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## Overreach and Innovation in Equality Regulation

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# OVERREACH AND INNOVATION IN EQUALITY REGULATION

OLATUNDE C.A. JOHNSON†

## ABSTRACT

*At a time of heightened concern about agency overreach, this Article highlights a less appreciated development in agency equality regulation. Moving beyond traditional bureaucratic forms of regulation, civil rights agencies in recent years have experimented with new forms of regulation to advance inclusion. This new “inclusive regulation” can be described as more open ended, less coercive, and more reliant on rewards, collaboration, flexibility, and interactive assessment than traditional modes of civil rights regulation. This Article examines the power and limits of this new inclusive regulation and suggests a framework for increasing the efficacy of these new modes of regulation.*

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## INTRODUCTION

This Symposium was inspired by a sense of possibility that administrative law and federal agencies might play a central role in advancing equality and social inclusion.<sup>1</sup> This possibility reflected what seemed to be a growing empirical reality. Over the past decade, federal agencies have increasingly taken on the antidiscrimination project, actively promulgating regulations and guidance to advance inclusion in areas such as housing, education, and employment.<sup>2</sup> This unleashing of administrative power has roots in prior presidential administrations,<sup>3</sup> but it is partially explained by two terms of a presidential administration favorable to an active administrative state and to particular civil rights goals. This emphasis on agencies as a source of civil rights norms has occurred alongside a gridlocked Congress that has struggled to respond to a changing civil rights landscape.<sup>4</sup> It occurs

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1. I use the term “inclusion” to reference goals that extend beyond nondiscrimination to include the advancement of participation and opportunity for groups or individuals that face systemic barriers. These barriers may be based on identity categories such as gender, ethnicity, disability, or race but may also include barriers such as poverty or geographic isolation that are not typically associated with an antidiscrimination or civil rights framework.

2. For examples of these agency actions, see *infra* notes 37, 46, 56, 69 and accompanying text.

3. See generally Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (2012) (describing regulatory initiatives to promote civil rights through the administrations of Presidents Kennedy, Nixon, Clinton, and George W. Bush).

4. For instance, Congress has been unable to enact protections against discrimination on the basis of sexual orientation and gender identity. See Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 3185, 114th Cong. (2015). According to the *Washington Times*, the most recent bills stood “no chance of passage” in the current Republican-controlled Congress. Juan A. Lozano & David Cray, *Showdown in Houston over LGBT Nondiscrimination Ordinance*, WASH. TIMES (Oct. 25, 2015), <http://www.washingtontimes.com/news/2015/oct/25/showdown-in-houston-over-lgbt-nondiscrimination-or> [<https://perma.cc/RX7W-DFXS>]. In this vacuum, the U.S. Equal Employment Opportunity Commission (EEOC) has interpreted “sex” discrimination in Title VII of the Civil Rights Act of 1964 to extend to certain forms of discrimination based on an individual’s sexual orientation or gender identity. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) [<https://perma.cc/UFG2-HRR7>]. One of the most prominent examples of administrative action as a response to a gridlocked Congress is President Obama’s executive action providing temporary immigration relief for certain categories of undocumented immigrants, an area of law beyond the scope of this Article. For a discussion of the legality of these executive immigration actions, see

at a time in which the limits of private enforcement and judicial remedies in addressing contemporary problems of exclusion have increasingly become apparent. Certain legal scholars have embraced the role of administrative agencies in regulating civil rights under the rubric of “administrative constitutionalism,” a framework that celebrates agency interpretation of landmark statutes to advance fundamental principles.<sup>5</sup> More generally, scholars provide accounts of administrative agencies as enduring sources of norms that can rival courts.<sup>6</sup> They offer theories of entrenchment as a counter to fears that positive administrative regulation is easily unwound by changes in the executive.<sup>7</sup>

This Symposium represents an opportunity to take stock of these agency-driven equality initiatives and to contemplate new directions. One might always have worried about outsize faith in administrative agencies, as opposed to courts or legislatures, for advancing equality goals. Administrative agencies might be vital to filling gaps and deliberating with interest groups,<sup>8</sup> but administrative action might also be seen as second best, a stopgap where legislation could not be achieved. Many of the administrative directives that one might celebrate lack private enforcement, depriving those who seek to advance civil rights goals of courts as an avenue for implementation.

In the wake of a new administration in 2017, the role of administrative agencies in equality law seems suddenly unclear. Transitions from Democratic to Republican administrations are often

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generally Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87 (2016).

5. See Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1898 (2013) (providing as an example the U.S. Department of Housing and Urban Development’s (HUD) promulgation of regulations implementing a disparate impact standard under the Fair Housing Act (FHA)); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 523 (2015).

6. See, e.g., WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 33 (2010) (providing a paradigmatic account of “administrative constitutionalism”); Metzger, *supra* note 5, at 1898 (rooting “administrative constitutionalism” in the “central role that the modern administrative state plays in our constitutional system today”); Ross, *supra* note 5, at 523 (arguing that “constitutional adaptation” to changing social contexts is necessary and that administrative constitutionalism can “supplement other forms of adaptation that primarily occur in courts”).

7. See ESKRIDGE & FEREJOHN, *supra* note 6, at 7–8, 12–22, 127–32 (describing the entrenchment of administrative norms through deliberation and administrative implementation).

8. See *id.* at 29–33 (describing administrative agency interaction with social movements and the process of dialogic deliberation between branches through which emerge “new fundamental principles and policies”).

accompanied by less vigorous civil rights enforcement.<sup>9</sup> The future is more uncertain today than in the usual partisan transition. The current transition features a President with policy commitments that are not well delineated and that are shifting even as one writes. To the extent that one can predict from recent appointments and statements, the future of administratively enforced and generated civil rights rules seems bleak.<sup>10</sup>

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9. As an example, over the last three decades civil rights advocates and political figures have faulted the U.S. Department of Justice (DOJ) for failing to enforce civil rights laws under Republican administrations. *See, e.g.*, Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL'Y REV. 211, 212–24 (2008) (claiming that the George W. Bush administration politicized enforcement decisions in the DOJ's Civil Rights Division and failed to vigorously enforce the law in voting and employment discrimination); Charlie Savage, *Report Examines Civil Rights Enforcement During Bush Years*, N.Y. TIMES, Dec. 2, 2009, at A26 (describing the results of a report by the General Accounting Office documenting the George W. Bush administration's failure to bring enforcement actions involving race and gender discrimination); LEADERSHIP CONFERENCE, *Why Reynolds Lost*, CIV. RTS. MONITOR (Aug. 1985), <http://www.civilrights.org/monitor/august1985/art2p1.html> [<https://perma.cc/S6FK-8TEK>] (arguing that the Civil Rights Division, when led by Reagan appointee Brad Reynolds, had “the worst civil rights record of any administration in more than half a century—in education, housing, voting, employment, disability rights, and women’s rights”).

10. As an example, incoming Secretary of HUD Ben Carson has previously stated that he opposes the Obama administration's fair housing rules, which are discussed later in this Article. For further discussion of the rules regarding disparate impact and affirmatively furthering fair housing, see *infra* notes 70–73 and accompanying text. *See* Ben S. Carson, *Experimenting with Failed Socialism Again*, WASH. TIMES (July 23, 2015), <http://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish> [<https://perma.cc/Q3GR-XRFU>] (characterizing the Affirmatively Furthering Fair Housing (AFFH) rule as “socialism” and misguided “social engineering”). In his confirmation hearing, Carson stated in response to questioning about the AFFH rule that he opposed the “central dictation to people’s lives.” *See Nomination of Dr. Benjamin Carson: Hearing Before the Committee on Banking, Housing, and Urban Affairs United States Senate*, 115th Cong. 14 (2017), <https://www.gpo.gov/fdsys/pkg/CHRG-115shrg24428/pdf/CHRG-115shrg24428.pdf> [<https://perma.cc/HKS4-DVZR>]. In addition, it is unclear whether the incoming leadership of the DOJ will vigorously enforce civil rights laws. The Senate confirmed the U.S. Attorney General over strong opposition from civil rights advocates and over 1100 law professors. *See* Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html> [<https://perma.cc/C4M8-7TUK>]; Sari Horwitz, *More than 1,100 Law School Professors Nationwide Oppose Sessions’s Nomination as Attorney General*, WASH. POST (Jan. 3, 2017), [https://www.washingtonpost.com/world/national-security/more-than-1100-law-school-professors-nationwide-oppose-sessions-nomination-as-attorney-general/2017/01/03/dbf55750-d1cc-11e6-a783-cd3fa950f2fd\\_story.html?utm\\_term=.1def7d588423](https://www.washingtonpost.com/world/national-security/more-than-1100-law-school-professors-nationwide-oppose-sessions-nomination-as-attorney-general/2017/01/03/dbf55750-d1cc-11e6-a783-cd3fa950f2fd_story.html?utm_term=.1def7d588423) [<https://perma.cc/SE6F-5PFR>] (noting opposition based in part on Sessions’s record of pursuing prosecutions against civil rights activists for alleged voting fraud in the 1980s, and his opposition to legislative efforts to protect women and LGBT individuals from discrimination); Letter from the Leadership Conference on Civil and Human Rights to Mitch McConnell, Senate Majority Leader, Harry Reid, Senate Minority Leader, Chuck Grassley, Senator, and Patrick Leahy, Senator (Dec. 1, 2016), <http://civilrightsdocs.info/pdf/policy/letters/2016/Sessions-Nomination-12-1-16.pdf> [<https://perma.cc/Z794-6XDU>] (raising

For this reason, this Article may be more elegiac than initially envisioned. The aim of the Article is to capture the possibilities of civil rights regulation, even while grappling with the resistance agency regulation engenders. Civil rights agencies once decried for doing nothing are now implicated as perhaps doing too much. At a time of heightened concern about agency overreach, the Article aims to highlight a less appreciated development in agency equality regulation. In this development, civil rights regulation is not simply deploying traditional bureaucratic forms of regulation such as prohibitions and conditional spending. Agencies are also experimenting with new forms of regulation that might in theory be more palatable to those skeptical of traditional top-down regulation as well as to reformers looking for effective strategies to advance inclusion.

