

Structuralist regulation

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**** PRELIMINARY DRAFT ****

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NOTE FOR PARTICIPANTS:

Dear Colloquium participants,

*Thank you very much for the opportunity to engage with you all on this paper draft. This is a very preliminary cut at a new project, as you will see below. This paper is the latest in a series of pieces where I have explored the ways in which law and policy can tackle structural inequities of economic power, access to public goods, and racialized disparities in economic and political inclusion (see e.g. Rahman, “The New Utilities,” *Cardozo LR* (2018); Rahman “Constructing Citizenship” *Columbia LR* (2018); Rahman, “Policymaking as power-building,” *S. Cal. Interdisc. L. J.* (2018)). The goal of this paper is to identify and unpack a theme that I think appears on a range of policy debates, and represents an important shift in how we think about regulation and public policy design.*

This is an early stage draft, so it is very much in formation. Part III in particular is offered here in very rough, broad brushstrokes, and I hope to incorporate more examples of structuralist logics in public law and democracy reform in particular. With such an early stage project, I am especially excited to hear your thoughts, suggestions, additions, and critiques.

Thank you in advance for all your insights and feedback, and look forward to seeing you all in a few weeks!

*Sincerely,
SR*

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Introduction

In the summer of 2020, the murder of George Floyd by police officers in Minneapolis sparked a new wave of Black Lives Matter protests, escalating into what would become the largest protest movement of modern American history.¹ The protests put at the forefront of reform debates long-standing demands to “defund the police” and calls for abolition of the prison industrial complex.² While many policy commentators recoiled at the demand to defund the police, offering more modest and less disruptive alternatives to mitigate the problem of police violence,³ longtime advocates for abolition responded by asserting that the demand was in fact intended to be taken literally and seriously: that police departments and prisons should be defunded and abolished, and that those resources be reallocated to different institutions committed to securing public safety and well-being. The central insight, for abolitionists, is that the problem of police violence against Black residents is a *structural* problem, a product of the institutionalized biases, cultures, and profit motives embedded in policing as an institution. Given the structural roots of the problem, many well-intentioned reformist proposals for more transparency, stricter rules of police conduct, or other anti-bias measures would simply not succeed⁴ in reducing the incidence of violence against Black and brown Americans.⁵

A similar dynamic played out the same summer in a very different policy domain. In July, Congress convened a historic first: a hearing featuring a tough grilling of the CEOs of the big four tech companies, Apple, Google, Amazon, and Facebook.⁶ After years of increasing public scrutiny over the business practices of these firms and concerns about their market power,⁷ policymakers are now for the first time in decades seriously entertaining questions about amped up antitrust enforcement and policy. But at the same time, some have raised cautionary notes, warning that greater antitrust efforts might be problematic, misleading, or ill-conceived.⁸

¹ Black Lives Matter may be the largest movement in US history, New York Times, July 3, 2020, at <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>

² See Movement for Black Lives policy platform: <https://m4bl.org/end-the-war-on-black-people/>

³ See e.g., Matthew Yglesias, Growing Calls to Defund the Police, Explained, Vox, June 3, 2020 <https://www.vox.com/2020/6/3/21276824/defund-police-divest-explainer> (voicing skepticism of and outlining barriers to enacting the “slogan” of defunding the police, and suggesting alternatives)

⁴ See Jocelyn Simonson, Police Reform Through a Power Lens, 130 Yale L. J. (forthcoming 2021)

⁵ See e.g., Mariame Kaba, Yes we literally mean abolish the police, New York Times, June 12, 2020, <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> (describing long-standing demands to defund and abolish the police); See also Derecka Purnell, What does police abolition mean? Boston Review, August 23, 2017: bostonreview.net/law-justice/derecka-purnell-what-does-police-abolition-mean

⁶ See Gilad Edelman, The Big Tech hearing proved Congress isn’t messing around, Wired, July 29, 2020, at <https://www.wired.com/story/big-tech-hearing-proved-congress-not-messing-around/>

⁷ See e.g., Lina Khan, Amazon’s Antitrust Paradox, Yale LJ; Zephyr Teachout, Break ‘Em Up; David Dayen, Monopolized; Matt Stoller, Goliath; Tim Wu, Curse of Bigness; Tim Wu et al, Utah statement; Marshall Steinbaum and Maurice Stucke, The Effective Competition Standard, University of Chicago L R 2018; others

⁸ See e.g., Fiona Scott Morton, Why breaking up big tech probably won’t work, Washington Post, July 16, 2019 <https://www.washingtonpost.com/opinions/2019/07/16/break-up-facebook-there-are-smarter-ways-rein-big-tech/>; See also [CITES TK critiquing “hipster antitrust”]

Even as concern over “fake news,” disinformation, and media polarization on online platforms like Facebook and YouTube proliferate,⁹ and as the COVID-19 pandemic accentuates the market dominance of these platform firms,¹⁰ a similar clash is emerging among policymakers, between those seeking structural constraints on the platform business models of information platforms, and those who see such interventions as too draconian, preferring instead case-by-case management of conduct and content on these platforms.¹¹

Or take one more example of this tension between structural and case-by-case regulation in the ongoing debates over the problem of financial malfeasance, too-big-to-fail financial firms, and the risk of financial crises. After the 2008 financial crisis, one set of policy responses has emphasized largely entity-by-entity and case-by-case responses: macroprudential regulation by federal officials overseeing the risk profiles and approaches of systemically risky financial firms, or greater corporate compliance mechanisms promoting “ethical” financial conduct.¹² Another set of policy proposals are more structural, seeking to alter the very business models and market dynamics of finance more broadly, whether by converting financial firms into de facto public utilities¹³ or by breaking up systemically risky banks to prevent the risk of financial collapse in the first place.¹⁴ These debates, most prevalent a decade ago, have started to reemerge as the country enters another historic economic collapse, and commentators raise questions about how to structurally remake the financial sector in response.¹⁵

This paper is not about abolition or antitrust or financial reform per se. But it is about an underlying conceptual and analytical debate that lies beneath each of these policy fights—and a wide range of other similar battles playing out in legal and policy circles. Whether it is in context of policing, tech, finance, or in other areas, we can see a similar pattern to the policy debate. Structuralist solutions are proposed in each of these debates, each time provoking a similar set of counterclaims and anxieties. Often, structuralist claims—like defunding the police, breaking up tech platforms, or the sharp restriction of too-big-to-fail banks—are seen as overly costly, dangerous, or simply naïve and ill-informed. Alternatives are proposed that seek to

⁹ Alina Tugend, Fervor Grows for Regulating Big Tech; NYT Nov 11, 2019; <https://www.nytimes.com/2019/11/11/business/dealbook/regulating-big-tech-companies.html>. Matt Yglesias, The push to regulate big tech, explained, Recode, May 3, 2019;

<https://www.vox.com/recode/2019/5/3/18520703/big-tech-break-up-explained>. Alan Boyle, Too big to fail? FTC commissioner sees parallels between Big Tech and bank crisis, GeekWire, October 8, 2019; <https://www.geekwire.com/2019/big-fail-ftc-commissioner-sees-parallels-big-tech-bank-crisis/>

¹⁰ See Jason Del Rey, Government shutdowns of ‘nonessential’ retailers were a huge gift for Amazon, Walmart, and Target, Recode, Aug 20, 2020 (<https://www.vox.com/recode/2020/8/20/21375942/amazon-walmart-target-pandemic-earnings-q2-2020-essential-retailers>)

¹¹ See Part II.A, *infra*.

¹² See Part II.B, *infra*.

¹³ Ricks, The Money Problem; Omarova / Hockett, Finance Franchise

¹⁴ Macey and Holdcroft, Failure is an option

¹⁵ See e.g., David Dayen, Building the People’s Banks, The American Prospect, January 16, 2020;

<https://prospect.org/economy/building-the-people%E2%80%99s-banks/>; Leah Downey, “Defund the Bankers,” Foreign Policy, July 6, 2020, <https://foreignpolicy.com/2020/07/06/united-states-economy-black-lives-matter-reform-federal-reserve/>

manage or mitigate the problematic conduct of firms or state actors; but these counter proposals are in turn critiqued for being too minimalist or incremental.

The problem, however, is that for many policymakers the unease with structural solutions can be habitual and under-explained. When structuralist policies are offered, they are read in terms of a simple spectrum of “more” versus “less” regulation, with more regulation facing a higher burden of justification against default market and private orderings. The problem with this response is that, while structuralist proposals do have their limitations and risks, they are also often apt and well-tailored to the problems they seek to address. That value, however, is easily overlooked insofar as structuralist proposals are too-readily caricatured as naïve or overly costly.

This paper attempts to fill this gap, providing a first cut at articulating and theorizing structuralist regulation as a distinct regulatory strategy.¹⁶ This paper is an attempt to theorize the concept of structuralist regulation, what makes it unique, what assumptions and under what conditions it should be preferred to more conventional solutions. While structuralist proposals like “breaking up the banks” are often criticized in the frame of being “too much” regulation in contrast to minimalist alternatives, as I will suggest in this paper, structuralist regulation is not necessarily “more”; but it is *different*, and those differences are sometimes warranted. The idea of structuralist regulation is related to but distinct from other familiar regulatory strategy distinctions: rules versus standards;¹⁷ adjudication versus rulemaking;¹⁸ command-and-control regulation versus decentralized and “new governance” models of regulation.¹⁹

In this paper, I define structuralist regulation as a regulatory approach that attempts to mitigate problematic conduct not through direct enforcement on individual actors, but rather by altering the background social, economic, political structures to prophylactically prevent or reduce the incentives for and likelihood of those incidents. Readers should note that I use the term “regulation” in this paper loosely to refer to various kinds of policymaking; as we shall see, structuralist policies can be effectuated through legislative or administrative means, often both. Structuralist regulation contrasts with more individualized, entity- or conduct-based regulations that depend on case-by-case enforcement, and instead focuses on limiting or altering the capacities and powers of those actors in the first place. Another way to understand structuralist policy is that it operates “upstream” of conventional policy debates: rather than

¹⁶ I have in previous work attempted to define this distinction between managerial and structuralist regulation, but have thus far done so in passing. See e.g., RAHMAN, *DEMOCRACY AGAINST DOMINATION*, 118; Rahman *The New Utilities*, [pincite tk]. This paper represents an attempt to pull back and focus more directly on the idea of structuralism as regulatory strategy.

