ANTIDISCRIMINATION LAWS AND THE ADMINISTRATIVE STATE: A SKEPTIC'S LOOK AT ADMINISTRATIVE CONSTITUTIONALISM

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INTRODUCTION

One might think that executive branch agencies, as such, should have little if any role to play in establishing the boundaries of constitutional law. Some legal scholars, however, beg to differ. These scholars have increasingly noted and praised the phenomenon of administrative constitutionalism, "the creative interpretation and evolution of legal norms and moral-rights claims by bureaucrats faced with pressure from social movements, often operating beyond or even despite the commands of the President, Congress, or the courts."[1]

Administrative constitutionalism includes the "elaboration of new constitutional understandings by administrative actors, as well as the construction (or 'constitution') of the administrative state through structural and substantive measures."[2] Professor Ernest Young concludes that courts do not resolve most important constitutional questions. Rather, various government actors, including administrators, rely on their own interpretations of constitutional norms and values.[3] These administrators, in turn, may ignore not just Supreme Court precedent, but the text of the Constitution itself.

Prominent historical examples of administrative constitutionalism include the National Labor Relations Board (NLRB) and the Federal Communications Commission (FCC) developing novel antidiscrimination rules not mandated by statute. These rules were premised on the notion that the Constitution protected a right to nondiscrimination in employment in closed shops and in a government licensed communications entity, respectively.[4]

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1 K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1352 (2016).

2 Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900 (2013).

3 *See* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411–12 (2007).

4 *See* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 42 (2014); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 813–16 (2010). *See generally* Cynthia Estlund, *How the Workplace Constitution Ties Liberals and Conservatives in Knots*, 93 TEX. L. REV. 1137, 1138 (2015) (reviewing LEE, *supra*) (noting that private sector employees lack federal constitutional employment rights because private employers are not state actors); Gillian E. Metzger, Essay, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 517 (2010) ("[C]onstitutional law frequently surfaces in ordinary

The NLRB and FCC enforced antidiscrimination policies even though Congress and the courts studiously ignored the issue, and even though the Supreme Court showed no inclination to apply constitutional equal protection principles to the private actors involved.[5]

Even when courts have addressed constitutional questions, judges may be influenced by the constitutional norms developed by agencies in the relevant area of law.[6] For example, Professor Anuj Desai documents that "it was the post office—not the Fourth Amendment of its own independent force—that originally gave us the notion of communications privacy that we now view as an abstract constitutional principle applicable to telephone conversations, e-mails, and the like."[7] Similarly, Professor Karen Tani has shown that starting in the 1930s, "federal administrators sought to embed a more robust idea of constitutional equal protection into the realm of social welfare, relying on a statute that said nothing about equality or rights."[8] These efforts influenced the Warren Court's forays into constitutionalizing poverty law, such as *Goldberg v. Kelly*,[9] which announced a constitutional right to a hearing before a claimant's public assistance benefits could be discontinued.

Legal scholars who have examined administrative constitutionalism have often embraced it, with their scholarship sometimes taking on a celebratory tone.[10] Proponents of administrative constitutionalism argue that agencies have several advantages over courts in creating constitutional norms. These

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administrative law in a highly indeterminate form; constitutional concerns shape administrative law doctrines and lie in the background of numerous administrative enactments, but often the precise scope of the constitutional requirements involved remains opaque.").

5 *See* LEE, *supra* note 4.

6 *See* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 33–34, 65–74 (2010); Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 568 (2007); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1092–93 (2014); Lee, *supra* note 4, at 801–06, 809–10; Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 18–19 (2000); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 321–23 (2012). Adrian Vermeule argues that courts should affirmatively defer to agencies' determinations that they have complied with constitutional due process requirements. He writes that "courts should ask only whether the agency offered a rational justification for providing whatever process it chose to provide." Adrian Vermeule, Essay, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1893 (2016).

7 Desai, *supra* note 6, at 557.

8 Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1881 (2017); *see also* Tani, *supra* note 6, at 343–45, 361–68, 378 (examining the emergence and use of rights talk in the administration of federal public assistance).

9 397 U.S. 254, 261 (1970).

10 As a recent article notes, scholars who have focused on administrative constitutionalism in the antidiscrimination context have frequently not simply described, but "celebrate[d] agency interpretation of landmark statutes to advance fundamental principles." Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1773 (2017).

advantages include that agencies' notice-and-comment rulemaking process is more transparent than judicial decisionmaking, that agencies have a more deliberative process than do courts, and that agencies are more accountable to public opinion than are courts.[11] A recent article argues that

> agencies can embrace the formal rules of constitutional jurisprudence, while deploying those rules in such an expansive or novel way that the justification for those rules is called into question. Administrative action then not only reflects but also refracts our constitutional order, shedding new light on our most basic legal commitments. Administrative practice can in such cases serve as a zone of constitutional experimentation.[12]

Of course, one person's heroic agency enforcing its own enlightened constitutional norms, or another person's creative constitutional experimentation, may be yet another person's "deep state," part of a permanent bureaucracy that is a law unto itself, ignoring or evading public opinion, Congress, the courts, and even the President and his appointees.[13]

Nevertheless, some scholars favor a significant role for administrative agencies in enforcing constitutional norms. Professor Gillian Metzger, for example, writes, "[a]gencies are not only well positioned to enforce constitutional norms effectively, but they are also better able than courts to determine how to incorporate constitutional concerns into a given regulatory scheme with the least disruption."[14]

This faith in agencies' capacity to appropriately take constitutional considerations into account is profoundly mistaken. Generalist judges have a clear duty to both enforce laws and enforce constitutional limits on such laws. By contrast, agency staff, whether politically appointed or civil service, tend to see their role as solely enforcing the law. Mission-driven agencies, not surprisingly, tend to adopt a culture in which their paramount goal is to fulfill their mission. Any external constraints on enforcement, including constitutional considerations, are thought best left to the courts, if not ignored entirely.[15]

It is hard to gainsay the merits of federal agencies experimenting with enforcing equal protection norms against monopoly actors empowered by

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11 *See* Sophia Z. Lee, *From the History to the Theory of Administrative Constitutionalism*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 109, 114–15 (Nicholas R. Parrillo ed., 2017) (recounting these arguments).

12 Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 169 (2017).

13 *Cf.* Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 972 (2016) (noting that "administrative constitutional change" is typically "beneath the radar of public notice and public input").

14 Metzger, *supra* note 4, at 486.

15 *See, e.g.*, DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMNATION LAWS 26 (2003) ("Because these administrative bodies are part of executive branch agencies charged specifically with enforcing the relevant antidiscrimination laws, they naturally tend to be more sympathetic to discrimination claims and less sensitive to free speech concerns than are federal courts, which have broader responsibilities and are part of the judicial branch of government.").

the agencies, as in the NLRB and FCC examples, especially when there is no firm judicial precedent to the contrary. Indeed, Supreme Court precedent on analogous issues arguably supported the agencies' actions.[16] In other contexts, however, agencies may enforce internal norms that conflict with constitutional protections for freedom of speech, raising troubling civil liberties concerns. This has become an especially pressing issue, this Article argues, when agencies purport to be enforcing legislation that prohibits invidious discrimination. This Article discusses why administrative agencies charged with enforcing antidiscrimination legislation while implicitly undertaking administrative constitutionalism tend to be inconsiderate of constitutional limitations on government authority in general, and especially of the limitations imposed by the First Amendment's protection of freedom of expression.

To establish the existence and contours of the problem, Part I of this Article provides context by recounting several detailed examples of how federal, state, and local civil rights agencies have favored broad antidiscrimination enforcement over countervailing constitutional doctrines that impose limits on regulatory authority.[17] These examples include the U.S. Department of Education's Office of Civil Rights' Obama-era attempts to use Title IX to strip university students accused of sexual assault of due process protection and to impose broad speech codes on universities, the U.S. Department of Housing and Urban Development's ("HUD") efforts in the 1990s to penalize neighborhood activists for lobbying against projects HUD deemed protected by the Fair Housing Act, local human rights commissions' threats to punish individuals for otherwise protected speech deemed to cause a hostile environment, and state and local agencies' willingness to prosecute individuals who discriminate in their choice of roommate.

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16 *See* Lee, *supra* note 11, at 125.

17 While some groups and individuals, such as the ACLU, tend to conflate civil rights and civil liberties, in contemporary discourse they have separate meanings, as explained by Professor Christopher Schmidt:

> In its common usage, civil rights involves the unequal treatment of different groups. The civil rights canon revolves around the Equal Protection Clause of the Fourteenth Amendment, supplemented by an array of local, state, and federal civil rights laws, which today protect against state and many forms of private discrimination based on race, sex, disability, and sexual orientation.
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> To speak of civil liberties in contemporary legal discourse raises quite different concerns. While civil rights policy often calls for government regulation of private relations, civil libertarianism is premised on skepticism toward government interference in the private sphere. Autonomy rather than equality is the guiding principle of civil liberties. The civil liberties canon revolves around the limitations on government power outlined in the Bill of Rights, starting with the foremost of all civil liberties principles, the First Amendment's protection of freedom of speech.

Christopher W. Schmidt, *The Civil Rights-Civil Liberties Divide*, 12 STAN. J. C.R. & C.L. 1, 3 (2016) (footnotes omitted).

Part II of this Article discusses the reasons why agencies that enforce antidiscrimination laws tend to be oblivious or hostile to constitutionally protected liberties in general and freedom of speech in particular. Part II begins with a discussion of institutional factors common to administrative agencies that tend to lead agencies to expand their power and neglect countervailing constitutional considerations. First, agencies increase their budget and authority by expanding, not contracting, the scope of the laws they enforce. Second, "purposivism," or the notion that ambiguities in statutes should be resolved to further the laws' underlying purposes, encourages agencies to resolve statutory interpretation disputes in favor of broad interpretations of agency authority. Third, antidiscrimination agencies attract employees ideologically committed to their agencies' missions. Fourth, and concomitantly, agency staff (unlike generalist courts) generally do not see enforcing constitutional limitations on government power, or protecting freedom of speech specifically, as their job. Part II concludes with a discussion of political and ideological factors specific to agencies charged with enforcing antidiscrimination laws that make them especially prone to neglect constitutional restraints on their authority.

Part III of this Article suggests solutions that may at least mitigate administrative neglect of civil liberties in the context of antidiscrimination law. Most of these solutions involve broad reforms that would have ramifications well beyond mitigating the problem addressed in this Article. A more limited and therefore practical reform would be for agencies that enforce antidiscrimination legislation to establish an internal watchdog office charged with advocating within the agencies for compliance with the First Amendment and other constitutional constraints.