Critics have long faulted civil rights agencies for regulatory overreach but these critiques became increasingly clamorous even before the 2016 election. Academic commentators charge federal agencies with bureaucratic regulation of innocent sexual conduct;<sup>11</sup> employers, courts, and Congress contest the legitimacy of agency efforts to prohibit discrimination against individuals with arrest and conviction records;<sup>12</sup> and recent federal agency actions on gender-identity discrimination have prompted a showdown with several states.<sup>13</sup> The aforementioned agency actions may be novel; but the complaints raise familiar concerns in the administrative law and civil rights arena regarding transparency, public participation, and the proper role of agencies in statutory implementation.

Today, these concerns about bureaucratic overreach are taking place even as novel forms of regulation by civil rights agencies have emerged that might be subject to the converse criticism. The traditional model of civil rights enforcement centers on top-down, bureaucratic

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concerns about Sessions's record on voting rights, gender equity, and LGBT rights, among other areas). Although the DOJ does not itself promulgate the types of regulations and guidance discussed in this Article, its Civil Rights Division plays a role in coordinating regulatory activity involving particular civil rights statutes. *See, e.g.*, Coordination of Enforcement of Non-Discrimination in Federally Assisted Programs, 28 C.F.R. §§ 42.401–415 (2011) (detailing the role of the DOJ in coordinating Title VI implementation across federal agencies).

11. *See, e.g.*, Jacob E. Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 881 (2016).

12. For further discussion on employers', courts', and Congress's pushback against prohibiting discrimination of individuals with arrest and conviction records, see *infra* notes 46–50 and accompanying text.

13. For further discussion of lawsuits between federal agencies and states on gender-identity discrimination, see *infra* notes 37–45 and accompanying text.

enforcement, specifically prohibitions on discrimination enforced through private enforcement in courts or agencies<sup>14</sup> or through termination of funding in federal spending programs.<sup>15</sup> At the federal level, civil rights agencies are increasingly using forms of regulation that can be described as open ended, less coercive, and more reliant on rewards, collaboration, and interactive assessment than traditional modes of civil rights regulation. Examples include competitive grant programs by the U.S. Department of Labor (DOL) that reward programs that effectively train women and minorities in underrepresented industries, as well as partnerships by federal agencies that encourage state and local efforts to build affordable housing and redesign transportation infrastructure in a manner that operates to combat, rather than exacerbate, racial and economic segregation.<sup>16</sup> These programs rely not just on the “stick” of federal fund termination but also on “carrots” and grant incentives. Even regulations that appear to take the familiar form of conditional spending, such as the recently promulgated agency guidelines requiring grantees to affirmatively further fair housing, place emphasis on processes for developing new solutions aiming to catalyze federal partnerships with states and other grantees and encourage self-assessment toward collaborative problem solving.

This Article refers to these new regulations as “inclusive regulation” to capture three aspects. First, they rely on a less coercive model of regulation. Instead, the model draws on the rhetoric of innovation in the current zeitgeist, one that values self-regulation, crowd-sourced and evidence-based solutions, and creative disruption of existing models.<sup>17</sup> These regulations also are resonant of ideas in administrative law over the last two decades that emphasize regulation through collaboration and cooperation with states, localities, and other regulated entities; regulation as problem-solving; and the potentially catalyzing role of subsidizing innovation.<sup>18</sup> Though it may be familiar

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14. See, e.g., Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-5(f)(1) (2012) (granting individuals the right to bring suit after exhausting claims with the EEOC).

15. See, e.g., *id.* tit. VI, 42 U.S.C. § 2000d-1 (listing processes for fund termination after a finding of noncompliance).

16. For a description of grant making in the areas of labor and housing, see *infra* notes 91–94 and accompanying text.

17. For a description of features of this new, inclusive regulation, see *infra* notes 91–111 and accompanying text.

18. See, e.g., Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 299–303, 342–48 (providing justification for increased deployment of collaborative governance and proposing a

in other regulatory contexts, this mode of regulation is less familiar in the civil rights context, which has depended on prohibitions and traditional bureaucratic use of federal power.<sup>19</sup> Second, they seek to further “inclusion,” by which I mean they address barriers based not just on identity discrimination but also those based on other factors such as poverty and geography.<sup>20</sup> In addition, rather than simply preventing exclusion, they aim to promote inclusion and opportunity for traditionally disadvantaged individuals and communities.<sup>21</sup> Third, they depend on regulatory power to issue guidance or rules, rather than on adjudication in courts or agencies.<sup>22</sup>

At a time of concern about too much administrative power exercised by civil rights agencies, one might legitimately wonder whether these administrative initiatives proceed too far in the other direction by being insufficiently coercive. These directives may thus become susceptible to the critique that they lack adequate enforcement and oversight mechanisms, and—because they depend on self-assessments—risk creating a nonuniform, patchwork civil rights regime.<sup>23</sup> My contribution to this Symposium considers the potential and the limits of this emerging civil rights regulatory model and suggests a framework for increasing the efficacy of these new modes of regulation in a context of heightened concern about agency overreach.

Part I begins with the current moment of concern about civil rights overreach against the backdrop of the countervailing concern that civil rights agencies lack the tools, design, and political will to effectively implement civil rights goals. Part II makes the case for rethinking civil rights regulatory power given the challenges facing the current civil

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legal framework for achieving the goals of accountability, efficiency, transparency, participation, and collaboration); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1, 3–7, 21–31, 33–62 (1997) (proposing a normative model of collaborative governance and providing examples from the environmental law context).

19. For examples of civil rights statutes that deploy federal power to prohibit discrimination or regulate through the threat of funding termination, see *supra* notes 14–15.

20. For an example of such regulations, see the AFFH regulation, *infra* notes 105–06.

21. This is akin to promoting integration rather than just remedying segregation. For further discussion of normative frameworks that seek to go beyond antidiscrimination and instead further more capacious goals such as participation and opportunity, see Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 *HARV. J.L. & GENDER* 247, 249 (2006) (calling for new frameworks in the area of workplace equality that “expand[] beyond the anti-discrimination paradigm that has shaped intervention over the last thirty years”).

22. See Johnson, *supra* note 3, at 1345–49, 1378, 1407 (describing the civil rights adjudicative model in courts and in agencies).

23. For a critique of fair housing rules as lacking sufficiently vigorous enforcement mechanisms, see *infra* note 117 and accompanying text.



rights enforcement regime, including the general limits of a prohibitory antidiscrimination approach. Part II then introduces the range of emerging inclusive regulation by civil rights agencies, defining the new regulation by three important features: (1) reliance on grants and other voluntary, opt-in, competitive forms of regulation; (2) the disruption of current boundaries between agencies and between traditional compliance-based enforcement and regulation; and (3) public participation as a catalyst for developing solutions and promoting compliance and enforcement. Part II also presents an account of why these forms of regulation might be emanating at this moment, arguing that they are reactions to long-standing critiques of civil rights bureaucracy as well as an attempt to retool administrative agencies to better address both developing as well as embedded problems of exclusion. Part III considers the future and the potential efficacy of this mode of regulation, given the persistent critique of civil rights bureaucratic power, and the converse critique that this regulatory form is insufficiently directive to meaningfully advance inclusionary goals.

#### I. INCLUSIONARY OVERREACH?

Claims of overreach by civil rights agencies seem suddenly ubiquitous. As civil rights agencies use administrative power to respond to a set of pressing and emerging problems—including sexual assault on campus, racial segregation in housing, and the consequences of mass incarceration—resistance is evident from many quarters. Arguments that civil rights agencies are exceeding their authority are advanced by entities such as states, private-sector businesses, members of Congress, and critics in the academy.<sup>24</sup> Courts have joined the fray, in key instances upholding challengers' claims and enjoining recent administrative guidance and regulations.<sup>25</sup>

These challenges and criticisms take a familiar form, combining concerns about process, mode, and regulatory goals. Challengers question whether agencies have overstepped their roles, the adequacy of their deliberation and transparency, and the normative legitimacy of what agencies are trying to do. Although it has become fashionable in the legal academy to celebrate agencies' role as norm entrepreneurs,<sup>26</sup> these more recent critiques cast agency action in a more dubious light.

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24. See *infra* notes 30–36 and accompanying text.

25. See *infra* note 54 and accompanying text.

26. See, e.g., ESKRIDGE & FEREJOHN, *supra* note 6, at 19; Metzger, *supra* note 5, at 1901.

Agencies' role as entrepreneurial innovators bumps against a familiar strain in American governance that questions the power and legitimacy of civil rights agencies.

#### A. *Criticism of Agency Overreach*

Among the agencies most subject to scrutiny and challenge in recent years has been the U.S. Department of Education (DOE), in particular for its regulatory activities related to the issue of campus sexual assault. The DOE's 2011 "Dear Colleague" letter to higher-education institutions, which offered "significant guidance" specifying the obligations of higher-education institutions pursuant to Title IX of the Education Amendments of 1972 to respond to sexual harassment and violence claims, is the provocation.<sup>27</sup> The guidance purports to make no new law but simply to clarify how the DOE will interpret Title IX when faced with evaluating complaints by alleged victims about the adequacy of schools' procedures for responding to complaints.<sup>28</sup> Nevertheless, schools, political leaders, and members of the public have charged that the 2011 letter, and ensuing guidance and pamphlets, exceeds the DOE's statutory power and fails to incorporate the views of the public and regulated entities. Three lawsuits to date challenge the legality of the DOE's guidance, claiming that it violates the Administrative Procedure Act (APA) because it was issued without notice and comment.<sup>29</sup>

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27. See Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleagues (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/JZ9J-WTX9>] [hereinafter Dear Colleague Letter]. The letter stemmed from the DOE's enforcement of Title IX, which forbids discrimination on the basis of "sex," and the resulting court-established jurisprudence that holds that Title IX forbids peer-on-peer sexual harassment. Specifically, the guidance requires that schools have certain procedures in place to investigate claims of sexual harassment and violence including notice, staffing, and particular grievance procedures. *Id.* Further, the guidance specifies the requirements for how investigations should be conducted, including requiring prompt resolution. *Id.* Hearings and investigations should be governed on a "preponderance of the evidence" standard. *Id.* Finally, the guidance offers proactive efforts that schools should "consider" to prevent sexual assaults on campus and to respond effectively. *Id.*

28. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/4Z2F-4KDE>].