¹⁷ Kaplow, *Rules vs Standards* cite TK

¹⁸ *Londoner; Bi-Metallic*

¹⁹ See e.g., Sabel and Simon, *Minimalism and Experimentalism in the Administrative State*, 100 *Georgetown L. J.* 53 (2011); Dorf and Sabel, *A Constitution of Democratic Experimentalism* 98 *Colum. L. Rev.* (1998); Cristie Ford, *New Governance in the Teeth of Human Frailty*, 2010 *Wisc. L. Rev.* (2010); Ford, *Innovation and the State: Finance, Regulation, and Justice* (2017).

attempting to manage particular instances of problematic conduct by firms or state actors, structuralist solutions preemptively seek to shape the powers and capacities of those actors as a way to prophylactically limit the likelihood of problematic conduct in the first place. Structuralist policy is not a sharp binary contrast with non-structural approaches. But it is a different, distinctive way of thinking about public policy and regulation, resting on different assumptions about the likelihood of harms, about administrative capacities, and also on different causal understandings of the problems it seeks to solve. Structuralist regulations may in some sense be costly: it is likely that some relatively benign conduct will also be swept up or eliminated in a structuralist regime. But these costs come with accompanying benefits: reduced costs of detection and enforcement for regulators; a better economizing of scarce regulatory capacity and autonomy; a precautionary limiting of potentially devastating outcomes; and a more direct addressing of problematic patterns that might otherwise defy remedial efforts.

This conceptual clarification generates a number of useful payoffs. First, it offers a language and framework to understand structuralist regulation as a distinct way of thinking about public policy. This is critical to disentangle some of the fuzziness around policy debates in areas like finance, tech, and racial justice. It is also a necessary precondition to having more productive policy debates and opening up more room for research. As I will argue below, often there are good reasons to prefer *some* kind of structuralist regulation, but plenty of disagreement or lack of clarity on *what* specific structuralist tool to deploy. Should we break up Facebook via antitrust, or impose public utility / common carriage regulations on the platform, or both? These are arguably both structuralist tools, and there is a debate to be had between them. But that debate can be obscured by unease with structuralist approaches to begin with, making it harder to have an apples-to-apples comparison and analysis of what policy lever to deploy.

Second, this concept of structuralist regulation helps provide a policy framework for understanding and engaging some of the structuralist claims made by grassroots reform movements especially in this moment. We are in a unique moment of resurgent grassroots activism, and as scholars of social movements have argued, many of these movements are advancing structural, transformative visions of public policy and legal-institutional change.²⁰ But these claims are often seen as outside the scope of more traditional modes of policy debate and analysis. Building a conceptual framework of what we mean by ‘structural’ reform can help bridge the reform ideas being generated by grassroots movements on the one hand, and those arising from policymakers and academics on the other. More broadly, we might even say we are on the cusp of a revival of interest in structuralist policy solutions in response to the deeper problems of economic inequality,²¹ racial subordination,²² power in public law,²³ and political

²⁰ See e.g., Amna Akbar, *Towards a Radical Imaginary*; Amna Akbar, Jocelyn Simonson, and Sameer Ashar, *Movement Law*, 73 *Sanford L. Rev.* (forthcoming 2021); Jocelyn Simonson and K. Sabeel Rahman, *Institutional Design of Community Control*, 108 *Cal. L. Rev.* 679 (2020) (connecting social movement visions of local governance to debates over power and structure).

²¹ See e.g., Joseph Fishkin and Willy Forbath, *The Anti-Oligarchy Constitution*

²² See e.g., Mehrsa Baradaran, *Color of Money*; Richard Rothstein, *Color of Law*; [others]

²³ Daryl Levinson, *Power in Public Law*; Ganesh Sitaraman, *The Puzzling Absence of Power in Public Law*; Kate Andrias, *Separations of Wealth*; [others]

economy approaches to law and public policy.²⁴ A clearer understanding of structuralist policy design will be important to inform the kind of inclusionary policy agenda needed to remedy these inequities.

The rest of the paper proceeds as follows. Part I provides a conceptualization of ‘structuralist’ policymaking, identifying the underlying assumptions that animate structuralism as a regulatory strategy. This Part also notes that this concept of regulatory strategy (or what I call “regulatory logic”, as defined below) should be understood as a distinct way of unpacking and analyzing the patterns of policymaking judgment distinct from other modes of analysis like cost-benefit analysis or the rules-versus-standards debate. Part II then looks at examples of structuralist policy proposals in recent economic policy debates: the debate over tech platforms, the debate over too-big-to-fail financial firms and systemic risk, and the renewed interest in anti-trust and anti-monopoly law. These examples help illustrate structuralist regulatory logics in action, and their distinctive assumptions and potential benefits over more conventional regulatory approaches. The purpose of this Part is not to offer a full-throated defense of structuralist policies in each of these sectors (although I am perhaps unsurprisingly sympathetic to the arguments on the merits); rather the purpose here is simply to illustrate structuralism as a distinct mode of thinking about policymaking. Part III articulates some broader implications for how to implement and institutionalize structuralist policies. Part IV concludes with some closing thoughts on how structuralism as a way of thinking about regulation connects to this broader moment of intense political and scholarly interest in inequality and racial (in)justice.

I. Structure as regulatory subject and strategy

Regulatory logics

The task of creating an effective and responsive regulatory system is often thought of in terms of questions of institutional design the balance of responsibilities between legislatures, agencies, and judges; how agencies should be structured; how agency heads should be appointed; how agencies can generate sufficient expertise to regulate effectively without falling prey to industry capture. But part of the challenge in ensuring effective and responsive regulation lies within the ways in which regulators and policymakers more broadly *think* about their task—the concepts and worldviews that operate within the ‘black box’ of policy decision-making and judgment.

However stringently we might read the external legal constraints on regulatory action—whether through judicial review or command—the fact of regulator discretion and judgment is

²⁴ See e.g., David Grewal, Jed Purdy, Amy Kapczynski, and K. Sabeel Rahman, *Beyond the Twentieth-Century Synthesis*, Yale L. J. (2020).

inescapable.²⁵ So how then should we think about the analytical methods or frameworks employed by regulators themselves? Regulators and legislators are not merely technical automatons executing the public will or legislative command. Nor are they simply political ideologues. Rather, policymakers are necessarily making decisions that involve degrees of subjective, normative, and policy judgments. The ways in which that judgment is exercised has an impact on the dynamics of regulatory policy.

Embedded in these judgments are a range of assumptions, values, and concerns. How are policymakers understanding the purposes of regulation in a given domain? Do they see their enterprise as complementary to existing private parties and practices? Or as fundamentally critical and oppositional? How do regulators view their own capacities and institutional competency—particularly relative to other private or governmental actors? Do they see themselves as outgunned and undermanned? Or well-informed and capable? What is their analysis of the systems and causes that drive the problems they are trying to solve—and which of those causes are, in their view, most amenable to the tools they have on hand? These are the kinds of underlying questions that operate upstream from a discrete policy issue or cost-benefit analysis inquiry.

These questions often aggregate into distinctive patterns of judgment, consistent regulatory strategies, or what I call in this paper “regulatory logics”. Regulatory logics live squarely in the midst of the black box of regulatory judgment; they are more reasoned and grounded in understandings of the empirical nature of the world than pure political ideology, but at the same time they also share some degree of normative, subjective judgment beyond merely technical calculations of risk, costs, and benefits. We can think of “regulatory logics” as analogous to canons and methods of statutory interpretation in the judiciary. Just as canons offer a conceptual framework and method of reasoning for judges seeking to fill in the gaps between statutory text and a new fact situation, regulatory logics can be thought of as a bundle of presumptions about the social goals of regulation, about the relative institutional competency of regulators in comparison to private actors, and about the appropriate methods of analysis required in formulating rules responding to new circumstances. And, like modes of interpretive reasoning, regulatory logics do not predetermine a specific outcome—though they may shade in some directions making some policy determinations and outcomes more likely than others. Nor are the same logics necessarily appropriate in all circumstances; different conditions may demand different regulatory logics.

For our purposes, we can think of regulatory logics as bundles of assumptions along three specific questions. First, what is the target of regulatory action? Depending on the regulator’s understanding of the causal forces driving the condition or practice to be regulated, regulators may choose to focus their efforts on different targets they are seeking to influence: individuals,

²⁵ Adrian Vermeule, “Our Schmittian Administrative Law,” 122 Harvard Law Review 1095 (2009) at 1104 (“At the heart of the system of administrative rules are law-free zones and open-ended standards”). As Vermeule argues, the complexity and diversity of both regulatory agencies and the issues they face necessarily means that there will be large gray zones of agency practice that are fundamentally not reviewable by the Administrative Procedure Act, judicial oversight, or *ex ante* legislative specificity. See Vermeule, at 1133-35, and 1137-38.

entities, broader social or economic systems. Second, what is the social value of the good or practice being regulated—and how does this alter conventional cost-benefit assessments of the proposed intervention? We often presume that less regulation is better, that private ordering and existing practices are generally better left undisturbed. But this is an assumption and is neither obvious nor appropriate; in some domains it might well be the case that good or practice being regulated itself has more or lesser normative value for social welfare, and that judgment informs (whether consciously or otherwise) the degree to which regulators are willing to countenance additional costs or repercussions that might flow from a regulatory policy. Third, what are the regulator’s assumptions about current state capacity and administrability? Are some interventions more doable and likely to succeed than others? We conventionally presume that more minimalist, managerial interventions are more administrable, and less complex, but often (as will be argued below), the opposite is true, and the more administrable, simple, capture-proof intervention is the more structural, prophylactic one.

Viewed this way, regulatory logics are distinct from but related to the two main existing literatures that analyze the inner workings of regulatory policy judgment: cost-benefit analysis, and the distinction between rules and standards.

The expansive literature on cost-benefit analysis is one area where academic research has examined these questions of how regulators can and should exercise their discretion.²⁶ Cost-benefit analysis promises to help rationalize policymaking, enhance transparency and accountability, reduce cognitive bias, and make policy outcomes more effective overall.²⁷ Much of the debate over cost-benefit analysis has focused on questions of whether it should be employed or not. Doctrinally, the debate over cost-benefit analysis has revolved around to what extent judicial review of agency action can and should require cost-benefit analysis as part of the “arbitrary and capricious” standard.²⁸ In the academic literature, this debate has focused more generally on whether cost-benefit analysis is appropriate, or how it should (or perhaps is unable to) address qualitative, normative, and other non-quantifiable elements in policymaking.²⁹ More sophisticated accounts of cost-benefit analysis concede the multifaceted nature of policymaking judgments, and suggest that cost-benefit analysis is a more fluid and capacious technique than simply computing dollar-figures and estimated impacts.³⁰ But cost-

²⁶ See Robert Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 NYU LR 1983 (2013), 1995-98 (describing the origins and evolution of cost-benefit analysis and summarizing scholarly literature).

