation and communications infrastructure in the Los Angeles basin); *id.* at 153 (describing the “subtreasury” system as “one of the most innovative proposals for federal intervention in the economy ever to enter American politics”). Professor Charles Postel's work provides a good articulation of the modernity of the Populist vision.

53. A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 *Law & Hist. Rev.* 53, 85–94 (2005) (tracing the origins of the 1964 Civil Rights Act in the evolution of common carriage nondiscrimination ideas into the broader civil rights and racial antidiscrimination struggles through the idea of travel and public accommodations).

54. *Id.* at 67 (citing Maryland innkeeper codes restricting the abilities of apprentices, servants, and slaves to patronize inns as examples of how travelers' privileges were withheld from broad classes of individuals).

travel networks.<sup>55</sup> However, the Court instead ratified such exclusions by granting constitutional immunity for a private right to exclude.<sup>56</sup>

Unequal access to the infrastructure of travel—and counteracting these private forms of exclusion—continued to inform desegregation and antidiscrimination movements, from 1890s efforts to challenge segregation via the Interstate Commerce Commission to the twentieth-century Montgomery Bus Boycott and the evocation of traveler necessity and common carriage in congressional hearings on the 1964 Civil Rights Act.<sup>57</sup> The importance of access to basic necessities makes exclusion from those goods, whether on racial, gender-based, or other grounds, all the more devastating and underscores the centrality of administering them in a manner that ensures fair and equal access.<sup>58</sup>

But the problem of access to necessities is not easily solved by focusing solely on common carriage by monopolistic providers. While public utility thinkers limited their concerns to monopoly and concentrated private control over basic services like railroads, their broader concerns with necessity and access to basic goods imply the need to address more systemic and diffused forms of inequality and exclusion.<sup>59</sup> Assuring access

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55. See *id.* at 59 (“When the legislators behind the civil rights bill sought to establish a connection between seemingly private institutions and state governments, they invoked particular kinds of establishments, usually in a particular order[:] . . . they first cited inns, then carriers, and then analogized to other kinds of public space.”).

56. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (holding that the 1875 Civil Rights Act did not extend to private, nonstate action).

57. As Professor A.K. Sandoval-Strausz suggests, this history paints the evocation of Congress’s commerce power in the 1964 Civil Rights Act in a different light, not as a workaround but as the culmination of a deliberate focus on producing inclusion and equity through the governance of basic necessities—like the infrastructure of travel, transit, and commerce. See Sandoval-Strausz, *supra* note 53, at 85–92. For a broader argument about the central role of federal enforcement in addressing structural racial discrimination, see, e.g., Desmond King, *Forceful Federalism Against American Racial Inequality*, 52 *Gov’t & Opposition* 356, 358–89 (2017).

58. A similar point might be made about the central role of education in constitutional and normative battles over inclusion and equality. The role of education in framing key civil rights cases like *Brown v. Board of Education*, 347 U.S. 483 (1954), or *United States v. Virginia*, 518 U.S. 515 (1996), is well known. But access to schools has also been a focal point for the broader idea of economic opportunity. See Fishkin, *Bottlenecks*, *supra* note 36, at 199–200 (suggesting that education, among other goods, constitutes a “bottleneck” that has an outsized impact on future economic well-being and thus is central to normative concepts of equality). Access to schools has been one of the key public goods motivating more subtle forms of exclusion through suburbanization and municipal secession. See *infra* section II.C.

59. See, e.g., Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 *Ala. C.R. & C.L. L. Rev.* 91, 92–93 (2011) (“United States law does and should recognize a foundational anti-apartheid principle that puts out of bounds market conduct that deprives individuals of equal opportunities because of their race.”); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 *Nw. U. L. Rev.* 1283, 1292, 1404–12 (1996) (critiquing the conventional view of nondiscrimination and common carriage norms as applying only in the context of monopoly providers, and arguing for a more generalized antifederal principle of nondiscrimination in all public

to this broader set of necessities required the innovation of a more multifaceted form of regulatory oversight than the public utility model of regulating monopolistic providers.

Indeed, as several recent historical accounts suggest, many of the successful mid- and late-twentieth-century efforts to establish norms of nondiscrimination and equal access in healthcare, welfare, and employment depended on modernized forms of the strategies used by public utility reformers in response to nineteenth-century industrialization. Just as public utility reformers created new administrative bodies to ensure equal access to modern infrastructure like rail and telecom, civil rights reformers also created enforcement agencies and other means to ensure equal access to public accommodations.<sup>60</sup> Through strategic use of federal authority over spending grants<sup>61</sup> and by creating new offices tasked with oversight of charges of racial discrimination, federal agencies could resist state regulators' efforts to restrict access to safety-net programs on the basis of race or ethnicity.<sup>62</sup> Similarly, federal agency administrators attempted to instill norms of equal employment in private industry by using the federal agencies—themselves major employers in the midcentury—to mandate as much in entities over which they had control.<sup>63</sup> For example, the FCC deployed its licensing powers to require internal equal employment practices within communications firms regulated by the FCC.<sup>64</sup> These approaches were crucial in promoting

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accommodations). Indeed, as we will see in Part II, the public utility idea has in some ways facilitated more subtle and sinister forms of exclusion, ensuring public access to goods and services like parks and municipal utilities but restricting the “public” that can access these goods in ways that foster racial segregation and disparities.

60. See Lee, *Workplace Constitution*, *supra* note 24 (explaining public–private efforts to establish equal opportunity norms among federal agencies as a way of spurring equal opportunity efforts nationwide); David Barton Smith, *The Power to Heal: Civil Rights, Medicare, and the Struggle to Transform America’s Healthcare System* 25–29 (2016) (describing the efforts of black physicians to ensure that black and poor Americans were not excluded from the American healthcare system).

61. On the use of grants and funding conditions as a key policy tool for federal agencies, including the well-known use of funding conditions to spur desegregation in the South in the 1960s, see Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *Yale L.J.* 248, 252–53 (2014). For a critical analysis of how such funding conditionality could be used to create new entitlements beyond statutory intent and congressional oversight, see generally Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 *Duke L.J.* 1677, 1686–1701 (2017).

62. Smith, *supra* note 60, at 69; see also Karen Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 *Cornell L. Rev.* 825, 845–59 (2015) (documenting how bureaucrats pioneered rationality-review models of equal protection through which restrictive state welfare rules were evaluated and often overturned by federal counterparts in the 1940s and 1950s).

63. See Lee, *Race, Sex, and Rulemaking*, *supra* note 24, at 844 (outlining how the FCC’s enforcement of equal opportunity rules inspired agencies to enforce equal employment nationwide).

64. *Id.* at 813.

equality in the face of more diffused, systemic patterns of exclusion or subordination. Thus, the twentieth-century establishment of laws and norms of antidiscrimination and universal access to entitlements like Medicare all owe a great deal to the background efforts by administrators to create new offices and techniques of oversight, enforcement, and even organizational cultural change.<sup>65</sup>

These examples underscore how the issue of access to basic necessities has been a central theme in battles for racial and gender-based inclusion. They also demonstrate how, as with public utility reformers of the Progressive Era, mid-twentieth-century reformers responded to problems of power and exclusion by building new state institutions capable of enforcing inclusion and access.

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While a full historical account of these battles for economic and social inclusion is beyond this Essay's scope, Part I's discussion of the public utility tradition and civil rights movements highlights several key themes for our present purposes. First, there is a wide range of basic necessities and public goods—from physical infrastructure, like the railroads and gas works highlighted by Progressive Era public utility reformers, to nonphysical public goods like healthcare—that are crucial to human flourishing and membership in the larger polity. The vital nature of these goods makes exclusion from or conditioning of access to them especially dangerous as a source of domination, subordination, and inequality. Second, the provision of these goods is not a matter of abstract, ideal theory; rather, there are existing service providers who make up the infrastructure of provision and who therefore possess the capacity to exclude. Third, ensuring inclusion and equality has thus required the creation of legal regimes that could in some way oversee and hold accountable these service providers to facilitate more equitable access. These three themes compose the dynamic of what this Essay has framed as the *construction of citizenship*. Equality and inclusion turn in part on a set of background rules that shape the terms of access to public goods and basic necessities.

The rest of this Essay explores these themes, focusing more concretely on the day-to-day governance of access to basic necessities. Part II shows how the modes of exclusion from public goods often operate in more subtle ways: Rather than being denied outright, access can instead be conditioned and toggled through other mechanisms. Part III then shows how we might rework these administrative regimes to promote inclusion through greater access to these basic necessities.

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65. See Smith, *supra* note 60, at 25–29 (describing the inner battles among bureaucratic reformers, critics, and the civil rights movement to ensure racially nondiscriminatory application of Medicare in what at the time remained a racially segregated healthcare system).

## II. INEQUALITY AND EXCLUSIONARY PUBLIC GOODS ADMINISTRATION

The most straightforward form of exclusion from public goods and basic necessities would be an outright and explicit denial of access or service to some constituencies. We can think of this as “first-order” exclusion. But focusing on the provision of public goods as driving inequality reveals that exclusion is often constructed through more subtle “second-order” strategies, often hidden in the background. This Part draws on two examples of basic necessities, water and housing, to show the ways in which these second-order exclusionary strategies operate to condition the terms of access to necessities.

Section II.A provides an overview of two particularly relevant examples of public-goods-administration failures—the water crisis in Flint, Michigan, and the broader urban housing crisis—and draws out the implications of these examples for the issues of exclusion and inequality. Section II.B illuminates three prominent second-order exclusionary techniques: (1) bureaucratic exclusion; (2) privatization; and (3) fragmentation. These patterns are not unique to water and housing; rather, they manifest more broadly in other public goods like healthcare, education, and more. These are problematic forms of governance that legal scholars have highlighted in various disciplines, including poverty law, local government law, and administrative law. But, as section II.C explains, the crucial insight that these examples provide is that there exists an “exclusionary playbook” composed of any number of these techniques. Moreover, these different policies are often addressed separately: Bureaucratic barriers to accessing goods and services are not the same as privatization and deregulation, and the fragmentation of regions into different legal jurisdictions reflects still another body of law-and-policy debate. Yet viewed from the standpoint of the accessibility of public goods, these policy fights start to look more interconnected, as a set of substitutable and complementary strategies through which policymakers can construct systemic forms of inequality and exclusion, often along lines of race, gender, and class.

### A. *Second-Order Exclusionary Administration: The Cases of Water and Housing in Debates over Urban Inequality*

Part I highlighted how the administration of and terms of access to public goods represent a key site at which inequality and exclusion are constructed—and conversely, at which inclusive citizenship has the potential to be made real. But it remains to be seen what this looks like concretely, on the ground. This section focuses on recent debates over urban inequality, debates that have highlighted the problem of differential access to basic necessities and public goods. Looking specifically at the contexts of water and housing, sections II.A.1 and II.A.2 draw out the ways in which legal and policy designs affecting the administration of public goods can construct exclusion.

Today, cities are at the forefront of policy and political interest, not just as economic engines for growth<sup>66</sup> but rather as critical junctions at which larger economic dynamics concentrate to produce more structural forms of exclusion, inequality, and disempowerment.<sup>67</sup> Meanwhile, there is a renewed interest among public law scholars in the institutional-governance regimes that arise in the context of state and local politics.<sup>68</sup> As this section suggests, unequal access to public goods is not just a problem of private actors exercising arbitrary control over users—though that is part of it. As the discussion below reveals, difficulties arise from a wide network of entities—including service providers, investors, and financial interests—and, crucially, from failures and weaknesses of government itself at the state, local, and federal levels.

1. *Inequality and Exclusion in the Water Crisis.* — There is perhaps no more notable example of inequality in administering public goods than the recent water crisis in Flint, Michigan. After years of budget crises, Flint was placed under Michigan’s emergency management regime.<sup>69</sup> As part of a variety of cost-cutting measures, in April 2013, city officials switched from Flint’s long-standing arrangement with the Detroit Water and Sewerage Department (DWSD) to a regional water authority.<sup>70</sup> Until the new authority and its water infrastructure was up and running, the

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66. See, e.g., Richard Florida, *The Rise of the Creative Class* 11 (2002); Edward Glaeser, *Triumph of the City: How Our Greatest Invention Makes Us Richer, Smarter, Greener, Healthier, and Happier* 250–51 (2011).

67. See, e.g., David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* 5 (2012).

68. This is perhaps best seen in several scholars’ revived interest in the interactions between federal, state, and local administrative law. See, e.g., Nestor M. Davidson, *Localist Administrative Law*, 126 *Yale L.J.* 564, 587–610 (2017) (discussing “the regulatory domains of local administration and the institutional forms through which that administration occurs” in addition to the “varied governmental-structural contexts in which local agencies operate”); Miriam Seifter, *Gubernatorial Administration*, 131 *Harv. L. Rev.* 483, 485–88 (2017) (discussing the rise of gubernatorial power and state power); Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 *Law & Contemp. Probs.*, no. 3, 2016, at 115, 118–30 (discussing recent legislative and regulatory initiatives directed at achieving civil rights goals at the “subnational” level); Kate Andrias, *Tripartite Workplace Law in States and Cities* 1–2 (Aug. 31, 2017) (unpublished manuscript) (on file with the *Columbia Law Review*) (discussing state and local systems allowing for development in labor rights despite limitations in federal labor law).

69. An emergency manager was appointed to oversee Flint, Michigan, in November 2011. Kristen Longley, *Emergency Manager Michael Brown Appointed to Lead Flint Through Second State Takeover*, *Mlive* (Nov. 29, 2011), [http://www.mlive.com/news/flint/index.ssf/2011/11/emergency\\_manager\\_michael\\_brow.html](http://www.mlive.com/news/flint/index.ssf/2011/11/emergency_manager_michael_brow.html) [<http://perma.cc/ML23-S857>]. Emergency managers serve for an indefinite amount of time and have broad powers to displace locally elected officials. *Mich. Comp. Laws Ann.* § 141.1549(3)(d) (West 2018). Emergency managers can privatize government services, sell public assets, cancel local programs, and break, negotiate, and enter into agreements on behalf of the municipality. *Id.* § 141.1552.