29. See Amended Complaint at 3, 21, 25, *Doe v. Lhamon*, No. 16-cv-01158-RC (D.D.C. Aug. 15, 2016) (including in a complaint by a University of Virginia law student an allegation that the Dear Colleague letter violates the APA by promulgating requirements without notice and comment and by mandating a preponderance-of-the-evidence standard in on-campus adjudications of sexual assault claims); Complaint at 17, *Ehrhart v. U.S. Dep't of Educ.*, No. 16-cv-01302-SCJ (N.D. Ga. Apr. 21, 2016) (documenting a suit by a Georgia representative claiming

Even those who purport to share the goals of reducing sexual assault on campus are asking whether the DOE has gone too far.<sup>30</sup> Critics ask whether the DOE should, as matter of both law and policy, have had greater public participation and formally adhered to the APA notice-and-comment procedures, which serve to ensure public input and reasoned deliberation.<sup>31</sup> Commentators also raise questions about the substance of the rule, most frequently whether the DOE had a basis for adopting the “preponderance of the evidence” standard and whether the rules themselves are sufficiently protective of the due process rights of the accused.<sup>32</sup> Some commentators build on this argument to raise a more generalized concern about bureaucratic overreach,<sup>33</sup> an argument that is resonant of long-standing critiques of the exercise of power by civil rights agencies.<sup>34</sup> In this vein, two scholars

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that the DOE violated the APA by issuing the Dear Colleague letter without notice and comment); Complaint and Jury Demand at 48–49, *Neal v. Colo. State Univ.–Pueblo*, No. 16-cv-00873-WYD (D. Co. Apr. 19, 2016) (including in a complaint by a Colorado State University–Pueblo student an allegation that the DOE violated the APA by evading the requisite notice-and-comment procedure). The *Doe v. Lhamon* case was spearheaded by the Foundation for Individual Rights in Education. See *Mission*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., <https://www.thefire.org/about-us/mission> [<https://perma.cc/F2M8-Q8QU>]. Most universities have not directly resisted the DOE guidance, but a higher-education institution subject to DOE regulation did join one of the lawsuits in August 2016. See generally Amended Complaint, *supra* (involving Oklahoma Wesleyan University as a plaintiff in the suit against the DOE).

30. See, e.g., Elizabeth Barholet 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> [<https://perma.cc/5WMA-X6ZF>]; David Rudovsky et al., *Open Letter from Members of the Penn Law School Faculty: Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, PHILLY.COM (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf> [<https://perma.cc/Z7XK-TTNN>].

31. Relatedly, some commentators question whether higher-education institutions have the capacity to investigate and adjudicate sexual assault claims. See Janet Napolitano, “Only Yes Means Yes”: An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 YALE L. & POL’Y REV. 387, 388 (2015).

32. See Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 62 (2013) (“[T]he Letter institutes . . . procedural reforms of campus sexual assault trials that will lead to increased convictions, irrespective of an accused student’s guilt or innocence.”); Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 U. KAN. L. REV. 915, 946–56 (2016) (arguing that universities should adopt alternative remedies for addressing claims of sexual assault including “restorative justice” and that claims that must be adjudicated should adopt the higher “clear and convincing evidence” standard).

33. For an example of the concern regarding the scope of the DOE’s Title IX guidance, see *infra* note 35–36 and accompanying text.

34. Fearing federal administrative power, members of congress successfully sought changes to early versions of the Civil Rights Act of 1964 to weaken the power of the EEOC to enforce Title VII. See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE*

in a recent piece critique the DOE for launching the “sex bureaucracy,” one in which “the federal bureaucracy is now regulating sex itself.”<sup>35</sup> The fault lies, according to this account, with *how* power is exercised by agencies (the use of “bureaucratic tools” and the creation of “mini bureaucracies within nongovernmental institutions to administer these procedural obligations”) and with *what* agencies are now doing (“the federal bureaucracy is now regulating sex itself”).<sup>36</sup> In this sense, the DOE’s action has unleashed familiar and persistent concerns about the power of civil rights agencies in particular to unsettle relations that are more properly the domain of individuals, families, or local communities.

The DOE’s regulatory actions with regard to preventing discrimination based on a student’s sexual identity have provoked similar concerns. In May 2016, the DOE issued a Dear Colleague letter propounding significant “guidance,” that “clarifies” that the DOE treats a student’s gender identity as a student’s sex for purposes of Title IX,<sup>37</sup> prompting pushback from some states and local schools districts.<sup>38</sup> Specifically, the Dear Colleague letter on gender identity affirms that Title IX requires equal access to educational programs and activities, and it specifies that, in creating identification documents and determining use of traditionally sex-segregated facilities such as bathrooms, schools should treat students consistent with their gender identity.<sup>39</sup> Echoing challenges to the sexual assault guidance, Texas and ten other states challenged the rules claiming that the 2016 guidance misinterpreted Title IX and failed to adhere to APA requirements.<sup>40</sup>

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LAWSUITS IN THE U.S. 117–19 (2010) (describing these legislative changes). In other domains, political leaders and regulated entities have pushed back against federal agencies that have sought to promote integration. *See generally* CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS* (2006) (describing resistance to HUD’s desegregation efforts during the Nixon administration).

35. Gersen & Suk, *supra* note 11, at 883.

36. *Id.* at 883–84. Professors Jacob Gersen and Jeannie Suk argue that the effect of the DOE’s activity is to regulate “ordinary sex” — “voluntary adult sexual conduct that does not harm others.” *Id.* at 885.

37. *See* Letter from Catherine Lhamon, Assistant Sec’y for Civil Rights, Office of Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Colleague (May 13, 2016) [hereinafter Dear Colleague Letter on Transgender Students].

38. For a description of legal challenges to the Title IX guidance, see *infra* note 40.

39. Dear Colleague Letter on Transgender Students, *supra* note 37, at 7 (citing 34 C.F.R. § 106.33 (2016)).

40. *See* Texas v. United States, 201 F. Supp. 3d 810, 815–16, 819 (N.D. Tex. 2016) (order granting preliminary injunction), *appeal docketed*, No. 16-11534 (5th Cir. Oct. 21, 2016). Plaintiffs

In late August 2016, a district court granted a nationwide injunction preventing enforcement of the guidance.<sup>41</sup> In a contrary ruling, the U.S. Court of Appeals for the Fourth Circuit upheld the DOE's guidance, holding that the interpretations were based on the DOE's valid regulations and that the agency was entitled to deference in the interpretation of these regulations.<sup>42</sup> The Supreme Court initially agreed to review the Fourth Circuit's decision,<sup>43</sup> but after the Trump administration withdrew the guidance,<sup>44</sup> the Court remanded the case back to the Fourth Circuit.<sup>45</sup>

Apart from the DOE, the U.S. Equal Employment Opportunity Commission's (EEOC) regulatory actions have similarly faced legal challenges and political opposition. The EEOC in 2012 promulgated

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also include a school district in Alabama, two school districts in Arizona, and the governor of Maine. Siding with the challengers, the district court rejected the DOE and other defendants' contention that the Dear Colleague letter and other documents were mere guidance that did not confer any rights or carry the force of law. *Id.* at 836. According to the district court, the guidelines were final agency action under the APA: they represented a "consummation" of the agency's decisionmaking process. *Id.* at 824 (quoting *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 755–56 (5th Cir. 2011)). According to the district court, the guidance had practical legal consequence since the agency's view of the law could force the regulated party "either to alter its conduct, or expose itself to potential liability." *Id.* (quoting *Texas v. EEOC*, 827 F.3d 372, 383 (5th Cir.), *reh'g en banc granted, opinion withdrawn, vacated*, 838 F.3d 511 (5th Cir. 2016)). The district court reasoned that the Dear Colleague letter was in effect a legislative rule, not merely an interpretive statement, and thus should have gone through the APA notice-and-comment process. *See id.* at 830. Finally, the court held that the DOE's guidance documents were not entitled to deference because they contradicted the plain meaning of the statute and were inconsistent with existing, unambiguous regulations. *Id.* at 832–33.

41. *See id.* at 836.

42. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (Oct. 28, 2016) (No. 16-273), *vacated and remanded*, No. 19-273, 2017 WL 855755 (U.S. Mar. 6, 2017) (mem.).

43. The Fourth Circuit agreed with the district court's determination that the regulation upon which the guidance was based was ambiguous, and thus the DOE interpretation was entitled to *Auer* deference unless the regulation was plainly erroneous or inconsistent with the regulation. *Id.* at 719, 721 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Applying this standard, the Fourth Circuit found the DOE's interpretation inconsistent with the "varying physical, psychological, and social aspects . . . included in the [dictionary definition of the] term 'sex.'" *Id.* at 722. The Supreme Court granted a petition for writ of certiorari to review the Fourth Circuit decision. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (Oct. 28, 2016) (No. 16-273).

44. Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., and T.E. Wheeler II, Acting Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Colleague (Feb. 22, 2017), <https://www.justice.gov/opa/press-release/file/941551/download> [<https://perma.cc/5D2B-H7QN>] (withdrawing a statement of policy and guidance on transgender students).

45. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 19-273, 2017 WL 855755, at \*1 (U.S. Mar. 6, 2017) (mem.) (vacating and remanding to the Fourth Circuit).

guidance stating that an employer's reliance on arrest and conviction status as the basis of an employment decision may in some instances violate Title VII of the Civil Rights Act of 1964's prohibitions on discrimination on the basis of race and national origin.<sup>46</sup> The guidance recommends a set of best practices and "safe harbors" for employers to follow to avoid liability.<sup>47</sup> Members of Congress have sharply questioned the EEOC on its guidance in oversight hearings and have introduced three bills that would prevent the EEOC from enforcing this guidance.<sup>48</sup> Although the congressional oversight and activity has not so far resulted in legislation, a federal appellate court allowed litigation brought by the state of Texas challenging the EEOC's guidance to go forward.<sup>49</sup>

### B. Criticism of Agency Goals and Process

For observers of civil rights agencies, these claims—made by scholars, regulated entities, and members of Congress—that agencies

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46. See *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, No. 915.002, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Apr. 25, 2012), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) [<https://perma.cc/S2QN-59EA>] (discussing potential violations of Title VII's disparate treatment and disparate impact provisions).