²⁷ Ahdieh, 2010-22.

²⁸ See e.g. Kathryn Watts CITE TK; Vermeule and Freeman, *expertise-forcing CITE TK*. For recent cases interpreting arbitrary and capricious review as requiring cost-benefit analysis, see e.g. *Business Roundtable*

²⁹ See e.g. Douglas Kysar, *Regulating from Nowhere CITE TK*; Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing*, CITE TK; Sunstein CBA recent articles, CITE TK.

³⁰ See e.g. Ahdieh (outlining different types cost-benefit analysis to be employed by agencies, based on examples in financial regulation); Sunstein, *The real world of cost-benefit analysis*, Columbia L. R. (2016). For literature on cost-benefit analysis in context of policing, compare Rachel Harmon, *Federal Programs and the Real Costs of Policing*, 90 NYU L. Rev. 870, 901 (2015) (advocating more grounded understanding of costs and benefits in policing) with Bernard Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit*

benefit analysis doesn't exhaust the terrain of judgment calls made by agencies. Prior to the actual exercise of cost-benefit analysis are a set of broader questions about regulatory strategy or approach.

Similarly, the idea of regulatory logics lies upstream from another key literature on regulatory policymaking judgment, the rules-standards distinction. As initially formulated by Louis Kaplow, rules are better policies when policymakers can specify the content prior to regulated activities taking place; standards are preferable when the content of the policy is better specified afterwards.³¹ The preference of rules over standards will vary with the complexity of the issue at hand. Some scholars have suggested that the choice of rules over standards may be influenced by the difficulties of administrability, of the regulators' own capacity.³² Thus, in the presence of risks, of uncertainty in estimating them, and agency costs in implementing policies, rules may be more preferable to standards. Where a standard may be too difficult and costly to interpret and apply with each instance, a rule may be more efficient. Similarly, the danger of industry influence on delegated or discretionary enforcement of standards may suggest a greater value to bright-line rules. As much of this literature highlights, it is rare to have a blanket preference for rules over standards in all cases. The idea of regulatory logics might yield policies that are more rule-like, or more standard-like depending on how they are operationalized.

The logic of structuralism (and anti-structuralism)

Before we can dig in to the dynamics and thought process behind structuralist regulations, it is important to first unpack the different types of critiques and skepticisms of structuralist proposals. From finance to antitrust to racial justice policies, skepticism of structural solutions takes a variety of forms. There are three variations of counterargument in particular: (1) the *erasure* of structure; (2) the *immutability* of structure, either literally, or effectively, due to the *costliness* of structural reform; and (3) doubts about the *administrability* of structural reform. These counterarguments are prevalent in public policy discourse and often operate in the background, undergirding presumptive skepticism of structural proposals. Identifying them up front is thus a helpful first step to understanding the distinctive features and qualities of structuralist regulation.

1. Erasure of structure: A first variety of counterargument is conceptual, essentially erasing or obscuring the structural roots of policy problems in the first place.

Analysis, 47 J. Legal Stud. 419, 432-33 (2018) (critiquing the use of cost-benefit analysis in criminal justice and more broadly).

³¹ See e.g. Louis Kaplow, CITE TK.

³² Prasad Krishnamurthy, Rules Standards, and Complexity in Capital Regulation, Journal of Legal Studies 43:2, 273-296 (2014), at 275-78.

Take for example, some of the Roberts Court's racial justice and civil rights jurisprudence (about which more below).³³ In the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1*,³⁴ for example, the Supreme Court struck down voluntary busing programs in Seattle and Louisville. Chief Justice John Roberts' opinion argued that because these districts had already eliminated *de jure* segregation, these models of school integration represented an impermissible use of race in public policy decisions. "The way to stop discriminating on the basis of race," Roberts famously (or infamously) wrote, "is to stop discriminating on the basis of race."³⁵ Missing from Roberts' analysis was a discussion about the ways in which housing policy, zoning, and urban planning reproduce economic and racial segregation in ways that perpetuate inequities even absent *de jure* Jim Crow regulations.³⁶ Similarly, in the 2013 voting rights case *Shelby County v. Holder*,³⁷ Roberts took a similar tack to put a stop to the Voting Rights Act's preclearance regime, in large part on the grounds that the empirical patterns of racialized, systemic voter suppression that made preclearance were no longer present.³⁸ In both cases, Roberts' argument is both empirical and conceptual, amounting to a denial that systemic patterns of racial disparity exist, and therefore removing the primary justification for structural inclusionary policies like school integration or preclearance. Justice Ruth Bader Ginsberg's dissent offered an extensive accounting of the hidden systems of voter suppression and discrimination, what she called "second generation" barriers to the right to vote.³⁹

This approach has rich theoretical roots as well. A central theme in libertarian social thought, for example, rests on critiques of efforts to advance theories and policies of what we might now call structural approaches to inequality.⁴⁰ Part of Friedrich Hayek's account of libertarianism, market ordering, and the critique of New Deal liberalism rested on a more explicitly normative variation of the erasure argument. For Hayek, the value of markets and private ordering was precisely that it produced efficient and welfare-enhancing spontaneous order (what Hayek termed "catallaxy").⁴¹ Any inequities that might result are products of that spontaneous market ordering, and thus are "the outcome of a process the effect of which was neither intended nor foreseen by anyone."⁴² What these arguments share is a deliberate skepticism about the

³³ For a longer discussion of the theoretical distinction between non-structural and structural views on inequality, see Rahman, *Constructing and Contesting Structural Inequality*, *Critical Analysis of Law* 5:1 (2018).

³⁴ *Parents Involved*, Cite TK

³⁵ *Parents Involved*, pincite TK

³⁶ See e.g. Susan Schindler, *Architectural Exclusion*, *Yale L. J.*; Richard Rothstein, *Color of Law*.

³⁷ *Shelby County*, Cite TK

³⁸ *Shelby County*, pincite tk.

³⁹ *Shelby County*, Ginsberg dissent pincite tk.

⁴⁰ See Rahman, *Constructing and Contesting Structural Inequality*, 102-4.

⁴¹ Hayek, *Use of Knowledge* CITE TK

⁴² Hayek, "'Social' or Distributive Justice," in Nishiyama & Leube, eds., *The Essence of Hayek*, at 65. It is notable that much of the critique of "neoliberalism" and market fundamentalism in public policy essentially highlights this very point: that arguments for private ordering often turn on an erasure of systemic inequities and existing power imbalances in social and economic life. See e.g., Jed Purdy and David Grewal, *neoliberalism, Law and Contemporary Problems*; Purdy, *Neo-lochnerism, Law and Contemporary Problems*; Grewal et al, *Beyond the Twentieth-Century Synthesis*, *Yale L. J.*

empirical existence or causal role that background structures play in producing disparities in lived experiences.

2. Immutability of structure. A second variation of antistructural thought turns not on the erasure of structure, but rather its immutability. In this argument, the empirical and causal role that structure plays in shaping inequality is acknowledged, but the rejection of structural regulation here stems from a concern about whether or not structure is itself mutable. In some variations, this could be a literal immutability: structural inequities may be recast as natural, not human-made, and not subject to human agency. The Hayekian defense of private ordering at times takes on this flavor. The immutability argument is also apparent in discussions of responses to natural disasters: hurricanes (or pandemics) are forces of nature, which we can at best mitigate but not control or defuse through public policy.⁴³ A variation of the immutability argument concedes that structural causes are present, and are amenable to human agency and alteration—but that the social and economic costs of such interventions are just too high. So a climate change skeptic, for example, might deny the degree to which increased hurricane prevalence is tied to anthropogenic causes, or he might concede the point but warn that structural measures like decarbonization or radical change to our energy infrastructure are far too costly to be justified.

3. (Un)administrability of structural policies. A third counterargument presents a variation on the costliness point, focused not on economic and social costs, but on the political and institutional costs. On this argument, the concern with structural policy proposals is that even if they do seem theoretically workable, and justified in terms of economic and social costs, the *political* repercussions weigh against structural policies. Specifically, we might be concerned that government lacks the capacity to effectively implement complex structural policies. The limits of human cognition and knowledge, for example, is a one of the primary arguments in favor of Hayekian private ordering, and against more complex regulatory schemes.⁴⁴ Any attempt at structural regulation, on this view, is destined for failure or futility. More troublingly, we might fear that government could implement structural policies, but in doing so, might risk creating perverse results, in particular fueling a degree of state power that creates risks of unaccountable, arbitrary, potentially totalitarian government.⁴⁵

These three counterarguments—erasure, immutability, administrability—can be deployed in combination, and together can animate a skepticism of structural policy, and a preference for alternative, more minimalist or meliorist approaches to public policy. Take the financial reform debate about “too big to fail” banks, for example.⁴⁶ Part of the pushback in 2010 against more stringent measures like breaking up large financial conglomerates evoked some of the counterarguments above: critics worried that structural measures would impose too severe

⁴³ Though of course even this analogy is fraught in an era of anthropogenic climate change.

⁴⁴ See e.g., Hayek, *Use of Knowledge*; Vermeule, *Law and the Limits of Reason*; [CITES on minimalism and Hayekian views on regulatory theory]

⁴⁵ Hayek, *Road to Serfdom*. For a classic distillation of the underlying roots of hostility to egalitarian policymaking, see Albert Hirschman, *Rhetoric of Reaction: Perversity, Futility, Jeopardy*.

⁴⁶ See Part II, *infra*.

costs on the economic system, eliminating some desirable forms of financial innovation, and costing the economy significant returns, growth, and jobs.⁴⁷ These critiques did not necessarily mean a rejection of the need to address the problem of systemic financial risk; but it did orient some reformers to a different kind of regulatory logic: a move towards what we might call more managerial or meliorist approaches, for example an emphasis on regulatory discretion in setting limits on risky financial models rather than more strict restrictions on financial corporate size, business model, or corporate structure. These managerial measures offered the promise of tailoring regulatory responses in ways to prevent excess costs on the economy, or governmental overreach. The structuralist alternative however—for example limiting the size of financial firms or to take an antitrust-inspired approach to capping financial concentration⁴⁸—rested on a very different assessment of these considerations of costs, benefits, and regulatory capacities.

The logic of structuralist regulation rests on a combination of three arguments, which represent the alternative to the three anti-structuralist arguments identified above: (1) a shift in the *target* of regulation, from individual entities or conduct to regulating system and structure; (2) a reassessment of *costs and benefits* of structural regulation; and (3) a different assessment of *regulatory capacity* and administrability.