70. See Kennedy, *supra* note 4; see also Anand, *Banality of Infrastructure*, *supra* note 4.

city temporarily began drawing water from the Flint River. To further contain costs, the city did not treat the Flint River water source with anticorrosion agents.<sup>71</sup> Like many midcentury industrial towns, however, Flint's underlying pipe infrastructure included many lead-based materials. Without the anticorrosion agents, the new water eroded the lining of the pipes, leading to a dramatic increase in lead levels in the city's drinking water.<sup>72</sup> The Michigan Department of Environmental Quality (DEQ) insisted the water was safe, treating it with chlorine to prevent *E. coli* infections, but neglected to use corrosion-controlling substances.<sup>73</sup> Furthermore, DEQ failed spectacularly in its lead testing; in its inspections, DEQ selectively checked more modern homes that were less likely to have lead pipes, pronouncing the entire water system lead free.<sup>74</sup> The result has been one of the worst environmental-, economic-, and racial-justice crises in decades. While this crisis had been brewing for years, local residents' mobilization and doctors' observance of the rise of lead-poisoning symptoms catapulted Flint to national prominence. The water crisis is now a central point of contention in Michigan state politics and recent state elections.<sup>75</sup>

Water is, of course, more than an ordinary commodity: It is a foundational necessity of life. Control of access to water evokes the very concerns of domination and unaccountable power that informed the public utility critique.<sup>76</sup> Who controls the water system—and to whom water is provided, and on what terms—constructs, in a very literal sense, the reach and meaning of citizenship and freedom. Notably, scholars of water rights, inequality, and development in the global context have similarly highlighted water governance as a central site at which unaccountable government actors and multinational corporations have

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71. See Kennedy, *supra* note 4; see also Anand, *Banality of Infrastructure*, *supra* note 4 (suggesting that the failure to use anticorrosion agents may have also been a way to “remain ignorant of the problem”).

72. Anand, *Banality of Infrastructure*, *supra* note 4; see also Kennedy, *supra* note 4.

73. See Anand, *Banality of Infrastructure*, *supra* note 4.

74. See *id.* (“They selected homes that were less likely to have lead pipes, flushed the lead out of water pipes before they collected their samples, etc.”); see also Anna Maria Barry-Jester, *What Went Wrong in Flint*, *FiveThirtyEight* (Jan. 26, 2016), <https://fivethirtyeight.com/features/what-went-wrong-in-flint-water-crisis-michigan> [<http://perma.cc/T3HU-YG5G>] (describing the failures of DEQ's statistical-sampling methodologies leading to a misleadingly normal-seeming lead finding).

75. See, e.g., *Clean Up Our Drinking Water*, Gretchen Whitmer for Governor, <https://gretchenwhitmer.com/issues/environment/> [<http://perma.cc/9LW2-C2YE>] (last visited Aug. 8, 2018) (describing a gubernatorial candidate's policies to fix the water crisis); *Water Policy*, Abdul for Michigan, <https://abdulformichigan.com/water> [<https://perma.cc/QQ3R-CEQL>] (last visited Aug. 20, 2018) (describing another candidate's proposals to ensure clean water).

76. See *supra* section I.B.



exercised control and domination.<sup>77</sup> Debates over water, then, are very much battles over citizenship, belonging, freedom, and democracy.

Flint certainly speaks to the dangers of contamination of the water supply, but even before the lead crisis, Flint, Detroit, and many other municipalities had been struggling with growing problems of underinvestment and rising costs. Nationally, water systems will require an estimated \$1 trillion in repairs and upgrades over the next twenty years, at a time when federal funding for water infrastructure has declined by over seventy percent in real terms since 1977.<sup>78</sup> Since 1990, water costs have been rising faster than incomes and inflation, especially in minority communities.<sup>79</sup> Water rates are forecast to increase as much as forty percent over the next five years, and by 2020, experts estimate that as many as forty-one million American households will face unaffordable water rates of over four percent of area median income.<sup>80</sup>

The rising cost of access to clean water and contamination issues caused by cost-cutting measures indicate a larger pattern of exclusion and inequality arising from conditioned or limited access to public goods and infrastructure. The ongoing privatization of urban infrastructure, including water, transit, and housing, has been a growing focal point for urban justice movements and advocacy groups. Activists have singled out

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77. See Nikhil Anand, *Hydraulic City: Water and the Infrastructures of Citizenship in Mumbai* 20 (2017) (discussing how water services are a key site for constructing urban inequality in Mumbai); Antina von Schnitzler, *Democracy's Infrastructure: Techno-Politics and Protest After Apartheid* 29 (2016) (examining how South African water infrastructure reaffirmed racial hierarchies after the fall of apartheid); Colin McFarlane & Jonathan Rutherford, *Political Infrastructures: Governing and Experiencing the Fabric of the City*, 32 *Int'l J. Urb. & Regional Res.* 363, 363–71 (2008) (discussing a political conceptualization of urban infrastructure and the impacts of this model on everyday life); Susan Leigh Star, *The Ethnography of Infrastructure*, 43 *Am. Behav. Scientist* 377, 377–79 (1999) (discussing the “difficulties of studying infrastructure” from the perspective of traditional ethnography); Malini Ranganathan, *The Environment as Freedom: A Decolonial Reimagining*, Soc. Sci. Research Council: Items (June 13, 2017), <http://items.ssrc.org/the-environment-as-freedom-a-decolonial-reimagining/> [<https://perma.cc/E6F8-9WGG>] (arguing that “a comprehensive understanding of freedom” includes “the ability to live in a safe and clean environment”).

78. Elizabeth Douglass, *Towns Sell Their Public Water Systems—and Come to Regret It*, *Wash. Post* (July 8, 2017), [https://www.washingtonpost.com/6ec5b8d6-4bc6-11e7-bc1b-fddb8359dee\\_story.html](https://www.washingtonpost.com/6ec5b8d6-4bc6-11e7-bc1b-fddb8359dee_story.html) [<https://perma.cc/HVA3-2QBZ>].

79. Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 36 *B.C. J.L. & Soc. Just.* 159, 164–65 (2016).

80. Sarah Frostenson, *America Has a Water Crisis No One Is Talking About*, *Vox*, <https://www.vox.com/science-and-health/2017/5/9/15183330/america-water-crisis-affordability-millions> [<https://perma.cc/8QQQ-56DG>] (last updated Mar. 22, 2018). One of the primary scientific studies informing this account conducted a detailed statistical analysis of affordability, projected consumption, and price changes, disaggregated by geographic location, suggesting that over thirty-five percent of households will fall below the threshold of water affordability. See Elizabeth A. Mack & Sarah Wrase, *A Burgeoning Crisis? A Nationwide Assessment of the Geography of Water Affordability in the United States*, 12 *PLOS ONE* 1, 7 (2017), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0169488&type=printable> [<https://perma.cc/9SLG-EY9U>].

several particularly perturbing trends driving unequal access to infrastructure, including the rise of fee-based, for-profit provision of basic services and private funding in exchange for investment returns.<sup>81</sup> The increasing privatization of the city is animating an attempt to build a new, public, and inclusive approach to infrastructure. For example, the Partnership for Working Families, a national coalition of city-based community organizations, recently launched a major campaign to organize and mobilize urban residents against corporate-run cities, calling instead for community control of urban infrastructures.<sup>82</sup> These movements and advocacy developments embody the themes developed in this Essay: Basic necessities, and the infrastructures through which they are distributed, are vital to human well-being; private and unaccountable control over these necessities is dangerous; and the remedy requires the development of new, inclusive, and democratically accountable governance regimes.

2. *Inequality and Exclusion in the Housing Crisis.* — A second front line for urban inequality debates revolves around the geographic concentration of, and individual-level access to, another core necessity: housing. Like water, housing is more than a commodity; it, too, is a necessity of life. And like water crises in cities across the country, the housing context involves a deep power imbalance between actors that control the terms of access—landlords, investors, and housing policymakers—and those seeking access—renters and homeowners.<sup>83</sup> Urban equality then requires some form of checking the power of the actors who control the terms of access to housing.

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81. See, e.g., In the Pub. Interest, *How Privatization Increases Inequality 3* (2016), [http://www.inthepublicinterest.org/wp-content/uploads/InThePublicInterest\\_InequalityReport\\_Sept2016.pdf](http://www.inthepublicinterest.org/wp-content/uploads/InThePublicInterest_InequalityReport_Sept2016.pdf) [<https://perma.cc/2BMB-CPJU>] (examining “the ways in which the insertion of private interests into the provision of public goods and services hurts poor individuals and families, and people of color”); About, Action Ctr. on Race & the Econ., <https://www.acrecampaigns.org/about/> [<https://perma.cc/K8B3-8978>] (last visited Aug. 7, 2018) (“We partner with local organizations . . . and help them connect the dots between their issues and Wall Street so that each of the local efforts feeds into a broad national movement to hold the financial sector accountable.”); Our Work, P’ship for Working Families, <http://www.forworkingfamilies.org/campaigns> [<https://perma.cc/4TH6-569P>] (last visited Aug. 7, 2018) (describing work “fighting for community-controlled, publicly owned institutions, structures, and services”).

82. *The Problem & Solution, We Make This City*, <http://wemakethiscity.org/the-problem-solution/> [<https://perma.cc/Q3GS-DLW3>] (last visited Aug. 7, 2018).

83. See, e.g., Susan Etta Keller, *Does the Roof Have to Cave In?: The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 *Cardozo L. Rev.* 1663, 1664–73 (1988) (attributing the unequal power relationship between landlords and tenants to “an amalgam of different, but interrelated factors,” such as the configuration of the housing market, historical or political circumstances, and “accidental” circumstances); Amy J. Schmitz, *Promoting the Promise Manufactured Homes Provide for Affordable Housing*, 13 *J. Affordable Housing & Community Dev. L.* 384, 388, 403 n.56 (2004) (arguing that the dominance of the Mobile Home Institute in generating studies and standards for manufactured homes “tends to perpetuate pro-industry status quo, and perhaps stymies much-needed reform”).

The problem of housing inequality is manifold. First and most immediate is affordability. By some estimates, one-third of households around the country spend over thirty percent of their incomes on housing, with a majority of poor Americans spending over half their income on housing.<sup>84</sup> Relatedly, tenants often experience unfair treatment at the hands of their landlords. Low-income renters represent a highly dependable and remunerative source of income for landlords, an issue only worsened by low-income renters' limited alternatives to extractive and precarious arrangements with their landlords.<sup>85</sup> Landlords can thus exploit their positional advantage to extract revenue—a dynamic similar to the exploitative, predatory financial relationships between low-income communities and payday lenders.

More broadly, geographic patterns of housing development play a major role in excluding whole swaths of the public from economic opportunity. A growing body of research has shown how histories of racial discrimination in lending, zoning, and urban planning concentrate racial-minority communities and poverty, which in turn has intergenerational effects on income, mobility, health, and well-being.<sup>86</sup> These

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84. Joint Ctr. for Hous. Studies of Harvard Univ., *The State of the Nation's Housing* 31, 32 fig.30 (2017), [http://www.jchs.harvard.edu/sites/default/files/harvard\\_jchs\\_state\\_of\\_the\\_nations\\_housing\\_2017\\_0.pdf](http://www.jchs.harvard.edu/sites/default/files/harvard_jchs_state_of_the_nations_housing_2017_0.pdf) [<https://perma.cc/GD3X-WSFV>].

85. See Matthew Desmond, *Evicted: Poverty and Profit in the American City* 305–06 (2016) (defining exploitation of poor people as “a product of extractive markets” and arguing that “[i]n fixating almost exclusively on what poor people and their communities *lack*—good jobs, a strong safety net, role models—we have neglected the critical ways that exploitation contributes to the persistence of poverty”); Matthew Desmond, *Opinion, The Eviction Economy*, *N.Y. Times* (Mar. 5, 2016), <https://www.nytimes.com/2016/03/06/opinion/sunday/the-eviction-economy.html> (on file with the *Columbia Law Review*) [hereinafter Desmond, *Eviction Economy*] (describing how landlords can rent to poor families and “still command handsome profits”); see also Mike Konczal, *The Violence of Eviction*, *Dissent* (Summer 2016), <https://www.dissentmagazine.org/article/the-violence-of-eviction-housing-market-foreclosure-gentrification-finance-capital> [<https://perma.cc/9W2H-5HRS>] (explaining that “[h]ousing insecurity creates a special kind of exhausting poverty, one that threatens the very security of one’s family,” including not just physical safety and economic opportunity but the “very sense of self and liberty”).

86. On the historical, racial, and structural drivers of geographic segregation and its impact on economic welfare, see generally Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) [hereinafter Rothstein, *Color of Law*] (arguing that most race-based residential segregation is a product of unconstitutional government policies); Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality* (2013) (arguing that the intergenerational experience of race-based residential segregation contributes to the limited socioeconomic mobility of African American families); Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 *Yale L.J.* 1934 (2015) (describing how various elements of urban design reinforce racially segregative patterns in urban areas); Raj Chetty et al., *Where Is the Land of Opportunity? Intergenerational Mobility in the US*, *VoxEU* (Feb. 4, 2014), <https://voxeu.org/article/where-land-opportunity-intergenerational-mobility-us> [<https://perma.cc/U9D3-X8Q7>] (“Economic mobility varies dramatically across US cities. Some have upward-income mobility comparable to the most mobile countries in the world.

structural dynamics change the quality and social and economic *value* of housing. Housing is a gateway to membership in the larger economy and society, at both the individual and community levels. Specifically, *where* one lives has intergenerational implications for a variety of outcomes, from access to employment opportunities to expected lifespan.<sup>87</sup>

Access to fair and affordable housing is thus essential for human well-being—and undermining that access is a key driver of structural inequality and exclusion. As with water, the push for housing equity and access has involved several different types of legal reforms and advocacy campaigns. On the individual level, the push for expanding common law and regulatory protections for tenants and homeowners has been a major theme in housing law, culminating in the common law warranty of habitability.<sup>88</sup> Recent housing reform efforts have sought to expand these protections and increase tenants' representation in housing court.<sup>89</sup> But given the multifaceted nature of housing inequality, ensuring equal access to housing also requires more far-reaching changes to the governance regime around housing policy itself. For example, existing housing regulators can be more aggressive about imposing rent controls and policing landlord violations under existing law. And cities and regions alike can be more mindful of how adjustments to zoning and urban planning can remedy geographic patterns of segregation.<sup>90</sup> Economic and racial inclusion thus turns not only on the landlord-tenant relationship but also on the larger patterns of economic segregation and mobility across neighborhoods and across the larger metro region.

