

Antidiscrimination Laws, the First Amendment, and the Administrative State

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CSAS Working Paper 18-01

Free Speech and the Administrative State

January 26, 2018

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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, while Federalist 70 celebrates “energy in the executive.” The energetic version of executive power has become increasingly dominant. One symptom of this dominance is the prominence of administrative agencies. As discussed below, agencies are often subject only to limited checks from the other branches, but have a great deal of power and, in practice, a significant amount of autonomy.

Not surprisingly, with power comes abuse, and administrative agencies at all levels of government have become an increasing threat to civil liberties. This is especially true when agencies purport to be enforcing legislation that prohibits invidious discrimination. This paper discusses why administrative agencies charged with enforcing antidiscrimination legislation tend to be inconsiderate of civil liberties considerations in general, and First Amendment freedom of speech limitations on their authority in particular.

To establish the existence and contours of the problem, Part I of this paper provides context by recounting several detailed examples of how federal, state, and local antidiscrimination-enforcement agencies have undermined civil liberties. These examples include the federal Department of Education’s Office of Civil Rights’ Obama-era attempts to interpret Title IX to strip university students accused of sexual assault of due process protection and to impose broad speech codes on universities, the federal Department of Housing and Urban Development’s 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.

Part II of this article discusses the reasons why agencies that enforce antidiscrimination laws tend to be oblivious or hostile to constitutionally protecting civil liberties in general and freedom of speech in particular. Part II begins with a discussion of institutional factors common to 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 encourages agencies to resolve statutory ambiguity in favor of broad interpretation of agency authority. Third, antidiscrimination agencies attract employees ideologically committed to their agency’s mission. Fourth, and concomitantly, agency staff (unlike generalist courts) generally do not see enforcing the Constitution in general, or protecting civil liberties specifically, as their job. Fifth and finally, to the extent agencies do see enforcing the Constitution as their job, they may enforce “constitutional values” that come to be accepted in agency culture that can be at odds with Supreme Court precedent and, indeed, any reasonable interpretation of constitutional text. Part II concludes with a discussion of political and ideological factors specific to agencies charged with enforcing antidiscrimination laws that makes them 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 affected the problem addressed in this article. A more limited and therefore practical reform would be for agencies that enforce antidiscrimination legislation to establish “offices of virtue” charged with advocating within the

agencies for the protection of civil liberties.

I. Examples of Antidiscrimination-enforcement Agencies Trampling on Civil Liberties

This section recounts several examples enforcement agencies neglecting civil liberties in their quest to aggressively enforce antidiscrimination laws. Section A discusses the Obama Administration's Department of Education's Office of Civil Rights' hostility to 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 B reviews attempts by the Department of Housing and Urban 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 C discusses examples of state and local antidiscrimination enforcement agencies trampling on civil liberties in favor of a broad enforcement agenda.

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

There is perhaps no better example of antidiscrimination enforcers ignoring valid constitutional considerations while expanding their own power in legally dubious ways than the "guidance" issued in 2011 via a "Dear Colleague" letter sent to university general counsels by the Department of Education's Office of Civil Rights. The latter 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. The government almost certainly did not have the authority to require universities to abide by this guidance, not least (but not only) because it did not go through the required notice and comment process. 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 guidance was mandatory.

The guidance impacted the rights of accused students in several ways. First, it required universities to lower the standard of proof in disciplinary hearing from the “clear and convincing” standard many had been using to a lower “preponderance” of evidence. While it’s not at all clear where OCR gets the authority to make this demand, and the demand itself was extremely controversial, imposing a preponderance of the evidence stand is not an inherent violation of due process.

Other aspects of the guidance more overtly sought to restrict due process for the accused. OCR “strongly discourag[e]” 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. Rather, according to the guidance, a school “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.” 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.” 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, even though such evidence is occasionally highly relevant, and a blanket rule would sometimes deprive the defendant 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.” 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 all 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 and keep their federal funding, accused students should be punished regardless of guilt.

Not surprisingly, the result was 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. In return, penalized students have filed dozens of lawsuits against their universities alleging that their punishments breached various contractual and procedural guarantees. Most of the claims adjudicated so far have been found to have sufficient merit to get beyond the initial pleading stage.

The Trump administration has revoked the guidance in question. But this is hardly the only example of unconstitutional overreach in enforcing antidiscrimination by federal agencies, indeed by OCR itself. Fresh from imposing its highly problematic Title IX “guidance,” OCR sought to impose a draconian nationwide speech code at American universities.