1. Structure as regulatory target. Structuralist regulation rests, unsurprisingly, on an assessment about the structural roots of a policy problem—and the view that those structures are themselves mutable, subject to change. This partly rests on an empirical and causal analysis, showing the underlying structural foundations of a policy dispute. In the *Parents Involved* case, for example, there is an underlying empirical and causal claim about how law and public policy reproduces racial and economic segregation even in the absence of formal Jim Crow-style *de jure* segregation measures. If segregation is a produce of background patterns and systems of zoning, urban planning, and the like, and if these systems lie “upstream” from individualized experiences of racial disparities in access to education, then there is a strong case for focusing on those structural, upstream issues as part of a response to the problem of racial inequities in education. The bottom line is that it is the background structure, not the behavior of individuals within that structure, that becomes the target of public policy. To return to the finance example, the distinction here would be between focusing on individualized conduct of “bad actor” firms that might engage in overly-risky financial behavior, in contrast to looking to the background powers, capacities, and size of financial firms—regulating the latter as a way to prophylactically preclude the likelihood of risky financial activities that could trigger a wider meltdown.

2. Reassessing costs and benefits. The assessment of structural roots to a given policy problem is also related to a second argument for structuralist regulation: a reassessment (or different assessment) of the costs and benefits of structural regulation. In short, structuralist regulation

⁴⁷ See Rahman, *Democracy Against Domination*, Ch6.

⁴⁸ See e.g. Brown-Kaufmann amendment; Macey and Holdcroft, “Failure is an option”; see Rahman, *Democracy Against Domination*, ch6

rests on a view of costs and benefits where the purported economic costs of structural regulations—like the idea of breaking up market-dominant firms—are seen as more manageable, and where the dangers of *not* pursuing a structural remedy seem greater. If the benefits of structural regulation are understood as preventing mass economic collapse of the kind witnessed in 2008, that produces a very different cost-benefit analysis on what to do about too-big-to-fail banks. To put it another way, structural regulation often rests on a greater concern about the costs of *under-regulation*, rather than a traditional focus on the costs of *over-regulation*. A related point is that structural regulation can often turn on a greater skepticism of the *social value* of the good being regulated in the first place: if financial innovation is of middling to negative social value—which it arguably might be⁴⁹—then the costs of over-regulation go way down. In this sense, a structuralist regulatory logic is perhaps most akin to the precautionary principle, which holds that regulators should take a more aggressive prophylactic approach where there are massive downside risks to underregulation and where regulators lack information.⁵⁰

3. Reassessing regulatory capacity and administrability. The third animating argument for structural regulation involves a different approach to concerns about regulatory capacity and administrability. In particular, structural regulation can be seen, perhaps counterintuitively, as reflecting a *greater* degree of humility and economy of governmental capacity. Once again, take the financial reform example. In the absence of structural constraints on financial firm size, powers, and capacities, the regulation of systemically risky financial activity relies on the ability of regulators to oversee a vast array of private conduct by firms and individuals. While this is often framed in terms of regulatory minimalism and prudence—better to approach regulation with a fine-tooth comb and granularity than to make blanket rules and standards that might sweep in a whole host of potentially unproblematic activity—the focus on individualized conduct rests on its own kind of superhuman presumptions about regulatory capacity and knowledge. Surveilling a vast ecosystem of private action requires tremendous resources, information, and regulatory capacity. Structuralist proposals like ‘breaking up the banks’ can be seen in this sense as “simpler” in a certain sense, reflecting a greater degree of regulatory humility: given that regulatory capacity, resources, and knowledge is limited, the argument goes, it is more economical to focus our efforts on the handful of specific interventions that will have the most impact in remedying a set of social or economic ills.⁵¹ By focusing on upstream structures, we can therefore accomplish greater impact. Similarly, a shift to structural remedies also takes into account the likelihood of regulatory capture, or failures to detect transgressions and enforce compliance. In particular, structuralist strategies seem a good solution for situations where regulators are likely to fail given strong industry influence, complexity of the

⁴⁹ See e.g., Kwak and Johnson on financial innovation; Friedman, “Is our financial system serving us well?”

⁵⁰ See e.g. Sunstein, *Laws of Fear: Beyond the Precautionary Principle*; Sunstein, *Irreversible and Catastrophic*, Cornell L R (2011); Jonathan B. Wiener, *Precaution in a Multirisk World*, in *HUMAN AND ECOLOGICAL RISK ASSESSMENT*, 1509 (Dennis J. Paustenbach ed., 2002), at 1513-16; [additional cites TK].

⁵¹ See Part II, *infra*.

sector, and large information asymmetries between industry and policymakers⁵²—conditions that in practice have often led to a consistent underenforcement of many rules and standards.

These arguments taken together help animate a structuralist logic to regulation and policymaking. These arguments can operate as a way of presumption-flipping, shifting the default presumption from one of private and market ordering subject to minimalist and managerial forms of intervention, to more prophylactic, precautionary, or upstream attempts to reshape markets and social systems. These structuralist arguments depend partly on different empirical bases—for example, in tracing the structural causes of a problem with enough specificity to enable upstream interventions—but also on different subjective judgments about how to weigh costs and benefits, about the relative social value of the good or activity being regulated, and about how one assesses the capacities and effectiveness of government actors.

Crucially, structuralist policy is not a sharply-defined binary; rather one can imagine a spectrum of more or less structuralist policies, depending on the circumstances. Similarly, structuralist approaches are not all the same and do not offer blueprints. There are wide policy disagreements within and among structuralist views. For example, sticking with the financial regulation debate, there are a range of different approaches to structural regulations of systemic risk, from antitrust style approaches to limiting financial firm market dominance, to public utility style approaches to regulating financial flows and activities in more stringent ways.⁵³ But these different proposals share a common structural logic. And identifying these proposals as structural ones helps clarify the lines of debate. Given a focus on or need for structural solutions, we can have greater apples-to-apples comparisons and debates over which type of structural proposal is most effective or desirable.

Table 1. Structural and anti-structural logics.

	<i>Anti-structuralism</i>	<i>Structuralism</i>
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⁵² See e.g. James Kwak, “Cultural Capture and the Financial Crisis,” in Daniel Carpenter and David Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Tobin Project / Cambridge University Press, 2014), pp. 71-98 (describing how a shared social and cultural background can lead to subtle forms of industry influence on regulators); and Nolan McCarty, “Complexity, Capacity, and Capture,” in Carpenter and Moss, eds., pp. 99-123 (describing how complexity creates an epistemic dependence of regulators on regulated parties themselves for information to ground regulatory policies, creating additional channels for special interest influence limiting regulatory effectiveness). For more on complexity and the limits of technocratic oversight, see e.g. Dan Awrey, “Complexity, Innovation, and the Regulation of Modern Financial Markets,” *2 Harv. Bus. L. Rev.* 277 (2012); Robert Weber, “Structural Regulation as Antidote to Complexity Capture,” *49 Am. Bus. L. J.* 643 (2012), at 645, 720; Wendy Wagner, “Administrative Law, Filter Failure, and Information Capture,” *59 Duke L. J.* (2010), 1326, 1332; K. Sabeel Rahman, “Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes,” *48 Harv. J. Legis.* 555 (2011), at 571 (“Indeed, even where agencies emphasize scientific knowledge, sophisticated interest groups are able to provide agencies with data and information more favorable to their interests”).

⁵³ See e.g. Macey and Holdcroft; Ricks; See Part II.B, *infra*.

<i>Structure as subject</i>	Erasure or avoidance of structure	Empirical analysis identifies structural causes
<i>Costs and benefits</i>	Structure is immutable, or too costly to change	Costs of inaction or underregulation are high, social value of activity being regulated is low, benefits of structural regulations are high
<i>Administrability</i>	Limited regulatory capacity or knowledge; fear of arbitrary state power	Limited regulatory capacity or effectiveness in monitoring and enforcing conduct regulations; economizing regulatory capacity by focusing on structural interventions

II. Structuralism in economic policy

What does structuralist policymaking look like in action? In this Part, we explore some recent economic policy debates that exemplify the structuralist approach. The purpose of these examples is not to definitely make the case for structuralist regulations in these policy fights; these proposals are still matters of robust debate among legal scholars and policymakers. Rather, the goal of this section is to use these debates to illustrate what it looks like to apply a structuralist logic or frame to matters of law and policy. In each of the areas discussed below—regulation of information platforms, regulation of systemically risky financial institutions, and the reemerging interest in anti-monopoly and antitrust law—we see the three structuralist moves in play: a reconceptualizing of the relevant policy problem to be a product of background structure rather than one of individualized conduct per se; a different assessment of the costs and benefits of prophylactic and structural regulations; and a reassessment of the administrability and efficacy of structuralist tools over more minimalist or managerial ones.

A. Structuralism and the problem of information platforms

Take the problem of online information platforms like Facebook and YouTube. We are in a moment of deep public and scholarly concern over the ways in which these online platforms—upon which much of news, media, and public discourse now sit—might be magnifying problems of misinformation, disinformation, and political radicalization. Structuralist policies are emerging as a key set of policy strategies for tackling these problems—and they represent a sharp contrast to more conventional conduct- and content-moderation approaches.

Over the last year, the realities of “fake news”, weaponized disinformation campaigns, and the leveraging of online platforms like Facebook and YouTube to radicalize and recruit followers to

extremist groups (whether in the US or globally) has become a topic of more widespread discussion. These features of our online information ecosystem have been long-noted by data scientists, media scholars, and experts in the field.⁵⁴ Gradually over time, information platforms have evolved complex systems for content moderation, involving a mix of human moderators and artificial intelligence (AI) based systems. Facebook, for example, developed—initially in secret—a set of rules for policing hate speech and other problematic content on its site.⁵⁵ But these systems were highly subjective, often themselves applied in ways that exacerbated discriminatory and disparate impacts.⁵⁶ Indeed, journalistic revelations about these content moderation systems generated even more outrage over the power of online platforms.⁵⁷

But the deeper problem with these content moderation interventions is not only that they are weak and have so far proven unable to keep up with the tide of problematic content.⁵⁸ The problem is that they fundamentally misunderstand the nature of the problem itself. As a number of scholars have argued, the deeper root cause of the myriad of ills on online information platforms—misinformation, disinformation, radicalizing content, hate speech, attacks on women and communities of color—are rooted in the design and operation of the online platforms themselves. The fundamental problem is that information platforms are intermediaries who can manipulate or structure the flow information to serve the platforms', rather than the users', interests.⁵⁹

Information platforms like Facebook and YouTube depend on a few key elements for their business model: data-mining and surveillance of users; the leveraging of that data for selling targeted ads to businesses; and the optimizing of platform design to maximize users' time spent on the platform. The more attention and mindshare the platforms elicit from users, the more

⁵⁴ See e.g., Alice Marwick & Rebecca Lewis, *Data & Society, Media Manipulation and Disinformation Online* (2017) https://datasociety.net/pubs/oh/DataAndSociety_MediaManipulationAndDisinformationOnline.pdf (describing how far-right groups leverage online information platforms to proliferate hate speech, attack critics, and advance political objectives); Anthony Nadler, Matthew Crain, & Joan Donovan, *Data & Society, Weaponizing the Digital Influence Machine: The Political Perils of Online Ad Tech* (2018), https://datasociety.net/wp-content/uploads/2018/10/DS_Digital_Influence_Machine.pdf (describing how the use of targeted ads drives the platform dynamics that lead to weaponized misinformation, fake news, and hate speech by creating a “digital influence machine” out of online platforms).