I. Examples of Antidiscrimination-Enforcement Agencies Ignoring Constitutional Limits on Their Authority

This Section recounts several examples of enforcement agencies aggressively enforcing antidiscrimination laws at the expense of constitutional protections for freedom of expression and guarantees of due process of law. Section I.A discusses the Obama administration's Department of Education's Office of Civil Rights' ("OCR") hostility to providing accused students with due process in campus sexual assault investigations, and OCR's aborted effort to interpret hostile environment law so broadly as to impose a draconian nationwide speech code for Americans pursuing higher education. Section I.B reviews attempts by HUD during the late Bush I and Clinton years to suppress neighborhood and community groups that opposed the establishment of group homes in residential areas. After HUD ultimately acknowledged that its efforts conflicted with the First Amendment and therefore changed its policies, the Justice Department's Civil Rights Division continued to prosecute such groups. Section I.C discusses examples of state and local antidiscrimination enforcement agencies choosing a broad enforcement agenda despite clear conflicts with constitutional doctrines that limit the scope of government power.

A. OCR vs. Due Process and Freedom of Speech on Campus

There is perhaps no better example of antidiscrimination enforcers ignoring settled constitutional constraints while expanding their own authority to enforce internal constitutional "values" adopted by the enforcers than the stringent "guidance" issued in 2011 via a "Dear Colleague" letter OCR sent to university general counsel.[18] The letter addressed universities' obligations under Title IX of the 1972 Education Amendments to the 1964 Civil Rights Act to adjudicate sexual assault claims against accused students and punish perpetrators.[19] As Tani notes, the guidance was a response to the success of a social movement against sexual violence. The guidance was intended to send the public "signals about both the nature of American citizenship and the nature of American governance."[20]

The government almost certainly did not have the authority to require universities to abide by OCR's guidance, not least (but not only)[21] because it did not go through the required notice-and-comment process.[22] Nevertheless, the guidance was framed in mandatory language, OCR treated the guidance as a binding rule, and OCR officials initially told Congress that they believed the colleges and university were required to follow the guidance.[23]

The guidance affected the rights of accused students in several ways. First, it required universities to lower the standard of proof in disciplinary hearings from the "clear and convincing" standard many had been using to a lower "preponderance of evidence" standard.[24] While it is not at all clear where OCR got the legal authority to make this demand, imposing a preponderance of the evidence standard on university disciplinary hearings is not an inherent violation of due process.

Other aspects of the guidance, however, did restrict due process for the accused. OCR "strongly discourage[d]" schools from allowing the accused student to cross-examine his accuser, lest it traumatize the accuser, and also discouraged schools from allowing an accused student's representative to cross-examine the accuser.[25] Rather, according to the guidance, a "school

18 "Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ. 2 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

19 *Id.*

20 Tani, *supra* note 8, at 1902.

21 Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 607–08 (2016) ("These changes acknowledge that Title IX does not really address sexual assault and seek to reconfigure it so that it can do so."). Novkov accurately describes the letter not as an interpretation of Title IX, but as a response to the perceived inadequacies of Title IX. *Id.*

22 *See* David E. Bernstein, *The Abuse of Executive Power: Getting Beyond the Streetlight Effect*, 11 FLA. INT'L U. L. REV. 289 (2016).

23 *Id.* at 291, 295.

24 *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 26 (2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

25 *Id.* at 31.

may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf."[26] Even then, OCR recommended that "the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case."[27] Given the he-said-she-said nature of many sexual assault allegations, restrictions on cross-examination severely inhibited many accused students' ability to defend themselves before university tribunals.

OCR also forbade university disciplinary panels from considering an accusing student's sexual history with anyone other than the accused,[28] even though such evidence is occasionally highly relevant, and a blanket rule would sometimes deprive the accused of a valid defense. The guidance also stated that a "school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant."[29] The "additional trauma" language implies that the school should start the proceedings with a presumption that the accused is guilty, which would in turn place the burden of persuasion to rebut the relevant allegations on the accused, contrary to the norms of our legal system. Meanwhile, OCR required universities to reopen cases that universities previously found meritless. The message that universities took from this is that to avoid the wrath of OCR, accused students should be punished regardless of guilt.[30]

The guidance resulted in a civil liberties debacle, with many accused students punished after extremely dubious "kangaroo" proceedings supervised by unqualified or willful administrators determined to rule against the accused student.[31] In return, penalized students have filed dozens of lawsuits against their universities alleging that their punishments breached various

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *See* Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 53 (2013).

31 *See, e.g.*, KC JOHNSON & STUART TAYLOR, JR., THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES (2017); ROBERT L. SHIBLEY, TWISTING TITLE IX (2016); Janet Halley, Commentary, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015); Henrick, *supra* note 30, at 54 (arguing that the guidance "is fundamentally unfair to the accused"); Committee Report, *The History, Uses, and Abuses of Title IX*, ACADEME (BULL. AM. ASS'N U. PROFESSORS), July–Aug. 2016, at 78–80, https://www.aaup.org/file/TitleIXreport.pdf (criticizing the Title IX guidance for neglecting the due process rights of the accused); Charles M. Sevilla, *Campus Sexual Assault Allegations, Adjudications, and Title IX*, CHAMPION, Nov. 2015, at 16; Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html; Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), https://prospect.org/article/sex-lies-and-justice; Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html; Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html; Emily Yoffe, *The Uncomfortable*

contractual and procedural guarantees.[32] Most of the claims adjudicated so far have been found to have sufficient merit to get beyond the initial pleading stage and dozens have resulted in settlements.[33]

The Trump administration has revoked the guidance in question.[34] But this was hardly the only example of unconstitutional overreach in enforcing antidiscrimination by federal agencies, or even the only example by OCR. Fresh from imposing its highly problematic Title IX "guidance," OCR sought to impose a draconian nationwide speech code at American institutions of higher educations.

Campus speech codes to prevent a hostile environment for protected groups have been in vogue in activist circles since the late 1980s. In the 1990s, federal courts overturned on First Amendment grounds speech codes at the University of Michigan, the University of Wisconsin, and Central Michigan University.[35] Overt speech codes enacted by individual universities were soon replaced by an OCR nationwide ban on "harassment" of students, including alleged harassment that consisted of otherwise constitutionally protected speech. OCR announced that to avoid losing federal funds, universities must proactively ban offensive speech by students that targeted people based on their membership in categories protected by law from discrimination, and diligently punish any violations of that ban.[36]

The Supreme Court's opinion in *Davis v. Monroe County Board of Education*[37] in 1999 implicitly limited the permissible scope of OCR regulation. The Court ruled that for schools to be liable under Title IX for failure to police student-on-student harassment, the school must be deliberately indifferent to harassment that is severe and pervasive such that it creates a hostile environment that interferes with the ability of a student to participate in educational programs, and be "objectively offensive" to a reasonable person.[38]

Truth About Campus Rape Policy, ATLANTIC (Sept. 6, 2017), https://www.theatlantic.com/education//2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/.

32 For a database of lawsuits, see TITLE IX FOR ALL, http://www.titleixforall.com/#section-legal-risk-management (last visited Dec. 27, 2018).

33 For a data set tracking the lawsuit, see *Post Dear-Colleague Letter Rulings/Settlements*, DOCS.GOOGLE.COM, https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BNAA5z9cv178Fjk3o/edit#gid=0 (last visited Dec. 27, 2018) (data set collected by KC Johnson).

34 Press Release, U.S. Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.

35 Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1180 (6th Cir. 1995); UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1164, 1181 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852, 853 (E.D. Mich. 1989).

36 For an account of the incident, see Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377, 419 & n.148.

37 526 U.S. 629 (1999).

38 *Id.* at 650.

In 2003, the Bush administration OCR, troubled by OCR's previously overbroad guidance, emphasized that for university inaction regarding harassment to be actionable, the alleged harassment "must include something beyond the mere expression of views . . . that some person finds offensive. . . . [The Office for Civil Rights'] standards require that the conduct be evaluated from the perspective of a reasonable person."[39] OCR's new guidance also noted that, because OCR was part of the government, OCR could not order private universities to adopt speech codes inconsistent with the First Amendment. OCR regulations, therefore, "should not be interpreted in ways that would lead to the suppression of [First Amendment] protected speech on public or private campuses."[40] Some universities, public and private, nevertheless voluntarily continued to enforce harassment rules that amounted to stringent speech codes.

Obama administration OCR officials were less concerned with constitutional niceties than were their Bush administration predecessors. In May 2013, OCR and the Justice Department's Civil Rights Division sent a join letter to the University of Montana memorializing a settlement to a sexual harassment case brought against the university. The letter stated that it was intended to "serve as a blueprint for colleges and universities throughout the country."[41] Ignoring Supreme Court precedent, the First Amendment, and OCR's own guidance from the Bush administration, the letter declares that "sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature,'" including "verbal . . . conduct", regardless of whether it is objectively offensive or sufficiently severe or pervasive to create a hostile environment.[42]

OCR, in short, tried to force universities to ban "any expression related to sexual topics that offends any person."[43] As the Foundation for Individual Rights in Education ("FIRE") pointed out in a blistering critique, this meant that the federal government was trying to impose a breathtakingly broad nationwide higher education speech code "that makes virtually every student in the United States a harasser."[44] For example, universities would be required to punish a student for telling a "sexually themed joke overheard by any person who finds that joke offensive for any reason," or for "any request

39 First Amendment: "Dear Colleague" Letter from Gerald A. Reynolds, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ. (July 28, 2003), https://www2.ed.gov/about/offices/list/ocr/firstamend.html.

40 *Id.*

41 Letter from Anurima Bhargava, Chief, Educ. Opportunities Section, Civil Rights Div., U.S. Dep't of Justice & Gary Jackson, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont. & Lucy France, Univ. Counsel, Univ. of Mont. 1 (May 9, 2013), https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf.

42 *Id.* at 4, 8.

43 *Federal Government Mandates Unconstitutional Speech Codes at Colleges and Universities Nationwide*, FIRE (May 17, 2013), https://www.thefire.org/federal-government-mandates-unconstitutional-speech-codes-at-colleges-and-universities-nationwide-3/.