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. 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.

The Supreme Court's opinion in *Davis v. Monroe Bd. of Education* in 1999 implicitly limited the permissible scope of OCR regulation. The Court ruled that to constitute illegal sexual harassment in education, sexual advances or other verbal or physical conduct must be severe and pervasive, create a hostile environment, and be "objectively offensive" to a "reasonable person." The Clinton administration soon clarified that OCR's regulations must be interpreted as consistent with Supreme Court precedent.

In 2003 the Bush administration OCR, troubled by OCR's previously overbroad guidance, emphasized that illegal 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." 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."

Many universities, public and private, nevertheless voluntarily continued to enforce harassment rules that amounted to stringent speech codes. Other universities, however, declined to enforce speech codes, either because their leaders believed that universities should be free marketplaces of ideas, or because they feared First Amendment lawsuits or bad publicity from organizations dedicated to freedom of speech on campus, especially the Foundation for Individual Rights in Education (FIRE).

Fast forward to May 2013. OCR and the Justice Department's Civil Rights Division jointly

sent a 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.” 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.

As FIRE pointed out in a blistering critique, this meant that the federal government was trying to impose a breathtakingly broad nationwide university speech code “that makes virtually every student in the United States a harasser.” OCR was trying to force universities to ban “any expression related to sexual topics that offends any person.” So, 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 for dates or any flirtation that is not welcomed by the recipient of such a request or flirtation.”

A few months later, OCR backed away from the Montana settlement. 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.” She also asserted that OCR’s understanding of hostile environment harassment in educational settings is “consistent” with the Supreme Court’s definition.

OCR even allowed the University of Montana to disregard some of the requirements of the agreement. But 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's letter's definition of sexual harassment, rather than with Supreme Court precedent, past OCR statements, and the letter OCR sent to FIRE.

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. 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." Apparently, DOJ felt free to make up its own, subjective standard for sexual harassment, completely ignoring relevant Supreme Court precedent.

Trump Administration Secretary of Education Betsy DeVos has signaled that the Montana settlement and the DOJ letter are contrary to current OCR policy, remarking that "harassment codes which trample speech rights derail the primary mission of a school to pursue truth."

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. I have recounted the most famous such incident, which arose in Berkeley California and involved a group of neighborhood activists known as the "Berkeley 3," in detail elsewhere. Berkeley, however, was just one of several venues for government misconduct.

In 1994, Community Access, a local housing group, negotiated with First Nationwide Bank to buy a building in Gramercy Park, New York. 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. The complaint alleged that a community group, the Irving Place Community Coalition, had pressured the bank into backing out of the contract. HUD investigated.

According to New York City Councilman Antonio Pagan, “HUD not only took sides but in reality had already arrived at a conclusion.” 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 action. 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.” After legal intervention by the ACLU, Community Access dropped the three community activists from its complaint.

In New Haven, a group of homeowners in the affluent Ronan-Edgehill neighborhood filed a state court zoning challenge to Marjorie Eichler’s plan to buy a 21-room mansion in the Neighborhood. Eichler planned to move in with her seven adopted children and three foster children. 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. The area was zoned for single-family residences only.

Because of the zoning suit, Eichler had trouble getting financing for the purchase and the state Department of Children and Youth Services refused to give her a license for the foster children to live with her in the house. In May of 1992, Eichler filed a complaint with HUD alleging housing discrimination. In June, HUD referred the matter to the Justice Department,

which sued the neighbors responsible for the state suit. The federal suit alleged discrimination based on family status and handicap. The neighbors dropped the state suit when they learned of Eichler's complaint, but the Justice Department pressed on with its suit. In February of 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 government for redress of grievances. By this time, the neighbors had spent \$20,000 on legal fees.

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.

In West Lake 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. Isobel Oxx wanted to turn her home into a hospice for the terminally ill. 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. The HOA had been considering a state suit to enforce the covenant. According to an attorney for the homeowners, 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.

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 agencies abuse of First Amendment rights. 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. "To write brochures and articles and go out and actively organize people to say, 'We don't want those people in those structures,' is another." The ACLU sent a letter to HUD Secretary Henry Cisneros in August of 1994 expressing concern over the Berkeley and New York investigations. 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 . . . cannot be reconciled with the First Amendment's commitment to robust debate."