⁵⁵ See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, *Harvard L R* (2018) (describing Facebook's behind-the-scenes algorithms and rules for content moderation); Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, *Yale L J* (2020), 2427-48 (describing the gradual development of content moderation systems at Facebook).

⁵⁶ For examples of the early journalistic revelations about Facebook's then-secret systems of content moderation, see e.g., Julia Angwin, *Breaking the Black Box: What Facebook Knows About You*, *ProPublica* (Sept 2016); Angwin and Grassegger, *Facebook's secret censorship rules protect white men from hate speech but not Black children*, *ProPublica* (June 2017)

⁵⁷ Klonick, *The Facebook Oversight Board*, at 2418.

⁵⁸ Cites tk; see e.g. Siva Vaidhyanathan, <https://www.wired.com/story/facebook-and-the-foolly-of-self-regulation/>

⁵⁹ Jonathan Zittrain, *Engineering an Election*, 127 *Harv. L. Rev. F.* 335, at 336 (2013-14). See also Zittrain, at 340 (“If we can't trust the intermediaries who not only bring us our viral videos but our news, our daily cries, and our calls to action, we enter a territory of power that's unfamiliar and unfair”).

data they can compile, which in turn can be monetized in a range of ways, including but not limited to selling advertisements.⁶⁰ This business model means that information platforms are rewarded for content that keeps users engaged—and that means they are designed to promote virality, to offer users ever more extreme versions of the things they already like. As Siva Vaidhyanathan puts it, “the problem with Facebook is Facebook”.⁶¹

The dynamics of the underlying business model and platform design in turn point to the wider issue: the challenge of online information platforms is not really about individual users, or individual instances of content; rather it is about the structure and design of the platform itself that shapes the dynamics of how speech and information flow on the platform.⁶²

Structural solutions to the problems of misinformation, disinformation, and radicalization online thus target the underlying design and structure of these information platforms, rather than seeking to remedy specific instances of problematic conduct or content. There are a range of proposed solutions that have this feature. Some scholars have suggested information platforms be subjected to antitrust-inspired measures that break up and regulate the platforms in various ways, for example separating the information platform of Facebook from the business of designing and selling apps or ads,⁶³ imposing public utility-style common carriage, privacy, and nondiscrimination measures that limit the ways in which platforms can collect and deploy the data they gather,⁶⁴ or a data tax that radically shifts incentives away from mass data surveillance and collection.⁶⁵ These structural remedies are familiar strategies for assuring the safety and soundness of communications infrastructure, going back to the nineteenth century policy debates over the emergence of the telegraph to the creation of the Federal Communications Commission itself.⁶⁶

⁶⁰ Zeynep Tufekci, It’s the (Democracy-Poisoning) Golden Age of Free Speech, WIRED, <https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/>; Tim Wu, Blind Spot: The Attention Economy and the Law, 82 ANTITRUST L.J. (2018); Dina Srinivasan, The Antitrust Case Against Facebook, Berkeley Business Law Journal (2019)

⁶¹ Siva Vaidhyanathan The Problem with Facebook is Facebook, Logic Mag. (Aug. 1, 2018) <https://logicmag.io/failure/siva-vaidhyanathan-on-antisocial-media>; See also Siva Vaidhyanathan, Antisocial Media: How Facebook Disconnects Us and Undermines Democracy (2018); Zeynep Tufekci, *Russian Meddling is a Symptom, not the Disease*, N.Y. Times (Oct. 3, 2018) (<https://www.nytimes.com/2018/10/03/opinion/midterms-facebook-foreign-meddling.html>). [Add additional cites here – Julie Cohen; Frank Pasquale; Zephyr Teachout; Lina Khan; etc]

⁶² Jack Balkin’s extensive work on online information and speech systems emphasizes the role that platform design plays in shaping our contemporary public sphere. See e.g., Jack M. Balkin, Free Speech in an Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation, UC Davis L R (2018); Balkin, Free Speech is a Triangle, Columbia LR 2019

⁶³ Lina Khan, The Separation of Platforms and Commerce, Columbia LR (2019), 1001-04

⁶⁴ See e.g. Rahman, The New Utilities, Cardozo L R 2018; Zephyr Teachout and K. Sabeel Rahman, From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure, Knight First Amendment Institute, February 2020.

⁶⁵ See e.g. Timothy Karr & Craig Aaron, Free Press, Beyond Fixing Facebook (Feb. 2019), https://www.freepress.net/sites/default/files/2019-02/Beyond-Fixing-Facebook-Final_0.pdf; Teachout and Rahman, From Private Bads to Public Goods

⁶⁶ See e.g., Richard John, Network Nation

While these various structural proposals are each distinct from one another and while there might well be intramural disagreements about which proposals are best suited to remedy the problem of online misinformation, disinformation, and radicalization, for our present purposes it is telling that these various proposals share a common set of underlying assumptions that mark them as structuralist strategies for addressing the problem. First, all of these various proposals target the underlying structure of the information platform, its business model, and its foundational capacities and powers, rather than focusing on individualized conduct or pieces of content. Second, these measures are all willing to countenance a greater degree of loss of functionality and hit to platform profits in service to the public benefits that such stricter regulations would generate. And third, these proposals all share a view that implementing these prophylactic, structural solutions are as doable if not more so than the Herculean task of managing the torrent of problematic content on these platforms. Crucially, these proposals focusing on the underlying business model and platform structures also bypass First Amendment concerns: even if government may not be able to directly regulate content and speech, public utility-style policies like common carriage and restraints on market power are familiar and established principles of governance.⁶⁷ Indeed, First Amendment concerns have been a barrier to imagining more direct regulatory interventions on information platforms, and a preference for private orderings in the “marketplace of ideas”; by contrast structural shifts to the design of these information markets and systems themselves offer an alternative way forward.⁶⁸

The distinction between structural and non-structural approaches is also helpful in clarifying the stakes and terms of some parallel policy debates in this arena. Take for example the question of privacy. Often the problem of data surveillance online is framed in terms of privacy violations, and some of the most high-profile regulatory strategies on the platforms, like the European Union’s General Data Protection Regulation (GDPR) has emphasized the privacy of users. But the privacy harms for individual users often seem modest, even infinitesimal compared to the larger systemic patterns that data-mining enables. A specific user may not experience individualized harm necessarily by the data collected behind the scenes from their use of the platform. But in the aggregate that data collection enables the systemic dangers noted above. Similarly, privacy as a policy solution might be understood in structural terms, as a design limit that fundamentally alters the technological and monetization capacities of the platform, rather than an effort to remedy individual users’ potential harms.⁶⁹ A regime like GDPR, while in a

⁶⁷ Crawford, at 2387. See also Frank Pasquale, Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power, University of Maryland Francis King Carey School of Law Legal Studies Research Paper No. 2016-24.

⁶⁸ While it is outside the scope of this paper, this broader notion of structuralist approaches to concerns about information and speech represents a deeper tradition in the regulation and structuring of speech infrastructure, from the history of common carriage, to the creation of the FCC, to contemporary debates about platforms. See for example, Richard John, *Network Nation* (describing the history of structural, anti-monopoly concepts in regulating information and media markets).

⁶⁹ See e.g. Woodrow Hartzog, *Privacy’s Blueprint* (reframing privacy as a matter of structural design limits and restraints on information platforms, rather than as an individualized right); Omri Ben-Shahar, *Data Pollution* (2018), at 16-31 (analogizing the problem of data surveillance and monetization to the social harms of environmental pollution, rather than individualized impacts on users).

sense focused on individuals' privacy harms, could if fully implemented, force a dramatic shift to platform structures and incentives.

The distinction between structural and nonstructural approaches also lies beneath the recent debate over the proposal to impose a fiduciary standard on information platforms like Facebook or Google / YouTube. As Jack Balkin has argued, information platforms collect sensitive information from their users, placing them in a fiduciary relationship with users akin to the relationships between doctors and patients or lawyers and their clients. Recognizing this relationship and imposing fiduciary obligations on platforms would, for Balkin, subject platforms to duties of care that would induce less troubling dynamics of the platforms themselves, without running afoul of potential First Amendment limits to government regulation of online speech.⁷⁰ But in a recent critique of this proposal, Lina Khan and David Pozen warn that a fiduciary standard will fail to address the underlying problems posed by information platforms.⁷¹ For Khan and Pozen, the root problem of platforms lies in the business model that fundamentally incentivizes platforms to collect data, monetize it, and to design algorithms that promote greater user engagement with the platform—goals that necessarily are in conflict with the fiduciary duties proposed by Balkin.⁷² “Many of the broader harms associated with these platforms,” write Khan and Pozen, “are magnified or made possible by a behavioral-advertising-based business model coupled with outsized market share.”⁷³ Structural solutions are needed to “reshape business incentives through bright-line prohibitions on specific modes of earning revenue,” and policies that “reshape markets by creating conditions for greater competition and consumer autonomy.”⁷⁴ The problem with the fiduciary proposal, in their view, is really a conceptual one—the fiduciary frame “conceives of systemic problems in relational terms”⁷⁵—which in turn leads to an avoidance of proposals that would remake those underlying systems themselves. Crucially, Khan and Pozen do not disagree with the need to improve consumer privacy—but they see this goal as better achieved through structural means.⁷⁶ Indeed, arguably fiduciary standards and structural remedies are not incompatible,⁷⁷ but the two strategies for regulation do operate in vastly different ways. If we start from a position that the problem posed by Facebook and information platforms is a structural one, then we can have a more straightforward debate about what policy designs are best suited to

⁷⁰ See e.g. Jack Balkin, *Information Fiduciaries and the First Amendment*, UC Davis LR (2016) at 1186 (“Because of their special power over others and their special relationships to others, information fiduciaries have special duties to act in ways that do not harm the interests of the people whose information they collect, analyze, use, sell, and distribute. These duties place them in a different position from other businesses and people who obtain and use digital information”)

⁷¹ Khan and Pozen, *A Skeptical View of Information Fiduciaries*, Harvard Law Review (2019)

⁷² See Khan and Pozen, 511-12.

