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Dissenting Statement of Commissioner Peter N. Kirsanow

Introduction

Let me save you the trouble of reading this 400+ page report. It can reduced to two words: Trump Bad.

Whether it is HHS protecting conscience and religious liberty rights, the Department of Education attempting to reduce due process abuses in Title IX cases, or DHS attempting to secure the border - Trump Bad. There is no suggestion that people can have good faith policy disagreements, that economic costs are a valid consideration, or that hotly contested cultural issues are in fact hotly contested. (All the good people agree, you see.) In effect, this report is the progressive civil rights establishment's primal scream about President Trump.

For example, the report states:

> The Heritage Foundation has reported that during the first 22 months in office, the Trump Administration initiated approximately half as many significant regulatory actions as were initiated under the George W. Bush Administration, and approximately a third as many as were initiated under the Obama Administration. Some champion these efforts, citing that deregulation can lead to economic growth and "improvements to quality of life from access to innovative products and services." However, many have criticized this deregulatory agenda, arguing that these rollbacks remove standards for protecting the important public needs, such as civil rights.[1]

This pattern is followed throughout the report. A Trump Administration policy is described in disapproving terms. A disparaging description of purported benefits of this policy is followed by a "But others say, [insert criticism from progressive advocacy organization]."

The report also engages in attempted guilt-by-association: "According to community leaders and civil rights experts who testified and submitted comments to the Commission, the Trump Administration's restrictive civil rights policy positions are part and parcel of a climate that has fostered increasing discrimination in the form of hate crimes and other civil rights violations."[2] As an initial matter, the number of reported hate crimes may not even be increasing, or at least is likely not increasing in the dramatic fashion portrayed by the media and the Commission majority. The increase in reported hate crimes may be entirely due to the increase in the number of jurisdictions reporting hate crimes to the FBI.[3] Second, I am unsure what other civil rights violations the

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[1] Report at n. 310-312.
[2] Report at n. 318.
[3] Robby Soave, *I Testified Before Congress About Hate Crimes and the Alt-Right. Here's What Happened.*, Reason, May 16, 2019, https://reason.com/2019/05/16/hate-crime-statistics-congress-house-subcommittee/.

majority is referring to, but it is worth noting that the Administration can't take a breath without being subject to legal challenge, and yet its policies are regularly upheld by the Supreme Court.

Because of the length of this report, I cannot possibly address every issue or agency contained within it. I have endeavored to address issues that I think are of greatest importance.

Chapter 2: U.S. Department of Justice

Here, as elsewhere in the report, the Commission majority adopts wholesale criticisms of CRT leveled by former Obama Administration officials.[4]

The report states:

> One way [CRT] can prioritize civil rights is to influence the scope and interpretation of federal civil rights laws through litigation that results in federal courts setting legal precedents. If CRT is active in convincing federal courts to set broad precedents, its work develops broader mandates for compliance and greater efficacy by developing the law and sending a message to potential violators. If CRT's position results in federal courts setting narrow precedents, it would limit the scope of civil rights protections and may result in lesser efficacy, possibly creating a chilling effect.[5]

The report also states, "[T]he major policy considerations in the Obama Administration took expansive views of civil rights protections, and the Trump Administration's focus has been restrictive and maybe less effective for impacted communities."[6] But is it CRT's job to expand the law? Or is it CRT's duty to enforce the law as passed by Congress? If CRT is developing "broader mandates," then at least theoretically it is placing new burdens on regulated entities – burdens that were not approved or contemplated by Congress. The report later cites a case in New York in which CRT initially filed a statement of interest in a case against a housing provider that barred individuals with criminal records, alleging that this violated the Fair Housing Act.[7] There is simply no way that Congress intended the Fair Housing Act to mean that landlords have to individually assess the criminal records of potential tenants, rather than simply having a "no felons" policy, or even a "no murderers or rapists" policy, and run the risk of having DOJ come down on them if

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While it's important to be aware that there is still hate and violence in this country, some policy makers and media figures have seized on the idea that hate crimes are actually rising. The FBI reported 7,175 crimes in 2017 vs. 6,121 crimes in 2016, which represents a 17 percent increase. But it's important to note that nearly a thousand additional municipalities submitted data to the federal government in 2017. This means the perceived increase in hate could partly be explained by the fact that we simply have more data. As the agencies involved in submitting data become more concerned with hate crimes, and more responsible about tallying them, the numbers will appear to be going up.