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, the Department 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." 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." Frivolous lawsuits might still

form the basis of a discrimination charge, but only if headquarters approved the charge. The department also announced it was dropping the investigation of the Berkeley incident because, it concluded, the Berkeley three had acted within their free-speech rights.

Assistant Attorney (and future Massachusetts governor) General Deval Patrick of the Justice Department's Civil Rights Division opposed the new HUD policy, and ordered Justice to bring additional lawsuits against community activists. 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."

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 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."

Not surprisingly, the federal judge overseeing the Fort Worth case Amendment rejected Patrick's theory. The judge held that "leafleting, petitioning, and soliciting" against the placement of a group home in one's neighborhood are actions protected by the First Amendment. 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. In that case, the court even took the unusual step of holding individual HUD employees personally liable for this violation because their conduct was so clearly and outrageously unconstitutional. In other cases that squarely addressed relevant First Amendment issues, courts similarly decided in favor of citizen activists and against HUD.

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 civil 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 school's failure to properly educate black athletes. The cartoon, entitled "The Plantation," depicted a basketball game with three anonymous African American University of Minnesota (UM) basketball players visible. 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." 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.

Terrill's complaint nevertheless alleged that the cartoon created an illicit "hostile public environment." 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." Terrill stated that he believed the First Amendment didn't 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.

A New Jersey administrative ruling concluded that employees who forwarded one list of crude jokes to their colleagues via e-mail had created an illegal "offensive work environment," even though this act would be highly unlikely to create liability under federal law. Similarly, a Vermont administration ruling found disability harassment in a public accommodation based on one rude comment.

The New York City Commission on Human Rights ruled that a black separatist organization

had no constitutional right to exclude whites from its otherwise public meetings. 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.” 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. 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. By contrast, a federal court held that the Ku Klux Klan had a constitutional right to discriminate against African Americans.

More recently, the New York City Commission has stated that those covered by antidiscrimination law must refer to their clients, tenants, customers, employees and so forth by their “preferred name, pronoun and 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.” This goes well beyond, for example, requiring that a transgender man be referred to as “he” rather than “she;” the Commission added that the requirements include referring to individuals by “they/them/theirs or ze/hir” if that is their preference.

Local antidiscrimination agencies have also placed a significant role in expanding the scope of “public accommodations” laws so that they forbid service providers--such as photographers, printers, cake bakers, and florists—from refusing to provide services for same-sex weddings, though they otherwise serve gay customers. It’s not at all obvious that a typical law prohibiting discrimination in “places of public accommodation” covers this behavior. First, some of these service providers, such as photographers who have no fixed place of business, do not easily come within the definition of a “place of public accommodation.” Second, it’s not clear that discrimination 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 covered by bans on sexual orientation discrimination. Analogously, it's not clear that someone who refuses to cater a bris 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. Nevertheless, and even though interpreting the laws broadly raises obvious free speech, and religious liberty concerns, in the absence of explicit statutory guidance state and local antidiscrimination agencies have frequently pioneered very broad interpretation 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 environment” and therefore supposedly violates laws that prohibit discrimination in public accommodations.

Perhaps most remarkably, at least three state and local antidiscrimination agencies, one in Madison, Wisconsin, one in Ohio, and one in California, have punished individuals for discriminating in their choice of roommate. Such punishment is almost certainly inconsistent with the right of intimate association delineated by the Supreme Court, 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. Despite its oversight capacity, Congress also has limited control over agencies, and most agency decisions, especially informal ones such as “guidance,” never are 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 paper 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.

A. Institutional Explanations

Section A discusses institutional reasons that executive agencies are generally likely 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 mission, which leads them to try to retain as much enforcement authority as possible; (4) agency employees often don’t see enforcing the Constitution as their job, and they are often encouraged in that perspective by judicial precedent; and (5) 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 so often ignore constitutional constraints on their authority is that agencies prefer more power and discretion over less. One strand of public choice theory attributes agency behavior primarily to a desire to maximize the

agencies' (and its employees') power, prestige, and budget. While extreme versions of this thesis have been subject to significant criticism, more modest versions, presenting this sort of self-interest as one important motive among many, are likely correct. 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. As Ginsburg and DeMuth conclude, "An agency succeeds by accomplishing the goals Congress sets for it as thoroughly as possible--not by balancing its goals against other, equally worthy goals."

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. While much of this literature deals with judicial review of agency actions, administrative law scholars have found that agencies themselves engage in purposivism, and have also argued that agencies are correct in doing so.