47. See generally *id.* (recommending proper screening, training, and confidentiality procedures).

48. See, e.g., *H.R. 4959, EEOC Transparency and Accountability Act, H.R. 5422, Litigation Oversight Act of 2014, and H.R. 5423, Certainty in Enforcement Act of 2014: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce*, 113th Cong. 7 (2014), <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg89724/pdf/CHRG-113hrg89724.pdf> [<https://perma.cc/DJD3-7SRD>] ("[T]he agency's edict restricting the use of criminal background checks is putting people in harm's way . . . ." (statement of Rep. Tim Walberg, Chairman, Subcomm. on Workforce Protections)); *The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce*, 113th Cong. 1 (2014) (examining recent EEOC actions particularly related to concerns with "policies that many believe are not in the best interest of workers and employers," including 2012 guidance regarding the use of criminal background checks in employer hiring (statement of Rep. Tim Walberg, Chairman, Subcomm. on Workforce Protections)).

49. Specifically, Texas filed a lawsuit to enjoin the EEOC from enforcing its guidance, claiming that the EEOC's guidance on arrest and conviction was a binding substantive interpretation of Title VII, which was forbidden by the statute, and in violation of the APA. After a district court dismissed the suit for lack of standing, the U.S. Court of Appeals for the Fifth Circuit in June 2016 reversed, holding that Texas had standing. See *Texas v. EEOC*, 827 F.3d 372, 377 (5th Cir.), *reh'g en banc granted, opinion withdrawn, vacated*, 838 F.3d 511 (5th Cir. 2016). Though the EEOC lacks power to bring direct enforcement actions against state employers, see 42 U.S.C. § 2000e-5(f)(1) (2012), the court found that failure to conform with the safe harbors in the guidance might cause the EEOC to investigate a state and refer it to the U.S. Attorney General to pursue litigation, see *EEOC*, 827 F.3d at 383–84.

are exercising too much power are striking. A long-standing complaint of civil rights reformers is that agencies lack regulatory power and fail to rely effectively on the powers they have. Yet the current claims suggest that the deployment of these relatively weak forms of regulatory power, such as guidance documents, are nonetheless perceived by some as too intrusive.

The EEOC, for instance, lacks substantive rulemaking power. Title VII, the fair-employment provisions, grants the EEOC power to issue procedural regulations but not the power to issue substantive regulations defining the ambit of Title VII.<sup>50</sup> This impotence was the congressional choice that prevailed, a choice with the precise goal of limiting federal power over employers.<sup>51</sup> For this reason, the EEOC guidance does not typically garner strong deference from the Court.<sup>52</sup> Similarly, while the DOE has formal regulatory power, it often acts through guidance rather than formal rulemaking. Functionally, the agency uses guidance to give clarity to regulated authorities as to the DOE's interpretation of its spending clause statutes—in the case of sexual assault and gender identity in schools, Title IX. Civil rights reformers have long faulted agencies for failing to enforce their authority to terminate funding under these programs or to effectively supervise grantees.<sup>53</sup> Yet the legal challenges to these weak forms of regulation must depend on the notion that guidance has legal consequences. As a district court recently found in the context of the

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50. See 42 U.S.C. § 2000e-12(a).

51. See generally FARHANG, *supra* note 34, at 117–19 (describing the formal weakness of the EEOC and the legislative choices that shaped it); ROBERT C. LIEBERMAN, *SHAPING RACE POLICY: THE UNITED STATES IN COMPARATIVE PERSPECTIVE* 162–63 (2005) (explaining the legislative compromise that led to the allotment of powers held by the EEOC).

52. See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1941–45 (2006). As Professor Melissa Hart has noted, even where the EEOC has formal rulemaking power, as for procedural regulations or for certain provisions in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12116, the Court has not consistently afforded the agency *Chevron* deference. *Id.*

53. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898*, at 1–5 (2016) (summarizing findings that the Environmental Protection Agency (EPA) has been unable to effectively respond to Title VI of the Civil Rights Act of 1964 environmental-justice complaints); Michael Allen, *No Certification, No Money: The Revival of Civil Rights Obligations in HUD Funding Programs*, 78 *PLAN. COMMISSIONERS J.* 16, 16 (2010) (documenting HUD's history of failing to enforce certification rules to promote integrated housing).

EEOC, the agency's view of the law could force the regulated party "either to alter its conduct, or expose itself to potential liability."<sup>54</sup>

One could say that these challenges to the legitimacy of agency action are simply an attempt to shift civil rights agencies away from relying on forms of regulation (like guidance) that lack the transparency and formal indicia of reasoned decisionmaking that are present when an agency deploys notice-and-comment rulemaking. The failure to safeguard against arbitrary administrative action is a consistent concern raised by academic critics of the DOE's actions in particular.<sup>55</sup> From the perspective of understanding the broader political critique of civil rights agencies, however, it is worth noting that these legitimacy concerns are not confined to agencies that fail to deploy notice-and-comment rulemaking. Even where civil rights agencies are exercising their rulemaking power and complying with agency procedures, challengers raise questions about the process and goal of regulation.

A recent example of a challenge to the legitimacy of civil rights regulation is found in criticisms of the U.S. Department of Housing and Urban Development's (HUD) 2015 rulemaking delineating the Fair Housing Act's (FHA) requirement that federal agencies and grantees "affirmatively further fair housing."<sup>56</sup> The statutory requirement had gone largely undefined for the forty-five years since the passage of the FHA until a fair housing group challenged a county grantee for failing to meaningfully comply with the statutory requirement.<sup>57</sup> The lawsuit prompted HUD to strengthen its regulation and to delineate what is required of grantees. Despite the statutory directive and the use of notice-and-comment rulemaking, groups have criticized HUD's Affirmatively Furthering Fair Housing (AFFH) regulation as an infringement on state and local power and faulted the regulations for engaging in "social engineering."<sup>58</sup> Members of Congress have

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54. See *EEOC*, 827 F.3d. at 383.

55. For the critique of the DOE's misuse of its regulatory power, see *supra* notes 32–36.

56. See *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903) ("Through this final rule, HUD provides HUD program participants with an approach to more effectively and efficiently incorporate into their planning processes the duty to affirmatively further the purposes and policies of the Fair Housing Act, which is title VIII of the Civil Rights Act of 1968.").

57. See *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cty.*, 668 F. Supp. 2d 548, 550 (S.D.N.Y. 2009).

58. See Thomas B. Edsall, Opinion, *Where Should a Poor Family Live?*, N.Y. TIMES (Aug. 5, 2015), <http://www.nytimes.com/2015/08/05/opinion/where-should-a-poor-family-live.html> [<https://perma.cc/CM8Q-RPU7>] (describing claims of opponents that HUD's AFFH rule



introduced measures to curtail HUD's spending to enforce the requirement, which have so far not advanced.

HUD's 2014 regulations on disparate impact provide another example. At this writing, homeowner's insurance industry groups are challenging HUD's disparate impact regulations<sup>59</sup> as unlawful.<sup>60</sup> This challenge persists even after the Supreme Court, in its 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc. (ICP)*,<sup>61</sup> affirmed that the FHA's antidiscrimination mandate extends to unjustified disparate impacts.<sup>62</sup> As the *ICP* case did not address the validity of HUD's rule, it provided a sufficient window for this subsequent lawsuit claiming that key aspects of HUD's regulations exceeded the scope of the statute.<sup>63</sup>

These scholarly, political, and legal challenges to agency action question both the process of civil rights regulation and its goals. On one level, the process critiques posit that the regulatory actions proceeded with insufficient public input and deliberation and fail to conform to the requirements of the APA. But the critiques embed a broader

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constitutes "social engineering"); see also Jeremy Carl, *The Obama Administration Thinks Hillary's Hometown is Racist: Does Congress Agree?*, NAT'L REV. (May 18, 2016, 9:42 AM), <http://www.nationalreview.com/article/435531/obama-administration-thinks-hillarys-hometown-racist-does-congress-agree> [<https://perma.cc/KY25-XB4G>] ("AFFH undercuts the independence of suburbs, towns, and small cities by forcing them to make up for supposed 'imbalances' in the racial, ethnic, and class composition of their greater metropolitan regions.").

59. Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,272. HUD's regulations interpret the FHA prohibition on discrimination to extend to actions with an unjustified disparate impact on a protected group, and they provide a burden-shifting framework for proving discrimination in courts and in agency adjudication. See Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

60. See *Am. Ins. Ass'n v. HUD*, 74 F. Supp. 3d 30, 31 (D.D.C. 2014), *vacated and remanded*, No. 14-5321, 2015 U.S. App. LEXIS 16894 (D.C. Cir. Sept. 23, 2015) (per curiam).

61. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

62. See *id.* at 2510 (holding that the FHA's text and purpose supported disparate impact liability).

63. Prior to *Inclusive Communities Project*, the district court in *American Insurance* held that HUD had exceeded its statutory authority in interpreting the FHA to extend to "disparate impact." *Am. Ins. Ass'n*, 74 F. Supp. 3d at 32 (finding that HUD's disparate impact rule exceeded the agency's statutory authority). The U.S. Court of Appeals for the D.C. Circuit vacated the *American Insurance* decision after *Inclusive Communities Project*. See *Am. Ins. Ass'n v. HUD*, No. 14-5321, 2015 U.S. App. LEXIS 16894 (D.C. Cir. Sept. 23, 2015) (per curiam). The district court nonetheless allowed the case to go forward on the question of whether the disparate impact rule exceeds HUD's authority to the extent it applies to insurers' ratemaking and underwriting decisions. See Amended Complaint at 17-20, *Am. Ins. Ass'n*, 74 F. Supp. 3d 30. HUD has moved for summary judgment. Defendant's Motion for Summary Judgment, *Am. Ins. Ass'n*, 74 F. Supp. 3d 30.

critique of process, particularly apparent when the target is not “soft” guidance but rulemaking. The broader charge is that agencies in their regulatory action on sexual assault, gender identity, ex-offenders, or housing integration have intruded on intimate domains—domains that are better left to states or local communities. And these process challenges are likely fueled by a concern about the specific areas in which the agencies seek to regulate: substantive matters over which there are deep disagreements such as employment of ex-offenders, gender identity, and where housing for poor people and minorities should be located.