⁷³ Khan and Pozen, at 527.

⁷⁴ Khan and Pozen, at 539

⁷⁵ Khan and Pozen, at 535.

⁷⁶ See Khan and Pozen at 528 (“limiting the dominance of some of these firms may well have salutary effects on consumer privacy, both by facilitating competition on privacy protection and by reducing the likelihood that any single data-security failure will cascade into much wider harm”.)

⁷⁷ Balkin himself has suggested as much in more recent work that engages with the renewed interest in antitrust measures on tech platforms. Cite TK.

address that structural root. But insofar as this debate is marked by differing regulatory logics in the first place, it becomes harder to overcome that initial impasse.

B. Structuralism and the problem of systemic financial risk

Since the financial crisis of 2008, debates over how to regulate “too-big-to-fail” financial firms and to mitigate the “systemic risk” of financial sector collapse are another arena where structuralist strategies have come to the forefront.

One of the central shifts in financial regulation following the 2008 crash involved a move away from a focus on the safety and soundness of individual financial entities, to a focus on more systemic “macroprudential” concerns about how the financial sector as a whole might be vulnerable to runs, shocks, and instabilities.⁷⁸ Post-crisis legal scholarship and policymakers alike devoted increasing attention to the ways in which nonbank entities like mutual funds and insurance firms could produce the same kinds of instabilities and risks of collapse as cash depositories, and how sophisticated techniques of financial innovation and securitization could magnify, rather than mitigate risks.⁷⁹ These empirical studies represent a conceptual shift, away from a focus on conduct of individual financiers or firms, towards a more holistic assessment of the financial sector as a system.⁸⁰

This conceptual shift in turn demands a wider range of structural solutions targeting the system as a whole.⁸¹ In 2010, some proposals sought to structurally limit the size of too-big-to-fail financial firms, breaking up these concentrations of financial might.⁸² The “Volcker Rule”, a provision banning banks from engaging in proprietary trading, is another example of a structural policy. The rule, as originally proposed during the 2010 debates over financial regulation consisted of two parts: an absolute size limitation on financial firms to less than ten percent of market share in loans or deposits, plus a ban on proprietary trading that supporters saw as a way to reformulate and modernize the New Deal era Glass-Steagall provision separating commercial and investment banking.⁸³ Even the less stringent version as

⁷⁸ See e.g., Ben S. Bernanke, *Implementing a Macroprudential Approach to Supervision and Regulation* (May 5, 2011), <https://www.federalreserve.gov/newsevents/speech/bernanke20110505a.htm>

⁷⁹ See e.g., Adam Levitin, *In Defense of Bailouts*, 99 *Georgetown Law Journal* 435 (2011), 454 (“The linkage of nonfinancial firms with financial markets underscores the fuzzy nature of what constitutes a ‘financial firm’”).

⁸⁰ See e.g., Steven Schwarcz, *Systemic Risk*, 97 *Georgetown L. J.* 193 (2008) (defining systemic risk as a distinctive form of financial risk).

⁸¹ See e.g. Dan Awrey and Kathryn Judge, *Why Financial Regulation Keeps Falling Short*, ECGI Working Paper 494, 2020, at 40 (noting that macroprudential goals require newer, more robust tools of financial regulation to grapple with the endemic complexity and instabilities of financial markets).

⁸² See e.g., Macey and Holdcroft, *Failure is an Option*, *Yale LJ* 2011. In Congress, Senator Sherrod Brown’s Safe Accountable Fair and Efficient (SAFE) Banking Act proposed a strict limit to the size of big banks to \$1.3 trillion in total liabilities, but was defeated in the Senate during the Dodd-Frank negotiations

⁸³ Macey and Holdcroft, Jr., “Failure Is an Option,” at 1397.

implemented by the Federal Reserve (until its rollback in January 2020)⁸⁴ fundamentally altered the incentives driving the business models and organizational cultures of banks themselves.⁸⁵

Historically, much of financial regulation can be understood as attempts to impose similar structural restrictions on banks as a way to prophylactically limit activities to ensure financial stability. The 1933 Banking Act, including the Glass-Steagall Act separating commercial and investment banking, placed strict limits on the business model designs for depositories and banks. The Bank Holding Company Act of 1956 was similarly designed as a kind of anti-monopoly policy, preventing the concentration of economic and financial power among banks by restructuring bank holding company activities and capacities.⁸⁶ Similarly, Regulation Q limited interest rates that banks can pay depositors—all of these provisions effectively compartmentalized the economic activities of different financial firms,⁸⁷ ensured public obligations of stability and access were met, and made “postwar commercial banking became similar to a regulated utility, enjoying moderate profits with little risk and low competition.”⁸⁸ This system of “boring banking”—a system that lacked the complex array of wildly profitable and risky securities that marked the pre-2008 crisis economy—proved more than adequate to facilitate postwar economic growth and relatively high incomes for workers in the financial sector.⁸⁹ Indeed, it is notable that the dismantling of these structural limits in the 1980s and 1990s unleashed new forms of financial innovation, activity, and business models that created new forms of risk, eventually culminating in the 2008 financial crisis.⁹⁰

Notably, these structural provisions represent a different regulatory strategy than one emphasizing case-by-case and firm-by-firm efforts aimed at instilling greater compliance mechanisms within firms themselves.⁹¹ These approaches reflect the different assumptions that undergird structuralist strategies.

First, the focus is on system and structure, rather than individual actors or instances of conduct—the strategy is that by reshaping the larger market context, the incentives, and the conditions ‘upstream’ from individual conduct, we can prevent (or at least lower the incidence of) risky actions.

⁸⁴ <https://www.washingtonpost.com/business/2020/01/30/volcker-rule-fed/>

⁸⁵ See John Coates, *The Volcker Rule as Structural Law*, ECGI Working Paper Series (2015)

⁸⁶ See Omarova, *Merchants of Wall Street*, 276-77; Note, the Bank Holding Company Act of 1956, 9 Stan. L. Rev. 333 (1957).

⁸⁷ Greta Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (Harvard University Press, 2011), at 61

⁸⁸ Simon Johnson and James Kwak, *13 Bankers: The Wall Street Takeover and the Next Financial Meltdown* (New York: Vintage, 2011), at 35.

⁸⁹ Johnson and Kwak, *13 Bankers*, at 61-4.

⁹⁰ See e.g. Omarova, *Merchants of Wall Street* at 265 (noting that unleashing Bank Holding Companies and Financial Holding Companies in the Gramm-Leach-Bliley Act “effectively nullified the foundational principle of separation of banking from commerce,” creating new forms of systemic risk.

⁹¹ See Don Langevoort, *Cultures of Compliance*, 2017 (noting that due to lax enforcement many firms under-invest in compliance mechanisms below the level that might be preferred for social optimum)

Second, these approaches reflect a different view of the costs and benefits of stricter restrictions on financial firms and financial products. Structuralist approaches reflect a more skeptical view of the social value of finance and a greater concern with the downside costs of meltdown.⁹² These policies all involve a willingness to forego some forms of financial innovation and profits as being on net less valuable for society at large, creating an unacceptably high risk of catastrophic financial panic, despite the short-term profits they might enable for financiers themselves.⁹³ As Simon Johnson and James Kwak argued, conventional financial regulations are premised on the notion that financial innovation “is inherently good, and regulators need only watch out for abnormal excesses or ‘bad apples.’” For Johnson and Kwak, regulations should instead presume that “innovation in financial products is costly—it increases transaction costs, the cost of effective oversight, and the risk of unanticipated consequences—and should have to justify itself against those costs.”⁹⁴ The flip side of this shift is a greater solicitude or awareness of the critical *public* functions of finance that need to be protected—even at the cost of undercutting some profit sources. If banking is at its heart about providing credit and liquidity through the franchising out of the state’s full faith and credit, and the provision of safe assets upon which financial stability and activity depend, then it is more important to secure those public uses—that underlying infrastructure—than it is to enable new forms of profit and financial engineering.⁹⁵

Third, these approaches reflect a different view of regulatory efficacy and administrability. For Morgan Ricks, structural limits on money-like products and financial firms is a way of making financial regulation simpler. As Ricks writes:

Arguably, we have been making financial stability policy much more complicated than it needs to be. Panics are an age-old problem. They are not about cutting-edge developments in modern finance. Short-term debt is primitive, not complex. The upshot is that panic-proofing does not entail the extension of regulatory oversight or control over the outer reaches of modern finance. Nor does it entail taking aim at nebulous

⁹² Hilary Allen, A New Philosophy for Financial Stability Regulation, 45 Loyola University of Chicago Law Journal 173 (2013) (proposing application of precautionary principle to financial regulation)

⁹³ The literature critiquing this presumption that financialization and financial innovation is good for the economy has grown significantly in the last decade. See e.g., Benjamin Friedman, *Is Our Financial System Serving Us Well?*, DAEDALUS 9 (2010); Krippner *Capitalizing on Crisis* (2011); Rana Foroohar, *Makers and Takers: The Rise of Finance and the Fall of American Business* (2016); James Kwak and Simon Johnson, *Is Financial Innovation Good for the Economy*, NBER 2012; Johnson and Kwak, *Finance: Before the Next Meltdown*, Democracy Journal (2009). These studies variously emphasize the dangers of how financial innovation increases risk, complexity, likelihood of financial collapse, and misallocation of human capital and economic resources in the financial sector rather than the “real” economy.

⁹⁴ Johnson and Kwak, *Finance: Before the Next Meltdown*.

