

Industrial Policy as Democratic Practice

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What's New About U.S. Industrial Policy?

- **Industrial policy never “went away” during the late twentieth century**
 - *Department of Energy National Laboratories, Manufacturing Extension Partnerships, Small Business Innovation Research (SBIR), etc.*
- **...what's more novel is (1) scale and (2) use of subsidy as regulatory tool:**
 - *Advance specific geopolitical objectives (e.g. domestic content rules), promote particular labor arrangements through prevailing wage and apprenticeship rules, greater attention to market structure*

What's Hard About the New U.S. Industrial Policy?

- **Challenge 1: The “Embedded Autonomy” Issue**
 - Government must have know-how about specific dynamics within sector it seeks to shape, but distance and authority to advance its own independent objectives.
- **Challenge 2: The Tension of Democratic Governance**
 - Government must have flexibility to design and implement sector-specific tools within a legal architecture that is responsive to a democratic will, through which sectoral goals will change iteratively.

The Familiar Regulatory Toolkit

- “Notice-and-comment” rulemaking
- Sub-regulatory guidance
- Adjudications
- Enforcement proceedings

The Industrial Policy Regulatory Toolkit

- Grants made from lump-sum appropriations
- Individually-negotiated loans, guarantees, and investments
- Procurement contracts
- “Other Transactions Authority”
- Priority and allocation orders

Procedural Ambiguities Are Implementation Challenges

- Industrial policy will necessarily raise issues of statutory interpretation
- But litigation is often improper forum for resolving questions of who should be awarded contract, whether a loan was too generous, etc.
- Interaction with aggressive Court eager to limit agency authority:
 - Agencies need to secure information from firms hampered by trade secrets law and “regulatory takings” doctrine
 - Potential for late judicial resolution and unpredictable remedies can deter firms from undertaking capital expenditures
 - Threat of judicial rollback limits agencies’ ability to respond to changing circumstances

Substantive Requirements of Democratic Administration

- **Public Power**

- Government information, knowledge, and control over sectoral targets of industrial policy

- **Countervailing Power**

- Organized capacity of structurally disadvantaged groups to exercise influence over both government and subsidy recipients

Public Power: The Continuum of Control

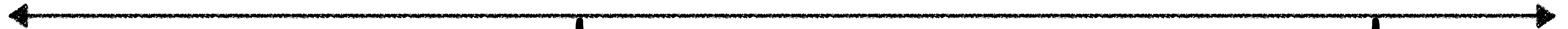
Government purchases undifferentiated commodities on open market

Purchases with conditionalities

Government has rights to outputs (e.g., Bayh-Dole)

Government sits in capital stack or has other ownership rights

Government produces good/service itself



Less Control

Variants on public investments:

More Control

- Contingent control of private firms (e.g., preferred stock vs. subordinated debt, bankruptcy rights, “golden shares”)
- Public corporations with different institutional designs
- March-in rights, profit limits

Countervailing Power: A Toolkit for Administrators

Tool	Function	Example
Administration		
Structured contestation	Identity-conscious requirements for appointments and advisory roles	<i>Federal Reserve Regional Banks, U.S. Railway Association, FLSA wage & hour boards</i>
Mobilization beachheads	Administrative sites where disempowered groups coalesce and strategize	<i>CFPB Office of Consumer Affairs, ITACs, SBREFA panels</i>
Operational empowerment	Formalized roles in program operation (e.g. community outreach)	<i>ACA navigators, contracting preferences</i>
Enforcement empowerment	Incentives to monitor industrial policy beneficiaries for program violations	<i>SEC whistleblower programs, Community Reinvestment Act review powers</i>
Production		
Empowering labor	Building power of workers to shape private ordering decisions by industrial policy	<i>Requiring project labor agreements, imposing labor standards by contract through market</i>
Empowering communities	Building power of communities to shape private ordering decisions by industrial policy	<i>Encouraging use of community benefits agreements</i>
Diffusion		
Power-shifting rules	Bright-line allocation rules that redistribute resources	<i>Justice40, Social Vulnerability Index</i>
Reliance on intermediaries	Using third parties to reach communities the federal government cannot	<i>EPA Greenhouse Gas Reduction Fund, state block grant conditions</i>
Supporting capacity-building	Giving underserved communities tools to make claims on resources	<i>Technical assistance grants</i>

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