44 *Id.*

for dates or any flirtation that is not welcomed by the recipient of such a request or flirtation."[45]

A few months later, Catherine Lhamon, OCR's new leader, wrote in a letter to FIRE that "the agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy."[46] She also asserted that OCR's understanding of hostile environment harassment in educational settings is "consistent" with the Supreme Court's definition.[47]

Despite FIRE's urging, OCR failed to issue any clarification of the Dear Colleague letter it had sent to the thousands of colleges and universities it monitors. Some of these schools, not surprisingly, took the Dear Colleague letter at its word, as representing a blueprint for all college campuses. These schools amended their disciplinary policies to be consistent with the Dear Colleague letter's definition of sexual harassment, rather than with Supreme Court precedent, past OCR statements, and the letter OCR sent to FIRE.[48]

Meanwhile, the Justice Department stepped in where OCR had become reticent. In April 2016, DOJ issued a letter criticizing the University of New Mexico's sexual harassment policy.[49] The letter claimed that the policy

> mistakenly indicates that unwelcome conduct of a sexual nature does not constitute sexual harassment until it causes a hostile environment or unless it is quid pro quo. Unwelcome conduct of a sexual nature, however, constitutes sexual harassment regardless of whether it causes a hostile environment or is quid pro quo.[50]

Apparently, DOJ felt free to make up its own legal standard for what constitutes sexual harassment. Oddly, OCR and DOJ were engaging in these speech-suppressing policies while President Obama was consistently defending and promoting freedom of speech and open debate on campus.[51] This suggests either that the relevant agencies were acting without, or contrary to,

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45 *Id.*

46 *'Blueprint' No More? Feds Back Away from New Campus Speech Restrictions*, FIRE (Nov. 21, 2013), http://www.thefire.org/feds-back-away-from-new-campus-speech-restrictions (quoting Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Greg Lukianoff, President, FIRE (Nov. 14, 2013), https://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire/).

47 *Id.*

48 Will Creeley, *A Year Later, Impact of Feds' 'Blueprint' Comes into Focus*, FIRE (Aug. 28, 2014), http://www.thefire.org/year-later-impact-feds-blueprint-comes-focus.

49 Letter from Shaheena Simons, Chief, Educ. Opportunities Section, Civil Rights Div., U.S. Dep't of Justice & Damon Martinez, U.S. Attorney, Dist. of N.M., U.S. Dep't of Justice, to Robert G. Frank, President, Univ. of N.M. (Apr. 22, 2016), https://www.justice.gov/opa/file/843901/download; *see also* Joe Cohn, *New DOJ Letter Threatens Campus Speech, Warns Former OCR Attorney*, FIRE (Apr. 26, 2016), https://www.thefire.org/new-doj-letter-threatens-campus-speech-warns-former-ocr-attorney.

50 Letter from Shaheena Simons & Damon Martinez to Robert G. Frank, *supra* note 49, at 9.

51 *E.g.*, Sam Sanders, *Obama Warns Campus Protesters Against Urge To 'Shut Up' Opposition*, NPR (Dec. 21, 2015), https://www.npr.org/2015/12/21/460282127/obama-warns-campus-protesters-against-urge-to-shut-up-opposition.

the President's wishes, or that Obama saw a significant philosophical difference between OCR and DOJ policies and other forms of campus speech suppression.

Trump administration Secretary of Education Betsy DeVos has signaled that the Montana settlement and the DOJ letter to the University of New Mexico are contrary to current OCR policy. She remarked that "harassment codes which trample speech rights derail the primary mission of a school to pursue truth."[52]

B. HUD and Justice vs. the Rights to Speech, Petition, and Assembly

Another example of federal agency encroachment on First Amendment rights involved investigations and enforcement actions by the Department of Housing and Urban Development and the Justice Department under the Fair Housing Act against neighborhood activists protesting proposed group homes during the early- to mid-1990s. Unlike the Obama administration examples, which might be attributable to top-down policies by liberal Democratic political appointees, some of the HUD cases were initiated during the waning years of the Republican George H.W. Bush administration, and others were initiated by regional offices of HUD without any apparent direction or input from senior management in Washington, D.C.

I have described the most famous case of HUD overreach, which arose in Berkeley, California, and involved a group of neighborhood activists who became known as the "Berkeley three," in detail elsewhere.[53] Berkeley, however, was just one of several venues for government misconduct.[54]

In 1994, Community Access, a local housing group, negotiated with First Nationwide Bank to buy a building in Gramercy Park, Manhattan.[55] When the negotiations fell through, Community Access filed a complaint against the bank and the winning bidder, and later amended the complaint to include three community activists who had opposed the project.[56] The complaint alleged that a community group, the Irving Place Community Coali-

52 *Education Department Says It Will Finally Confront Its Role in Campus Due Process Crisis*, FIRE (Sept. 7, 2017), https://www.thefire.org/education-department-says-it-will-finally-confront-its-role-in-campus-due-process-crisis.

53 *See* BERNSTEIN, *supra* note 15, at 47–51.

54 *See* Sigfredo A. Cabrera, *HUD Continues Its Assault on Free Speech*, WALL ST. J., June 7, 1995, at A15; Lou Chapman, *Free Speech An Issue in Suit Against Ridgmar Group*, FT. WORTH STAR-TELEGRAM, Nov. 19, 1994, at 27; Editorial, *Intimidating Political Protest*, WASH. POST, Aug. 22, 1994, at A16; Edmund Mahony, *Judge Dismisses Suit Against Neighborhood*, HARTFORD COURANT (Conn.), Feb. 12, 1995, at B1; Joyce Price, *Federal Government Sues Five for Fighting Group Home; Act of Getting a Restraining Order Called Discriminatory*, WASH. TIMES, May 31, 1995, at A3; Joyce Price, *HUD Sues Texans in Home-Sale Battle; Citizens Fought to Stop Deal in 1991*, WASH. TIMES, Nov. 19, 1994, at A4; Brian J. Taylor, *No Retreat in Feds' War on Free Speech*, SACRAMENTO BEE, Sept. 10, 1995, at F1.

55 Guy Gugliotta, *ACLU Alleges Free Speech Violations in HUD Probes*, WASH. POST, Aug. 17, 1994, at A20.

56 *Protecting Freedom of Speech and Neighborhood Safety Under the Fair Housing Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 27–32

tion, had pressured the bank into backing out of the contract. HUD investigated.[57]

According to New York City Councilman Antonio Pagan, "HUD not only took sides but in reality had already arrived at a conclusion."[58] The investigation had a chilling effect on opposition to Community Access's proposed project. "Attendance at the Irving Place Community Coalition meetings significantly dwindled. People were afraid of speaking up for fear of retaliatory government actions. Community sympathy for the Irving Place Three was quickly expanding. Neighbors were afraid of being targeted but were outraged enough to contribute towards their legal defense."[59] After legal intervention by the American Civil Liberties Union (ACLU), Community Access dropped the three community activists from its complaint.[60]

In New Haven, Connecticut, a group of homeowners in the affluent Ronan-Edgehill neighborhood filed a state court zoning challenge to Marjorie Eichler's plan to buy a twenty-one-room mansion in the neighborhood. Eichler planned to move in with her seven adopted children and three foster children.[61] According to an attorney for two of the homeowners, the protesting neighbors were concerned about the number of children who might be allowed to live in the home—up to seventy-two children were permitted under the home's state license.[62] The area was zoned for single-family residences only.[63]

Because of the zoning suit, Eichler had trouble getting financing for the purchase and the state's Department of Children and Youth Services refused to give her a license for the foster children to live with her in the house.[64] In May 1992, Eichler filed a complaint with HUD alleging housing discrimination.[65] In June, HUD referred the matter to the Justice Department, which sued the neighbors responsible for the state suit.[66] The federal suit alleged discrimination based on family status and handicap status.[67] The neighbors dropped the state suit when they learned of Eichler's complaint, but the Justice Department pressed on with its suit.[68] In February 1995, a district court judge dismissed the suit against the neighbors. The judge concluded that the neighbors' zoning suit was within their First Amendment right to petition the

(1996) (statement of Antonio Pagan, Councilmember, New York City) [hereinafter *Protecting Freedom of Speech*].

57 Gugliotta, *supra* note 55.

58 *Protecting Freedom of Speech*, *supra* note 56, at 30.

59 *Id.*

60 *See id.* at 31.

61 Mahony, *supra* note 54.

62 *See id.*

63 *See id.*

64 139 CONG. REC. 446, 446–47 (1993).

65 *Id.* at 446.

66 *Id.* at 446–47.

67 *Id.* at 447.

68 Mahony, *supra* note 54.

government for redress of grievances.[69] By this time, the neighbors had spent $20,000 on legal fees.[70]

The president of a Ronan-Edgehill neighborhood association described the effects of the investigation as follows:

> It financially ruined the neighborhood association and terrified residents. HUD investigators pressured neighbors to turn informer. Residents were afraid to join the association or to speak out at public meetings. The government even tried to deprive us of legal representation by threatening to call our attorney as a witness.
>
> We couldn't take minutes at meetings of our board because these could be seized and used as evidence against us. We tried to settle the case, but the terms of the consent decree drafted by the government were intolerable. They would have required residents to undergo an enforced course of political re-education and proposed unconstitutional restraints on our right to speak, write and associate.[71]

In Westlake Village, California, a member of the Windward Shores Homeowners Association complained to HUD after the association voted to enforce a covenant against commercial use of homes in the development.[72] May I. Oxx wanted to turn her home into a hospice for the terminally ill.[73] HUD began investigating her complaint, sending letters to members of the board of directors informing them that they were being investigated and might be subject to fines of up to $100,000.[74] The homeowners association had been considering a state suit to enforce the covenant. According to an attorney for the homeowners association, a HUD conciliator told him that if the homeowners made any effort to file a state suit against the hospice, HUD would refer the matter to the Justice Department for prosecution.[75]

HUD investigations of citizens for opposing group homes—particularly the Berkeley, New York, and New Haven incidents—attracted a great deal of negative press coverage and editorials decrying the Agency's abuse of First Amendment rights.[76] HUD spokesperson John Phillips, trying to parry free speech concerns raised by the media, instead stoked them. "To ask questions is one thing," Phillips told reporters.[77] "To write brochures and articles and go out and actively organize people to say, 'We don't want those people in

69 *Id.*

70 *Id.*

71 *Id.*

72 Taylor, *supra* note 54.

73 *Id.*

74 *Id.*

75 *Id.*

76 *See, e.g.*, Editorial, *Free the Berkeley Three: HUD vs. Free Speech*, VA.-PILOT, Aug. 19, 1994, at A20; Editorial, *No More Speech Police*, BOS. HERALD, Sept. 3, 1994, at 12; *Intimidating Political Protest*, *supra* note 54; Heather Mac Donald, *Rule of Law: HUD Continues Its Assault on Free Speech*, WALL ST. J., Sept. 14, 1994, at A19.