[4] Report at n. 642-644.

[5] Report at n. 481-483.

[6] Report at n. 816.

[7] Report at n. 696-699.

HUD disagrees with their assessment.[8] CRT did not even attempt to claim as much, admitting that the guidance effectively forcing landlords to rent to felons were dreamed up by HUD as part of the Obama Administration's Federal Interagency Reentry Council.[9]

This is what Robert Driscoll meant when he stated:

> Federal civil rights enforcement is no different than tax, environmental, or federal contracting as a body of law. There is a set of statutes. There is a constitution. There are specific texts that govern what enforcers do. It's not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences or particularize a vision of justice.[10]

The majority does not consider that the Obama-era Civil Rights Division (and the other Obama-era civil rights agencies and offices) may have exceeded its statutory authority. If that is the case, adopting a narrower interpretation of civil rights is restoring CRT to its proper place. CRT and other administrative agencies are not supposed to make law, merely to interpret and enforce existing law.

Nor is CRT supposed to be the supervisor for every police department in the nation, although for several years it labored under this delusion. The report states, "Former CRT head Vanita Gupta testified at the Commission's briefing that consent decrees are key to civil rights enforcement because they provide for court oversight 'regardless of political winds.'"[11] Well, that is the problem. There needs to be political oversight of these decisions and political accountability. Consent decrees are a way of tying the hands of future administrations, which means that there is no way for voters to control the civil rights bureaucracy.

The report also states:

> [O]n October 6, 2017, DOJ issued a memorandum to all U.S. Attorneys and DOJ departments ordering them to take into account new guidance on protecting religious liberties. This new guidance permits recipients of federal funding to make exceptions to their services based on "sincerely held religious beliefs." The Commission received testimony that this new guidance prioritizes religious freedom over the rights of others and may be retrogressive to protecting the rights of LGBT persons.[12]

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[8] United States of America's Statement of Interest, Fortune Society, Inc., v. Sandcastle Towers Housing Development Fund Corp. (E.D.N.Y.), Oct. 18, 2016, https://www.justice.gov/crt/case-document/statement-interest-fortune-society-inc-v-sandcastle-towers-housing-development.

[9] Id. at 1-2; Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, Dep't of Housing and Urban Development, Apr. 4, 2016, https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

[10] Driscoll Testimony, Briefing Transcript, pp. 115-117.

[11] Report at n. 642.

[12] Report at n. 831-833.

In this case, the Commission did not even bother presenting the other side. Given the many religious liberty cases that have wound up in the federal courts over the past ten years, it is clear that many Americans do see another side. Additionally, the memorandum at issue states that it is attempting to ensure that federal agencies comply with the provisions of the Religious Freedom Restoration Act (RFRA).[13] Had the Obama Administration heeded RFRA before issuing Obamacare's contraception mandate, a lot of people and institutions (including the federal government) might have been saved a lot of time and money.[14]

The report also trumpets the glory of disparate impact. Disparate impact is a pernicious legal theory when not firmly tethered to smoking out intentional discrimination (or reckless disregard for equal treatment), as was ostensibly the case in *Griggs*.[15] The way disparate impact has been abused to extend the power of the civil rights agencies and to force regulated entities to "get their numbers right" is shameful. And make no mistake, that is exactly what happens. The report may say:

> [T]he term 'disparate impact' elides the reality that mere statistical disparities are not enough to prove unlawful discrimination; instead, plaintiffs must prove that a policy or practice caused the disparities and that the policy was not necessary to advance a legitimate interest. Courts have long been clear that proving disparate impact discrimination requires more than just providing the existence of a statistical disparity in impact.[16]

Hogwash. Sure, the courts may say that – but you have to actually make it in front of a court in order for that requirement to be enforced. In the real world, when a statistical disparity exists, the functionary from Cubicle 17E deep in the bowels of the EEOC, or the Department of Labor, or the Department of Education suddenly perks up and takes an interest in you. And your case may not even make it to the point of attracting the interest of some Washington bureaucrat before the local activists – having been firmly told by activist organizations that the only reason for a disparity is intentional racism – are raising Cain. Much better to simply get your numbers right the first time. Hasn't anyone at the Commission read the facts in *Ricci v. DeStefano*?[17]

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[13] U.S. Dept. of Justice, Implementation of Memorandum on Federal Law Protections for Religious Liberty (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001886/download.
[14] *See, e.g.,* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Zubik v. Burwell, 136 S.Ct. 1557 (2016).
[15] Griggs v. Duke Power, 401 U.S. 424 (1971).
[16] Report at n. 889-890.
[17] Ricci v. DeStefano, 557 U.S. 557, 561-575 (2009).
In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. . . .
When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It threw out the examinations.

Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials. Theirs is the suit now before us. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed.

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When the City of New Haven undertook to fill vacant lieutenant and captain positions in its fire department (department), the promotion and hiring process was governed by the city charter, in addition to federal and state law. The charter establishes a merit system. . . .

The City's contract with the New Haven firefighter's union specifies additional requirements for the promotion process. Under the contract, appplicants for lieutenant and captain positions were to be screened suing written and oral examination, with the written exam account for 60 percent and the oral exam 40 percent of an applicant's total score. . . .

After reviewing bids from various consultants, the City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations, at a cost to the City of $100,000. IOS is an Illinois company that specializes in designing entry-level and promotional examinations for fire and police departments. In order to fit the examinations to the New Haven Department, IOS began the test-design process by performing job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions. IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department. At every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results—which IOS would use to develop the examinations—would not unintentionally favor white candidates.

With the job-analysis information in hand, IOS developed the written examinations to measure the candidates' job-related knowledge. For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions. IOS presented the proposed sources to the New Haven fire chief and assistant fire chief for their approval. Then, using the approved sources, IOS drafted a multiple-choice test for each position. Each test had 100 questions, as required by CSB rules, and was written below a 10th-grade reading level. After IOS prepared the tests, the City opened a 3–month study period. It gave candidates a list that identified the source material for the questions, including the specific chapters from which the questions were taken.

IOS developed the oral examinations as well. These concentrated on job skills and abilities. Using the job-analysis information, IOS wrote hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. Candidates would be presented with these hypotheticals and asked to respond before a panel of three assessors.

IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. At the City's insistence (because of controversy surrounding previous examinations), all the assessors came from outside Connecticut. IOS submitted the assessors' resumes to City officials for approval. They were battalion chiefs, assistant chiefs, and chiefs from departments of similar sizes to New Haven's throughout the country. Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels contained two minority members. IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria.

Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant.

Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.

The report also mischaracterizes the testimony of Joshua Thompson, an attorney at the Pacific Legal Foundation, who cautioned against focusing on disparate impact claims to the detriment of cases of intentional discrimination. The report claims, "Thompson advocated against federal enforcement of this mandatory enforcement tool."[18] First, although CRT has interpreted the Supreme Court's decision in *Alexander v. Sandoval* to permit federal enforcement of disparate impact regulations, this is not a *mandatory* enforcement tool. These are mere regulations, and regulations can be changed. Statutes are *mandatory* – for example, enforcement of RFRA is *mandatory*. Second, Thompson did not advocate against all federal use of disparate impact. Rather, he cautioned against "over-enforcement of disparate impact" and suggested that "Title VI disparate impact enforcement should be focused on rooting out covert intentional discrimination."[19] The report quotes the second statement, but somehow interprets this as "Thompson opposing enforcement of this mandatory enforcement tool." Nor does the report consider Thompson's point that seeing a disparate-impact bogeyman behind every disparity can lead to perverse results for minorities – the very people who supposedly benefit from disparate impact.

Chapter 3: Department of Education

This report assumes that the only legitimate interpretations of civil rights statutes are those favored by the Left. As is the case throughout this report, ED OCR's changes in policy and procedure are considered illegitimate. There is no effort made to grapple with the objections made to Obama-era innovations in the realm of Title VI and Title IX.

The report states: "ED OCR enforces these civil rights laws and regulations through processing and acting upon individual complaints, through its own compliance investigations of schools receiving federal funds, and through issuing policy guidance documents to assist schools in understanding their civil rights obligations."[20] The report also says, "ED OCR has dramatically

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The City's contract with IOS contemplated that, after the examinations, IOS would prepare a technical report that described the examination processes and methodologies and analyzed the results. But in January 2004, rather than requesting the technical report, City officials, including the City's counsel, Thomas Ude, convened a meeting with IOS Vice President Chad Legel. (Legel was the leader of the IOS team that developed and administered the tests.) Based on the test results, the City officials expressed concern that the tests had discriminated against minority candidates. Legel defended the examinations' validity, stating that any numerical disparity between white and minority candidates was likely due to various external factors and was in line with results of the Department's previous promotional examinations.