Indeed, in the end it may be too difficult to disentangle whether these challenges are about the goals or the misuse of administrative power to achieve those goals. What is clear is that this conflation of form and function in challenging the regulatory action of civil rights agencies is not entirely new. Long before claims of “sex bureaucracy,” or “social engineering” through bureaucracy, opponents challenged the DOE for, in effect, promoting a race bureaucracy that sought to advance integration in education.<sup>64</sup> Prominent scholars have cast the work of the EEOC and other agencies in the 1960s and early 1970s, in particular with respect to its disparate impact guidance, as a creative hijacking of the meaning of 1964 Act. One prominent account argues that administrative agencies improperly transformed the Civil Rights Act of 1964’s mandate of antidiscrimination and colorblindness into a mechanism for advancement of group-based rights.<sup>65</sup> Critics charged President Richard Nixon’s program of affirmative action in federal contracting as a usurpation of congressional power.<sup>66</sup>

Connecting current critiques to earlier periods does not dispose of legitimate concerns about transparency, participation, and fidelity to statutory interpretation. Rather it is meant to suggest that the invocation of regulatory power by civil rights agencies has always been contested, and those contestations have often surfaced as attacks on

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64. See generally STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* (1995) (articulating some of the criticisms of federal actions pursuant to Title VI of the Civil Rights Act of 1964).

65. See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA 456–58* (1990). Scholars have in turn questioned Professor Hugh Graham’s assessment. See, e.g., Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1725 (1991) (book review) (questioning some of Graham’s characterizations).

66. See J. Larry Hood, *The Nixon Administration and the Revised Philadelphia Plan for Affirmative Action: A Study in Expanding Presidential Power and Divided Government*, 23 PRESIDENTIAL STUD. Q. 145, 150–54 (1993) (describing resistance to the “Philadelphia Plan” as an unconstitutional usurpation of power away from Congress by the DOL).

the misuse of bureaucratic power. These concerns about bureaucracy are long-standing and are often difficult to disentangle from resistance to substantive goals.

## II. RETHINKING INCLUSIONARY REGIMES

This Part shows how, against the backdrop of these concerns about bureaucratic overreach, civil rights agencies are retooling conventional bureaucratic forms of regulation to advance inclusion. The current clamor about the legitimacy of civil rights regulation risks rendering agencies more reluctant to use regulatory power. And yet the complexity of civil rights problems today and the inefficacy of traditional solutions would seem to demand a greater role for agencies in developing innovative approaches to advance equality and inclusion.

This Part provides a positive account of the civil rights regulations of the kind described in Part I, which one can see as regulatory responses to an emerging set of problems using long-standing informal and formal regulatory power. This Part suggests that, although the regulatory tools that civil rights agencies are invoking are not themselves new, they represent an attempt to address emerging problems. To be sure, they occur in a space in which the antidiscrimination norms are often contested. Yet functionally they serve to catalyze institutions to respond far beyond the regulatory space precisely governed by bureaucratic rules. This Part then presses beyond these examples to show the emergence of new forms of “inclusive regulation” that rely on carrots (grant making) in addition to sticks (funding termination); encourage collaborative work with regulated actors and communities; engage states, localities, and communities in developing context-specific, evolving solutions rather than mandating “top-down” solutions; and attempt to collapse traditional boundaries between agencies.

### *A. Regulatory Responses to Emerging Problems*

The current context of concern over civil rights overreach butts against recent scholarly attention to agencies’ distinct role in flexibly implementing statutes to respond to emerging problems. Commentators have provided positive accounts of civil rights agencies’ capacity to use informal and formal regulatory powers to respond to emerging problems of exclusion. Professors William Eskridge and John Ferejohn’s influential account of the role of statutes in instantiating enduring norms features the EEOC’s role in interpreting

Title VII to protect women against discrimination based on pregnancy in the face of constitutional rulings narrowing such protection.<sup>67</sup> Agencies are celebrated for the capacity to deliberate and develop expertise on particular problems. In the area of civil rights, this emerges as the ability to engage with social movements to define problems as they change and emerge.<sup>68</sup> These accounts de-emphasize the fear of bureaucratic power, but rather point to the advantages of regulatory intervention generally, and in the civil rights area in particular.

More recent agency action can be seen within this lens of responsiveness and innovation for which agencies are well suited. In addition to engaging with social movements, agencies have the capacity to deliberate with regulated entities such as businesses and employers not just through the formal process of notice and comment but through outreach, interaction, and discussion. Civil rights agencies also have the capacity to develop systemic solutions to problems identified through individual adjudication or private enforcement in courts.<sup>69</sup> Regulated entities concerned about individual complaints (in agencies and in courts) might look to an agency for guidance in hopes that it functions as a “safe harbor” against complaints or to advance inclusionary goals that are consistent with the regulated entities’ inclusionary values and objectives.

Much of the recent regulation of civil rights agencies can be seen through this framework of innovation, in which agencies are building on long-standing tools to develop responses to contemporary problems of exclusion. Agencies are not always taking the lead in developing new interpretations of existing law. Indeed, courts often play this role. But agencies expand the reach of these judicial interpretations through rulemaking and guidance.

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67. See ESKRIDGE & FEREJOHN, *supra* note 6, at 33–40 (describing the process of administrative constitutionalism in which legislative and executive officials advance new fundamental principles and policies).

68. See, e.g., *id.* (describing the EEOC’s interaction with women’s groups concerned about pregnancy discrimination). See generally LIEBERMAN, *supra* note 51 (providing an account of the EEOC’s interaction with civil rights groups like the NAACP Legal Defense Fund to identify discriminatory employment barriers); Chen, *supra* note 4 (detailing the DOE’s interaction with immigrant advocacy groups to develop guidelines on education of students with limited English proficiency).

69. See JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 111–45 (1996) (describing the development of the EEOC’s “disparate impact” standard as an administrative solution to the EEOC’s limited capacity to address systemic complaints).

In key instances, agencies are dusting off untapped regulatory power. HUD, which has engaged in a range of regulatory activity to clarify the FHA, provides an example. Between 2012 and 2016, HUD issued the disparate impact rule<sup>70</sup> and the rule requiring federal grantees to affirmatively further fair housing<sup>71</sup> discussed in Part I. In addition, HUD formalized its standards for assessing claims of sexual harassment under the FHA,<sup>72</sup> promulgated rules prohibiting discrimination on the basis of sexual orientation and gender identity in HUD-funded and HUD-operated housing programs,<sup>73</sup> and provided guidance on the FHA's application to the use of criminal history in making housing decisions in public and federally funded housing.<sup>74</sup> Using regulatory tools that are uncontested, HUD's actions aim to respond to emerging problems. Yet the tools employed—notice-and-comment rulemaking and enforcement guidance—build on long-standing regulatory mechanisms.

Agencies are also responding to a void left by a gridlocked Congress.<sup>75</sup> Recent regulatory responses to the problem of wage disparity provide an example. In recent years, advocates began to highlight these problems related to wage disparity, and efforts to strengthen legislative protection from wage discrimination have stalled in Congress.<sup>76</sup> In the void, agencies have begun to craft responses using existing regulatory tools in new ways. Specifically, the EEOC has proposed amending EEO-1 forms—which have been used to collect data on gender, race, and ethnicity—to require collection of pay data

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70. See Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

71. See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

72. See Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,054 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100).

73. See Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662, 5,662 (Feb. 3, 2012) (to be codified at 24 CFR Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).

74. See OFFICE OF PUB. & INDIAN HOUS., U.S. DEP'T OF HOUS. & URBAN DEV., GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 1-7 (2015), <https://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf> [<https://perma.cc/R9W2-F9CZ>].

75. For an account of congressional polarization, see Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. OF POL. SCI. 85, 86 (2015) (reviewing the literature on the causes of legislative stalemate and finding that partisanship and electoral competition are undermining Congress's "broader problem-solving capacity").

76. See Paycheck Fairness Act, S. 2199, 113th Cong. (2014).

for private industry and federal contractors with one hundred or more employees.<sup>77</sup>

In other examples, agency guidance has the effect of catalyzing innovative programs by regulated entities that go beyond the letter of the guidance. The sexual assault guidelines provide an example. In the area of sexual assault, beyond what the guidance itself requires, schools are conducting peer training and education, promoting bystander intervention programs, and launching efforts to curb excessive alcohol use.<sup>78</sup> For some schools, the framework has broadened beyond the notion of preventing and providing responses to sexual violence and gender-based misconduct to more broadly promote “Sexual Respect and Community Citizenship.”<sup>79</sup> This framework is meant to move beyond a set of responses to individual instances of violence to develop a campus climate that promotes participation and inclusion. This reveals that agency intervention is not propelled simply by the contours of the guidance requirements themselves or the mandates of bureaucratic regulation, but from a surrounding context in which universities have their own incentives and institutional motivations to promote gender inclusion. These motivations might range from relatively thin compliance-oriented motivations (such as diminishing Title IX complaints or avoiding a Title IX investigation by the DOE). But they also may be motivated by a set of thicker motivations that align with institutional imperatives, such as improving the learning environment for women and other parties affected by sexual violence or creating citizens and leaders who understand and are prepared to engage with diverse communities. In short, institutions may initially be prompted by an agency-driven framework of compliance, but

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77. See Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5,113, 5,113 (Feb. 1, 2016). This effort stems from a multiagency initiative to determine potential responses to gender-based wage disparities. See Presidential Memorandum, Advancing Pay Equality Through Compensation Data Collection, 79 Fed. Reg. 20,751, 20,751 (Apr. 11, 2014) (directing the Secretary of Labor to develop a compensation data collection proposal). The EEOC proposal is not yet final and is opposed by some employers. See Vin Gurrieri, *EEOC Gets Polarized Feedback On Rule To Fight Wage Gap*, LAW360 (Apr. 12, 2016), <http://www.law360.com/articles/782449/eoc-gets-polarized-feedback-on-rule-to-fight-wage-gap> [<https://perma.cc/G5YG-Y78R>].

78. For a description of sexual assault prevention programs operative at a range of institutions, see *infra* notes 108–11.