77 Susan Ferriss, *Free Speech Advocates Find a Fight in Berkeley*, S.F. EXAMINER, Jul. 22, 1994, at A6.

those structures,' is another."[78] The ACLU sent a letter to HUD Secretary Henry Cisneros in August 1994, expressing concern over the Berkeley and New York investigations.[79] The letter argued that HUD's apparent theory that "even traditional forms of political advocacy—such as leafleting, petitioning and litigation—can be prohibited if they interfere with the goals of the Fair Housing Act . . . [and] cannot be reconciled with the First Amendment's commitment to robust debate."[80]

In response to the uproar, HUD announced new guidelines for its field offices to use in determining whether an investigation of a complaint would raise First Amendment issues. Under the guidelines, HUD would not investigate "any complaint . . . that involves public activities that . . . are directed toward achieving action by a governmental entity or official; and . . . do not involve force, physical harm, or a clear threat of force or physical harm to one or more individuals."[81] Activities such as distributing fliers, holding open meetings, writing newspaper articles or letters, conducting peaceful demonstrations, and testifying at public hearings were listed as examples of protected "public activities."[82] Frivolous lawsuits might still form the basis of a discrimination charge, but only if headquarters approved the charge.[83] HUD also announced it was dropping the investigation of the Berkeley incident because it concluded that the Berkeley three had acted within their free speech rights.[84] HUD also dropped the Gramercy Park investigation.[85]

Assistant Attorney General (and future Massachusetts governor) Deval Patrick of the Justice Department's Civil Rights Division opposed the new HUD policy, and ordered the Justice Department to bring additional lawsuits against community activists.[86] He justified these prosecutions by arguing that "Congress intended the [Fair Housing Act] to proscribe any speech if it leads to discrimination prohibited by the FHA."[87]

Two years after HUD acknowledged that prosecuting neighborhood activists for expressing their political viewpoints was unconstitutional and unwise, Patrick continued to defend the Justice Department's attempted

78 *Id.*

79 Gugliotta, *supra* note 55 (describing a letter from ACLU Legal Director Steven R. Shapiro).

80 *Id.*

81 Memorandum from Roberta Achtenberg, Assistant Sec'y for Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev., to the Fair Hous. and Equal Opportunity Office Dirs., Enf't Dirs., Compliance Dirs., Staff & Office of Investigations for Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev. (Sept. 2, 1994), http://fairhousing.com/node/17574.

82 *Id.*

83 *See id.*

84 Roberta Achtenberg, *Sometimes on a Tightrope at HUD*, WASH. POST, Aug. 22, 1994, at A17.

85 Andrea Hamilton, *HUD Backs Off After Outcry over Protest Investigations*, CHARLESTON GAZETTE, Feb. 14, 1995, at P.

86 *See* Editorial, *Government by Intimidation*, WASH. POST, Feb. 26, 1996, at A18.

87 *Id.* (alteration in original) (emphasis omitted).

squelching of free speech in a Fair Housing Act case in Fort Worth, Texas. In doing so, he analogized political leaflets to baseball bats, remarking that bats "are perfectly legal too. But if you wield one to keep people out of the neighborhood, we are going to use the bat as evidence of your intent to violate the civil rights laws."[88]

Not surprisingly, the federal judge overseeing the Fort Worth case held that "leafleting, petitioning, and soliciting" against the placement of a group home in one's neighborhood are actions protected by the First Amendment.[89] More generally, federal courts steadfastly protected First Amendment rights against legal assaults on neighborhood activists. For example, the Berkeley three successfully sued HUD in federal court for its violation of their constitutional rights.[90] In that case, the court even took the unusual step of holding individual HUD employees personally liable because their conduct was so clearly and outrageously unconstitutional.[91] In other cases that squarely addressed relevant First Amendment issues, courts similarly decided in favor of citizen activists and against HUD.[92]

C. State and Local Antidiscrimination Agencies vs. Civil Liberties

State and local agencies have also been responsible for assaults on First Amendment rights and other constitutional liberties in the name of enforcing antidiscrimination dictates. For example, St. Paul, Minnesota's Human Rights Director, Tyrone Terrill, sought to punish the St. Paul Pioneer Press for running a biting editorial cartoon critical of the University of Minnesota's ("UM") failure to properly educate black athletes.[93] The cartoon, entitled "The Plantation," depicted a basketball game with three anonymous African American UM basketball players visible.[94] Two middle-aged, well-dressed white males are watching the game from the stands, and one says, "Of course we don't let them learn to read or write."[95] Cartoonist Kirk Anderson was protesting the UM athletic program's perceived exploitation of African American athletes—at the time, only one in four UM basketball players graduated from the university.[96]

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88 Deval L. Patrick, *Evidence of Intent*, WASH. POST, Feb. 19, 1996, at A24.

89 United States v. Wagner, No. 94-cv-2540, 1995 WL 841924, at *5 (N.D. Tex. Dec. 11, 1995).

90 White v. Lee, 227 F.3d 1214, 1220 (9th Cir. 2000).

91 *See id.*

92 Salisbury House, Inc. v. McDermott, No. 96-cv-6486, 1998 WL 195693, at *10 (E.D. Pa. Mar. 24, 1998); Mich. Prot. & Advocacy Serv., Inc. v. Babin, 799 F. Supp. 695, 720 (E.D. Mich. 1992), *aff'd*, 18 F.3d 337 (6th Cir. 1994).

93 *St. Paul Human Rights Director Files Complaint Over Pioneer Press Cartoon*, ST. PAUL PIONEER PRESS, June 10, 1999, at 5A.

94 Kirk Anderson, *The Plantation*, ST. PAUL PIONEER PRESS, May 18, 1999, at 8A.

95 *Id.*

96 *See* BERNSTEIN, *supra* note 15, at 56; *see supra* text accompanying note 93.

Terrill's complaint nevertheless alleged that the cartoon created an illicit "hostile public environment."[97] Terrill claimed that by creating such an environment, the newspaper illegally "discriminated against African American student-athletes past, present and future in the area of public accommodations on the basis of race."[98] Terrill stated that he believed the First Amendment did not cover the cartoon, because it was analogous to an employee hanging nude centerfolds in the workplace or directing racial epithets at coworkers, behavior other courts had punished.[99]

A New Jersey administrative ruling concluded that employees who forwarded one list of crude jokes to their colleagues via email had created an illegal "offensive working environment," even though this act would be highly unlikely to create liability under federal law.[100] The New York City Commission on Human Rights ("the Commission") ruled that a black separatist organization had no constitutional right to exclude whites from its otherwise public meetings.[101] The Commission acknowledged that the United African Movement had proved "that there is a nexus between its racially discriminatory membership policies and the group's message that Caucasians and people of African descent should not mix."[102] Therefore, forcing the movement to admit whites to its meetings would dilute the group's message and consequently infringe upon its right to expressive association.[103] The Commission concluded, however, that New York had a compelling interest in eradicating race-based discrimination, an interest that trumped the movement's First Amendment rights.[104] By contrast, a federal court held that the Ku Klux Klan had a constitutional right to discriminate against African Americans.[105]

More recently, the New York City Human Rights Commission ruled that those covered by antidiscrimination laws must refer to their clients, tenants, customers, employees, and so forth, by their "preferred name, pronoun and

97 *See* BERNSTEIN, *supra* note 15, at 56.

98 *Id.* (quoting *St. Paul Human Rights Director Files Complain Over Pioneer Press Cartoon*, *supra* note 93).

99 *Id.* at 56–57; Charles Laszewkski, *Human Rights Complaint Against Newspaper Appears to Be a First*, ST. PAUL PIONEER PRESS, June 11, 1999, at 4D. After meeting with the newspaper's attorney, Terrill agreed to drop the complaint, apparently because the attorney persuaded him that the newspaper's editorial column could not have violated St. Paul's antidiscrimination ordinance because an editorial column is not an "area of public accommodation" under the law. *City Official Files, Withdraws Discrimination Charge Over Cartoon*, REPS. COMMITTEE FOR FREEDOM PRESS (June 28, 1999), https://www.rcfp.org/browse-media-law-resources/news/city-official-files-withdraws-discrimination-charge-over-cartoon.

100 Olivant, No. 12695-95, 1999 WL 430770, at *4 (N.J. Office of Admin. Law, Apr. 12, 1999) (citing N.J. ADMIN. CODE § 4A:7–1.3(a) (1994) (repealed 2002)).

101 United African Movement, Nos. MPA95-0851, PA95-0031, 1997 WL 1051933, at *1–2 (N.Y. City Comm'n on Human Rights, June 30, 1997).

102 *Id.* at *15.

103 *Id.*

104 *Id.*

105 Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281, 291 (D. Md. 1988).

title (e.g., Ms./Mrs.) regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual's identification."[106] This goes well beyond, for example, requiring that a transgender man be referred to as "he" rather than "she;" the Commission mandated referring to individuals by "they/them/theirs or ze/hir" if that is their preference.[107]

Local antidiscrimination agencies have also placed a significant role in expanding the scope of public accommodations laws. Most recently, they have interpreted such laws so that they forbid service providers—such as photographers, printers, cake bakers, and florists—from refusing to provide services for same-sex weddings, even if they otherwise serve gay customers.[108] A typical law prohibiting discrimination based on sexual orientation in "places of public accommodation" does not unambiguously cover this behavior. First, some of these service providers, such as photographers, who have no fixed public place of business, do not easily come within the definition of a "place of public accommodation." Second, discriminating against those seeking services for same-sex weddings based on moral objections to those weddings, rather than hostility to a customer's sexual orientation as such, is arguably not covered by bans on sexual orientation discrimination. Analogously, it is not clear that someone who refuses to cater a bris (traditional Jewish circumcision ceremony) based on moral objections to circumcision is engaging in discrimination based on religion, even if that individual will cater christenings, so long as he provides services to Jews in other contexts.[109] Moreover, while the vast majority of same-sex weddings will involve members of sexual minorities, one can imagine circumstances in which two heterosexuals of the same sex decide to marry each other. Service providers who refuse to provide services to same-sex weddings would assumedly refuse services to them as well, further weakening the case that such discrimination is based on sexual orientation.