Several days after the meeting, Ude sent a letter to the CSB purporting to outline its duties with respect to the examination results. Ude stated that under federal law, "a statistical demonstration of disparate impact," standing alone, "constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntar[y] remedies—even ... race-conscious remedies."

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The CSB's decision not to certify the examination results led to this lawsuit. The plaintiffs—who are the petitioners here—are 17 white firefighters and 1 Hispanic firefighter who passed the examinations but were denied a chance at promotions when the CSB refused to certify the test results. They include the named plaintiff, Frank Ricci, who addressed the CSB at multiple meetings [citations omitted][emphasis added].

[18] Report at n. 901.

[19] Thompson statement at 2-3.

[20] Report at n. 1010.

changed its practices in nearly every domain, functionally discontinuing issuance of guidance, reducing the scope and number of investigations conducted, and seeking to curtail its budget capacity significantly."[21] The report also approvingly quotes Fatima Goss Graves's characterization of the regulatory changes made by ED OCR as "OCR has retreated from its proactive commitment to enforce civil rights."[22] Ms. Goss Graves says "proactive commitment," I (and many others) say "overreach."[23] The policy changes encouraged by OCR's overreach had serious negative consequences in a variety of areas, ranging from absurd inquisitions of professors for writing articles[24] to students thrown out of college without the benefit of due process[25] to increasing disorder in schools.[26]

The report uncritically parrots a report from the Center for American Progress (CAP) regarding ED OCR's enforcement of claims of discrimination on the basis of sexual orientation and gender identity. It is risible to treat CAP as an unbiased source. It is even sillier to do so in this instance. CAP claims that it is obvious that the Trump Administration's OCR is not enforcing Title IX as well as the Obama Administration because ED OCR is issuing *fewer* findings of "no violation" or "insufficient evidence" than it did under the Obama Administration.

> Actions taken by the Obama Administration to protect transgender students had been criticized as overreaching and mandating things that schools weren't ready for. However, the data show that 12 percent of complaints resulted in a finding of no violation or insufficient evidence – twice as much as under the Trump Administration. Recipients were more likely to be found in compliance with Title IX under investigations into SOGI complaints under the previous administration. This finding suggests that schools and colleges were prepared to support their transgender students, and the joint ED-DOJ guidance issued in 2016 was not unduly burdensome on recipients of federal funding.[27]

I suppose this is one plausible interpretation of the data. However, we all know that if the Obama Administration found "no violation" in 6 percent of cases and the Trump Administration found

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[21] Report at n. 1012-1014.
[22] Report at n. 1203.
[23] *See, e.g.*, H. Bader et al., "A Review of Department of Education Programs: Transgender Issues, Racial Quotas in School Discipline, and Campus Sexual Assault Mandates," released by the Regulatory Transparency Project of the Federalist Society, September 12, 2017, https://regproject.org/paper/a-review-of-department-of-education-programs/; Laura Kipnis, *My Title IX Inquisition*, The Chronicle of Higher Education, May 29, 2015, http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf; Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For all Students Under Title IX*, Aug. 21, 2017, https://dash.harvard.edu/handle/1/33789434.
[24] Laura Kipnis, *My Title IX Inquisition*, The Chronicle of Higher Education, May 29, 2015, http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf
[25] Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019); Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018).
[26] *See* Dissenting Statement of Commissioner Peter N. Kirsanow in Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities, July 2019, U.S. Commission on Civil Rights, at 199-205, https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf.
[27] Report at n. 1103.

"no violation" in 12 percent of cases, the majority would claim that this proves that the Trump Administration doesn't take the complaints of gay and transgender students seriously.

The CAP report also states:

> Author analysis of the data show that the rate of civil rights complaints resolved with a change benefitting the student actually decreased from 13 percent between fiscal years 2009 and 2016 to 11 percent in fiscal years 2017 and 2018.[28]

Three points: 1) A two percent change tells us very little one way or the other; 2) Looking at percentages does not tell us if the right resolution was reached in individual cases – in some cases, the student's preferred changes will be unreasonable or will not be authorized by statute or regulation; and 3) Comparing an eight-year average to a two-year average could be misleading.