79. See *Sexual Respect and Community Citizenship Initiative 2016*, COLUM. UNIV., <https://sexualrespect.columbia.edu/sexual-respect-and-community-citizenship-initiative-2016> [<https://perma.cc/2EDQ-FSWK>].

institutions adopt, adapt, and embed commitments that extend further than these regulations.

This is not to diminish all concerns about process, but it is to temper them. Some of these forms of federal administrative regulation are long-standing and quite “soft” in their use of regulatory power. To the extent that they are prompting change, it may be because institutions have a broader range of incentives to adopt them than is evident simply from the mandates of a coercive regulatory regime.

### *B. Rethinking Civil Rights Regimes*

These regulatory responses emerge at a time in which the limits of traditional modes of civil rights regulation have become more evident. As a general matter, the turn to agencies can be explained as a response to the limits of adjudication or complaint resolution as a mechanism of advancing systemic change. These limitations are in part the result of judicial doctrines that hamper the ability of plaintiffs to recover in individual antidiscrimination cases,<sup>80</sup> weaken mechanisms such as the class action device for systemic change,<sup>81</sup> as well as curtail the ability of plaintiffs to bring private enforcement actions in court.<sup>82</sup> Agency regulations thus provide a mechanism for advancing systemic strategies for a set of enduring problems that courts or other systems are not always well suited to address. The DOE regulations regarding sexual assault and harassment on college campuses might be seen in this vein,

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80. For a discussion of the limitations of the antidiscrimination framework in Title VII, see Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 85 (2011) (stating that “courts largely seem to view discrimination as being motivated by an individual who possesses a bad motive”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 467–68 (2011) (describing organizational practices that are “difficult to trace directly to intentional discrete actions of particular actors,” such as harassment claims between coworkers and exclusion caused by patterns of interaction, informal norms, networking, and mentoring); Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 124–25 (2012) (discussing how the sharp division between disparate impact and disparate treatment prevents plaintiffs from addressing “structural” workplace practices that fit neither the fault-based disparate treatment model or the strict-liability-based disparate impact model); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1366 (2009) (referring to the disparate treatment–disparate impact framework of Title VII as “a theoretical straitjacket with two arms”).

81. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011) (holding that the proposed Title VII nationwide class of former and current female employees at Wal-Mart claiming discrimination in pay and promotion practices lacked the “commonality” of factual and legal claims required to satisfy Federal Rule of Civil Procedure 23).

82. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (curtailing the ability of plaintiffs to bring enforcement actions).

as a response to the limitations of a system of individual complaints (in agencies or courts) for addressing or preventing what may be a systemic problem on campuses.

A broader limitation, however, relates not just to efficacy of adjudication but to the capacity of the antidiscrimination enforcement framework to respond to contemporary problems of exclusion and inequality. In part, this reflects the limitation of the antidiscrimination framework. In the areas of race and gender exclusion, for instance, it is easy to discern a mismatch between the concept of antidiscrimination and the mechanisms of exclusion, which might be subtle, implicit, and the result of “favoritism” rather than simple bias.<sup>83</sup> Further, discrimination (even if we incorporate notions of implicit bias) may be inadequate to explain exclusion in certain areas. Bias and even favoritism are only some of the mechanisms that generate racial and gender exclusion. Discrimination interacts with other mechanisms, many of which are rooted in long-standing patterns of economic exclusion including segregation, access to training and education, and social capital networks.<sup>84</sup> In the area of housing, for instance, housing segregation might be fueled by long-standing and contemporary discrimination in private housing markets but also fueled by decisions on where to site low-income housing, the crisis of affordability in housing, and ostensibly race-neutral barriers such as the availability of transportation.

The limitations of existing antidiscrimination frameworks have implications for how agencies might better advance inclusion through regulation. First, civil rights agencies may need regulatory systems that respond to multiple barriers of exclusion simultaneously. Relatedly, agencies may have to develop regulatory responses that connect solutions to traditional notions of discrimination—that is, bias—with the solutions to problems that extend beyond bias (for example, in the areas of employment, addressing skills, social capital, and other barriers to inclusion).

Second, agencies may need in some instances to set inclusionary goals without knowing in advance what strategies might best achieve those solutions. This builds on the insights of those who emphasize the

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83. See, e.g., Sturm, *supra* note 80, at 460.

84. See generally DEIDRE A. ROYSTER, RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE-COLLAR JOBS (2003) (providing an account of how discriminatory networks contribute to occupational segregation).



need for “experimentation” and responsiveness to local conditions.<sup>85</sup> An agency may require states and localities to share and work to achieve a particular end—decreasing housing segregation—but the best strategies to achieve that goal might not be fully known in advance and may be specific to a local community.

A final implication is that addressing systemic barriers may require agencies to not only prohibit discrimination but also engage an affirmative set of strategies for advancing inclusion. Inclusionary regimes would need to do more than sanction the paradigm noncompliant regulated entities (schools that utterly fail to respond to sexual assault, for instance); they would also need to provide tools that help those who share inclusionary regulatory goals achieve them. The tools for achieving these ends may then differ from the traditional enforcement tools of individual complaints, adjudication, investigation, and funding termination.

### C. *The Emerging Inclusive Regulation*

In the face of the limitations of extant regimes, there is evidence that civil rights agencies are adopting regulatory approaches to advance inclusion that depart from traditional bureaucratic regulation. As discussed below, these approaches include (1) competitive grants to support jurisdictions that seek to advance civil rights goals, (2) regulatory programs that collapse boundaries between agencies and between enforcement and regulation, and (3) greater engagement of affected communities in developing and implementing solutions.

1. *From Sticks to Carrots.* One possible implication is that civil rights regimes might need to depend on regulatory “carrots” of grant making as much as on the prohibitory “sticks” of conditioned spending. The federal government widely uses grant making to spur “innovation” in design across a range of areas. But civil rights agencies have not pervasively used grants in this way.<sup>86</sup> Reliance on competitive government grant awards to those who seek to advance inclusion could encourage innovation to develop new solutions tailored to local conditions and expertise. Agencies could use these grant-making

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85. See, e.g., Sturm, *supra* note 21, at 249 (introducing a conceptual framework for inclusion that engages “crucial stakeholders and encourage[s] experimentation”).

86. There are a few important exceptions to this, most prominently the Magnet Schools Assistance Act, which provides grants to states and localities to develop racially and economically integrated magnet schools. See 20 U.S.C. § 7231 (2012).

programs to provide support to those jurisdictions who seek to advance equality goals but require funding incentives and substantive direction to effectively move forward.

An emphasis on competitive grants might build on the framework of conditioned spending that currently exists. Conditioned spending is at the heart of affirmative action programs—hiring, pay, and nondiscrimination requirements placed on employers that receive federal contracts.<sup>87</sup> Employers receiving covered contracts are required to certify compliance with particular requirements, engage in self-analyses, and submit to systemic reviews and investigations by the DOL's Office of Federal Contract Compliance Programs. Contractors in violation of the equal-opportunity directives may have their contracts canceled, terminated, or suspended.<sup>88</sup> Title IX requires educational institutions and districts taking federal funds not to discriminate on the basis of gender. Title VI of the Civil Rights Act of 1964 prohibits discrimination by all entities that receive federal funds,<sup>89</sup> and the FHA requires the federal government and its grantees to “affirmatively further fair housing.”<sup>90</sup> These conditioned spending

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87. See Rehabilitation Act of 1973, Pub. L. No. 93-122, § 503, 87 Stat 355, 393–94, 29 U.S.C. § 791 (2012) (requiring federal contractors to develop a plan to employ and advance individuals with disabilities); Exec. Order No. 13,672, 79 Fed. Reg. 42,971, 42,971 (July 23, 2014) (extending Executive Order No. 13,087 to gender identity); Exec. Order No. 13,087, 63 Fed. Reg. 30,097, 30,097 (May 28, 1998) (extending Executive Order No. 11,478 to sexual orientation); Exec. Order No. 11,478, 34 Fed. Reg. 12,985, 12,985 (Aug. 8, 1969) (extending Exec. Order No. 11,246 to all federal employees); Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,319 (Sept. 24, 1965) (mandating, with regard to “race, creed, color, or national origin,” nondiscrimination in the areas of “employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship”); *Regulations Implementing Section 503 of the Rehabilitation Act*, U.S. DEP'T OF LABOR, <https://www.dol.gov/ofccp/regs/compliance/section503.htm> [<https://perma.cc/YX4Q-RJTR>] (describing the requirements for complying with the obligation to hire and advance individuals with disabilities); see also Exec. Order No. 13,665, 79 Fed. Reg. 20,749, 20,749 (Apr. 8, 2014) (amending Executive Order No. 11,246 to prohibit discrimination or discharge by federal contractors who inquire about compensation).

88. See, e.g., *Executive Order 11246—Equal Employment Opportunity*, U.S. DEP'T OF LABOR, <http://www.dol.gov/ofccp/regs/compliance/aa.htm> [<https://perma.cc/PB5K-WE7A>]. Indeed, the DOL's review and investigation process provides a potentially powerful tool for promoting nondiscrimination as well as affirmative action. In recent years, the DOL has identified pay and promotion discrimination by federal contractors and brokered remedial settlements. See *Lahey Clinic Settles Pay Discrimination Case with US Labor Department*, U.S. DEP'T OF LABOR (Feb. 12, 2015), <http://www.dol.gov/opa/media/press/ofccp/OFCCP20142056.htm> [<https://perma.cc/NAG6-B3VB>].

89. Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (2012) (prohibiting discrimination on the basis of race, color, or national origin in federally funded programs).

90. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903). These directives implement section

programs provide nondiscriminatory baseline prohibitions. Competitive grants could be deployed in agencies that have spending and programmatic authority, specifically in agencies that regulate and support programs involving labor, education, and housing. Grants could use spending to spur experimentation and to leverage government funds to develop new approaches to address inequality.