Nevertheless, and even though interpreting the laws broadly raises free speech and religious liberty concerns, in the absence of explicit statutory guidance, state and local antidiscrimination agencies have frequently pioneered very broad interpretations of public accommodations laws to encompass service providers who decline to provide services for same-sex weddings. Such agencies have also been at the forefront of the attempt to forbid speech—by employees, customers, or others—that purportedly creates a "hostile public

106 Eugene Volokh, *You Can Be Fined for Not Calling People 'Ze' or 'Hir,' if That's the Pronoun They Demand That You Use*, WASH. POST: VOLOKH CONSPIRACY (May 17, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/you-can-be-fined-for-not-calling-people-ze-or-hir-if-thats-the-pronoun-they-demand-that-you-use.

107 *Id.*

108 *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (bakery); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (photographer); Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051 (Or. Ct. App. 2017) (bakery).

109 *See* David Bernstein, *Is Refusing to Provide Commercial Services for a Circumcision Discrimination Against Jews?*, VOLOKH CONSPIRACY (Dec. 14, 2013, 12:46 PM), http://volokh.com/2013/12/14/refusing-provide-commercial-services-circumcision-discrimination-jews.

environment" and therefore supposedly violates laws that prohibit discrimination in public accommodations.[110]

Perhaps most remarkably, at least three state and local antidiscrimination agencies, one in Madison, Wisconsin,[111] one in Ohio,[112] and one in California,[113] have punished individuals for discriminating in their choice of roommate.[114] Such punishment is almost certainly inconsistent with the right of intimate association delineated by the Supreme Court,[115] but the agencies were undeterred.

II. Why Agencies Enforcing Antidiscrimination Laws Tend to Be Inconsiderate of Freedom of Speech

While in theory agencies lack autonomy to make their own policy, scholars have found that the day-to-day operation of agencies is largely free from presidential control.[116] Despite its oversight capacity, Congress also has limited control over agencies and most agency decisions,[117] especially informal

110 *See* Volokh, *supra* note 36, at 414–21.

111 *See* State *ex rel.* Sprague v. City of Madison, No. 94-2983, 1996 WL 544099, at *1 (Wis. Ct. App. Sept. 26, 1996).

112 McGlynn, No. 7979, 1999 Ohio Civil Rights Comm. LEXIS 10, at *3 (Apr.15, 1999).

113 DeSantis, No. 02-12, 2002 WL 1313078, at *9 (Cal. Fair Emp't & Hous. Comm'n, May 7, 2002).

114 *But cf.* Baker, No. H 97-98 Q-0649-00gu; C 98-99-124; 99-14, 1999 CAFEHC LEXIS 14 (Cal. Fair Emp't & Hous. Comm'n, Nov. 9, 1999) (declining to apply California's public accommodations law, the Unruh Civil Rights Act, to a roommate situation, in part because of concerns about the constitutional right to freedom of intimate association).

115 *See* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) ("[T]he freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights."); Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."); *see also* Fair Hous. Council of San Fernando Valley v. Roommate .com, LLC, 666 F.3d 1216, 1220, 1223 (9th Cir. 2012) (declining to apply the Federal Fair Housing Act to roommate advertising because doing so would implicate the right of intimate association); *id.* (describing a complaint against a party who advertised for a Christian roommate that was dismissed by the U.S. Department of Housing and Urban Development for no reasonable cause). For recent discussions of whether roommate selection is protected by the Constitution, see Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 Ind. L. Rev. 1125 (2010); John T. Messerly, Note, *Roommate Wanted: The Right to Choice in Shared Living*, 93 Iowa L. Rev. 1949 (2008); Brooke Wright, Comment, *Fair Housing and Roommates: Contesting a Presumption of Constitutionality*, 2009 BYU L. Rev. 1341.

116 *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47, 47–52 (2006); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696, 704–05 (2007).

117 *See* David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. Legal Stud. 413, 445–46 (1999) (concluding that congressional control over agencies is limited); *see also* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empir-*

decisions such as "guidance" that are never subject to judicial review. When such decisions are subject to judicial review, courts generally take a deferential posture. This means agencies have a fair amount of autonomy, both to soundly fulfill their missions and to engage in unconstitutional mischief. Part II of this Article focuses on how and why agencies get away with the latter. This Part discusses why agencies charged with enforcing antidiscrimination laws tend to be inconsiderate of constitutional protections for freedom of speech. This includes institutional explanations that apply broadly to executive agencies and ideological explanations that are either peculiar to or especially important in the context of antidiscrimination concerns. These factors combine to create administrative constitutionalism norms that favor broad interpretations of statutes banning discrimination over First Amendment and other constitutional liberties.

A. Institutional Explanations

Section II.A discusses institutional reasons why executive agencies are inclined to neglect limitations, constitutional or otherwise, on their power, to wit: (1) public choice theorists note that agencies increase their budget and authority by expanding, not contracting, the scope of laws they are charged with enforcing, and therefore predict that agencies will in fact try to expand the scope and not contract the scope of enforcement; (2) "purposivism" encourages agencies to resolve statutory ambiguity in favor of broad interpretations of statutes; (3) agencies tend to attract employees who are committed to the agencies' underlying missions, and these employees naturally prefer to interpret relevant statutes to provide broad agency power to accomplish the mission; and (4) agency employees often do not see enforcing the Constitution as their job, and they are often encouraged in that perspective by judicial precedent. The result of these factors is that agencies, particularly those with an ideological mission, tend to develop their own internal culture of constitutional norms that may be at odds with even uncontroversial, longstanding black letter Supreme Court doctrine.

1. Agencies Increase Their Budget and Authority by Expanding, Not Contracting, the Scope of the Laws They Enforce

The simplest explanation of why administrative agencies ignore constitutional constraints on their authority is that agencies prefer more power and discretion to less. One strand of public choice theory attributes agency behavior primarily to a desire to maximize the agency's (and its employees') power, prestige, and budget.[118] While extreme versions of this thesis have

ical Portrait of the Modern Administrative State, 94 VA. L. REV. 889, 967–71 (2008) (calling for more research into whether agency behavior tends to stay constant despite changes in partisan control of Congress).

118 *See* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 9, 37–38 (1971); THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE (André Blais & Stéphane Dion eds., 1991); Sam Peltzman, *Toward a More General Theory of Regula-*

been subject to significant criticism, more modest versions, presenting this sort of self-interest as one important motive among many, are likely correct.[119] Agencies maximize their power and budget, and retain the support of members of Congress and outside interests that provide them political support, by expanding the scope of the laws they enforce.[120]

OCR's sexual assault and harassment guidance, for example, provided it with allies in Congress and within progressive feminist organizations. Vice President Joe Biden also took a personal interest in combating sexual assault on campus, so OCR's guidance also gave it a powerful ally within the Obama administration.[121] KC Johnson and Stuart Taylor, Jr., authors of a book on Title IX and the Obama administration, suggest that OCR's leaders believed they were promoting President Obama's political interest in rallying support from feminist constituencies following the Democrats' shellacking in the 2010 midterm elections.[122]

2. Purposivism Encourages Agencies to Resolve Statutory Ambiguity in Favor of Broad Interpretations

Many legal scholars have argued that a purposivist approach is appropriate when government authorities interpret statutes. In other words, any ambiguities in the text should be resolved in favor of interpreting statutes broadly in light of the legislature's purpose in enacting them.[123] While much of this literature deals with judicial review of agency actions, administrative law scholars have found that agencies themselves engage in purposiv-

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tion, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

119 *See* Matthew C. Stephenson, *Statutory Interpretation by Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

120 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2279 (2001) (noting that advocates of centralizing regulatory policy in the Reagan administration argued that such centralization was necessary "to guard against regulatory failures—in particular, excessive regulatory costs imposed by single-mission agencies with ties to special interest groups and congressional committees").

121 Press Release, U.S. Dep't of Educ., Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence (Apr. 4, 2011), https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad.

122 *See* KC Johnson & Stuart Taylor, *The Path to Obama's 'Dear Colleague' Letter*, WASH. POST: VOLOKH CONSPIRACY (Jan. 31, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter.

123 *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 205–08 (2006); William N. Eskridge Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 427; Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 887–900 (2015); Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016).

ism. Some of these scholars have argued that agencies are correct in doing so.[124]

Purposivism practically invites agencies to find and even create ambiguities so that they can interpret statutes broadly. Agencies believe that they succeed "by accomplishing the goals Congress set for it as thoroughly as possible—not by balancing its goals against other [considerations]."[125] In practice, constitutional considerations do not necessarily constrain broad agency interpretation of statutes; indeed, some legal scholars argue that agencies not only do not, but at least in some circumstances should not, hesitate to interpret statutes in ways that cause conflicts with existing judicial interpretations of relevant constitutional provisions.[126]

When agencies' implementations of statutes raise significant constitutional issues, courts may refuse to apply the *Chevron* doctrine and not defer to agency interpretations. For example, in *Solid Waste Agency v. U.S. Army Corps of Engineers*,[127] the Supreme Court suggested that when administrative action raises constitutional questions not apparent on the face of the statute, a court need not defer to administrative interpretation.[128] This nondeference policy is not applied universally, however. For example, in *FCC v. Fox Television Stations, Inc.*,[129] the Supreme Court refused to "apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties."[130]

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124 Stack, *supra* note 123, at 887.

125 Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986).

126 Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008) (contending that courts should apply the same standard of review to agencies' adherence to the Constitution as to agency interpretation of statutes); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (arguing that in some circumstances executive branch officers should not employ the avoidance canon even if a court would); H. Jefferson Powell, Comment, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006) (arguing against the executive branch, including administrative agencies, interpreting statutes so as to avoid constitutional problems). *But cf.* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1092, 1180–81, 1184 (2008) (arguing that courts should not defer to agencies if their statutory interpretations raise serious constitutional problems); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2608–10 (2006) (noting a line of cases where the executive branch is not permitted to construe statutes so as to raise serious constitutional issues).

127 531 U.S. 159 (2001).

128 *Id.* at 174; *see also* Williams v. Babbitt, 115 F.3d 657, 661–63 (9th Cir. 1997) (holding that *Chevron* deference is not appropriate if "serious" constitutional concerns have arisen).

129 556 U.S. 502 (2009) (plurality opinion).

130 *Id.* at 516. *See generally* Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 3–4, 101 (2000) (discussing how judicial deference to agency interpretation of statutes allowed agencies a significant role in determining how to interpret the First Amendment within the agencies' sphere).