The literature on both water and housing law is vast and need not be recounted here. For our purposes, water and housing are two useful examples of public goods and inequality today, through which broader insights emerge. Both access to and governance of core infrastructure like water and the implications of macroscale urban planning for access to housing and economic opportunity indicate how inequality is centrally rooted in problems of domination and control over access to public goods. The quality, value, and reach of these goods are conditioned by how a range of public and private actors administer them, which in turn

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Others have rates below that of any developed country. These geographical differences are correlated with five factors: segregation, income inequality, local school quality, social capital, and family structure.”).

87. See, e.g., Sharkey, *supra* note 86, at 92 (“[T]he unique ecological location of African Americans in the most disadvantaged urban neighborhoods, over long periods of time, has played a central role in reproducing racial inequality across multiple dimensions.”).

88. See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 *Calif. L. Rev.* 389, 397–423 (2011) (surveying the “genesis of the implied warranty of habitability and related innovations”).

89. See *infra* notes 139–142 and accompanying text.

90. For an expanded discussion of different housing solutions and their limits, see *infra* Part III.

defines the lived reality of inclusion, equality, and membership. Advocates today consequently must address this governance dimension of public goods. The problem, however, is not just the direct first-order problem of service providers shutting off access; rather, there is an additional, more subtle set of second-order governance failures that help contribute to unequal access to basic necessities.

B. *Second-Order Exclusionary Tactics*

While outright rejection by service providers can create conditions of inequality, denial of access to basic necessities often takes a more hidden form. As the debates over water and housing illustrate, there are a number of second-order exclusionary tactics that functionally reduce certain constituencies' access to basic necessities through more hidden mechanisms. While these tactics exist in many forms as part of a broader playbook, this section outlines three specific exclusionary strategies: (1) bureaucratic exclusion, or the failure and deliberate recalcitrance of public authorities; (2) the privatization and financialization of public goods; and (3) the fragmentation of legal authorities. These are not just happenstances or tendencies that arise naturally; rather, they often emerge as deliberate, if hidden, strategies through which policymakers can restrict access to basic necessities—and in so doing, construct a hierarchy of membership and citizenship in the polity.

1. *Bureaucratic Exclusion: The Failure of Public Authorities.* — As detailed above, the Flint crisis is notable for how much of the lead-poisoning tragedy is a product of egregious failures of *governmental* actors.<sup>91</sup> The Michigan DEQ failed to adequately test the safety of the water supply, for example.<sup>92</sup> Similarly, housing agencies' failures to enforce common law and regulatory protections for tenants contribute significantly to the injustices and inequities of the housing system.

More broadly, many legal protections meant to ensure access to public goods are dramatically underenforced due to a lack of resources and a fragmented enforcement system. For example, the warranty of habitability, a crowning achievement of the 1960s-era movements for economic and racial justice, has proven a disappointment in practice.<sup>93</sup> Implementation depended on the action of overburdened courts and on tenants having the knowledge, sophistication, and legal representation needed to withhold rent and vindicate the warranty in court. Furthermore, the warranty itself, intended for the context of urban decay, was not adaptable to emerging problems of landlord harassment and tenant displacement in the context of an affordability crisis caused by an

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91. See *supra* section II.A.1.

92. See Anand, *Banality of Infrastructure*, *supra* note 4.

93. See generally Super, *supra* note 88, at 423–39 (discussing the ultimate failure of the tenants'-rights revolution).

overheated real estate market.<sup>94</sup> Underenforcement of the warranty and of existing housing codes represents a state-sanctioned undermining of a tenant's right to a habitable environment.<sup>95</sup> For tenant and homeowner protections to be effective, they must extend beyond the realm of individual rights vindicated in court. Administrative regimes—such as rent stabilization, expanded monitoring of landlords, or oversight of claims against landlords—represent more systematic attempts to oversee the housing sector, and the relative strength or weakness of these regimes in monitoring and enforcing standards is critical to tenants' lives.

Geographic patterns of concentrated development or poverty, of displacement, or of environmental pollution similarly owe much to government agencies' failures, deliberate or subconscious. The physical architecture of our urban spaces—through the placement of transit stops, the design of traffic flow, or the presence of pedestrian paths—can orient the flow of foot and vehicle traffic in ways that can create patterns of “architectural exclusion.”<sup>96</sup> Urban planning and housing policy, meanwhile, have actively furthered neighborhood-level economic segregation, dating back to the legacy of redlining and discrimination in federal support for homebuyers. Cities still tend to zone neighborhoods in measurably unequal ways, concentrating economic exclusion and even environmental harms in minority neighborhoods.<sup>97</sup>

These forms of systemic inequality and exclusion are thus themselves the product of legal regimes. In other words, legal regimes are central to constructing inequality and disparate access to basic necessities like

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94. See *id.* at 451–60.

95. Timothy M. Mulvaney & Joseph William Singer, *Move Along to Where? Property in Service of Democracy* (A Tribute to André Van Der Walt) 4 (2017) (unpublished manuscript) (on file with the *Columbia Law Review*) (describing how tenants are systematically harmed by the pattern of underenforcement of their existing common law rights).

96. See, e.g., Schindler, *supra* note 86, at 1949–53 (surveying scholarship on “architecture, the built environment, municipal infrastructure, space, and place in the context of class and race”). For a classic account of racial exclusion through urban planning, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harv. L. Rev.* 1841, 1847–57, 1870–74 (1994).

97. See Schindler, *supra* note 86, at 1979–87 (discussing judicial ambivalence toward exclusionary zoning practices); see also Richard Rothstein, *Econ. Policy Inst.*, *The Making of Ferguson: Public Policies at the Root of Its Troubles* 1–2 (2014), <https://www.epi.org/files/2014/making-of-ferguson-final.pdf> [<https://perma.cc/KKB8-TCLL>] (arguing that the “conditions that created Ferguson cannot be addressed without remedying a century of public policies that segregated our metropolitan landscape”). For an expanded version of Richard Rothstein's critique, see Rothstein, *Color of Law*, *supra* note 86 (arguing that segregation is the byproduct of explicit government policies); see also Gerald E. Frug, *City Making: Building Communities Without Building Walls* 143–49 (2001) (describing how municipalities have used zoning and redevelopment policies to create exclusionary, homogeneous neighborhoods); Richard Schragger, *City Power: Urban Governance in a Global Age* 115–16 (2016) (“Lower-income residents, hampered by physical distance and the costs of commuting, are . . . at a significant disadvantage in the regional labor market.”).

housing.<sup>98</sup> Far from appearing exclusively in the context of housing or water, this pattern extends to other public goods and entitlements. Poverty scholars have long noted the ways in which administrative regimes make it difficult for individuals to access entitlements like food stamps, unemployment insurance, and other safety net protections, requiring multiple trips to social services offices, extensive paperwork, and often-demeaning and -arbitrary interviews.<sup>99</sup> For much of the history of the welfare state, policymakers have resorted to the (often-racially-charged) trope of the “undeserving poor” to justify the imposition of eligibility requirements and screening measures that limit and condition access to safety-net programs.<sup>100</sup> This pattern paints a picture of domination, much like the domination Progressive Era reformers feared could arbitrarily exclude individuals and communities from accessing public goods. But here, the domination arises not just from private providers but also from public actors themselves charged with overseeing these goods. This in turn points to the need for more robust forms of accountability and checks and balances *within* administrative bodies themselves.<sup>101</sup>

2. *Privatization and Financialization.* — The failures of public institutions have, especially in the later decades of the twentieth century, motivated a turn to private providers and market systems in a search for greater efficiency and accountability. But this decision to shift from public to private provision should be a context-specific and comparative-institutional one: To the extent that private providers fail to act more accountably and effectively than public institutions, the move to privatize itself becomes problematic, replicating the original concerns about private power that led to the “public-izing” of utilities in the first place. As a result, even as public agencies fall short in enforcing protections,

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98. See *supra* section I.A for further discussion of domination and structural inequality.

99. See Kathryn J. Edin & H. Luke Shaefer, *\$2.00 a Day: Living on Almost Nothing in America* 32 (2016) (explaining that individuals eligible for welfare “may be dissuaded from applying because the process is so time-consuming”); Daniel L. Hatcher, *The Poverty Industry: The Exploitation of America’s Most Vulnerable Citizens* 22–24 (2016) (“[I]n confidential systems with unfettered discretion as sought by the agencies . . . the rights of the vulnerable often give way to the self-interests of the agencies.”). For a classic statement of the above-described problem, see Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 *Soc. Serv. Rev.* 3, 4 (1984); see also Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 *Geo. J. on Poverty L. & Pol’y* 13, 48–54 (2005) (discussing how the 1996 welfare-reform law contributed to bureaucratic disentitlement, and assessing whether the pretermination hearings required by *Goldberg v. Kelly*, 397 U.S. 254 (1970), provide meaningful protection against bureaucratic disentitlement).

100. See generally Michael B. Katz, *The Undeserving Poor: America’s Enduring Confrontation with Poverty* (1989) (describing the historical contexts in which policymakers have used the trope of the “undeserving poor” to justify limiting access to safety-net programs and arguing that poverty stems from factors beyond personal moral failure).

101. See *infra* Part III.

today, problematic forms of private power also undermine access to public goods.

The water crisis and the larger problem of privatized urban infrastructure are linked to broader structural economic and legal constraints. Localities facing municipal bankruptcy or budget cuts engage in aggressive efforts to shrink their formal public-sector footprint by cutting services, privatizing, or deregulating.<sup>102</sup> Private water systems now serve about twelve percent of all Americans, but in some states like Indiana, where state laws allow companies to pass on the purchase cost of water utilities to users in other geographies, thirty to seventy percent of utilities are privately owned.<sup>103</sup> Water services are just one of many such city services eroded by fiscal pressures as cities attempt to offload the costs of maintaining the water system in order to trim public budgets and even pay off municipal debts. These tactics ultimately result in price hikes for residents and little investment in needed water-system repairs.<sup>104</sup>

This privatization trend is further complicated by a related shift toward the financialization of public goods, as cities turn to Wall Street to finance critical infrastructure repairs in exchange for guaranteed returns for investors. The result is a similar price increase for users and a greater vulnerability of users, neighborhoods, and cities to debt owners and investors. Take, for example, Bayonne, New Jersey. There, a deal with private equity firm Kohlberg Kravis Roberts to finance water upgrades generated double-digit returns for investors but led to a twenty-eight percent price hike and drove a tripling of liens on houses as households fell behind on bills.<sup>105</sup> The city of Bayonne originally told citizens that its utilities authority would oversee the private equity firm's role in funding water upgrades, but the City Council has since shuttered its own oversight office, likely due to a lack of resources and staff.<sup>106</sup> The privatization plan resulted in an increase in fees, reducing access and affordability.<sup>107</sup>

Similarly, the lack of affordable housing today is tied to larger national and international pressures of finance, wealth-seeking asset-based returns, and the proliferation of predatory lending at both the individual and city levels. As recent accounts of the housing-affordability

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102. See Michelle Wilde Anderson, *The New Minimal Cities*, 123 *Yale L.J.* 1118, 1157–79 (2014) (describing how austerity budgets force municipalities to aggressively strip down services).

103. Douglass, *supra* note 78.

104. See *id.*; Jen Kinney, *Examples of How City Services Privatization Leads to Inequality Are Piling Up*, *Next City* (Sept. 29, 2016), <https://nextcity.org/daily/entry/privatization-water-utilities-inequality-poverty> [<https://perma.cc/2H9H-WDKY>].

105. Danielle Ivory, Ben Protess & Griff Palmer, *In American Towns, Pumping Private Profits from Public Works*, *N.Y. Times* (Dec. 25, 2016), <http://www.nytimes.com/2016/12/24/business/dealbook/private-equity-water.html> (on file with the *Columbia Law Review*).

106. *Id.*

107. *Id.*



crisis in attractive markets like New York suggest, the scramble for high-yield real-estate investments has incentivized investors and buyers to pressure more residents to sell their homes for relatively small amounts of cash, with buyers hoping to purchase and then flip houses in gentrifying neighborhoods.<sup>108</sup> The influx of investment not only displaces residents; it also further bids up the price of housing in neighboring areas, accelerating the affordability crisis.<sup>109</sup> As a result, these financial interests have radically accelerated problems of gentrification, displacement, and urban inequality.<sup>110</sup> This combination of explicit privatization of public services and the growing influence of investor and financial interests in the day-to-day operation and availability of public goods thus further exacerbates economic and racial inequality.<sup>111</sup>

Neither the individual-level protections of the law nor municipal-zoning and urban-planning authorities are equipped to address the systemic financial pressures imposed by private actors in an era of fiscal austerity. For example, cities have struggled to find policy tools that enable them to target financial causes of predatory lending, overheated investment and displacement, and the like. Litigation against lenders has proven difficult on both standing and causality grounds.<sup>112</sup> City

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108. The academic literature on these topics is vast and long-standing. But perhaps the most compelling and sharp accounts of the interactions between finance, investor interests, and urban inequality come from investigative, on-the-ground accounts. See Andrew Rice, *The Red Hot Rubble of East New York*, N.Y. Mag. (Jan. 28, 2015), <http://nymag.com/daily/intelligencer/2015/01/east-new-york-gentrification.html> [<https://perma.cc/ZS6D-JFKQ>] (describing the rapid influx of real estate investment in advance of New York City's proposed plans to rezone and develop some of the poorest neighborhoods in Brooklyn, resulting paradoxically in the displacement of the very communities city officials had hoped to assist); Lisa Riordan Seville & Lukas Vrbka, *Their Home Was in Foreclosure. Then It Was Sold on Reality TV.*, BuzzFeed News (Dec. 20, 2017), <https://www.buzzfeednews.com/article/lisariordanseville/they-lost-their-homes-now-a-reality-tv-star-is-selling-them> [<https://perma.cc/2UPM-4BBV>] (charting the shadow industry of home flippers who pressure poor residents to sell their foreclosed or near-foreclosed homes and then flip those properties to multimillion-dollar investors or luxury buyers).