There is evidence that civil rights agencies are placing greater reliance on competitive grant making of this sort. Under the Obama administration, three federal agencies—HUD, the U.S. Department of Transportation (DOT), and the U.S. Environmental Protection Agency (EPA)—initiated a “Partnership for Sustainable Communities,” which awards state and local grants to build affordable housing, redesign transportation infrastructure, and promote environmental efficiency, and the Partnership has issued grants to support programs in more than twenty-five jurisdictions.<sup>91</sup> While the DOE’s sexual assault guidance has received the most attention, the DOE has also called for grants to higher-education institutions to develop innovative responses to problems of sexual assault on campus. Similarly, the DOL has announced competitive grants to public-private partnerships to “develop and implement innovative, high-quality . . . apprenticeship programs”<sup>92</sup> that move workers into “high-growth occupations and industries.”<sup>93</sup> A key focus of the grant program is spurring partnerships that increase training opportunities for

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3608 of the FHA, which requires HUD to administer programs “in a manner affirmatively to further the policies of [the FHA].” See 42 U.S.C. § 3608(e)(5) (2012); see also *id.* § 3608(d) (requiring the same of all federal departments and agencies).

91. See *About Us*, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, <http://www.sustainablecommunities.gov/mission/about-us> [<https://perma.cc/39AF-MCLX>] (describing the goals as using “agency resources to advance Ladders of Opportunity for every American and every community . . . helping communities adapt to a changing climate, while mitigating future disaster losses . . . [and] supporting implementation of community-based development priorities”); *List of Case Studies*, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, <https://www.sustainablecommunities.gov/case-studies> [<https://perma.cc/AU7W-FDWG>] (providing case studies of jurisdictions that have launched promising programs with these grants).

92. *Opportunities*, U.S. DEP’T OF LABOR, <https://www.dol.gov/featured/cwip/opportunities> [<https://perma.cc/XR6X-ZXNA>]. The grant competition will “focus on public-private partnerships between employers, business associations, joint labor-management organizations, labor organizations, training providers, community colleges, local and state governments, the workforce system, non-profits and faith-based organizations.” *Id.*

93. U.S. DEP’T OF LABOR, NOTICE OF AVAILABILITY OF FUNDS AND FUNDING OPPORTUNITY ANNOUNCEMENT FOR THE AMERICAN APPRENTICESHIP INITIATIVE, <https://www.dol.gov/dol/grants/FOA-ETA-15-02.pdf> [<https://perma.cc/3C2M-MQQ3>] (describing a reward of up to \$100 million in grants financed by a user fee generated by the H-1B nonimmigrant visa program).

historically excluded groups including women, people with disabilities, and people of color.<sup>94</sup> Another DOL grant program awards grants to innovative approaches to training low-skilled and historically excluded workers for employment in the technology industry.<sup>95</sup>

In addition to leveraging government funds to develop new strategies for inclusion, the approach evident in programs such as the DOL grant program and the Partnership for Sustainable Communities provides the advantage of “pooling” agency resources to meet multiple goals.<sup>96</sup> For instance, in the area of employment this might include both providing skills training for workers and advancing inclusion of particular groups. In the area of housing, it would include both building affordable housing and advancing the civil rights goals of nondiscrimination and integration.

Yet another example involves the Department of Justice’s (DOJ) efforts to address the civil rights implications of municipal fines that target the poor. Alongside the DOJ investigations and settlement agreements prohibiting excessive court fines for misdemeanor arrests and quality-of-life violations,<sup>97</sup> the DOJ established a \$2.5 million program to help state and local courts develop new policies.<sup>98</sup>

These grant-making efforts do not yet dispense large amounts of funding. And as discussed in Part III, below, their capacity will depend on the quality of the initiatives they develop, the efficacy of oversight,

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94. See *Opportunities*, *supra* note 92.

95. See *DOL Grants: Funding Opportunities*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/grants/funding-ops.htm> [<https://perma.cc/MHD6-6SBS>] (announcing \$100 million in grants to support innovative approaches to moving lower-skilled workers on the fastest paths to well-paying information-technology and high-growth jobs in industries like healthcare, advanced manufacturing, financial services, and other in-demand sectors).

96. See Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 211 (2015) (“[T]he executive creates joint structures capable of ends that no single agency could otherwise achieve.”). Professor Daphna Renan also provides some reasons to be cautious about the agency “pooling” approach from the perspective of administrative law and design. *Id.*

97. See, e.g., CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf) [<https://perma.cc/VF36-JGJX>] (detailing the DOJ’s finding that law enforcement’s focus on maximizing revenue imposes hardship on the city’s low-income residents and has a disproportionate impact on African Americans); Consent Decree at 83–86, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Apr. 19, 2016) (enumerating elements of the settlement agreement between the DOJ and the City of Ferguson).

98. See Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices (Mar. 14, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices> [<https://perma.cc/6CJV-S8JF>].

and the development of systems for diffusing the benefits of effective solutions. Still, they suggest a promising emerging approach for using federal grants that provide incentives and financial support to state and local programs to further statutory and regulatory goals (such as integration in housing).

2. *Collapsing Boundaries.* The limitations of existing civil rights regimes also call for collapsing traditional boundaries between agencies addressing different substantive domains and rethinking boundaries between agency functions. This is not just a question of bureaucratic reorganization. Addressing problems of exclusion might involve attending to multiple interrelated barriers that affect communities and individuals, areas that may be the domain of more than one agency. As an example, racial segregation affects the health and environmental well-being of communities as well as access to quality education. Promoting integration may require addressing transportation, housing, and access to employment.

There is evidence of this collaboration across domains in recent federal programmatic initiatives. The Partnership for Sustainable Communities (referenced in the prior subsection as an example of an increasing emphasis on grants as a source of equality innovation) combines grant making and oversight across agencies so that recipients of grants are able to draw on the expertise of multiple agencies and attend to intersecting barriers and problems facing communities.<sup>99</sup> Another aspect of the collaboration is the development of “sustainability” indicators that communities can use to measure community well-being related to land use, housing, human health, transportation, and the environment.<sup>100</sup> The programmatic design stems from the reality that achieving sustainable communities cannot simply result from regulation in one substantive area but requires addressing barriers that are within the purview of different agencies and regulatory regimes.

Next, beyond substantive boundaries, solving emerging and embedded problems of inequity may involve collapsing the traditional divide between antidiscrimination enforcement and programmatic regulation. Civil rights offices of agencies involved in complaint

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99. For further discussion of the Partnership for Sustainable Communities, *see supra* note 91 and accompanying text.

100. *Sustainable Community Indicator Catalog*, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, <https://www.sustainablecommunities.gov/indicators> [<https://perma.cc/RD7M-ZWJY>].

resolution would need to consider questions of program design—how agency programs might be designed and structured to promote inclusion. Similarly, if addressing barriers to inclusion involves attending to bias in addition to other impediments that individuals and communities face, this calls for dissolving barriers between independent agencies traditionally dedicated to antidiscrimination enforcement (such as the EEOC) and agencies that regulate to further broader federal policy goals (such as the DOL, responsible for training and preparing the workforce).

Recent agency initiatives are beginning to collapse the boundaries between *ex post* enforcement of violations and ongoing regulation and programmatic design. The guidance on spending programs and agency equality directives exemplify this feature. For instance, the DOE's efforts to address sexual assault and violence on campus center not simply on resolving complaints or providing guidance on the procedure for adjudicating campus sexual assault but on encouraging institutions to adopt practices to *prevent* sexual assault. The DOE furthers these goals through trainings, technical assistance, publications, and solicitation for grants to support inclusive, preventive practices.

Regulatory implementation of the FHA's statutory mandate to affirmatively further fair housing provides another example.<sup>101</sup> The AFFH rule seeks to achieve fair housing goals, not through HUD's powers over adjudication or its power to delineate the prohibitory scope of the fair housing act, but through a system in which communities and regulated entities (state and local housing agencies) identify the processes that sustain discrimination and segregation and take steps to address the identified problems.

Yet another example is found in the design of the DOL's apprenticeship initiatives. The program is designed to achieve ends that are related to workforce development generally and not civil rights goals in particular. The DOL's program is aimed at creating industry- and government-developed high-quality apprenticeship programs for training workers in industries that are growing in particular regions. In seeking proposals, the DOL makes inclusion not a matter for *ex post* enforcement (through complaints or DOL compliance reviews of those receiving federal grants) but a matter of front-end design. The DOL's grants establish inclusion of underrepresented groups (in particular

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101. See 42 U.S.C. § 3608(e)(5) (2012) (requiring HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the FHA]”).

women) as a substantive goal. The program seeks to provide strategies for all grantees to develop inclusive practices and provides grants to “intermediaries” (community-based organizations, labor organizations, and workforce organizations) to develop regional partnerships to increase opportunities for women, racial and ethnic minorities, people with disabilities, and other traditionally underserved groups.<sup>102</sup>

3. *Participation and “Crowd-Sourced” Solutions.* The changing civil rights context also suggests the need to engage regulated entities (employers, schools, and state and local governments) as well as affected communities in devising and implementing solutions to civil rights problems. The barriers to inclusion may differ in different regions. For instance, the form and sustaining mechanisms of housing segregation may differ between growing metropolitan areas and older industrial cities. Solutions may also differ in different regions. In the area of housing segregation, the tools available to expanding, relatively affluent areas experiencing growth may differ from those in smaller, shrinking cities.<sup>103</sup>

The reasons that regulated entities fail to effectuate inclusion may also differ. Civil rights violators include the hostilely noncompliant as well as the ineffectual. Sexual assaults may occur on campuses resistant to adopting any role in responding to complaints, as well as those that with good intentions advance programs and policies that prove ineffective. Participation of regulated entities may advance tailored approaches and development of broadly effective solutions. In this way, participation can be consistent with emphasizing front-end design to advance inclusion, rather than *ex post* enforcement.

Participation of affected communities also provides deeper understanding of the scope of a particular problem and a pathway to more effective solutions. Further, organizational theory tells us that participation in design and implementation allows regulated entities to connect the inclusionary regulatory goal to their own institutional

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102. See *ApprenticeshipUSA Investments*, U.S. DEP’T OF LABOR, <https://www.dol.gov/featured/apprenticeship/grants> [<https://perma.cc/2W84-SGGJ>] (describing grants to “National Equity Partners” who would be responsible for developing regional “opportunity partnerships” across the nation, intended to “increase gender, racial, ethnic and other demographic diversity and inclusion in apprenticeships, among traditionally underrepresented populations”).