3. Agencies Attract Employees Ideologically Committed to the Agency's Mission

Numerous scholars have concluded that federal agencies tend to attract employees who are committed to the agency's regulatory mission.[131] For example, environmentalists will join the Environmental Protection Agency, union supporters the Department of Labor, and civil rights advocates the Justice Department's Civil Rights Division or the Department of Education's Office of Civil Rights. As a result, these agencies develop cultures that favor broad interpretations of the agencies' enforcement power.

This tendency may be mitigated somewhat in areas where there is a good chance a government employee will ultimately seek employment in private industry, like the defense industry, and the employee therefore wants to stay on good terms with the industry. Civil rights enforcers, however, build their reputation less on their ability to collaborate or cooperate with industry and more on their reputation as being tough and thorough enforcers of civil rights laws.

The tendency of agency culture to be proregulation may also be mitigated with regard to types of regulation that affect specific industries, such as pharmaceutical regulation or the regulation of mining, which will attract organized and well-heeled interest groups opposed to regulatory overreach. This is far less likely in the context of antidiscrimination regulation, which operates broadly across many industries and which many businesses hesitate to publicly oppose because of the negative public relations implications.

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131 JENNIFER BACHNER & BENJAMIN GINSBERG, WHAT WASHINGTON GETS WRONG 60 (2016) ("When agencies that provide such benefits as healthcare and welfare hire employees and secure the services of consultants and contractors, they quite naturally attract individuals who by personal belief and prior training are committed to the organization's goals."); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 49 (2008) ("[W]hat motivates many administrators in the first place . . . is some philosophical commitment to an agency's regulatory mission."); *id.* at 93 ("[I]t seems plausible that administrators self-select into an employment pool consisting of individuals who share some ideological commitment to a given agency's mission or, more generally, who believe that regulation can ameliorate difficult social and economic problems. . . . Over time, then, those who remain with an agency and climb its ranks are those who tend to believe in its mission . . . ."); Steven Kelman, *Occupational Safety and Health Administration*, *in* THE POLITICS OF REGULATION 236, 250 (James Q. Wilson ed., 1980) (concluding that the Occupational Safety and Health Administration's (OSHA) actions are motivated by the "pro-protection values of agency officials, derived from the ideology of the safety and health professionals and the organizational mission of OSHA"); *see* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO L.J. 97, 119 (2000) ("That agencies are systematically more loyal to their basic mission seems persuasive, even obvious. People who are sympathetic to that mission *are* more likely to be attracted to work at the agency."); David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 424 (1997) ("[A]n agency with a well-defined mission will tend to attract bureaucrats whose goals are sympathetic to that mission."). *See generally* JAMES Q. WILSON, BUREAUCRACY (1989); Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884, 888–89 (1986).

Moreover, many employees who join an agency for purely careerist reasons or because they are political appointees will eventually "go native" and become committed to the agency's mission.[132] A related phenomenon seems quite common among attorneys; many lawyers know an otherwise liberal acquaintance who became a prosecutor and whose views shifted to a law-and-order perspective, or who joined a corporate law firm and became a strong advocate of tort reform and limits on class actions.

4. Agency Staff Generally Do Not See Enforcing the Constitution as Their Job

Ironically, while leading legal scholars celebrate the role of agencies in undertaking "administrative constitutionalism," they neglect the fact that agency staff do not see enforcing constitutional constraints on their authority as their job. This mentality is reinforced by judicial precedent and other authority constricting the power of agencies to consider the constitutionality of their actions. At the federal level, the Supreme Court has noted that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."[133] The Court added, however, that "[t]his rule is not mandatory."[134] In practice, federal agencies will not consider the underlying constitutionality of explicit statutory demands, but when engaging in rulemaking, promulgating an enforcement agenda, or issuing guidance, they will sometimes consider which of their alternative courses of action is more or less likely to raise constitutional concerns.[135]

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132 *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 700–01 (2000) (noting concerns that career civil service employees will "succumb to the pressures of the entrenched ideologues to sustain the preexisting mission of the agency even when it deviates from 'the administration's' agenda"); E. Donald Elliott, *TQM-Ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167, 176 (1994) (raising the possibility of political appointees going native and adopting the characteristic values of their agencies). For a detailed discussion of why government bureaucrats face strong psychological incentives to support the mission of their agency, see Daniel B. Klein, *If Government Is So Villainous, How Come Government Officials Don't Seem Like Villains?*, *in* THREE LIBERTARIAN ESSAYS 61 (Daniel B. Klein ed., 1998).

133 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994) (alteration in original) (quoting Johnson v. Robinson, 415 U.S. 361, 368 (1974)); *see also* Robertson v. FEC, 45 F.3d 486, 489 (D.C. Cir. 1995) ("It was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional.").

134 *Thunder Basin*, 510 U.S. at 215.

135 Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN L. REV. 329, 361–62 (1991) ("[A]gencies should consider the constitutionality of their programs and procedures insofar as their statutes allow change to meet constitutional objections."); John F. Duffy, Essay, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 921–22 (2009) (noting that "there may be a modern trend to allow agencies to consider constitutional issues at least in those circumstances where they can provide effective relief from the constitutional problem"). Agencies that directly regulate communications, such

At the state level, California, by far the most populous state, has a constitutional provision that severely restricts the ability of agencies to consider the constitutionality of their actions. The California Constitution states that administrative agencies have no power (a) "[t]o declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional," and (b) "[t]o declare a statute unconstitutional."[136]

The scope of this amendment has been broadened by judicial decision beyond "statutes" to include city ordinances.[137] In other states, agencies adhere to the traditional rule that "[n]o administrative tribunal of the United States has the authority to declare unconstitutional the act which it is called upon to administer."[138]

I agree with Professor Gillian Metzger that courts act appropriately when they encourage agencies to consider the constitutional ramifications of their decisions, and that Supreme Court doctrine often fails to do so.[139] I disagree that giving agencies autonomy to establish their own constitutional common law largely shorn from dependence on Supreme Court precedent is likely to have a salutary outcome,[140] for the reasons described in subsections II.A.1, 2, and 3. Indeed, Metzger's defense of administrative constitutionalism shows precisely why it is problematic. She writes:

> [W]hat is demanded is consideration of significant constitutional implications of agency action, not that constitutional concerns necessarily trump other relevant factors in an agency's deliberations. As a result, under ordinary administrative law principles, a careful explanation of how constitutional concerns were accommodated or why constitutional concerns are outweighed is all that an agency must supply.[141]

Metzger and others believe that an agency's expertise puts it in an especially strong position to "integrat[e] constitutional concerns" with "regulatory priorities."[142] In fact, an agency staffed with strong believers in the agency's mission, inclined to increase the power of the agency for public choice and ideological reasons, should not be trusted to determine whether the agency's understanding of "constitutional concerns" are outweighed by other imperatives.

Professor Bertrall Ross, by contrast, believes that it is beneficial to have mission-driven agencies, and antidiscrimination agencies specifically, engage

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as the FCC, would seem to have little choice but to consider whether the policies they are enacting conform with constitutional norms. *See* Bernard W. Bell, *Interpreting and Enacting Statutes in the Constitution's Shadows: An Introduction*, 32 U. DAYTON L. REV. 307, 311 (2007).

136 CAL. CONST. art. III, § 3.5.

137 Westminster Mobile Home Park Owners' Ass'n v. City of Westminster, 213 Cal. Rptr. 640, 645 (Cal. Ct. App. 1985).

138 First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 585 (N.D. 1984) (quoting Buckeye Indus. v. Sec'y of Labor, 587 F.2d 231, 235 (5th Cir. 1979)).

139 *See* Metzger, *supra* note 4.

140 *Id.* at 479.

141 *Id.* at 526.

142 Metzger, *supra* note 2, at 1922–23.

in constitutional decisionmaking because they have expertise in "fleshing out . . . statutes that rest on constitutional values."[143] For all the reasons discussed in this Article, in practice this means that agencies will be inclined to expand the scope of antidiscrimination laws at the expense of constitutional rights. That may be normatively desirable in particular circumstances, but it surely is problematic to let agencies use amorphous "constitutional values" to ignore Supreme Court precedent and violate constitutional rights.

B. Ideological Considerations Specific to Antidiscrimination Law That Lead Agencies to Neglect Freedom of Speech

Antidiscrimination law is a particularly fraught area for protection of freedom of speech. In some areas of law, such as Food and Drug Administration regulation, freedom of speech and other civil liberties may be incidental casualties of broader regulatory goals. In the context of antidiscrimination law, however, the very goals of antidiscrimination advocates are often threatened by constitutional protections for due process or freedom of speech. For example, if an agency's goal is protecting students and workers from perceived hostile environments, or protecting potential homeowners and renters from actions, including speech, aimed at discouraging their housing market activity, enforcement aimed at achieving those goals will necessarily come into conflict with First Amendment protections for freedom of speech. If an agency's goal is to make it easier for students to successfully prosecute sexual assault complaints against other students, reducing due process protections for the accused is an easy way to do so.

Some would justify favoring antidiscrimination goals over constitutional rights by invoking a purported Fourteenth Amendment guarantee of "equality," which may override, or mitigate, First Amendment guarantees of free speech. However, the Fourteenth Amendment contains no general guarantee of equality, only a prohibition on states denying any person equal protection of the law. Nor has the Supreme Court ever held that the Fourteenth Amendment provides a right to be free from private discrimination. Therefore, conflicts between freedom of expression on the one hand, and restrictions on discrimination by private actors on the other, are conflicts between a constitutional right and a statutory privilege. In the American constitutional system, constitutional rights are supposed to trump statutory grants.

This does not sit well with many Americans, especially on the progressive end of the political spectrum, who believe that protecting vulnerable groups from discrimination should be at the heart of our legal and political system. Those who share this perspective are naturally reluctant to give significant weight to competing considerations, including constitutional constraints on antidiscrimination enforcement such as the prohibition on government infringement on freedom of speech. In the mid-1980s, even the Supreme Court suggested that the need to "eradicate" discrimination is a compelling

143 Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 522 (2015).

interest that can overcome otherwise valid First Amendment objections to antidiscrimination laws.[144]

The Court has since backed away from such pronouncements,[145] but the notion that the "constitutional value" of antidiscrimination should trump First Amendment limitations on government regulation is alive and well, both in the academy and among progressive political activists. For example, a recent law review article by a prominent professor references the purported "tension between the often competing demands of the First Amendment's express guarantee of free speech and the Fourteenth Amendment's implicit promise of dignity and equality."[146] This quotation reflects the increasingly common view that equalitarian concerns—derived from an extremely aggressive (and frankly dubious) interpretation of the Fourteenth Amendment's ban on the deprivation of the equal protection of the law to any person—should have at least as much weight in constitutional decisionmaking as the Constitution's expressly libertarian requirements.[147]

144 *See* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

145 *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557 (1995) (holding a Massachusetts antidiscrimination law violated the associational rights of the organizers of Boston's St. Patrick's Day Parade, without suggesting that this violation served a compelling interest). Five years later, in *Boy Scouts of America v. Dale*, the dissenters disputed whether the law in question impinged on the Scouts' First Amendment right to exclude gay scoutmasters, but did not claim that if the Scouts had such a right, the government's compelling interest in eradicating discrimination would trump that right. 530 U.S. 640, 670–71 (2000) (Stevens, J., dissenting).