⁹⁵ See Hockett and Omarova, *The Finance Franchise*; Gelpern and Gerding, *Safe Assets*; White, *Banks as Utilities*, 90 Tulane L. Rev. at 1241 (“the key point for banking law is that we must first describe and agree on the social goals that banks, as utilities should serve”); Levitin, *In Defense of Bailouts*, 99 Georgetown L. J. 435 at 451 (2011); Levitin, *Safe Banking*.

enemies like ‘systemic risk’ or ‘excessive risk-taking.’ It is not clear that these are even meaningful concepts—much less that they can provide a sound basis for policy.⁹⁶

Indeed, financial regulation scholars have noted how financial firms can at times deploy complexity and innovation strategically as a way to develop new products, extract new rents from myopic consumers.⁹⁷ Complex financial markets and products can also create unanticipated complexities, feedback loops, and risks, all beyond the scope of regulatory oversight. It is this “pervasive, acute, and often deeply entrenched asymmetries of information and expertise within modern financial markets” that constantly leaves regulators behind the curve.⁹⁸ Structuralist regulation would limit *ex ante* the size or scope of activities permitted to firms, for example by breaking up the large financial institutions, or through limited purpose banking restraints that would reduce complexity and focus on preserving the core social function of financial intermediation—and make the financial system more amenable to effective regulatory oversight.⁹⁹

C. The anti-monopoly revival as a structuralist turn

Both the platforms and financial regulation debates are manifestations of a broader shift in policy thought: the growing and renewed interest in antitrust and anti-monopoly regulatory approaches.¹⁰⁰ For these scholars antitrust law encompasses a broad toolkit of regulatory strategies to deal with concentrated corporate power and market dominance in sectors ranging from agriculture to pharmaceuticals to ‘big tech’ firms to finance. The toolkit involves not just the familiar strategies of limiting mergers and breaking up large firms, but also ‘functional’ separations, public utility regulations, and more. While there many design questions and intramural debates among these different tools and which tools apply best to which sectors, what this antitrust revival shares is an underlying orientation towards structuralist solutions.

First, these antitrust scholars generally offer an empirical analysis of contemporary markets that shift the focus away from individual firm conduct to the linkages between conduct of firms and the larger structure of the market, its relative concentration, and the ways in which the market setting enables or incentivizes problematic firm behavior.¹⁰¹ While some critics have framed this renewed interest as naïve, it is very much rooted in empirical assessments of the

⁹⁶ Morgan Ricks, “A Simpler Approach to Financial Reform,” *Regulation* (Winter 2013-2014), 36-41, at 41.

⁹⁷ Dan Awrey, Complexity, Innovation, and the Regulation of Modern Financial Markets,” 2 *Harvard Business Law Review*, 236 (2012), at 259-67.

⁹⁸ Awrey, 277. It should be noted that while Awrey identifies correctly the fundamental disadvantages that financial innovation and complexity create for regulators, his solution is to enhance the informational knowledge of regulators themselves, following in the footsteps of Dodd-Frank and New Deal managerialism. But as I suggest in this section, a better (perhaps complementary) strategy is to shift to a structuralist regulatory logic that takes these limitations on the part of agencies as a starting point.

⁹⁹ See Weber, “Structural Regulation as an Antidote to Complexity Capture,” 706-7.

¹⁰⁰ See e.g., Zephyr Teachout; Lina Khan; Tim Wu; Sandeep Vaheesan; others tk. For an overview of the antitrust revival, see Lina Khan, *The End of Antitrust History Revisited*, Harvard L R (2020)

¹⁰¹ See e.g. Khan, *Amazon’s Antitrust Paradox*.

current state of particular markets and sectors, which in turn motivates a return to structural solutions like breakup or common carriage obligations.¹⁰²

Second, these antitrust proposals reflect a reassessment of conventional views of the costs and benefits of structural solutions like breakup. Since the 1970s, antitrust enforcement came under fire, as breakups were viewed as net harmful for the economy, and the goals of antitrust shifted to emphasize consumer welfare as the dominant focal point. But as more recent studies suggest, the fears of the costs of breakup may be overstated—and the assessment of the social and economic benefits of market concentration also overstated in ways that tip the scales back in favor of structural solutions.¹⁰³

Finally, the new antitrust moment also reflects a different assessment of administrative capacities. As Rory Van Loo suggests in a recent paper, breakups are, despite their conventional image, administrable and effective, and where there are challenging details to be worked out, those particulars are no more difficult to manage than many familiar thorny problems in complex regulatory policy.¹⁰⁴ Nonstructural alternatives, meanwhile, are more complex in practice than these critiques suggest.¹⁰⁵

III. Applications and Implications

The examples of structuralist policymaking in Part II above are illustrative of a broader pattern of structuralist policymaking and structuralist regulatory strategy. The underlying assumptions—focusing on structure and system as the target of regulation rather than individual instances of conduct; the reassessing of costs and benefits of these interventions, especially to prevent especially problematic risks or outcomes; and the reimagining of administrability and efficacy questions—can shape how we approach a range of other policy debates as well. This Part identifies some examples of how this approach to conceptualizing policymaking might apply in other cases, as well as some general implications of structuralist approaches.

A. Structuralism: other potential applications

The distinction between structuralist and non-structuralist regulatory logics helps explain and inform a range of other policy debates beyond the ones profiled in Part II above.

¹⁰² Khan, Separation of Platforms and Commerce, 981-83

¹⁰³ Khan, End of Antitrust History, 1667-76; Rory Van Loo, In Defense of Breakups, Cornell L R (2020)

¹⁰⁴ Van Loo, In Defense of Breakups.

¹⁰⁵ See e.g., Spencer Weber Waller, Access and Information Remedies in High-Tech Antitrust, 8 J. Comp. L. & Econ. 575 (2012)

As suggested in the Introduction, one way to read the debates over criminal justice reform and policing reform right now is in terms of this same distinction between structural and nonstructural logics. There are a range of proposals for combating the problem of police brutality and police violence, particularly as it affects Black and brown communities in the United States. Many of these proposals revolve around attempts to improve police officer conduct: through anti-bias training, changes to use-of-force principles, body cameras to provide ex post accountability and surveillance of police officer conduct, and the like. But for abolitionists and racial justice movements, these proposals have largely been met with skepticism. For these movement activists, the problem of police violence is endemic to a system of policing where racial bias and where the ethic of violent disciplining of communities of color is baked in so deeply that these kinds of conduct-focused measures will not be sufficient to address the problem of police violence. Alternative proposals of abolition, “defunding the police” or “invest-divest” rest on a different logic: that the problem of police violence can be better addressed by intervening upstream from individual instances of police conduct, and instead redirecting resources away from police departments, into alternative institutions focused on community stability and security. This shift is animated by the structuralist presumptions explored above. First, there is an empirical and causal claim about the systemic origins of police violence. Second, there is a different assessment of the social value of current policing institutions as net-negative, and worth restructuring rather than preserving. Third, there is an implicit view about administrability: the resources and level of information and efficacy needed for technocratic solutions to have impact reflect an overly-rosy view of what training or body cameras can accomplish; by contrast the simple redirecting of public funds would create such a sea change in the nature of public authority that it is in many ways more efficacious an intervention.

Or take antidiscrimination law as another example. From employment to housing, legal scholars have suggested a range of structural solutions to endemic problems of discrimination in employment and housing contexts, as a way to remedy the deeper root drivers of discrimination and move beyond individualized, case-by-case modes of enforcement. In the employment context, for example, Susan Sturm has suggested that the problem of systemic biases requires a move beyond individualized enforcement measures to “structural” ones that seek to alter the underlying culture and organizational structure of firms, in particular by embedding systems within firms to monitor and respond to transgressions, and affirmatively prevent more subtle forms of bias in the workplace.¹⁰⁶ On this approach, employers could be held liable for institutional practices and systems that conduce to instances of discrimination.¹⁰⁷ Sam Bagenstos has similarly argued for more systemic approaches to antidiscrimination laws, such as the reasonable accommodation standard established in the Americans with Disabilities Act as offering a way to affirmatively promote systemic inclusion and combat patterns of

¹⁰⁶ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006).s

¹⁰⁷ Samuel L. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006)

subordination.¹⁰⁸ In the housing context, Olati Johnson has argued for a move away from private enforcement of individual claims to instead using affirmative “equality directives” that through administrative measures like the “Affirmatively Furthering Fair Housing” rule, prods local governments to pro-actively design different approaches to zoning, housing policy, and urban infrastructure to promote desegregation.¹⁰⁹

These approaches to antidiscrimination share a few common features that echo the structuralist moves identified above. They all shift focus from individualized instances or conduct to underlying firm or geographic systems, designing regulatory interventions to alter those background systems as a way of changing the incidences and patterns of discrimination. Second, these alternative approaches reflect a very different set of presumptions, a greater willingness to exert more dramatic costs and changes on private ordering, in service of public values of non-discrimination. And third, they reflect a boldness and faith in regulatory capacity to induce these changes to the system—and in some ways also reflect a humility, a realization that individualized private enforcement is unlikely to diagnose and respond to the number of instances of problems that will arise.

B. Conceptual implications of structuralist approaches

Stepping back from particular applications of structuralist approaches, there are a number of broader implications of deploying structuralist strategies that are worth naming explicitly.

First, structuralism as a way of thinking about public policy operates in some ways as a flipping of presumptions, from a default orientation to market and private ordering in which policy interventions are to be judicious, minimalist, and face higher burdens of justification, to a focus on public goals and needs, where the presumption operates in favor of state action designed to constitute the terrain of economic or social activity.

Consider for example proposals for regulating financial activities and money-like products along the lines proposed by Ricks. As Ricks suggests, a range of modern financial firms create money-like financial instruments, from money market mutual funds to repo markets. These activities, to Ricks, should be regulated strictly in ways analogous to the strict restrictions imposed on cash depositories.¹¹⁰ Money, for Ricks, is a kind of economic infrastructure that should be subjected to public utility style regulations on market entry, rate regulations, and obligations to serve all comers.¹¹¹ This infrastructural approach is rooted in a conceptual shift: “rather than seeing bank money creation as a legitimate private activity that is regulated, it sees money

¹⁰⁸ Samuel Bagenstos, “Rational Discrimination,” Accommodation, and the Politics of (Disability) Civil Rights, 89 Va. L. Rev. 825 (2003).

¹⁰⁹ See Olatunde Johnson, Beyond the Private Attorney General; Johnson, Equality Directives; Johnson, The Last Plank: Rethinking Public and Private Power To Advance Fair Housing, 13 U. PA. J. CONST. L. 1191 (2011)

¹¹⁰ Morgan Ricks, The Money Problem (2016).