Purposivism practically invites agencies to find and even create ambiguities so that they can interpret statutes broadly. 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.

Nevertheless, when agencies' implementation of statutes raises significant constitutional issues, courts may refuse to apply the *Chevron* doctrine and do not defer to agency interpretations. For example, in *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 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. This non-deference policy is not applied universally, however. For example, in *FCC v. Fox Television Stations, Inc.*, the Supreme Court refused to “apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties.”

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. Environmentalists will join the EPA, 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.

These tendencies 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 based on their ability to collaborate or cooperate with industry, and more on their reputation as being tough and thorough enforcers of civil rights.

These tendencies 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 not only tends to operate broadly, but which many businesses hesitate to publicly oppose because of the negative public relations implications.

Moreover, many employees who join an agency solely because they think it will be a “good” or undemanding job or because they are political appointees will eventually “go native” and

become committed to the agency's mission. A related phenomenon, anecdotally, 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 very quickly, 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

Gillian Metzger has argued in favor of a significant role for administrative agencies in enforcing constitutional norms. She writes, "Agencies 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."

This faith in agencies' capacity to appropriately take constitutional considerations into account strikes me as profoundly mistaken. Unlike generalist judges, who have a clear duty to both enforce antidiscrimination (and other) laws and enforce constitutional limits on such laws, agency staff, whether politically appointed or civil service, tend to see their role as solely enforcing the law. Any external constraints on enforcement, including constitutional considerations, are thought to be addressed eventually by courts.

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 "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." The Court added, however, that "[t]his rule is not mandatory." In practice, federal agencies won't 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 actions is more or less likely to create constitutional problems.

At the state level, the California, by far the most populous state, has a constitutional provision that severely restriction the ability of agencies to consider the constitutionality of their actions. The California Constitution states that administrative agencies have no power

- (a) To 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;
- (b) To declare a statute unconstitutional;
- (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

By judicial decision, the scope of this amendment has been broadened beyond “statutes” to include city ordinances. In other states, agencies adhere to the traditional rule that “no administrative tribunal of the United States has the authority to declare unconstitutional the act which it is called upon to administer.”

I agree with Metzger that courts act appropriately when they encourage agencies to consider the constitutioanl ramifications of their decisions, and that Suprme Court doctrine often fails to do so. 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, the reasons described in section 1, 2, 3, and 5 of this Section.

5. To the Extent Agencies Do See Enforcing the Constitution as their Job, They May Enforce “Constitutional Values” that are at Odds with Supreme Court precedent

Legal scholars have noted the phenomenon of administrative constitutionalism, which

involves agencies developing a culture in which the agency believes it should be supporting certain “constitutional values”--values of overarching importance that trump other concerns. Conforming statutory enforcement to these values may have no basis in, or even directly contradict, Supreme Court precedent, and may indeed have no basis in the written Constitution. One author describes administrative constitutionalism as involving “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.” Metzger defines administrative constitutionanism to include “elaboration of new constitutional understandings by administrative actors, as well as the construction (or “constitution”) of the administrative state through structural and substantive measures.”

For example, the National Labor Relations Board starting in the 1940s, and the FCC starting in the 1960s, developed administrative antidiscrimination rules premised on the idea that the Constitution protected a right to nondiscrimination in employment in closed shops and in government- licensed communications entity, respectively. They gradually implemented policies based on this premise even though Congress and the courts studiously ignored the issue, and even though the Supreme Court never showed itself inclined to apply constitutional equal protection principles to the private actors involved.

Such agency interpretations may be more significant overall than judicial interpretations of the constitution. Ernest Young, for example, argues 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.

Even when courts rather than administrative agencies do resolve constitutional questions, the courts are sometimes influenced by the constitutional norms developed by agencies in the

relevant area of law. For example, Anuj Desai argues 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.” Similarly, 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.” These efforts undoubtedly influenced the Warren Court’s forays into constitutionalizing poverty law, such as *Goldberg v. Kelly*, which announced a constitutional right to a hearing before one’s public assistance benefits could be cut off.

While one’s intuition might be that agencies, as such, should have little if any role to play in creating constitutional norms, some legal scholars beg to differ. They argue that agencies have several advantages over courts in creating such norms, including that agencies’ notice and comment rulemaking process is far more transparent than judicial decisionmaking, that agencies have a more deliberative process than courts, and that they are more accountable to public opinion than are courts. A recent article argues,

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.