146 Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 739 (2017).

147 For an early and influential argument that the Thirteenth, Fourteenth, and Fifteenth Amendments create a governmental obligation to enforce equality among groups that can, in turn, supersede explicit protections provided by the Bill of Rights, including the First Amendment, see Akhil Reed Amar, Comment, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992). For broader arguments that the "constitutional value" of freedom of expression should be subordinated to the "constitutional value" of equality, see, e.g., CATHARINE A. MACKINNON, ONLY WORDS 71 (1993); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 345–46 (1991); Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 ST. JOHN'S L. REV. 119, 162 (1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 60–61 (1993); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* MATSUDA ET AL., *supra*, at 17, 24–25.

For a sound rejoinder to such perspectives, see Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. L. SCH. ROUNDTABLE 223 (1996). More colorfully, after several liberal Jewish civil libertarian groups abandoned a coalition favoring religious freedom legislation because of concerns about its effect on antidiscrimination law, an unhappy Marc Stern of the American Jewish Congress attacked their implicit idolatry: "The principle of equality is taking on a quasi-religious status," he complained. "Maybe for some people questioning civil rights is like questioning God." David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. L. F. 133 (quoting Eric Fingerhut, *Jewish Groups Back Away from Religious Protection Act*, WASH. JEWISH WK., Oct. 7, 1999, at 5).

Civil rights enforcement agencies, meanwhile, are "mission-driven agencies, which are typically designed to be responsive to members of the civil rights community."[148] As a result, antidiscrimination activists naturally turn to these agencies, staffed by their ideological compatriots, when seeking to expand antidiscrimination law even when such an expansion would conflict with constitutionally guaranteed liberties.[149] Naturally, these agencies, especially but not exclusively when run by Democratic political appointees, are similarly inclined to start from the proposition that antidiscrimination principles have (at least) equal constitutional value as the First Amendment, regardless of constitutional text and Supreme Court precedent.

Consider a recent report of the U.S. Commission on Civil Rights, endorsed by its Democratic majority. The Commission is not an enforcement agency, but its reports reflect political and ideological developments as reflected in the view of its partisan appointees.[150] Chairman Martin Castro wrote, "Civil rights protections ensuring nondiscrimination, as embodied in the Constitution, laws, and policies, are of preeminent importance in American jurisprudence."[151] The report went on to denigrate religious liberty claims, regardless of their constitutional merit, if such claims interfere with antidiscrimination laws.[152]

At the state and local level, many enforcement agencies have become known as "human rights commissions," suggesting that the right to be free from private discrimination is at least as valuable as other rights, including constitutional rights. Indeed, the phrase "human rights" suggests a superiority over mere textually supported constitutional rights. Agencies charged with enforcing antidiscrimination laws that apply to private parties are inclined to apply those laws broadly, even in the face of competing considerations arising from the written Constitution.[153]

148 Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L.J. 1807, 1832 (2017).

149 *Id.* at 1839 ("The mission and personnel of agencies responsible for enforcing civil rights statutes provide built-in strength to the ideological and moral imperative for protecting suspect classes. This resilient institutional character is bolstered further by the role of social-justice activists and lawyers in providing information and putting pressure on agencies to do more.").

150 *See* Letter from Martin R. Castro, Chairman, U.S. Comm'n on Civil Rights, to President Barack Obama, Vice President Joe Biden, and Speaker of the House Paul Ryan, *in* U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016).

151 *Id.*

152 *Id.*

153 One should be cautious, however, about painting with too broad a brush, as agencies do sometimes show admirable respect for civil liberties. For example, the Virginia ACLU filed a complaint with the Virginia Fair Housing Office against neighborhood activists opposing a home for AIDS sufferers, in part because the activists "had made public statements designed to foster opposition to the . . . home . . . based on irrational prejudice, fear and animus toward those who will reside there." Alan Cooper, *Organization Fighting AIDS Homes Wins Round Gilmore Cites Free-Speech Provisions*, RICHMOND TIMES-DISPATCH, Oct. 13, 1994. After an investigation, the Fair Housing Office determined that the First Amendment protected the activists' actions. *Id.* In that case, government antidiscrimination

As Professor R. Shep Melnick notes, this dynamic manifested itself quite early at the Department of Health, Education, and Welfare's Office of Civil Rights. According to Melnick:

> OCR's primary role morphed from terminating funding for programs engaged in court-defined discrimination, to using its rulemaking authority to define standards that could then be enforced by the courts through injunctive relief. A mechanism designed to enforce constitutional norms became a font of much more extensive prohibitions—ostensibly based on a federal statute—that went well beyond the U.S. Constitution.[154]

At least in Democratic administrations that count on groups dedicated to expanding antidiscrimination regulations as part of their electoral coalition, enforcement agencies will not only rely on administrative constitutionalism developed organically within the agency—note that some of the HUD investigations and prosecutions discussed earlier in this Article were initiated during the George H.W. Bush administration—but will at times be subject to top-down rules favoring antidiscrimination principles over freedom of speech and other civil liberties. The obvious recent examples, discussed previously, are OCR's efforts during the Obama administration to expand the scope of Title IX at the expense of due process, and to expand the scope of harassment rules on campuses at the expense of freedom of speech.

This ability of agency heads to favor antidiscrimination concerns over constitutionally protected civil liberties is facilitated not just by employees who naturally migrate to agencies with whose mission they agree, but by aggressively ideological hiring of officially nonpolitical appointees, federal civil service law notwithstanding. Consider the trajectory of the Justice Department's Office of Civil Rights during the Obama administration. Attorney General Eric Holder looked for civil service candidates with a "[c]ommitment to civil rights."[155] Commitment to civil rights was, in practice, interpreted not as a commitment to enforcing the laws on the books, but as a commitment to left-wing political activism, as demonstrated by past work for liberal activist groups.[156] Meanwhile, even when desperately searching for qualified attorneys to fill civil service positions, the Justice Department, for reasons it could not explain to investigators from the Office of the

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enforcement bureaucrats were more supportive of the First Amendment than was the Virginia ACLU!

154 R. Shep Melnick, *The Odd Evolution of the Civil Rights State*, 37 HARV. J.L. & PUB. POL'Y 113, 122 (2014).

155 *See* J. CHRISTIAN ADAMS, INJUSTICE: EXPOSING THE RACIAL AGENDA OF THE OBAMA JUSTICE DEPARTMENT 78 (2011).

156 *Id.* Even before Obama won the 2008 election, Holder, in a speech to the liberal American Constitution Society, promised the "Justice Department would be 'looking for people who share our values,' and that 'a substantial number of those people would probably be members of the American Constitution Society.'" Charlotte Allen, *Politicizing Justice*, WKLY. STANDARD (Feb. 25, 2013), https://www.weeklystandard.com/charlotte-allen/politicizing-justice.

Inspector General, failed to contact experienced former Bush administration attorneys who might have been lured back to the Department.[157]

During the first two years of the Obama administration, over sixty percent of attorneys hired for civil service positions in the Office of Civil Rights had liberal entries (such as working for a left-leaning activist group) on their resumes, and none had conservative entries.[158] The Justice Department's rationale for hiring progressive activist lawyers was that their traditional civil rights backgrounds gave them appropriate law-enforcement credentials.[159] In fact, relatively few of the lawyers in question had much in the way of law enforcement experience.[160] Rather, much of their experience was in challenging existing law as insufficiently broad or insufficiently progressive, and advocating for new or amended laws, or for broad judicial interpretations of existing laws at odds with existing judicial precedent or agency policy.[161] One could hardly expect such attorneys, who devoted their working lives to expanding the scope of antidiscrimination laws, to be terribly interested in constitutional limitations on such laws.

III. Proposals for Reform

This Article raises the obvious question of why courts cannot be relied upon to rein in agencies when they neglect civil liberties in favor of antidiscrimination concerns. While generalist courts have their own imperfections, they do not share most of the pathologies, described above, that lead agencies to systematically discount constitutional rights. Generalist courts' most important advantage is that they do not share mission-driven agencies' tunnel vision, i.e., the latter's devotion to its statutory mission at the expense of other considerations.[162]

The first problem with relying on courts to discipline agencies is that many agency actions are never reviewed by courts. Sometimes, the process of

157 *See* Office of the Inspector Gen., U.S. Dep't of Justice, A Review of the Operations of the Voting Section of the Civil Rights Division 194–95 (2013), http://www.justice.gov/oig/reports/2013/s1303.pdf.

158 Charlie Savage, *In Shift, Justice Department Is Hiring Lawyers with Civil Rights Backgrounds*, N.Y. Times (May 31, 2011), http://www.nytimes.com/2011/06/01/us/politics/01rights.html. The Obama administration's hiring practices were, in part, a reaction to the Bush administration's practice of trying to hire conservatives to fill OCR, which in turn was a reaction to the Clinton administration stacking OCR with progressive lawyers in its waning days. *See* David E. Bernstein, Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law 15–28 (2015).

159 Savage, *supra* note 158.

160 Bernstein, *supra* note 158, at 26.

161 *Id.*

162 Indeed, nongeneralist judges, such as family law judges, may exhibit similar tunnel vision. Family law judges, for example, seeing their role primarily as resolving custody disputes in the best interest of the child, often issue orders that blatantly violate the First Amendment rights of parties to the dispute, such as requiring a parent of one religion to not practice that religion in front of his child. I thank Eugene Volokh for raising this point.

going through multiple levels of agency review before reaching a court is too daunting for potential litigants. Other times, it is difficult if not impossible to find a potential plaintiff who has standing to challenge agency action.[163] Even when standing is available and a potential litigant has the means to proceed, various administrative law doctrines that require judicial deference to agency actions can dissuade litigation.[164]

Agencies can avoid public and congressional input, as well as judicial review, by engaging in what is known as "sue and settle."[165] Agencies can establish enforcement precedent through settlements, sometimes with parties who *want* the agency to expand its regulatory reach.