109. See Rice, *supra* note 108.

110. See, e.g., *id.*

111. See generally *In the Pub. Interest*, *supra* note 81 (exploring examples of privatization and financialization furthering existing inequalities). Scholars and policymakers have focused increasingly on the broader role that financialization plays in driving inequality. See, e.g., Gerald F. Davis & Suntae Kim, *Financialization of the Economy*, 41 *Ann. Rev. Soc.* 203, 212–14 (2015); Mike Konczal & Nell Abernathy, *Roosevelt Inst.*, *Defining Financialization* 6–8, 23–24 (2015), [http://rooseveltinstitute.org/wp-content/uploads/2015/10/Defining\\_Financialization\\_Web.pdf](http://rooseveltinstitute.org/wp-content/uploads/2015/10/Defining_Financialization_Web.pdf) [<https://perma.cc/SC32-SDPK>]. For an excellent journalistic account of financialization, see generally Rana Foroohar, *Makers and Takers: The Rise of Finance and the Fall of American Business* (2016).

112. See, e.g., *Bank of Am. v. City of Miami*, 137 S. Ct. 1296, 1305–06 (2017) (remanding from the Supreme Court back to the Eleventh Circuit to consider whether Miami had sufficiently shown proximate cause to state a valid claim under the Fair Housing Act); see also *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d 513, 515–16, 531–32 (N.D. Ohio 2009) (dismissing on standing and causation grounds

ordinances, many of which sought to address the problem of subprime lending well before the 2008 financial crash, have often been preempted, replicating a larger pattern of limited city power.<sup>113</sup> Financial regulation involves its own ecosystem of federal and state administrative regimes, existing well outside the reach of municipal authorities.<sup>114</sup> Cities and municipalities alone are thus ill prepared to combat the negative effects that financialization and privatization have on access and equality. Addressing the inequality-enhancing pressures of privatization and financialization thereby requires more empowered, regional forms of regulatory authority with the capabilities and accountability to act.

3. *Fragmented Authority, Legal Secession, and the Drive for Autonomy.* — Even if individual agencies act more effectively, the very fragmentation of legal responsibility and enforcement authority—across different federal agencies on the one hand and a multiplicity of federal, state, and local actors on the other—makes it more difficult to ensure active and effective oversight of access to public goods.

In the water context, for example, federalism challenges and the jurisdictional limits of both congressional authority and regulators like the EPA—not to mention the EPA's limited focus on water safety and quality—make federal statutes by themselves an inadequate substitute for a more robust right to water.<sup>115</sup> The tension between Flint's local

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Cleveland's attempt to sue Wall Street for public nuisance in the proliferation of subprime mortgages), aff'd, 615 F.3d 496 (6th Cir. 2010).

113. See, e.g., *Am. Fin. Servs. Ass'n v. City of Oakland*, 104 P.3d 813, 813 (Cal. 2005) (upholding the preemption of Oakland's city ordinance, reversing the judgment of the Court of Appeal). Oakland passed a publicly backed municipal code regulating the subprime industry and the secondary mortgage market. *Id.* at 815–16. The state, however, passed its own regulatory statute that specified less stringent regulations, and local banks initiated a lawsuit to strike down the Oakland regulation as preempted by the state statute. *Id.* Though Oakland argued that it had the authority to pass regulations that went above and beyond the minimum floor established by the state statute, the court ruled that the state regulation set both a minimum and maximum level of regulation and thus struck down the Oakland code. See *id.* at 820. Notably, the state statute largely failed to curb banks' predatory lending practices. See Ronald Law, Note, Preventing Predatory Lending in the California Subprime Mortgage Market, 42 *Loy. L.A. L. Rev.* 529, 529, 537–48 (2009); see also *Mayor of New York v. Council of New York*, 780 N.Y.S.2d 266, 273–75 (Sup. Ct. 2004) (striking down local predatory lending regulations as preempted by similar state legislation); *Am. Fin. Servs. Ass'n v. City of Cleveland*, 858 N.E.2d 776, 782–86 (Ohio 2006) (same).

114. One of the underappreciated aspects of the 2010 Dodd–Frank financial-regulation overhaul was its modest but important efforts to better integrate state and local institutions with federal financial regulators by granting such institutions representation on an advisory body to the Financial Stability Oversight Council. See, e.g., K. Sabeel Rahman, Note, Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes, 48 *Harv. J. on Legis.* 555, 574–84 (2011).

115. See, e.g., Derrick Howard, The Appearance of Solidity: Legal Implementation of the Human Right to Water in the United States, 11 *Appalachian J.L.* 123, 136–45 (2011) (detailing how cooperative federalism in the water context “has been severely undermined

government and state authorities has also frustrated attempts to address the crisis.<sup>116</sup> To the extent that city governments are more responsive to local demands arising from the water crisis, their legal weakness relative to state authorities—especially in the face of municipal austerity and bankruptcy procedures that further centralize state control over city policies—poses a challenge to redressing those concerns. Furthermore, as water systems cut across multiple municipalities, city government may not be an effective vehicle for translating these concerns.<sup>117</sup>

Larger patterns of economic segregation are similarly linked to the fragmentation of city power. At the regional level, exclusionary zoning—through which municipalities can make some areas cost prohibitive for poor and racial-minority communities by using measures like lot sizes and occupancy restrictions—persists despite extensive criticism from urban-planning and legal scholars.<sup>118</sup> Indeed, this systemic pattern of economic segregation through urban development and housing policy is as much a *feature* as it is a bug of the emergence of city power over zoning and urban planning. As local-government-law scholars have long noted, the fragmentation of regions into competing municipalities, itself a product of legal regimes for municipal secession, has facilitated these patterns of inequality.<sup>119</sup> This in turn creates vicious cycles of competition as municipalities struggle to attract capital investment by offering ever greater incentives to businesses.<sup>120</sup> Even the formative early-twentieth-century efforts to establish city zoning power were tied to racial segregation and the secession of smaller community enclaves away from

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by bipartisanship and the struggle for states not to be micromanaged by Washington politicians”).

116. Tension between local and state authorities is a familiar theme in local-government-law scholarship highlighting the structural barriers to city power. For a general discussion of the structural legal limits on city power, see generally Gerald E. Frug & David J. Barron, *City Bound: How States Stifle Urban Innovation* (2008). But for a more optimistic view of the potential scope of city power today, see generally Schragger, *supra* note 97, at 135–90.

117. For a discussion of the difficulties of managing urban-policy challenges through county-level governance, see, e.g., Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 *UCLA L. Rev.* 1095, 1133–59 (2008) [hereinafter Anderson, *Cities Inside Out*].

118. See Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 *Soc. Sci. Q.* 1123, 1140–41 (2010) (noting the effect of modern density-zoning regulations in perpetuating racial segregation created by earlier exclusionary zoning efforts). For a description of the historical processes through which housing law, urban planning, zoning, and local government law combined to produce systemic racial segregation in cities, see generally Rothstein, *Color of Law*, *supra* note 86. For a discussion of how urban architecture also contributed to systemic racial segregation, see generally Schindler, *supra* note 86.

119. See, e.g., Frug, *supra* note 97, at 137 (“Decentralization of power to the dozens of cities into which metropolitan regions have been divided is likely to exacerbate their separation and inequality . . .”).

120. See *id.* at 3 (explaining that municipalities “wield their zoning and redevelopment authority to foster their own prosperity even if it is won at the expense of their neighbors”).

the larger metropolitan areas—and their more diverse populations.<sup>121</sup> Thus, the City Beautiful movement, the rise of tenement regulations and public parks, and early zoning efforts were all bound up in expressions of distaste for and efforts to exclude racial minorities, immigrants, and urban poverty.<sup>122</sup> Euclid, Ohio, itself was a township seeking to prevent the intrusion of commercial and multifamily residential property uses into what was previously an affluent residential area.<sup>123</sup> It should be no surprise then that the foundational case confirming city zoning power, *Euclid*,<sup>124</sup> helped contribute to the rise of sprawl and exclusionary zoning in its modern form.<sup>125</sup>

The history of segregation, funding, and municipal public goods underscores how wealthier and whiter communities have often chosen withdrawal and secession in response to mandates to provide racially desegregated access to local public goods. Efforts by these whiter and wealthier localities to preserve local control over property-tax revenues and school funding, rather than making those local public goods available to racial minorities—and sharing tax revenues accordingly—largely drove the legal secession of suburbs from urban cores in the late twentieth century.<sup>126</sup> If geographic fragmentation of city power helps fuel patterns of economic segregation, then an equitable urban infrastructure is inextricably linked to the need to transform the governance regime through which these regional and municipal decisions are made.

### C. *Exclusionary Administration of Nonphysical Public Goods*

These three failures—of regulatory effectiveness, of privatization and financialization, and of fragmented jurisdiction—make it more

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121. Richard H. Chused, *Euclid's* Historical Imagery, 51 Case W. Res. L. Rev. 597, 613 (2001) (“Zoning rules, like many of the other moral reforms of the late nineteenth and early twentieth centuries, were designed to significantly reduce the likelihood that middle- and upper-class children would come into contact with poor, immigrant, or black culture.”).

122. See *id.* at 597 (recasting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), as arising from a historical “ugliness—derived from and embedded with the racism of the era”); *id.* at 605–14 (suggesting the Supreme Court’s approval of zoning powers in *Euclid* was not a break from its prior laissez faire attitudes but rather a continuation of attempts to assert Jim Crow segregation whether through deregulatory or regulatory means).

123. See *id.* at 603.

124. *Euclid*, 272 U.S. at 397 (upholding local zoning authority).

125. Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court’s Seminal Zoning Decision *Euclid v. Ambler* in the 21st Century*, 17 Va. J. Soc. Pol’y & L. 373, 374 (2010).

126. Frug, *supra* note 97, at 170–73, 182, 184 (describing how fights over access to public goods have driven municipal secession); see also Nancy MacLean, *Southern Dominance in Borrowed Language: The Regional Origins of American Neoliberalism*, in *New Landscapes of Inequality: Neoliberalism and the Erosion of Democracy in America* 21, 28–37 (Jane L. Collins et al. eds., 2008) (highlighting the interaction between racial inequality and resistance to desegregation on the one hand, and attempts to limit the scope or degree of investment in public goods like parks and education on the other).

difficult to address systemic patterns of inequality and exclusion in the provision of and access to basic necessities—a dynamic that extends beyond the contexts of water or housing. These limitations are not merely passive features of the current policy landscape; they are often *active* strategies that erode the public realm and produce patterns of inequality and exclusion, frequently in the service of consolidating greater control over economic opportunity and wealth, and often in ways that simultaneously construct racial inequities.<sup>127</sup> Furthermore, while these policy debates are often viewed in isolation from one another, the reality is that these various techniques can operate in concert to erode public goods, and therefore functional citizenship.

Water and housing are just two examples of public goods and social infrastructure for which control over the terms of access can yield an outsize influence on the economic opportunities for and membership of individuals and communities. But this brief account illustrates broader patterns that arise in the context of public goods governance.

While the discussion in sections II.A and II.B centered primarily on urban public goods with a physical, almost literal, infrastructural component, the analysis has implications for a wider set of *nonphysical* public goods, such as healthcare or education. This Essay suggests that, while these goods are usually viewed through the lens of social policy, they are also public goods in that they are central to human flourishing. Further, by virtue of nonphysical necessities' vital importance and the network of public and private power that conditions their provision and access, goods like healthcare and education raise similarly important concerns about domination, accountability, and governance. Just as the common second-order exclusionary strategies above can construct inequality and exclusion without outright eliminating or denying the good itself, so too can they threaten the equal access to and provision of nonphysical public goods.

With respect to healthcare, for example, attempts to dismantle Medicaid have often taken the form of increased eligibility requirements or the decentralization of funding and implementation through block granting.<sup>128</sup> We can view both of these efforts as variations on the strategies of bureaucratic exclusion and fragmentation: By raising barriers to access and by converting a universal entitlement into a fragmented

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127. Richard Reeves has provocatively cast these policies as a form of “opportunity hoarding.” See Richard V. Reeves, *Dream Hoarders* 100–01 (2017).