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. Surely, at least, many of us would agree that whatever the merits of federal agencies "experimenting" with enforcing equal protection norms against monopoly actors empowered by the agencies, the idea of agencies enforcing norms that conflict with constitutional protections for freedom of speech raises troubling civil liberties concerns.

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 FDA or FCC regulation, freedom of speech and other civil liberties may be an incidental casualty of broader regulatory goals. In the context of antidiscrimination law, however, the goal itself, such as making it easier to punish students accused of sexual assault, or protecting students and workers from perceived hostile environments (defined very broadly), or protecting potential homeowners and renters from actions, including speech, aimed at discouraging their housing market activity, the very goals of antidiscrimination advocates are necessarily intertwined with a diminution of civil liberties, at least as interpreted by longstanding Supreme Court doctrine.

Moreover, many Americans, especially on the liberal end of the political spectrum, have an absolutist vision of what attempts to limit the harm from discrimination should entail, a vision that makes it difficult to give significant weight to competing considerations, including freedom of speech. Initially, the most prominent rationale for antidiscrimination law was to ensure that members of protected classes could participate on equitable terms in the economic marketplace. Senator Hubert Humphrey explained his support for the employment discrimination provisions

of the federal 1964 Civil Rights Act this way: “The Negro American is the principal victim of a vastly complex system of self-perpetuating practices, traditions, and processes that has denied him true parity in the national job market. He has consistently and effectively been kept from participating fully in the job opportunities developed by the American free enterprise system.”

Gradually, however, as civil rights legislation and changing social mores undermined traditional economic barriers, the rhetorical focus of antidiscrimination shifted from ensuring economic fairness and participation by all sectors of society to banning the moral evil of discrimination. As early as 1964, Lyndon Johnson, lobbying for the passage of the 1964 Civil Rights Act, announced that “As far as the write of Federal law will run, we must abolish not some but all racial discrimination. For this is not merely an economic issue--or a social, political or international issue. It is a moral issue...”

Conservatives, who saw the focus on the immorality of discrimination as both philosophically sound and a good rhetorical strategy in opposition to affirmative action preferences, joined in. The first President Bush, who had voted against the 1964 Civil Rights Act as a congressman from Texas, in 1990 called discrimination “a fundamental evil that tears at the fabric of our society.” Once private sector discrimination was portrayed primarily as a secular sin, rather than as an economic issue, the rhetorical goal of civil rights advocates became the *elimination* of invidious discrimination.

As the intense moralism of modern antidiscrimination ideology became entrenched in American politics and society, antidiscrimination advocates increasingly saw civil liberties as inconvenient and unnecessary obstacles to a discrimination-free world. By the mid-1980s, the Supreme Court was almost routinely suggesting that the need to eradicate discrimination was a compelling interest that overcame First Amendment objections to antidiscrimination laws.

The Court has since backed away from such pronouncements, but the notion that the

“constitutional value” of antidiscrimination should trump constitutional civil liberties is alive and well, both in the academy and among progressive political activists. Consider a just-published law review article by a prominent professor that references “the 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.” This quotation reflects the increasingly common view that equalitarian concerns—derived, allegedly, from an extremely aggressive 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 libertarian concerns.

Indeed, even though at least since the Nixon era, the Supreme Court has denied that there is an affirmative constitutional right to be free from private discrimination that might overrule other constitutional guarantees, many Americans, especially those on the left, think that such a right should exist. Civil rights enforcement agencies, meanwhile, are “mission-driven agencies, which are typically designed to be responsive to members of the civil rights community.”

As a result, antidiscrimination activists naturally turn to these agencies, staffed by their ideological compatriots, when seeking to expand antidiscrimination law even when it conflicts with civil liberties. Naturally, these agencies, especially but not exclusively when run by Democratic appointees, are similarly inclined to start from the proposition that antidiscrimination principles have (at least) equal constitutional value as the First Amendment, even when the relevant principles cannot easily be found in the text of the Constitution.

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, “human rights” suggests a certain 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.

As 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."

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 paper were initiated during the Bush I 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 campus at the expense of freedom of speech.