103. See, e.g., William H. Frey, *Mid-Decade, Big City Growth Continues*, BROOKINGS (May 23, 2016), <https://www.brookings.edu/blog/the-avenue/2016/05/23/mid-decade-big-city-growth-continues> [<https://perma.cc/XWH8-XFET>] (documenting the continuing growth of large cities).

objectives. The theory is that participation in developing and implementing specific strategies allows regulated entities to “buy in” to the regulatory goals and strategies and allows remedies to better stick.<sup>104</sup>

This emphasis on participation is evident in the new HUD AFFH regulation. A key part of strengthening the rules requiring state and local governments to advance fair housing was the development of an assessment tool in which grantees would, with HUD’s assistance, assess the barriers to fair housing in their communities.<sup>105</sup> In identifying regional fair housing issues and setting goals, grantees must engage in a structured “community participation process” in which they consult with community groups and citizens.<sup>106</sup>

The DOE’s guidance on sexual assault and violence provides another example. Though the DOE’s guidance calls for participation with much less specific direction than in the AFFH context, the guidance appears to be spurring schools to develop programs that extend beyond the boundaries of the guidance. Specifically, the DOE’s guidance calls for higher-education institutions to adopt training, education programs, and materials for the school population and generally targeted audiences (for example, new students and athletes).<sup>107</sup> This guidance appears to be catalyzing schools to adopt a range of initiatives beyond the formal requirements of the guidance, including vigorous counseling and support,<sup>108</sup> peer training panels and

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104. This is the key insight of the “new governance” literature. See generally Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265 (2012) (discussing the emergence of regulatory regimes that structure engagement by various stakeholders to address public problems whose solutions have been hampered by ignorance or uncertainty).

105. See *The Assessment of Fair Housing*, HUD EXCHANGE, U.S. DEPT OF HOUS. & URBAN DEV., <https://www.hudexchange.info/programs/affh/overview> [<https://perma.cc/AN2H-4MGV>] (“The rule identifies four fair housing issues that program participants will assess: 1. Patterns of integration and segregation; 2. Racially or ethnically concentrated areas of poverty; 3. Disparities in access to opportunity; and 4. Disproportionate housing needs.”).

106. See 24 C.F.R. § 91.100 (2016). The regulation states:

The jurisdiction shall consult with community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws, such as State or local fair housing enforcement agencies (including participants in the Fair Housing Assistance Program (FHAP)), fair housing organizations and other nonprofit organizations that receive funding under the Fair Housing Initiative Program (FHIP), and other public and private fair housing service agencies, to the extent that such entities operate within its jurisdiction.

*Id.*; see also *id.* § 91.105 (detailing citizen-participation requirements for local governments).

107. See Dear Colleague Letter, *supra* note 27.

108. See *Campus Choice*, S. OR. UNIV., <https://inside.sou.edu/campuschoice/index.html> [<https://perma.cc/X55K-3GLD>].



discussion groups to move toward cultures of “consent,” “respect,” and “empowerment”;<sup>109</sup> harnessing higher-educational institutional capacity to conduct research on campus climate and effective practices;<sup>110</sup> and offering trainings that move beyond standard sexual assault prevention strategies by allowing students to engage visual arts, dance, media, and theater to express more comprehensive themes of sexual identity and respect.<sup>111</sup>

### III. REGIME FOR THE FUTURE?

The central aim of this Article is to bring to the fore these new modes of agency regulation. The question ultimately is whether the emerging inclusive regulatory regime will be meaningful and effective. There is too much uncertainty in the current political moment to fully predict the immediate fate of the guidance documents and regulations discussed in this Article. Both traditional and innovative forms of civil rights regulation depend on enforcement, as well as programmatic and financial support from the federal government. At the same time, some of the innovations—such as those involving sexual assault reforms in higher-education institutions—are currently underway,<sup>112</sup> and some aspects may continue even in the absence of federal guidance.

However, this Article’s interest in understanding the potential and limitations of this new inclusive regulation transcends the current political moment. The question is what place models that take this mode of regulation have in civil rights. The new inclusive regulation emphasizes participation, problem-solving, and solutions that are not mandated but generated through the iterative process of implementation. This model is thus open to the critique that it is insufficiently directive and too precatory.

One can use the example of the AFFH rule, which has been subject to the criticism that it is too coercive.<sup>113</sup> In his confirmation

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109. See, e.g., *Creating a Culture of Consent*, HARVARD UNIV., <http://osapr.harvard.edu/creating-culture-consent> [<https://perma.cc/7YMD-UVN7>].

110. See, e.g., *UT System to Launch the Most Comprehensive Sexual Assault Study in Higher Education*, UNIV. OF TEXAS SYS. (Aug. 5, 2015), <https://www.utsystem.edu/news/2015/08/05/ut-system-launch-most-comprehensive-sexual-assault-study-higher-education> [<https://perma.cc/GT8J-FVKW>].

111. See, e.g., *Sexual Respect & Community Citizenship Initiative: The Arts Option*, COLUM. UNIV., <http://artsoption.columbia.edu> [<https://perma.cc/BL2M-E9VC>].

112. For a description of efforts underway at higher-education institutions, see *supra* notes 108–11.

113. For critiques of the AFFH rule as too coercive, see *supra* note 58 and accompanying text.

hearing, incoming Secretary of HUD Ben Carson echoed these critiques, describing the rule as an example of “people sitting around desks in Washington, D.C., deciding how things should be done” at the local level.<sup>114</sup> At the hearing, Senator Robert Menendez challenged this characterization of the rule, stating the AFFH rule was not “top-down” and instead “requires local communities to assess their own patterns of racial and income segregation and make genuine plans to address them.”<sup>115</sup> Indeed, the AFFH rule’s heavy reliance on the development of flexible, locally developed solutions<sup>116</sup> has drawn criticism that it contains insufficient directives to localities to abolish practices that, over the last forty years, have been proven to have exclusionary effects (such as exclusionary zoning).<sup>117</sup> HUD’s own explanation of the AFFH rule concedes that this flexibility will lead to indeterminate outcomes.<sup>118</sup>

A more general critique is that any move toward voluntary and competitive grants, collaboration, and tailored problem-solving depends on shared inclusionary goals. As the discussion in Part I reveals, inclusionary goals are not shared; indeed, they are deeply contested. The success of this mode of regulation would require baseline norms of antidiscrimination that apply to a broad array of public and private entities, as well as the support and encouragement of institutions that seek to extend inclusion beyond these norms. Whether this is desirable depends on how broadly one defines the baseline civil rights requirements. If nondiscrimination is interpreted to require furthering fair housing, and if one knows the best strategy for advancing that goal throughout jurisdictions, it is hard to see the

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114. *Nomination of Dr. Benjamin Carson Hearing*, *supra* note 10, at 13–14 (testifying further that he had no problem with integration but did have a “problem with people on high dictating it when they don’t know anything about what’s going on in the area”).

115. *Id.* at 17 (statement of Sen. Robert Menendez).

116. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903) (noting that the AFFH process allows for flexibility in setting goals, prioritizing outcomes, and developing measurement standards).

117. *See, e.g.*, Lauren Gurley, *The Fair Housing Failure—Where Even the Liberal North Whistles Dixie*, AM. PROSPECT (Aug. 6, 2015), <http://prospect.org/article/fair-housing-failure%E2%80%94where-even-liberal-north-whistles-dixie> [<https://perma.cc/8MNR-4UNZ>] (quoting a fair housing advocate who believes that the AFFH framework is too weak to undo segregated housing patterns and that HUD should emphasize stronger enforcement through the withholding of federal funds to counter “massive resistance to changing the segregated status quo”).

118. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,272 (noting that the AFFH process will encourage communities to plan ahead).

justification for not mandating that all entities that receive federal funds work meaningfully to achieve that goal.

The risk of these new modes of regulation is the production of places with thick forms of inclusion, alongside those with thin inclusion. Imagine a jurisdiction actively enforcing AFFH, receiving a sustainability grant to link environmental, housing, and transportation services and promoting public-private apprenticeship programs to train a diverse set of workers. Next to it might lie a jurisdiction adhering to basic nondiscrimination requirements and nothing more. The normative justification for allowing such variation among regions given the goals and values at stake is not easy to articulate.

If the new mode of regulation is to hold promise, it will depend on vigorous oversight by the federal government, which includes monitoring local plans for progress towards inclusionary goals, study of effective practices and interventions across jurisdictions, and meaningful mechanisms for disseminating understanding of what works and the benefits of adopting these more robust forms of inclusion.

This mode of regulation also depends on engagement by public and private actors at the state and local levels. A potential virtue of inclusive regulation is that it diffuses implementation authority away from the federal government to subnational government actors. For instance, the AFFH rule requires governments to self-assess and develop solutions to problems of fair housing.<sup>119</sup> This may serve to increase subnational capacity to deliberate, evaluate, and address barriers to inclusion. Inclusive regulations' dependence on participation can also build similar capacity among local community and civil rights groups. These groups become part of the policymaking process and may then have the expertise, information, and political networks necessary to hold regulated entities accountable.

Still, even with vigorous implementation the model is likely to produce variation among jurisdictions. In some sense, this variation is a concession to a second-best form of regulation: in the context of resistance to civil rights goals, more specific delineation of requirements is politically unlikely. However, these new modes of regulation create a space for those jurisdictions and entities who seek to do more in a climate of concern about over-regulation.

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119. *See id.*

## CONCLUSION

Any conclusion must return to where this Article begins: the future of civil rights regulation to advance inclusion is uncertain. Both “new” and “old” forms of civil rights regulation may now be threatened as too expansive and coercive. Beyond the *mode* of relegation, the inclusionary *goals* may not have the support of an incoming presidential administration. Further, some of the specific programs on which these inclusive regulations depend may not receive funding in the current federal budget.<sup>120</sup> Still, it is worth highlighting the promise generated by agencies endeavoring to address difficult problems by using their power in new ways. If these ideas are not taken up in the immediate future, perhaps they will be revisited before too long.

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120. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN (2017), <https://www.gpo.gov/fdsys/pkg/BUDGET-2018-BLUEPRINT/pdf/BUDGET-2018-BLUEPRINT.pdf> [<https://perma.cc/AF2J-F8VC>] (proposing eliminating funding for HUD’s Community Development Block Grant program).