128. See, e.g., Ryan LaRochelle, *The GOP Plan to Fund Medicaid Through Block Grants Will Probably Weaken It*, *Wash. Post* (Jan. 18, 2017), <https://www.washingtonpost.com/news/monkey-cage/2017/01/18/republicans-want-to-fund-medicaid-through-block-grants-thats-a-problem> [<https://perma.cc/U8HX-NY3U>] (describing how block granting Medicaid would reduce access); Dylan Scott, *How Medicaid Became the Most Important Battleground in American Health Care*, *Vox* (Nov. 10, 2017), <https://www.vox.com/policy-and-politics/2017/11/10/16118644/medicaid-future> [<https://perma.cc/8XCT-Z27H>] (describing recent efforts to undermine access to Medicaid through the imposition of work requirements).

system of state-by-state provision, these policies effectively operate to thin out meaningful access to the necessity of healthcare. It is perhaps unsurprising then that while advocates for expanded healthcare access do not always deploy the language of public goods, necessity, or public utility, many do frame the forward-looking battle for access in utility-like terms.<sup>129</sup>

Similarly, in education, privatization has long been a central fault line, as advocates struggle to balance education reform with the fear that charter schools represent a gutting of public commitment to universal education.<sup>130</sup> Meanwhile, the proliferation of for-profit higher education programs creates the same problematic privatization and extraction dynamics described in the water context above.<sup>131</sup> Localities have long used patterns of fragmentation and municipal secession as a central tool to limit the scope of the “public” that local schools are required to serve, reasserting economic and geographic segregation as wealthier and whiter localities secede from larger metro areas to avoid racial integration.<sup>132</sup>

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Many economic-justice advocacy groups have increasingly focused their attention on these three second-order exclusionary strategies.<sup>133</sup> But addressing inequality in the form of frustrated and differential access to public goods requires more than substantive policy changes; it requires changes to the institutional design and governance of these systems.<sup>134</sup>

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129. See, e.g., Bagley, *Medicine as a Public Calling*, *supra* note 48, at 60 (“[A] durable strain of the law has always treated modern medicine as a public calling—even today.”).

130. See generally Noliwe Rooks, *Cutting School: Privatization, Segregation, and the End of Public Education* (2017) (exploring “the social and economic forces, past and present, that have worked together to propose and maintain separate school systems that are organized very differently depending on the race and class of the children in the classroom”).

131. See, e.g., Tressie McMillan Cottom, *Lower Ed: The Troubling Rise of For-Profit Colleges in the New Economy* 31 (2017) (detailing the distinction between for-profit and not-for-profit colleges with respect to revenue, profit, and distributions).

132. This practice of resegregation through secession has recently been challenged successfully by the NAACP. See, e.g., *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 992 (11th Cir. 2018) (upholding a district court finding that Jefferson County’s secession was racially motivated); see also Nikole Hannah-Jones, *The Resegregation of Jefferson County*, *N.Y. Times Mag.* (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/magazine/the-resegregation-of-jefferson-county.html> [<https://perma.cc/AE4H-RH2K>].

133. For a sampling of such advocacy groups, see, e.g., Action Ctr. on Race & the Econ., <http://www.acrecampaigns.org> [<https://perma.cc/G4ZV-VXNN>] (last visited Aug. 7, 2018); Occupy Our Homes, <http://occupyourhomes.org> [<https://perma.cc/52J4-TK9A>] (last visited Aug. 7, 2018); P’ship for Working Families, <http://www.forworkingfamilies.org> [<https://perma.cc/X82B-EXXZ>] (last visited Aug. 7, 2018); Re:Public Project, Roosevelt Inst., <http://rooseveltinstitute.org/republicproject> [<https://perma.cc/7YJW-YWGX>] (last visited Aug. 7, 2018).

134. As scholars and reformers working in environmental justice have long noted, battles over the geographic concentration of pollution and access to clean air, water, and

Exclusion and inequality constructed through differential access to public goods suggests that the remedy for this form of structural inequality requires the creation of governance institutions capable of overseeing and managing these goods and services, thereby providing a layer of checks and balances over the system and network of service providers. These governance institutions have to address the first-order problems that nineteenth- and twentieth-century reformers faced—such as arbitrary denials of access and unfair pricing. But they must also address the kinds of second-order exclusions and limitations identified above: failures of regulators themselves to act accountably and responsively, privatization and financialization, and fragmented jurisdiction.

But though the previous waves of reform around public goods described in this Essay involved the creation of legal protections for public goods and necessities, today's inequality crisis highlights the limits of the existing administrative and governance regimes. While reformers in the public utility tradition or the early waves of the civil rights movement could operate on an optimism about the capacities and public spiritedness of public administrative agencies, that optimism is now tempered by skepticism and concern.<sup>135</sup> Public actors can be just as dominating and subordinating as private providers, as in the bureaucratic-exclusion dynamics described in section II.B.1. If the challenge for waves of twentieth-century reformers was the need to create new public institutions capable of checking the concentrations of power over access to basic necessities, today's reform movements are grappling with a similar, but in some sense inverse, problem: the failures of those very legal institutions and regimes to address the modern drivers of inequality and exclusion. Whereas reformers of a century ago had to create new administrative regimes from whole cloth, the challenge for ensuring access to basic necessities today turns on reconstructing these administrative authorities so that they are more empowered and effective, capable of making policies that can overcome the fragmentations of local municipalities or the transfer of public-goods administration into private or investor control. It also requires making these administrative processes more accountable to constituencies most in need of access to these basic

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parkland involve a range of economic, racial, and systemic dimensions. As such, many of the key demands of environmental justice reformers center on questions of governance and decisionmaking. See Luke W. Cole & Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* 85–86 (2001). Similarly, the pathologies of fragmented and underaccountable city planning and infrastructure provision have been understood to demand governance solutions, as well as substantive ones. See, e.g., Frug & Barron, *supra* note 116, at 231–33.

135. See, e.g., Daniel Carpenter & David A. Moss, Introduction, *in* *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* 1, 2–5 (Daniel Carpenter & David A. Moss eds., 2013) [hereinafter *Preventing Regulatory Capture*] (commenting on how regulatory capture contributes to pervasive public distrust of government regulation).

necessities. Part III explores what these reformed administrative regimes might look like.

### III. INCLUSIONARY ADMINISTRATION OF PUBLIC GOODS

As Parts I and II demonstrate, access to basic necessities like water and housing represents a crucial site at which on-the-ground realities of inequality and exclusion, or equality and inclusion, are constructed and made real. These necessities are provided and governed by an ecosystem of public and private actors, and as Part II suggests, these systems of provision can produce inequality and exclusion not just through first-order direct denials of access but also through subtler second-order practices. But if access to these necessities is so vital for membership in the polity and equality more broadly, how then should these goods be governed to ensure access and inclusion, particularly when these problems arise in the context of *public* administrative failures rather than through private domination alone?

Part III develops a converse vision of inclusionary administration of public goods that responds to the kinds of second-order exclusions mapped in Part II. Section III.A suggests that the problems of privatization and fragmentation in particular can be addressed through expanded and more strategic forms of administrative oversight. Next, to ensure that this oversight is itself responsive and accountable, section III.B explores approaches to expand representation, participation, and accountability within these oversight bodies themselves. Finally, all three problems of bureaucratic exclusion, privatization, and fragmentation can be offset by a renewed commitment to public provision and public options for various necessities. In parallel with Part II, section III.C discusses these inclusionary administrative strategies in the context of the examples of water and housing, which are illustrative of broader patterns and strategies that could be ported to other public goods and administrative regimes.

#### A. *Expanded Oversight*

Users' vulnerability to the unchecked, arbitrary control of service providers suggests a strong need to expand the duties and capacities of public actors to engage in effective oversight. The water crisis in Flint has already generated litigation and legal reform efforts aimed at imposing tougher, affirmative mandates for government action.<sup>136</sup> Michigan state

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136. This crisis spurred: (1) a class action lawsuit led by the NAACP challenging the water contamination, see Class Action Complaint at 2–9, 102, *Gilcreast v. Lockwood*, No. 2:16-cv-11173 (E.D. Mich. filed Mar. 31, 2016), 2016 WL 1258320; (2) an ACLU suit alleging violations of the federal Safe Drinking Water Act, see Complaint for Declaratory & Injunctive Relief at 1, *Concerned Pastors for Soc. Action v. Khouri*, 217 F. Supp. 3d 960 (E.D. Mich. 2016) (No. 16-10277), 2016 WL 319206; and (3) criminal charges against former Flint public officials, see Monica Davey & Mitch Smith, 2 Former Flint Emergency



legislators have considered a package of bills aimed at ensuring equal access to and the affordability of water in the state. House Bill 5101, for example, declared that “[e]ach individual has the right to safe, clean, affordable, and accessible water for human consumption” and that “[a]ll state departments and agencies shall employ all reasonable means to implement this section,” including revising existing regulations and imposing water-affordability requirements.<sup>137</sup> Scholars have also suggested more creative applications of civil rights and administrative-oversight authorities. Legislators could leverage, for example, existing provisions in the Fair Housing Act (FHA), which contains a discrimination-in-service provision, or the Americans with Disabilities Act (ADA), which contains protections for equal access to quality dwellings, to address water quality and affordability.<sup>138</sup>

On the housing front, cities in the grips of a housing-inequality crisis—like those in the Bay Area in California—are considering bringing back some form of rent control and rent stabilization.<sup>139</sup> Because rent control and rent stabilization are implemented by state agencies that oversee landlord practices, the imposition of such rent regulations

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Managers Charged over Tainted Water, *N.Y. Times* (Dec. 20, 2016), <https://www.nytimes.com/2016/12/20/us/flint-water-charges.html> (on file with the *Columbia Law Review*) (describing criminal charges brought against former Flint emergency managers). These legal actions have already resulted in an initial November 2016 court order requiring the city to deliver bottled water to residents. *Khoury*, 217 F. Supp. 3d at 980; see also Paul Egan, Federal Judge Orders Delivery of Bottled Water in Flint, *Det. Free Press* (Nov. 10, 2016), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/11/10/delivery-bottled-water-flint/93613760/> [<https://perma.cc/74QS-GELD>]. A March 2017 settlement between the ACLU, Natural Resources Defense Council, city, and state committed \$97 million in funds for pipe replacement, guaranteed funding for addressing the health consequences of lead exposure, and expanded efforts to promote new-filter installation and tap-water-monitoring programs. Roz Edward, Flint’s Lead Pipes Will Be Replaced Under Settlement in Federal Safe Drinking Water Case, *Mich. Chron.* (Mar. 29, 2017), <https://michronicleonline.com/2017/03/29/flints-lead-pipes-will-be-replaced-under-settlement-in-federal-safe-drinking-water-case> [<https://perma.cc/C6T7-ECBJ>].

137. H.B. 5101, 98th Leg., Reg. Sess. (Mich. 2015).

138. See Martha F. Davis, Let Justice Roll Down: A Case Study of the Legal Infrastructure for Water Equality and Affordability, 23 *Geo. J. on Poverty L. & Pol’y* 355, 379–82 (2016) (arguing that the “provision of services” provision in the FHA may be extended to apply to disparate impact claims of discrimination in municipal services); see also *id.* at 382–85 (discussing possible ADA claims); Murthy, *supra* note 79, at 189 & n.209 (citing the implied warranty of habitability, the covenant of private enjoyment, and the “provision of services” provision in the FHA as evidence for a constitutionally protected right to water under the Due Process Clause); cf. Justin J. Lee, Note, Information Drought: Bringing Knowledge About Groundwater to the Surface in California Water Policy, 38 *Environ* 191, 202–03 (2015) (mapping the argument that groundwater in California should be regulated for the public good under the public trust doctrine).

139. See Gabrielle Gurley, Bay Area Voters Take On Rent Control, *Am. Prospect* (July 8, 2016), <http://prospect.org/article/bay-area-voters-take-rent-control> [<https://perma.cc/H3EX-3BDC>]; Kathleen Pender, Bay Area Rent Control Movement Continues to Spread, *S.F. Chron.* (Apr. 19, 2017), <http://www.sfchronicle.com/business/article/Bay-Area-rent-control-movement-continues-to-spread-11084978.php> [<https://perma.cc/85Y7-VXJY>].

represents an attempt at both limiting landlords' power—for example, to raise prices—and expanding public oversight—for example, through rent regulation agencies. In New York City, rent stabilization policies under Mayor Bill de Blasio have become more tenant friendly in comparison to years of rent increases and market-oriented policies under the previous mayor, Michael Bloomberg.<sup>140</sup> Tenant-oriented reformers have pursued further protections that follow in a similar vein: New York City recently passed ordinances establishing city funding for legal representation for families in eviction proceedings and for those facing harassment by landlords.<sup>141</sup> In addition, reformers have enacted ordinances that require landlords to secure a “certificate of no harassment” if they want to repair or redevelop their properties.<sup>142</sup> Taken as a whole, these efforts can be viewed as a kind of piecemeal inching toward a utility-style regulation of housing. Together, these measures limit the prices landlords can charge, akin to rate regulation; they attempt to enforce norms of nondiscrimination, akin to common carriage. In this sense, the various reform efforts around housing evince the same kinds of animating principles as the public utility and basic-necessities frameworks explored above.<sup>143</sup> That said, these measures are still quite far removed from a true utility-style regulatory approach. It might well be that this hesitation to go all-in on more aggressive regulation of housing is what keeps these measures from fully addressing the deep power and access disparities afflicting many communities.

As suggested in Part I, however, a key to assuring access to public goods is the expansion of and investment in the core capacities of administrative institutions themselves. All of these mandates and restrictions would require vastly improved resources, authorities, personnel, and capacities for regulatory oversight. The relevant regulatory bodies—whether housing, environmental, procurement, or other agencies—would

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140. See Mireya Navarro, *New York City Board Votes to Freeze Regulated Rents on One-Year Leases*, N.Y. Times (June 29, 2015), <https://www.nytimes.com/2015/06/30/nyregion/new-york-city-board-votes-to-freeze-rents-on-one-year-leases.html> (on file with the *Columbia Law Review*); Rent Guidelines Board Apartment Orders #1 Through #50 (1969 to 2019), N.Y.C. Rent Guidelines Board, <https://www1.nyc.gov/assets/rentguidelinesboard/pdf/guidelines/aptorders.pdf> [<https://perma.cc/GBD4-VCZX>] (last visited Aug. 8, 2018) (recounting the allowed rent increases for rent-stabilized apartments, which have been much lower since 2014, when Mayor de Blasio entered office).

141. Tenants with incomes under 200% of the federal poverty line qualify for legal assistance. See N.Y.C., N.Y., Admin. Code §§ 26-1301–1302 (2018); see also Raphael Pope-Sussman, *City Will Guarantee Legal Counsel to Low-Income Tenants in Housing Court*, Gothamist (Feb. 12, 2017), [http://gothamist.com/2017/02/12/city\\_will\\_guarantee\\_legal\\_counsel\\_t.php](http://gothamist.com/2017/02/12/city_will_guarantee_legal_counsel_t.php) [<https://perma.cc/6BL2-HDTJ>].