This ability of agency heads to favor antidiscrimination concerns over constitutionally protected civil liberties is aided not just by employees who naturally migrate to agencies with whose mission they agree with, but by aggressively ideological hiring of officially non-political 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 went about finding staff for this office by looking for civil service candidates to with a "commitment to civil rights." 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. Meanwhile, even when desperately searching for attorneys to fill new civil service positions, the Justice Department, for reasons it couldn't explain to investigators from the Office of the Inspector General, failed to contact experienced former Bush administration attorneys who could potentially have been lured back to the Department.

The result was rather astonishing. During the first two years of the Obama administration, over sixty percent of attorneys hired for civil service positions in the Office of Civil had liberal entries (such as working for a left-wing activist group) on their resumes and none had conservative entries. The Justice Department's rationale for hiring progressive activist lawyers is that their "traditional civil rights backgrounds" gave them appropriate law-enforcement credentials. In fact, relatively few of the lawyers in question had much in the way of law enforcement experience. 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. 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

Given what has been said in this Article until now, the obvious question that arises is why we cannot simply rely on courts to rein in agencies when they neglect civil liberties in favor of antidiscrimination concerns. While generalist courts have their own imperfections, they don't share most of the pathologies, described above, that lead agencies to systematically underprotect constitutional rights. Generalist courts's most important advantage is that they don't share agencies' tunnel vision, i.e., the latter's devotion to its statutory mission at the expense of other

considerations.

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

In yet other situations, judicial review proves impossible to obtain because the agency never issues a formal, binding rule. As the example of the University of Montana settlement described previously suggests, agencies can avoid public and Congressional input, as well as judicial review, by engaging in what's known as "sue and settle," establishing agency enforcement precedent through settlements, sometimes with parties who *want* the agency to expand its regulatory reach.

And as with the Title IX sexual assault guidance, agencies can avoid judicial and other scrutiny by issuing informal "guidance" rather than formal rules. Moreover, while guidance has its virtues in some contexts, 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. 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, while ignoring the formal rulemaking that would have subjected its guidance to public comment and ultimately judicial review.

Indeed, 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, OCR failed to use the procedures laid out in the Administrative Procedure Act in the 1960s, "and it has rarely done so since." Instead, "virtually 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." OCR's attempts to impose speech codes and strip students accused of sexual assault of due process protections, are just the most recent manifestation of this propensity.

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 "guidance." 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. It's heartening when on rare occasions courts find government officials being held personally liable when they intentionally overstep clear constitutional boundaries, as in the Berkeley 3 case. 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 paper. One might at least hope, however, that legal actors responsible for rather blatant

constitutional violations, such as Obama administration DOE OCR chief Catherine Lhamon, will not in the future be rewarded with plum political appointments for stripping Americans of their constitutional rights.

Another possible reform would be to establish in the executive branch an institution like 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 constitutional norms. Once again, however, while this is a promising idea, it would almost certainly take broader concerns than those expressed in this article to 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 particular 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, limited reform goal would be to establish “Offices of Goodness” devoted to protecting constitutional rights from agency overreach within antidiscrimination agencies. Margo Schlanger describes an “Office of Goodness” as “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 sits; and internal and dependent on its agency.” For example, a law enforcement agency might have an office devoted to promoting concern for civil rights within the agency. The agency’s primary mission is “to prevent and respond to crime and maintain order,” but the Office of Goodness’s task is to try to ensure that the agency does so “without infringing anyone’s civil rights.” To take a real-world example, the Department of Homeland Security has an office dedicated to privacy rights.

Civil rights enforcement agencies need their own offices of goodness, dedicated to ensuring

that enforcement of civil rights laws does not trample on constitutional rights. Of course, offices of goodness devoted to protecting freedom of speech could either get captured by the same forces that create the problem the offices would be designed to prevent or, in the absence of anything but persuasive authority, might be entirely ineffectual.

Offices of goodness are sufficiently new that it's difficult to draw any firm conclusions of potential effectiveness in the context discussed in this article based on experience in other contexts. One analogous example that should be examined 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 being overruled by university administration. Nevertheless, they seem to have some effect in protecting freedom of speech on campus, at least on the margin.

The problem, 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 and Due Process rights. The Trump administration, by contrast, has rescinded the problematic Title IX sexual assault guidance, and both its Education Secretary and Attorney General have denounced the growing suppression of free speech on college campuses. The administration has also taken the side of religious freedom when it conflicts with broad antidiscrimination mandates. Instituting offices of "civil liberties goodness" 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 encroach on civil liberties, something that seems important to the Trump Administration and its political base.

CONCLUSION

TO BE ADDED