¹¹¹ Ricks, Money as Infrastructure,” Columbia Business LR (2018)

creation as an intrinsically public activity that is outsourced.”¹¹² By shifting the “institutional baseline” to “public provisioning,” this alters in a fundamental way how risks and costs are assessed. Ricks’ example is indicative of a common feature across applications of structuralist policymaking. Other structural-oriented financial regulation proposals share a similar burden-shifting quality. Yesha Yadav has proposed stricter liability on exchanges for failing to prevent instances of fraud, for example, placing the burden on the exchanges, not on regulators, to be pro-active.¹¹³ Saule Omarova proposes a financial product approval process, which would place the burden of justification and safety design on firms, not on regulators.¹¹⁴

These examples show a shifting of baseline presumptions away from markets and private ordering as a default. This in turn places structuralist regulation in the company of policy strategies and concepts that may be of particular value in overcoming market fundamentalist and market-oriented presumptions that for many scholars and critics have characterized the last few decades of “neoliberal” and market-oriented policy imagination.¹¹⁵ Like the precautionary principle, this burden-shifting can also manifest in the other direction, as a greater willingness to deploy strict regulatory restrictions in the face of uncertainty, rather than requiring a greater burden of proof for regulators seeking to intervene.¹¹⁶

Second, this flipping of the baseline is partly a result of an empirical and sociological understanding. Structural regulation depends partially on analysis that can diagnose the “upstream” causes and identifying levers to change the background socioeconomic conditions that would lower the incidence of problematic conduct “downstream.” The idea that breakups could prevent problematic conduct by market dominant actors turns in part on new empirical findings about how firms have achieved concentration and how that shapes their business models and day-to-day practices. Similarly, the turn to structuralist financial regulations rests on the causal and empirical analyses that identified the structural dimensions of the 2008 financial collapse.

This idea of “upstream” causes is not without controversies of its own. There are likely to be significant empirical, causal, and sociological disagreements about whether and which structural features lie at the “root” of the goods or practices that regulation targets. In the financial regulation or antitrust contexts, empirical study has been key to highlighting the underlying features of market structure that conduces to problematic conduct or systemic risks. In the antidiscrimination context, we could understand familiar legal concepts like disparate impact as offering legal justification for shifting from a focus on individualized intent or proof of harm to longer causal chains less tethered to discrete individual actors.¹¹⁷ We may disagree about these causal claims in ways that make aligning on structural solutions difficult. But it is also worth distinguishing where there are genuine factual or causal disagreements about *which*

¹¹² Ricks, *Money as Infrastructure*, 765-6.

¹¹³ Yesha Yadav, *Oversight Failures in Securities Markets*, 104 *Cornell L Rev* 1799 (2019), at 1861-65.

¹¹⁴ Omarova, *License to Deal: Mandatory Approval of Complex Financial Products*, 90 *Wash. U. L. Rev.* 62 (2012)

¹¹⁵ See e.g., Britton-Purdy and Grewal, *Neoliberalism*

¹¹⁶ See Sunstein, *Beyond the Precautionary Principle* at 1014; Wiener, *Precaution in a Multirisk World*, 1513-16.

¹¹⁷ See Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 *B.U. L. REV.* 1359 (2017)

structural causes are central, from instances where instead we have an anti-structural skepticism of regulatory intervention as noted in Part I above.

Third, it is worth noting that structuralist interventions themselves can operate at different levels. For some scholars who have explicitly employed structuralist frames in their work, the structural turn is about shifting the organizational culture and norms within a firm, as a way of institutionalizing more systemic changes in conduct rather than focusing on individual transgressions. Coates frames the Volcker rule in this way.¹¹⁸ As noted earlier, Sturm similarly defines “structural” approaches to anti-discrimination as a way to shift the culture of the workplace itself to prevent or blunt more hidden and implicit forms of bias.¹¹⁹ Similarly, some corporate law and financial regulation scholars emphasize compliance culture.¹²⁰ Other structuralist interventions operate even further upstream from the culture of the firm: antitrust concepts or limits on financial firm size or GDPR-style restrictions on the use of data in Facebook’s business model for example alter the very nature of the market and system in which these firms operate, above and beyond any impact on firm cultures of compliance.

This suggests a fourth implication: while this paper has largely treated ‘structural’ interventions as distinct from non-structural ones, one could imagine circumstances where structural and non-structural solutions might coexist and even complement one another. Some structuralist strategies might operate by targeting specific firms in ways designed to induce a broader change in business models, practices, and conduct in the sector more broadly.

In the financial regulation context, one way to read the impact of the FSOC’s power to designate firms as ‘systemically risky’ is as a highly costly threat that forces firms to alter their business models and cultures to avoid running afoul of the designation authority—what some scholars have called “regulation by threat”.¹²¹ Although this intervention in a sense targets individual firms, it does so in a way that induces wider shifts in the sector writ large. Similarly, Rory Van Loo has highlighted the role of “gatekeeper” firms who themselves can be deputized as enforcers and regulators of whole sectors, by well-designed regulatory interventions that leverage the oversight and systemic power of key firms like platforms or infrastructural firms like banks.¹²² In the policing context, we might consider the revocation of qualified immunity in a similar light: while this shift would operate by imposing costs on individual state actors, it could shift incentives so dramatically as to induce a wider shift in policing culture and practice.

¹¹⁸ Coates, Volcker Rule

¹¹⁹ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006).

¹²⁰ Langevoort, Cultures of Compliance.

¹²¹ See e.g., Schwarz and Awrey, Regulation by Threat

¹²² Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467 (describing regulatory strategies that mandate regulated entities to themselves serve as enforcers of public-serving rules)

C. Institutionalizing structural policies

A structuralist lens on regulation and public policy raises a number of further implications for the structure of policymaking bodies themselves.

First, structuralism can apply just as readily in context of legislation as it can in context of administrative policymaking. This paper has used the term “regulation” loosely, at times referring to statutory interventions, at other points highlighting administrative rules. The point is that when we look at the underlying *strategy* informing a policy intervention, we can see important differences in how policymakers conceptualize the problem and their tools that shapes the content of those policy interventions—independent of the institutional setting through which the policy is implemented.

Second, insofar as structural regulations do involve administrative actions, it is likely that some of our prevailing conceptions about regulatory policymaking will also have to shift to better align with these strategies. In particular, as scholars in the financial regulation arena have noted, structuralist approaches to financial regulation seem to require a more expansive view of conventional understandings of cost-benefit analysis. When rules are themselves *constitutive* of markets, and upstream of individual firm or entity actions, any cost-benefit analysis is likely to be highly speculative—and easily misapplied. In this context, cost-benefit requirements whether doctrinal (as in the case of arbitrary and capricious review) or administrative could be misapplied, or even weaponized by industry to oppose structural solutions.¹²³

Third, structuralist regulations will still require administrative agencies to be implemented and enforced—and this type of regulatory strategy might require different types of agency structures, capacities, or designs. The implementation and then quick dismantling of structural financial regulations like the Volcker Rule and the systemic risk designations by the Financial Stability Oversight Council for example suggests that precisely because of their significant impacts on industry, structuralist rules might be more likely to generate tougher pushback and lobbying from industry—which in turn suggests the need for greater attention to agency designs that prevent capture, empower other stakeholder groups, and promote democratic accountability.¹²⁴ Structuralist anti-discrimination law, as Bagenstos notes, depends on alert, active, and engaged enforcement agencies to get off the ground.¹²⁵ In the tech platforms and big data debate, some scholars have proposed various administrative law mechanisms to promote greater regulation, from review boards to disparate impact statements to the creation

¹²³ On a broader critique of cost-benefit analysis in financial regulation, see e.g. Coates, Volcker Rule; Coates, Cost Benefit Analysis of Financial Regulation: Case Studies and Implications, Yale LJ 2014; Jeffrey Gordon, The Empty Call for Benefit-Cost Analysis in Financial Regulation, Journal of Legal Studies 2014;

¹²⁴ See e.g. Spencer Weber Waller, Antitrust and Democracy (2019); Carpenter and Moss, eds., Preventing Regulatory Capture; Rahman, Democracy Against Domination CITE TK; Rahman and Russon Gilman, Civic Power, CITE TK.

¹²⁵ See e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006), pincite TK

of dedicated regulatory bodies focused on the problems of big data.¹²⁶ The efficacy of these administrative structures, however, depend on the degree to which they are deployed in service of more structurally transformative policies.

IV. Conclusion: Structuralism and the inequality crisis

Across a range of debates in economic policy, racial justice, and public law, we see a renewed interest among scholars and policymakers in what this paper has called “structuralist” policymaking strategies. Structural strategies are animated by three underlying conceptual shifts: first a focus on the structure and system as the target of regulation rather than individualized conduct or entities; second, a reassessment of costs and benefits that favors more prophylactic and “upstream” interventions; and third, a reassessment of the relative administrability and efficacy of structural approaches in contrast with more conventional regulatory models such as direct conduct supervision or disclosure regimes.

This focus on structuralist strategies arises particularly in context of the broader current crisis of economic, social, and political inequality affecting American democracy. The renewed interest in more structural, transformative, and durable policy interventions in these different policy domains from finance to tech to antitrust to racial justice reflects in part a broader political moment of deeper concern in and attention to structural inequities. In recent years, the problem of economic inequality has taken center stage in law and policy discussions, and in the last few years we have also seen a greater public attention to questions of racial justice and structural questions of power.¹²⁷ Structural regulations seem especially critical for overcoming deeply entrenched inequities of wealth, power, influence, and control over the economic and social realities of American democracy. The urgency of these inequities is reflected in the surge of social movement organizing in recent years, and it is telling that many of these movements for economic and racial justice themselves deploy a specifically structural language and frame for diagnosing the root causes of inequality and in the solutions they are offering.¹²⁸ The stakes of this structuralist turn in policymaking strategy, then, is about more than simply rediscovering a different way to approach public policy; it is also fundamentally about developing the kind of policy language and a legal architecture needed to meet the urgent needs of egalitarian and democratic social change in this moment.

¹²⁶ See e.g., Ryan Calo, Response, Consumer Subject Review Boards: A Thought Experiment, 66 STAN. L. REV. ONLINE 97 (2013), <https://www.stanfordlawreview.org/online/privacy-and-big-data-consumer-subject-review-boards/>; Andrew D. Selbst, Disparate Impact in Big Data Policing, 52 GA. L. REV. 109 (2018); Solon Barocas & Andrew D. Selbst, Big Data’s Disparate Impact, 104 CAL. L. REV. 671 (2016); Frank A. Pasquale & Oren Bracha, Federal Search Commission? Access, Fairness, and Accountability in the Law of Search, 93 CORNELL L. REV. 1149 (2008).

¹²⁷ See e.g., Britton-Purdy, Grewal, Kapczynski, and Rahman, Building a Law and Political Economy Framework (2020).

¹²⁸ See e.g., Amna Akbar, Toward a Radical Imagination of Law, NYU L. R. (2018) (describing the structural, transformative policy imagination of grassroots social justice movements).