142. See N.Y.C., N.Y., Admin. Code §§ 27-2093–2093.1; Andrea Leonhardt, *City Council Passes ‘Certificate of No Harassment’ to Safeguard NYC Tenants*, BK Reader (Dec. 1, 2017), <http://www.bkreader.com/2017/12/city-council-passes-certificate-no-harassment-safeguard-nyc-tenants/> [<https://perma.cc/5TT6-2CF2>].

143. See *supra* section I.C.

need to be provided with more robust legal authority for monitoring and enforcement.<sup>144</sup>

First, expanded government capacity is essential to addressing the problems of privatization and financialization. There will likely always be a spectrum of private actors involved in public-goods provision, even if robust public options are introduced.<sup>145</sup> But as critics of privatization have noted, the turn to private provision can be problematic, as private providers operate outside of constitutional and often statutory regimes for transparency, participation, checks and balances, or other modes of accountability.<sup>146</sup> This makes them relatively more immune to contestation. In the context of basic necessities, this immunity from contestation is particularly fraught. To counter these forces, expanded regulatory oversight of privatized infrastructure could be deployed through a variety of conventional administrative tools, from specific oversight processes and substantive mandates imposed as contractual terms,<sup>147</sup> to formal administrative oversight through the procurement process or direct regulatory oversight of private actors.<sup>148</sup>

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144. A lack of administrative capacity has been a central problem in the housing context. HUD itself is a notably weak federal agency in terms of its ability to enforce housing policies. See Hugh Davis Graham, *The Surprising Career of Federal Fair Housing Law*, 12 *J. Pol’y Hist.* 215, 219, 222 (2000). It is a historical quirk that despite the passage of the FHA, congressional opposition to housing equity grew in the early 1970s and 1980s, resulting in a reluctance by Congress to endow HUD with the kinds of enforcement powers possessed by sister agencies like the Equal Employment Opportunity Commission. *Id.* at 222–25. As a result, HUD relies on its own administrative law judges or Article III courts for adjudicating claims. *Id.* at 220. A reliance on common law protections in housing court has, as noted earlier, been an inadequate institutional structure for overseeing housing and enforcing protections. See generally Super, *supra* note 88, at 440–61 (describing the failures of the warranty of habitability as a common law regime for protecting tenants).

145. See, e.g., Emily S. Bremer, *Private Complements to Public Governance*, 81 *Mo. L. Rev.* 1115, 1116–22 (2016) (describing how private actors are involved in implementing various “public” regulatory regimes); Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 *U. Pa. L. Rev.* 841, 855–61 (2014) (same). On the problem of privatization and accountability, see generally *Government by Contract: Outsourcing and American Democracy* (Jody Freeman & Martha Minow eds., 2009).

146. See generally Jon D. Michaels, *Constitutional Coup: Privatization’s Threat to the American Republic* (2017) [hereinafter Michaels, *Constitutional Coup*] (arguing that a government fractured by privatization threatens constitutional order); *Government by Contract*, *supra* note 145, at 1 (questioning the American government’s “ability to manage its outsourcing relationships” and this outsourcing regime’s compatibility with “the country’s professed commitment to democratic values of public participation, accountability, transparency, and rule of law”).

147. See Alfred C. Aman, Jr. & Joseph C. Dugan, *The Human Side of Public-Private Partnerships: From New Deal Regulation to Administrative Law Management*, 102 *Iowa L. Rev.* 883, 916–28 (2017) (discussing how contract formation, terms, and enforcement present opportunities for increased oversight and protection of individual rights).

148. See, e.g., Gillian Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, *in* *Government by Contract*, *supra* note 145, at 291, 295–97 (describing the

In addition to strategic and targeted oversight focused on the immediate service providers, the government could also oversee the financialized investor firms that, as noted above, exercise tremendous influence over the operation of privatized city infrastructure. In the early twentieth century, public utility concepts led precisely to such an effort to limit outsized investor power over electric utilities. Indeed, Congress passed the 1935 Public Utility Holding Company Act (PUHCA) in part to respond to the oligarchic control of investors who, through holding companies, had acquired dominant control over gas and electric utilities.<sup>149</sup> The bill thus required all holding companies that owned electric and gas utilities to register with the Securities and Exchange Commission (SEC), which was then empowered to mandate radical changes to the corporate ownership structures of these utilities.<sup>150</sup> Though institutionalized for much of the 20th century, PUHCA was repealed in 2005.<sup>151</sup> However, similar statutory and administrative oversight could be extended to cover the financial investors that lie behind increasingly privatized city utilities and that increasingly drive the dynamics of gentrifying real estate markets.<sup>152</sup>

Second, expanded regulatory authority is needed to combat fragmentation and geographically segregated access to public goods and infrastructure. The growing experimentation with mandatory inclusionary zoning at the local level represents a structural effort to address the deeper drivers of housing inequality and economic segregation.<sup>153</sup> But these efforts must transcend the boundaries of local jurisdictions. Regional coordination in urban planning and municipal infrastructure is especially necessary to overcome the fragmented nature of municipal authority in order to allow widespread access to basic infrastructure. Such regional planning is also increasingly necessary to dismantle the durable forms of inequality and exclusion arising from economic

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legal obligation of government agencies to supervise private actors exercising state-like functions).

149. See, e.g., Roberta S. Karmel, *Is the Public Utility Holding Company Act a Model for Breaking Up the Banks that Are Too-Big-to-Fail?*, 62 *Hastings L.J.* 821, 843–45 (2011) (describing the origins of PUHCA as a bill animated by antitrust concerns about concentrated control over utilities).

150. Public Utility Act of 1935, ch. 687, 49 Stat. 803 (repealed 2005).

151. Energy Policy Act of 2005, Pub. L. No. 109-58, tit. XII, § 1263, 119 Stat. 594, 974.

152. See, e.g., Karmel, *supra* note 149, at 827–28 (describing the applicability of PUHCA for addressing systemic financial risk).

153. See Karen Destorel Brown, *Ctr. on Urban & Metro. Policy, Brookings Inst., Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area 1* (2001), <https://www.brookings.edu/wp-content/uploads/2016/06/inclusionary.pdf> [<https://perma.cc/7M5M-VS5G>] (arguing that mandatory inclusionary zoning can be a tool to avoid economic segregation); Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 *B.C. Envtl. Aff. L. Rev.* 383, 388 (2006) (“Some advocates of inclusionary zoning argue that the creation of affordable housing alone is insufficient; rather, the housing must be strategically placed within the community to prevent segregation based on income level.”).

segregation and municipal fragmentation<sup>154</sup> and to link metropolitan cores with a wider geographic range of outlying suburbs and peripheral localities.<sup>155</sup>

As Professor Olatunde Johnson argues, regulations can be designed to function as “equality directives” that force agencies to tackle such systemic inequalities.<sup>156</sup> Johnson provides the compelling example of the “Affirmatively Furthering Fair Housing” rule issued by the Obama Administration’s HUD as one possible model for tackling structural- and regional-level inequalities in access to basic goods and infrastructure, taking into account the fragmented nature of city power.<sup>157</sup> HUD reinterpreted Title VIII of the 1968 Fair Housing Act to require municipalities to engage in proactive efforts to desegregate neighborhoods, adopt inclusionary zoning ordinances, and address income and other forms of housing discrimination, among other requirements.<sup>158</sup> These HUD rules are complemented by similar initiatives from related departments, like the Department of Transportation (DOT), to bolster the development of racially integrated neighborhoods.<sup>159</sup> By shifting to an administrative approach to racial and economic inclusion rather than operating at the level of individual rights claimed in court, policymakers are able to consider the macrodynamics of zoning and urban planning. This in turn enables them to formulate policies that can ensure a more structural form of housing and economic inclusion by addressing the underlying disparities arising from segregation or zoning.<sup>160</sup> By spurring more active and regionally based regulatory oversight, these regulatory regimes thus offer a way of counteracting the exclusionary strategies noted above.

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154. See *supra* sections II.A.2 (on housing inequality) and II.B.3 (on municipal fragmentation). See generally Rothstein, *Color of Law*, *supra* note 86 (exploring the causes, including government practices and policies, of residential racial segregation).

155. See Frug & Barron, *supra* note 116, at 45–52 (arguing for a more regional approach to urban governance); see also Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 *U.C. Davis L. Rev.* 63, 68–69 (2013) (“[I]nterregional mobility can correspondingly bolster doctrinal and legislative support for regionalism.”). On the potential role of counties as a unit of local governance and the importance of democratic governance of the urban periphery, see Anderson, *Cities Inside Out*, *supra* note 117, at 1155–59.

156. Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 *N.Y.U. L. Rev.* 1339, 1343 (2012) [hereinafter Johnson, *Equality Directives*].

157. *Id.* at 1367–68. Notably, the Trump Administration recently announced a pause on the AFFH rule. See Emily Badger & John Eligon, *Trump Administration Postpones an Obama Fair-Housing Rule*, *N.Y. Times* (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html> (on file with the *Columbia Law Review*).

158. Johnson, *Equality Directives*, *supra* note 156, at 1341, 1388–91 (describing the implementation of HUD’s interpretation of the FHA).

159. *Id.* at 1378–92 (describing the use of equality directives by both HUD and DOT).

160. See *id.* at 1390–92 (“HUD requires federal grantees to . . . conduct a regional equity assessment . . . and take steps at the regional level to address segregation and disparities in opportunity.”).

More broadly, federal agencies can facilitate this regional-level governance of infrastructure by explicitly playing a regional coordination role. Today, disparate impact assessments by DOT and HUD prompt local governments to address systemic forms of economic segregation and coordinate across localities.<sup>161</sup> Federal agencies like the EPA often have an overlooked regional governance structure that can help facilitate this kind of coordination across states.<sup>162</sup> For the moment, these measures are dependent on the policy priorities of the federal Executive and thus may be of limited long-term durability, particularly in an era in which the current Trump Administration seems strongly opposed to such regulatory innovation.<sup>163</sup> But nevertheless, these policies offer an example of a potential institutional structure that could be codified in a more durable form—for example, through state legislation or, one day, federal legislation.

#### B. *Expanded Accountability*

While public options and expanded oversight would help to address the pathologies identified in section II.B, once provided with additional capacity and authority as suggested in section III.B, administrative agencies will themselves have to be structured to improve accountability and responsiveness. Questions of regulatory accountability and capture persist, often rightly so.<sup>164</sup> The literatures on regulatory reform and capacity building are of course vast,<sup>165</sup> the point for our present purposes

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161. See *id.* at 1379–86 (describing the legal and bureaucratic development of DOT’s transportation-impact-assessment regime); *id.* at 1386–92 (describing the potential for HUD oversight of fair housing and the macrolevel urban planning implications of the AFFH directive); Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 *Duke L.J.* 1771, 1798–99 (2017) [hereinafter Johnson, *Overreach and Innovation*] (discussing collaboration among agencies and the adoption of proactive policies to address self-identified problems).

162. See, e.g., Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 *Stan. L. Rev.* 1895, 1901–03 (2018) (documenting how federal agencies can facilitate regional governance); Jessica Bulman-Pozen, *Our Regionalism*, 166 *U. Pa. L. Rev.* 377, 388–92 (2018) (noting the often-underutilized role of regional structures in federal agencies).

163. See Johnson, *Overreach and Innovation*, *supra* note 161, at 1774 (“[T]he future of administratively enforced and generated civil rights rules seems bleak.”).

164. See generally *Preventing Regulatory Capture*, *supra* note 135 (detailing the problem of capture, why it occurs, and what can be done to mitigate it).

165. One set of literature approaches these questions of regulatory capacity and responsiveness through the framework of “collaborative” or “experimentalist” governance. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 345–56 (1998) (identifying a new kind of governance called “democratic experimentalism” and arguing that the chief purpose of administrative agencies in that structure is to support state and local governments in benchmarking initiatives); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. Rev.* 1, 4–5 (1997) (arguing for a new normative model of governance based on collaboration rather than representation); Orly Lobel, *The ReNew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *Minn. L. Rev.* 342, 344 (2004) (building on new scholarship to propose a decentralized model of

is that the administrative capacities needed to ensure equitable access to basic necessities are not a given—they must be actively constructed and built. This is particularly true at a moment when regulatory bodies—particularly at the local level but also increasingly at the federal level—are suffering from deep crises of defunding, deregulation, and dismantling.<sup>166</sup> Regulatory capacity, funds, and personnel are all limited. The porousness of regulatory agencies, especially state and local agencies, creates risks of interest-group capture—but also the potential for institutional innovation.<sup>167</sup>

Conventional approaches to participation and accountability have had mixed results in the context of public goods provision. When public goods are administered by special districts or utilities, as in the context of water, these administrative systems have been immunized from direct electoral accountability.<sup>168</sup> In the past, “Citizens’ Utility Boards” (CUBs)

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regulation). Another approaches these questions through a focus on administrative expertise and deliberative processes. See, e.g., Cass R. Sunstein, *From Technocrat to Democrat*, 128 *Harv. L. Rev.* 488, 492 (2014) (explaining Justice Breyer’s support of judicial deference to administrative action as an artifact of his belief in the importance of technocratic expertise in enacting regulation); Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 *N.Y.U. L. Rev.* 962, 1020–21 (2005) (arguing for an altered deliberative-process structure for administrative agencies that would overcome social pressure and informational influence); Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 *U. Pa. L. Rev.* 1607, 1608–11 (2016) (advocating for increased deference to the executive branch in policymaking because it is the most knowledgeable of the three branches). More recently, some scholars of regulation have foregrounded questions of power, participation, representation, and accountability. See, e.g., Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 *Colum. L. Rev.* 515, 517–19 (2015) (arguing that a renewed commitment to separation of powers is necessary to check private control of the administrative state); Rahman, *Democracy Against Domination*, *supra* note 29, at 60–61 (arguing for a democratic and participatory approach to economic regulation in order to increase the legitimacy of administrative action); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 *S. Cal. Interdisc. L.J.* 315, 317–19 (2018) [hereinafter Rahman, *Policymaking as Power-Building*] (arguing that administrative agencies should design policies with “an eye towards their substantive merits, but also in ways that rebalance disparities of power”). In general, this attention to the inner workings of administrative bodies has been the focus of a renewed interest in administrative law scholarship. See, e.g., Gillian Metzger & Ken Stack, *Internal Administrative Law*, 115 *Mich. L. Rev.* 1239, 1244–45 (2017) (offering a “full-throated account of internal administrative law” and arguing that “internal measures . . . qualify as forms of law”).