As with the Title IX sexual assault guidance, agencies can avoid judicial and other scrutiny by issuing informal "guidance" rather than formal rules.[166] Moreover, while guidance has its virtues in some contexts,[167] agencies sometimes improperly and intentionally avoid the rulemaking process to evade judicial review. Agencies are especially tempted to engage in such evasion when the powers that be know that their guidance likely would not survive legal challenge if converted into a formal rule.[168] The Obama administration, for example, never initiated the notice-and-comment process to formalize its Title IX sexual assault "guidance," even though it had more than five years to do so. Instead, the administration proceeded as though its guidance was binding,[169] while ignoring the formal rulemaking that would have subjected its guidance to public comment, and ultimately judicial review.

Refusal to comply with the Administrative Procedure Act has been a longstanding problem with the Department of Education's Office of Civil Rights. Despite a statutory mandate, in the 1960s OCR failed to use the pro-

163 *See, e.g.*, Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) (describing the history of standing in the United States and noting that judicial protection is traditionally unavailable unless a common-law right is at stake); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395 (1988) (contrasting the historical understanding of justiciability from the time of the Framers with the narrower private rights model of standing dominant today).

164 For an overview of these doctrines, see Richard J. Pierce, Jr., Essay, *The Future of Deference*, 84 GEO. WASH. L. REV. 1293 (2016).

165 *See supra* notes 41–52 and accompanying text.

166 *See* John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J.L. & PUB. POL'Y 30, 38 (2014).

167 *See* NICHOLAS R. PARRILLO, FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 7 (2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-draft-report.pdf. For some of the problems that arise when guidance substitutes for formal rulemaking, see Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2014).

168 *See* Graham & Broughel, *supra* note 166, at 39.

169 *See* Joe Cohn, *Department of Education's Overreach Questioned by Senator Lamar Alexander*, FIRE (Sept. 30, 2015), https://www.thefire.org/department-of-educations-overreach-questioned-by-senator-lamar-alexander/ (reporting that Catherine Lhamon, the Department of Education's Assistant Secretary for the Office for Civil Rights, testified that "she expected institutions of higher education to fully comply with OCR's guidance").

cedures required by the APA, "and it has rarely done so since."[170] Instead, "[v]irtually all its rules have taken the form of 'guidelines' or 'interpretive memos' issued without opportunity for public comment and without the type of detailed explanation offered by regulatory agencies that comply with the APA."[171] OCR's attempts to impose speech codes and strip students accused of sexual assault of due process protections are just the most recent manifestations of this propensity.[172]

Given all that, an obviously useful reform would be to make it easier for litigants to challenge agency actions in generalist courts, and for such courts to exhibit less deference to agencies. One positive sign is that the Supreme Court has recently emphasized agency pronouncements that have "the force and effect of law" cannot be deemed to be unreviewable guidance.[173] Further elaboration of this point in future cases should make it easier for rules disguised as guidance to be challenged in court. However, the issues of guidance, administrative procedures, and deference are far too complex to expect reforms to be implemented solely or primarily based on concerns regarding agency neglect of civil liberties in general, much less based specifically on antidiscrimination agencies' neglect of civil liberties.

Similarly, qualified immunity and other immunity doctrines, as well as statutory protections for government employees, often serve to protect even willful agency employees from the consequences of their neglect for constitutional rights. Only on rare occasions do courts hold government officials personally liable when they intentionally overstep clear constitutional boundaries, as in the Berkeley three case.[174] Once again, however, one cannot expect reform of such a broad area of law based solely or primarily on the specific problems discussed in this Article. One might at least hope, though, that legal actors responsible for rather blatant constitutional violations, such as Obama administration OCR Chief Catherine Lhamon, will not in the future be rewarded with plum political appointments.[175]

Another possible reform would be to establish in the executive branch an institution akin to the Office of Information and Regulatory Affairs ("OIRA"). Instead of vetting regulatory activity for compliance with statutory mandates and administration policy as OIRA does, this new institution would be charged with reviewing agency actions to ensure they complied with Supreme Court precedent, including First Amendment and due process considerations. Once again, however, while this is a promising idea, it would almost certainly take broader concerns than those expressed in this Article to

170 Melnick, *supra* note 154, at 122.

171 *Id.*

172 *See supra* Section I.A.

173 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015) (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

174 *See* White v. Lee, 227 F.3d 1214, 1239 (9th Cir. 2000).

175 *See Catherine E. Lhamon Selected as Chair of the U.S. Commission on Civil Rights*, PR NEWSWIRE (Dec. 28, 2016), https://www.prnewswire.com/news-releases/catherine-e-lhamon-selected-as-chair-of-the-us-commission-on-civil-rights-300383886.html.

bring the idea to fruition. Moreover, there would be the inherent danger that such an institution would become something of a rubber stamp that would make every effort to deny that any action had constitutional infirmities, so as to preserve executive power and discretion. The example of the Office of Legal Counsel and its strong presumption in favor of presidential authority may serve as a cautionary example.

A more practical, though limited, reform goal would be to establish constitutional watchdog offices devoted to protecting constitutional rights from agency overreach within antidiscrimination agencies. The model would be the so-called Office of Goodness—"an office within an operational agency" that is "advisory rather than operational," tasked with furthering "a particular value not otherwise primary for the agency in which [it] sit[s]," and "internal and dependent on [its] agency."[176]

For example, a law enforcement agency might have an office devoted to promoting concern for freedom of speech, freedom of religion, and due process within the agency. The agency's primary mission is "to prevent and respond to crime and maintain public order,"[177] but the constitutional watchdog's task would be to try to ensure that the agency does so "without infringing anyone's civil rights."[178] To take a real-world example, the Department of Homeland Security has a watchdog office dedicated to privacy rights.[179]

Civil rights enforcement agencies need their own constitutional watchdogs, dedicated to ensuring that enforcement of civil rights laws does not trample on established constitutional rights. This is clearly not a cure all. There is a risk that such an office would get captured by the same forces that created the problem the watchdog was designed to prevent. Moreover, in the absence of anything but persuasive authority, such watchdogs might be entirely ineffectual. Constitutional watchdog offices are sufficiently new that it is difficult to draw any firm conclusions of potential effectiveness in the context discussed in this Article based on experience in other contexts. But, as the old joke about chicken soup goes, "Can it hurt?"[180]

One analogous example that might provide some room for optimism is universities' experience with freedom of expression committees. These committees' authority comes mostly from their role in being a persuasive force regarding protecting academic freedom, and whatever regulatory authority they have is typically subject to review by university administration. Neverthe-

176 Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 60–61 (2014).

177 *Id.* at 54.

178 *Id.*

179 *Id.* at 56.

180 At least in the version this author knows, a Jewish lady offers chicken soup to her sick grandchild. The grandchild inquires, "Grandma, will this help my cold?" The grandmother shrugs her shoulders and replies, "Can it hurt?" It helps if you imagine the grandmother speaking with a Yiddish accent.

less, they seem to have some effect in protecting freedom of speech on campus, at least on the margin.[181]

The difficulty, of course, is that someone with authority must recognize there is a problem before anyone even seriously considers such a solution. The Obama administration, to take an obvious recent example, was almost entirely oblivious to arguments that its Title IX enforcement policies threatened First Amendment protections and due process rights. The Trump administration, by contrast, has rescinded the problematic Title IX sexual assault guidance, and both its Secretary of Education[182] and Attorney General[183] have denounced the growing suppression of free speech on college campuses. Instituting constitutional watchdog offices at the Department of Education's OCR and in the Civil Rights Division of the Justice Department would likely significantly aid in institutionalizing concern about how antidiscrimination laws may encroach on First Amendment and due process rights, something that seems important to the Trump administration and its political base.

CONCLUSION

The proper scope of executive power in the United States has been a matter of dispute ever since the Founding. The Federalist Papers reflect that tension, with Federalist 51 emphasizing checks and balances,[184] while Federalist 70 celebrates "energy in the executive."[185] The energetic version of executive power has become increasingly dominant. One symptom of this dominance is the ever-growing importance of administrative agencies. As discussed above, agencies are often subject only to limited checks from the

181 *See* Sasha Volokh, *Emory University Gets "Green-light" Free-Speech Rating from FIRE*, WASH. POST: VOLOKH CONSPIRACY (Dec. 5, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/12/05/emory-university-gets-green-light-free-speech-rating-from-fire/. One famous example of such a committee's influence is the 1974 *Report of the Committee on Freedom of Expression at Yale*. *See* YALE COLL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE (1974), https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale. A more recent influential example is the "Chicago Principles," promulgated by a faculty committee at the University of Chicago. *See* Robert J. Zimmer, *Free Expression on University Campuses: The Chicago Principles*, MEDIUM (Apr. 7, 2017), https://medium.com/uchicago/free-expression-on-university-campuses-the-chicago-principles-4edb45471dfe.

182 Press Release, U.S. Dep't of Educ., Secretary DeVos Prepared Remarks on Title IX Enforcement (Sept. 7, 2017), https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.

183 Press Release, U.S. Dep't of Justice, Attorney General Sessions Gives an Address on the Importance of Free Speech on College Campuses (Sept. 26, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-gives-address-importance-free-speech-college-campuses.

184 THE FEDERALIST NO. 51 (James Madison).

185 THE FEDERALIST NO. 70, at 363 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

other branches, but have a great deal of power and, in practice, a significant amount of autonomy.

This power and autonomy manifests in a variety of ways, including when agencies promote their own constitutional vision via administrative constitution, sometimes ignoring contrary Supreme Court doctrine and even the legal and political views of the extant presidential administration. While legal scholars have celebrated several examples of administrative constitutionalism serving progressive ends, they have largely ignored the threat that giving agencies the power to impose self-invented constitutional norms poses to civil liberties.

This Article has shown that at all levels of government, agencies charged with enforcing legislation that prohibits invidious discrimination have interpreted their mandates in ways that threaten Americans' basic First Amendment freedoms and due process protections. As noted above, this is not surprising, given that the agencies' cultures and incentive structures incline them strongly toward enhancing enforcement and ignoring countervailing constitutional considerations. Legal scholars should heed these examples and think twice before wholeheartedly embracing administrative constitutionalism.