166. On the current attacks on the regulatory state, see, e.g., Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *Harv. L. Rev.* 1, 2–4 (2017).

167. See, e.g., Davidson, *supra* note 68, at 595–603.

168. See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973) (declining to extend one person, one vote to a water storage district because “of its special limited purpose and of the disproportionate effect of its activities on landowners as a group”); *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 108 (2d Cir. 1998) (declining to extend one person, one vote to a Business Improvement District because it “exists for a special limited purpose, . . . has a disproportionate effect on property owners, and . . . has no primary responsibilities or general powers typical of a governmental entity”); Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60

sometimes facilitated grassroots participation in public utility governance by enrolling members through state-mandated flyers printed on utility bills. These organizations could in theory help represent consumer and community interests in the complex day-to-day administration of the utility.<sup>169</sup> However, the Supreme Court barred this practice as a form of impermissible compelled speech.<sup>170</sup> CUBs have since continued to exist in some states as nonprofit advocacy organizations with varying degrees of support, including formal public funding and informal consultations on utility-rate changes or other policy decisions.<sup>171</sup> Meanwhile, participatory reforms around local government and urban planning have experimented with greater participation in urban-planning administrations and processes.<sup>172</sup> But this approach has tended to focus on a hyperlocal view of participation, concentrating on community boards and other local forums, and this overly narrow focus on local groups can be problematic.<sup>173</sup> So the challenge is not just to increase participation and accountability; rather, participation must be designed in ways that facilitate actual power for grassroots communities and ensure effective policymaking.

Two strategies in particular stand out as potentially useful approaches to enhancing accountability in the context of administering

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U. Chi. L. Rev. 339, 342–43 (1993) (“[M]any special districts . . . have been defined as largely outside the scope of constitutional protection. This has limited the impact of one person/one vote on many traditional state-authorized local arrangements, preserving considerable flexibility for state regulation of governance at the local level.”). Some scholars have suggested the need for more flexibility in the types of accountability required of special districts, going beyond property-based voting (as currently required for such quasi-governmental bodies). See Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. Chi. L. Rev. 275, 307–09 (2010); see also Camille Pannu, *Drinking Water and Exclusion: A Case Study from California’s Central Valley*, 100 Calif. L. Rev. 223, 248–53 (2012) (critiquing the fragmentation and insulation of water districts). For a similar critique of municipal utility districts (MUDs) in Texas, see Sara C. Galvan, *Wrestling with MUDs to Pin Down the Truth About Special Districts*, 75 Fordham L. Rev. 3041, 3045–47 (2007) (“MUDs fall short of the democratic ideal in both their formation and their maintenance.”).

169. See, e.g., William T. Gormley, Jr., *Policy, Politics, and Public Utility Regulation*, 27 Am. J. Pol. Sci. 86, 87–91 (1983) (describing how civil society and representation mechanisms can facilitate participation and accountability in public utility administration).

170. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16–17 (1986).

171. See, e.g., *About Us*, Citizens Util. Bd. of Minn., <http://cubminnesota.org/about-us/> [<https://perma.cc/YG3U-3XSZ>] (last visited Aug. 8, 2018); *About Us*, Or. Citizens’ Util. Bd., <https://oregoncub.org/about-us/> (on file with the *Columbia Law Review*) (last visited Aug. 8, 2018); *About Us*, Wis. Citizens Util. Bd., <https://cubwi.org/about-us/> [<https://perma.cc/J47Q-B24Q>] (last visited Aug. 8, 2018).

172. See, e.g., Xavier de Souza Briggs, *Democracy as Problem Solving: Civic Capacity in Communities Across the Globe* 15–22 (2008) (describing case studies of participatory urban policymaking in the United States and globally); Hollie Russon Gilman, *Democracy Reinvented: Participatory Budgeting and Civic Innovation in America* 2–3 (2016) (describing the rise of participatory budgeting at the local level in the United States).

173. See Nadav Shoked, *The New Local*, 100 Va. L. Rev. 1323, 1376–78 (2014) (“The equation of democratization with decentralization [and localization] is common. It is intuitive. Unfortunately, it is also simplistic.”).



public goods.<sup>174</sup> First, in light of chronic problems of underenforcement and limited regulatory accountability, one approach would shift stakeholder participation from *ex ante* policy design to *ex post* ongoing monitoring, enforcement, and revision of public obligations. This turn to “citizen audits” would enable constituencies to report violations of broad mandates for affirmative provision and access, triggering inspections and enforcement actions. Such participation helps hold both lax regulators and private violators accountable while channeling participation in a productive form.<sup>175</sup> This kind of participatory monitoring was a key strategy for grassroots efforts to democratize urban development during the War on Poverty.<sup>176</sup> It is also one that advocacy groups are reviving in the context of urban-development and community-benefits agreements today. Groups like the Partnership for Working Families have prioritized efforts to create new city-chartered oversight bodies in which communities and city officials jointly monitor community-benefits agreements entered into by developers.<sup>177</sup>

Second, given the cross-cutting and cross-geographic nature of many public goods, formal bodies for “proxy advocacy,” such as ombudsmen or offices dedicated to advocating for end users, could help ensure accountability in public-goods administration.<sup>178</sup> In Michigan, legislators proposed the creation of both citizen-based oversight commissions and a “water ombudsman.”<sup>179</sup> To respond to the water crisis, the city of Flint created a “health officer” tasked with ensuring that state-level authorities

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174. Elsewhere I explore these strategies in more detail as general participatory-regulation approaches. See Rahman, *Policymaking as Power-Building*, *supra* note 165, at 360–66.

175. See *id.* at 364–66.

176. See, e.g., Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 *Yale Hum. Rts. & Dev. L.J.* 1, 3 (2010) (describing an era of “meaningful participation of the poor in identifying barriers to economic opportunity and defining poverty-alleviation strategies”). For several recent analyses of the institutional, administrative, and political power struggles around the War on Poverty, see generally Noel A. Cazenave, *Impossible Democracy: The Unlikely Success of the War on Poverty Community Action Programs* (2007); Michael L. Gillette, *Launching the War on Poverty: An Oral History* (1996); *The War on Poverty: A New Grassroots History, 1964–1980* (Annelise Orleck & Lisa Gayle Hazirjian eds., 2011).

177. See Rahman, *Policymaking as Power-Building*, *supra* note 165, at 348 (describing the Partnership for Working Families model for community monitoring and enforcement of developer commitments to local hiring and neighborhood investment).

178. For more information on proxy advocacy and dedicated institutional representatives, see, e.g., Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 *Admin. L. Rev.* 411, 491 (2005); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 *Cardozo L. Rev.* 53, 54–56 (2014); Daniel Schwarcz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, *in* *Preventing Regulatory Capture*, *supra* note 135, at 365, 366.

179. See H.R. 4375, 99th Leg., Reg. Sess. (Mich. 2017) (proposing the establishment of a water ombudsman); H.R. 4214, 99th Leg., Reg. Sess. (Mich. 2017) (proposing the creation of a water-resources commission); H.R. 4201, 99th Leg., Reg. Sess. (Mich. 2017) (same).

do not overlook Flint’s water concerns.<sup>180</sup> Institutionalized oversight and representation through dedicated bodies can, if done correctly, address many of the second-order exclusionary administrative tactics noted in Part II. By providing a visible target for complaints and mobilization, these offices can reduce beneficiaries’ barriers to collective action in contexts in which it might otherwise be hard to organize. By providing institutionalized expertise—especially if mandated to engage with grassroots constituencies—these bodies can also help catalyze and translate grassroots concerns into effective policy oversight and change, helping to address regulatory failure and unaccountability. If given a broad enough mandate, these bodies can help mitigate the gaps that arise among regulatory authorities otherwise limited by subject matter and geographic jurisdictions, thereby addressing some of the fragmentation concerns noted in section II.B.3.<sup>181</sup>

### C. *Public Provision and Public Options*

A more straightforward approach to the adequate provision of public goods lies in direct public provision. Examples of direct public provision include a return to public control over utilities or expanded investment in public goods themselves. The general idea of “public options”—itself a product of nineteenth-century public utility thought—is experiencing a revival in social-policy debates from healthcare to finance, and rightly so.<sup>182</sup> Whereas other solutions might require reliance on bureaucratic discretion to enforce standards against private actors or direct nationalization of the entire housing and healthcare systems, a

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180. See K. Sabeel Rahman, *Infrastructural Exclusion and the Fight for the City: Power, Democracy, and the Case of America’s Water Crisis*, 53 *Harv. C.R.-C.L. L. Rev.* 533, 558 (2018) (discussing the creation of the “health officer” position as an “important first step[]” in improving enforcement). The health-officer position was created in 2017 with philanthropic resources from the Ford Foundation and other organizations. *Id.* at 558 n.114.

181. See Rahman, *Policymaking as Power-Building*, *supra* note 165, at 342–45 (describing how consolidation of authority and jurisdiction can promote democratic accountability, using the example of the Consumer Financial Protection Bureau).

182. For discussions of public options in different contexts, see, e.g., Mehrsa Baradaran, *How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy* 9–10 (2015) (arguing for a public option for banking); Robert C. Hockett & Saule T. Omarova, “Private” Means to “Public” Ends: Governments as Market Actors, 15 *Theoretical Inquiries L.* 53, 55–56 (2014) (describing finance as a form of public rather than private provision); Adam J. Levitin & Susan M. Wachter, *The Public Option in Housing Finance*, 46 *U.C. Davis L. Rev.* 1111, 1115–19 (2013) (discussing public options in the housing-finance context); Morgan Ricks et al., *A Public Option for Bank Accounts (or Central Banking for All) 1* (Vanderbilt Univ. Law Sch., Research Paper No. 18-33, 2018), <https://ssrn.com/abstract=3192162> (on file with the *Columbia Law Review*) (proposing to give the general public the ability to open accounts at a central bank that would closely resemble ordinary bank accounts). For a general discussion of public options as a policymaking strategy, see generally Ganesh Sitaraman & Anne L. Alstott, *The Public Option: How to Expand Freedom, Increase Opportunity, and Promote Equality* (forthcoming 2019).

“public option” could provide plain-vanilla, basic service and access alongside private alternatives, providing both a public version of the good and introducing market competition. While there are of course budgetary and moral arguments for direct public provision, the use of a public option is also a *political* strategy for ensuring checks and balances and accountability. As some scholars have recently suggested, the move to privatization in general can be seen as an attempt to *bypass* these very checks and balances that ensure democratic accountability.<sup>183</sup> Public provision, by contrast, offers potentially more transparent, accountable, and equitably distributed goods and services.<sup>184</sup>

The value of public provision and public options is evident in the water-reform context. Several cities have considered remunicipalizing recently privatized services such as water provision.<sup>185</sup> Water utilities have historically been quasi-public entities. Outright public provision by entities that are directly state run could indeed be one possible approach to addressing the concerns of extractive pricing or corner-cutting in managing the safety of the water system. The public role could take other forms too: cash or tax subsidies for private providers or end users to offset prices; vouchers to enable public competition; public options that compete alongside private providers; or outright monopolized public provision.<sup>186</sup> These various approaches could be applied to a range of public goods beyond water, such as municipal broadband or banking.

In the housing context, a public-provision solution suggests renewed attention to long-running debates over public housing and public subsidies. The current housing-voucher system (known as “Section 8” vouchers) is woefully inadequate: The waiting list for Section 8 housing vouchers is so long that some cities have simply stopped accepting new applicants.<sup>187</sup> But the inability to publicly finance housing purchases is

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183. See generally Michaels, *Constitutional Coup*, supra note 146 (arguing that privatization is a mode of avoiding public law institutions that ensure accountability and transparency); Jon D. Michaels, *Privatization’s Pretensions*, 77 *U. Chi. L. Rev.* 717 (2010) (same); Jon D. Michaels, *Privatization’s Progeny*, 101 *Geo. L.J.* 1023 (2013) (same).

184. See Jacob S. Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* 23–27 (2002) (arguing for a shift back to more public provision of basic necessities).

185. For a running list of remunicipalization efforts around the world, see Water Municipalisation Tracker, <http://www.remunicipalisation.org/> [<https://perma.cc/Z8KN-2C3H>] (last visited Aug. 7, 2018).

186. See, e.g., Rahman, *New Utilities*, supra note 25, at 1663–64. For a mapping of different mechanisms of public provision, see Mike Konczal, *New Am. Found., No Discount: Comparing the Public Option to the Coupon Welfare State* 5 (2012), [https://static.newamerica.org/attachments/4165-no-discount-comparing-the-public-option-to-the-coupon-welfare-state/Konczal\\_Mike\\_PublicOption\\_NAF\\_Dec2012.73ec1576c8a14f248cf792a954387e36.pdf](https://static.newamerica.org/attachments/4165-no-discount-comparing-the-public-option-to-the-coupon-welfare-state/Konczal_Mike_PublicOption_NAF_Dec2012.73ec1576c8a14f248cf792a954387e36.pdf) [<https://perma.cc/9DXL-WVM6>].

187. See NYCHA Section 8 or Public Housing Application, NYC, <https://www1.nyc.gov/nyc-resources/service/2146/nycha-section-8-or-public-housing-application> [<https://perma.cc/S4YT-WXKN>] (last visited Aug. 15, 2018) (“NYCHA is no longer accepting new Section 8 applications.”).

not a matter of limited resources: We already subsidize housing to the tune of \$171 billion per year through the home-mortgage-interest deduction and other tax benefits, benefits that accrue to wealthier (and whiter) families.<sup>188</sup> Those funds could be redirected to contribute directly to low- and medium-income families' housing costs. The cost of expanding housing vouchers to cover "all renting families below the 30th percentile in median income for their area"—many of them people of color—could be achieved for an additional \$22.5 billion annually.<sup>189</sup> At the state level, similar reallocations could radically expand income support and rent subsidies. In New York, for example, real-estate-development tax breaks are enormously expensive yet generate relatively few affordable housing units on a dollar-for-dollar basis.<sup>190</sup>

Similarly, we can imagine more aggressive public involvement in housing ownership and management. For decades, states and municipalities have experimented with new systems like cooperative housing, land trusts, inclusionary zoning, and other mechanisms to create affordable housing more systematically and with less dependency on incentivizing private developers.<sup>191</sup> Another variation of public housing arises in the context of foreclosures and eminent domain: Some legal thinkers have proposed the use of eminent domain as a way to seize underwater homes and reduce principals to protect poorer (and often minority) communities, essentially municipalizing these properties as a way to prevent foreclosure and eviction.<sup>192</sup> This is not to downplay the

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188. Desmond, *Eviction Economy*, *supra* note 85.

189. *Id.*; see also Douglas Rice & Lissette Flores, *Congress Should Add Funding to Prevent 2018 Housing Voucher Cuts*, Ctr. on Budget & Policy Priorities (Nov. 27, 2017), <https://www.cbpp.org/research/housing/congress-should-add-funding-to-prevent-2018-housing-voucher-cuts> [<https://perma.cc/6X62-3YKA>] (claiming that \$19.64 billion would be required to fully renew HUD Housing Choice Vouchers for 2018).

190. The most important of these development subsidies is the 421-a program, which lapsed in January 2016. See Jarrett Murphy, *UrbaNerd: Understanding the Latest Changes to 421-a*, City Limits (Apr. 10, 2017), <https://citylimits.org/2017/04/10/urbanerd-understanding-the-latest-changes-to-421-a> [<https://perma.cc/F9GS-QUC8>]. New York State Governor Andrew Cuomo and New York City Mayor Bill de Blasio are arguing over a new version of the subsidy. Current estimates suggest that, depending on its design, the renewed program would cost anywhere from approximately \$421,000 to \$544,000 in forgone tax revenue *per unit of affordable housing*. See Charles V. Bagli, *De Blasio and Cuomo Spar over Cost of Affordable Housing Plan*, N.Y. Times (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/nyregion/new-york-affordable-housing-plan.html> (on file with the *Columbia Law Review*). Needless to say, that is an enormous per-unit cost, which raises questions about whether 421-a is a cost-effective measure to facilitate access to quality housing, even if the "affordable units" are ultimately affordable in practice.

191. See, e.g., Frug & Barron, *supra* note 116, at 111–20 (describing different mechanisms for developing affordable housing); William H. Simon, *The Community Economic Development Movement: Law, Business, & the New Social Policy* 113–41 (2001) (same).

192. See, e.g., Robert Hockett & John Vlaholpus, *A Federalist Blessing in Disguise: From National Inaction to Local Action on Underwater Mortgages*, 7 *Harv. L. & Pol'y Rev.*

dangers of public provision; indeed, many public-housing authorities suffer from the kinds of accountability problems described in section II.B.<sup>193</sup> The point is simply that, whether through public financing via vouchers or public provision via cooperatives and land banks, there exist a variety of measures through which the state can assert a greater degree of control over the private-housing market in the name of ensuring greater access.

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Part III thus suggests approaches for constructing structural *inclusion and equality* through the governance of public goods. In contrast to the exclusionary strategies described in Part II, the focus here is on creating points of leverage and influence on the larger ecosystem of public and private actors who collectively shape the provision of and access to public goods. By creating public options or by establishing empowered and well-resourced oversight bodies, we can begin to shift the systemic patterns of public-goods provision. And by creating democratic levers for participation and representation in these new bodies, constituencies can become more influential stakeholders and combat those larger systemic patterns of inequality and exclusion.

#### IV. IMPLICATIONS OF THE PUBLIC GOODS APPROACH

In an era of widespread distrust of and hostility toward government, enacting these inclusionary administrative strategies may seem a tall order. Indeed, as Part II demonstrates, governmental failures of accountability and responsiveness play a central role in erecting barriers to accessing public goods. Furthermore, as fears of governmental capture, corruption, or failure increase, faith in governance's constructive potential is understandably shaken. A full reckoning with this attack on government is beyond the scope of this Essay and is a matter of common public debate. It is important, however, not to oversell the problems of political controversy in this regard. While the battle over the desirability of "big government" continues, this Essay points to an important set of countervailing arguments that support the expansion of government regulation on the merits.

First, given the centrality of public goods to human flourishing and the many ways in which inequality can be reproduced through disparate access to those goods, there is simply no escaping the need for

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253, 266–67 (2013) (encouraging state and local governments to use the power of eminent domain to avoid foreclosure and eviction).

193. See, e.g., Benjamin Weiser & J. David Goodman, New York City Housing Authority, Accused of Endangering Residents, Agrees to Oversight, N.Y. Times (June 11, 2018), <https://www.nytimes.com/2018/06/11/nyregion/new-york-city-housing-authority-lead-paint.html> (on file with the *Columbia Law Review*) (outlining systemic failures at New York City's housing authority).

governance and administrative institutions to ensure equity and inclusion. And, as seen in Part II, familiar arguments against government—that it is too expensive and should be privatized, that benefits should be conditioned, or that it is too big and decentralized—are often vehicles for certain exclusionary strategies rather than principled stances against big government.<sup>194</sup> As a normative matter, the existence of opposition to such inclusionary policies is not an argument against their value; if anything, such opposition underscores the moral necessity of redoubling our commitment to inclusionary policies and institutions.

Second, insofar as we need a political response to opposition to inclusionary administrative regimes, the historical account in Part I suggests the beginnings of an answer. Inclusionary administrative regimes during the public utility era or the civil rights era did not just emerge because political opposition was “won over.” Those reforms were the product of pitched political battles, in which reform movements and policymakers had to overcome severe and at times violent political opposition.<sup>195</sup> At some level, the problem of political opposition is less a concern for the design of policy proposals such as the ones advanced in this Essay and more a concern for the *practice and tactics* of reformers and advocates seeking to implement such proposals.

At the same time, it would be foolish for reformers to turn a blind eye to government’s numerous failures and threats, many of which have been detailed in Part II’s discussion of exclusionary strategies. Government may be necessary, but that does not mean it is intrinsically good. The challenge then lies in constructing governance institutions that, as Part III suggests, are themselves both capable of addressing underlying inequities and accountable to this mission.<sup>196</sup>

Precisely because it emerges inductively, from the bottom up out of on-the-ground struggles against the concentration of power over basic

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194. Recent intellectual histories of the antigovernment turn in public discourse and the rise of “neoliberal” political economy have suggested this link between the desire to exclude and dedemocratize on the one hand and the appeals to antigovernment rhetoric on the other. See generally Nancy MacLean, *Democracy in Chains: The Deep History of the Radical Right’s Stealth Plan for America* (2017) (discussing the origins and development of a radical right movement to further privatize American governance); Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism 2* (2018) (demonstrating that the goal of neoliberalism was to design institutions “not to liberate markets but to encase them, to inoculate capitalism against the threat of democracy”). For a further account, see K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 *Harv. L. Rev.* 1671, 1691–97 (2018) (reviewing Jon D. Michaels, *Constitutional Coup: Privatization’s Threat to the American Republic* (2017)) (discussing the overlap of economic, bureaucratic, and racial dimensions of the anti-administrative movement).

195. See *supra* section I.C.

196. See Rahman, *Democracy Against Domination*, *supra* note 29, at 55–56 (“We need the state as an instrumentality to address problems of domination in economic and social life, but we must ensure that the state itself acts in a manner that is non-dominating . . . . To do so, the state must itself operate through some form of popular control.”).

necessities, this governance approach to public goods and inclusion offers a more tractable way of thinking about basic necessities and citizenship, the problem of power, and institutional remedies. All rights, whether constitutionally recognized or not, require some combination of enforcement and administration, depending on an ecosystem of public and private entities to actually provide and deliver the good or service in question. If there is no right without a remedy, similarly there can be no meaningful access to basic necessities without an administrative regime capable of implementing, monitoring, and securing that access. Thus, some rights may be judicially recognized but severely underprovided; other rights may be avoided by courts altogether yet made real through administrative regimes that create *de facto* universal access and codify social norms. Administration takes center stage, and the metaphysics of what is or is not a “right” fall by the wayside. Furthermore, the focus on institutional structures provides a more usable and accurate theory of change: Access to public goods becomes real not just by public narratives or persuasion but by the construction of durable institutional regimes of the sort described above. It is not so much that these institutions arise after a public agreement about the value of certain basic goods; it is that in the process of creating these institutions, we convert certain goods to a *de facto* higher moral and legal stature.<sup>197</sup>

There is another implication of this approach. In the recent debates over inequality and constitutional political economy, it is often argued that inequality matters because it threatens the necessary foundations for maintaining a constitutional republic.<sup>198</sup> Addressing inequality is important to fulfilling aspirations for democracy. But as Progressive Era public utility thinkers and contemporary activists working on urban inequality and public goods suggest, the relationship between inequality and democracy may also run the other way.<sup>199</sup> It is not just that inequality undermines the viability of democratic governance; it is that we need democratic governance to *counteract* social and economic systems of inequality. Without the creation of powerful and publicly accountable state institutions, from the water utility to the zoning power to more modern forms of inclusive administration, it is difficult to address the

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197. Indeed, there is a tension here in that it might be the case that the very hidden nature of these governance regimes is both an element that enables the expansion of the provision of public goods and a source of the regimes’ vulnerability to backlash. See, e.g., Metzger, *Administrative Constitutionalism*, supra note 24, at 1931 (noting that administrative constitutionalism often operates in the shadows—and might need to remain there to avoid backlash).

198. See, e.g., Sitaraman, supra note 23, at 5 (“The problem today is that the basic foundation upon which our middle-class constitution was built—the prerequisite of relative economic equality—is crumbling.”); *id.* at 18 (“[W]hen economic and constitutional structures become misaligned, reform or revolution must ultimately get them back into sync.”).

199. See supra section I.C.

systemic social and economic inequalities and exclusions that mark our political economy.

The approach implied in this Essay, then, does not begin with some abstract notion of civic virtue that requires an equitable distribution of wealth as a prerequisite. Rather, the starting point is a hostility to domination and concentrated power, whether in the form of the unaccountable state or the unaccountable market—domination that is especially troubling in the context of control over basic necessities. Democracy is not merely an aspiration but a vital and urgent tool through which we make possible the radical restructuring of social and economic inequalities. Democracy becomes a vehicle for empowering the community to fight back against concentrations of wealth, power, and opportunity.

#### CONCLUSION

In the Roman Republic, the punishment for armed treason took the form of *aquae et ignis interdictio*: the banishment of the offender from membership in the polity.<sup>200</sup> As an alternative to the death penalty, the offender would be barred from access to water and shelter.<sup>201</sup> The practice is revealing in its association between citizenship and the access to core infrastructural goods. Gradations of access to and exclusion from basic necessities like water and shelter in our modern era similarly encode degrees of equality and belonging. Debates today over access to basic necessities are very much about the scope and content of the privileges and immunities of citizenship: who is a full member of the polity and what that membership entails. If access to basic necessities is a key site for our inequality crisis, then the governance of these systems is also a matter of central concern.

This Essay explores this insight, that the terms of access to basic necessities represent a central way in which law and public policy construct systemic, structural forms of inequality and exclusion. Such exclusion can manifest not just in explicit, first-order denial but also through subtler, second-order forms of exclusion such as bureaucratic exclusion, privatization, and fragmentation. These dynamics represent strategies through which law and policy adjust who can access which goods on what terms and, in so doing, condition the lived reality of citizenship and inclusion. Conversely, *inclusion* requires not just redistribution and other responses to income inequality but also attention to changing the background rules governing access to these basic necessities and public goods. Here, we could imagine inclusionary administrative strategies, such as expanded authority and oversight, greater administrative

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200. Gordon P. Kelly, *A History of Exile in the Roman Republic 1–2* (2006). I am grateful to Adam Lebovitz for suggesting this connection.

201. *Id.*



accountability, and a reinvestment in public provision and public options.

This Essay has also focused on the running examples of water and housing, highlighting how second-order exclusionary tactics operate in practice and how certain administrative approaches might lead to a more inclusionary regime. This focus on water and housing is meant to be illustrative, not exclusive; these same strategies can be readily adapted to ensure greater inclusion in the context of other public goods, including nonphysical ones like healthcare or education. Further, these strategies can also be applied at different levels of government, by federal, state, or local administrative bodies. The important point is simply to demonstrate that the task of constructing inclusion—of ensuring access to goods vital to human flourishing—requires deploying these types of policy design and legal strategies. Inclusion and, by extension, citizenship require the construction of affirmative institutions for governance.

This link between governance and basic necessities reinforces that the current battles for the legitimacy of the administrative state cannot be viewed only in terms of the procedural and institutional dimensions of administration; some of this debate is inextricably linked with a battle over the *substantive* aspirations for equality and inclusion. This may make these institutional debates harder to untangle and resolve. It is precisely for this reason that the moral claims of membership, inclusion, and equality—the scope of citizenship and its accompanying privileges and immunities—are being fought over so vociferously by social movements, policymakers, and political actors on the terrain of public goods and the modern administrative state. For better or worse, the scope of democracy, equality, and inclusion in the twenty-first century turns on the future of these administrative regimes.