Professor R. Shep Melnick of Boston College testified about the problems created by OCR's refusal during both Republican and Democrat administrations to engage in notice-and-comment rulemaking. Instead, OCR has long preferred to rely on changing enforcement in individual cases and "Dear Colleague Letters" in order to signal changes in policy. The report does not address the substance of Melnick's critique, dismissing it in two sentences:

> The Commission received testimony from Shep Melnick criticizing ED OCR's use of guidance as a tool during the Obama Administration, charging that ED OCR lacked authority to issue that guidance, stating that 'their legal status remains ambiguous.' But the United States Supreme Court has issued a unanimous and dispositive ruling on the question, which determined that agencies do have authority to issue policy guidance.[29]

This is not the point Melnick was making. He did not question whether OCR had the *authority* to issue policy guidance. Rather, he questioned whether it would be preferable to make policy through notice-and-comment rulemaking, rather than through guidance.[30] Notice-and-comment rulemakings are more transparent than guidances and allow greater participation by regulated entities.

The Supreme Court's decision in *Perez v. Mortgage Bankers Association*[31], which the report suggests disposes of Melnick's concerns, does not address Melnick's second point – are these

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[28] Report at n. 1104.
[29] Report at n. 1204-1205.
[30] Melnick Statement at 2.
Notice-and-comment rulemaking is designed to make room for public participation, to require extensive deliberation and consultation on the part of the agency, and to facilitate "hard look" judicial review. With DCLs [Dear Colleague Letters], regulators' "colleagues" are told they can comment on the new requirements only after they have been announced. The justification for this avoidance of rulemaking procedures is that such "guidance" contains nothing that is new. In many cases this is obviously untrue – and everybody knows it.
[31] 135 S.Ct. 1199 (2015).

guidances legally binding, or are they not?[32] This was not the question at issue in *MBA*, which concerned D.C. Circuit precedent that held "that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted."[33] In dictum that ***does*** pertain to Melnick's point, Justice Sotomayor wrote in her majority opinion, "Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'"[34]

As Justice Scalia said in his concurring opinion, however, this does not settle the question whether guidances are legally binding. The APA says that interpretive rules are *not* binding. But the Supreme Court, independent of any requirement in the APA, has over the years developed a habit of deferring to an agency's interpretation of its own regulations. If a court defers to an agency's interpretive rule, then the interpretive rule *is* binding. Justice Scalia wrote:

> Even when an agency's interpretation gets deference, the Court argues, "it is the court that ultimately decides whether [the text] means what the agency says." That is not quite so. So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to "decide" that the text means what the agency says. The Court continues that "deference is not an inexorable command in all cases," because (for example) it does not apply to plainly erroneous interpretations. True, but beside the point. Saying *all* interpretive rules lack force of law because plainly erroneous interpretations do not bind courts is like saying *all* substantive rules lack force of law because arbitrary and capricious rules do not bind courts. Of course an interpretative rule must meet certain conditions before it gets deference – the interpretation must, for instance, be reasonable – but once it does so it is every bit as binding as a substantive rule. So the point stands: By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures. [35]

The intervening four years have not caused the Court to look more kindly upon judicial deference to agency interpretations of regulations. This last term, all nine justices agreed in *Kisor v. Wilkie* that judicial deference to agency interpretations of regulations (known as *Auer* deference or *Seminole Rock* deference) should be severely curtailed.[36] The justices only disputed how far

[32] Melnick Statement at 2.
This truncated procedure raises an awkward question: are these various forms of guidance mere suggestions, or are they legally binding? When asked that question by Senator Alexander in 2014, two high ranking officials in the Obama Administration's Department of Education said they were *not* legally binding. A third – Assistant Secretary for Civil Rights Catherine Lhamon – said they *are* legally binding. So does "enforcing civil rights laws" mean requiring schools to follow each command in these often lengthy guidance documents, or does it mean something less demanding? Given the huge gap between what OCR says in its sparse regulations and what it says in its lengthy guidance documents, this is no minor matter.
[33] Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1204 (2015).
[34] Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1204 (2015).
[35] Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1212 (2015)(Scalia, J., dissenting).
[36] Kisor v. Wilkie, 139 S.Ct. 2400 (2019).

deference should be pruned back. The majority opinion, written by Justice Kagan, kept *Auer* (and *Seminole Rock*) deference alive, but "reinforce[d] its limits."[37]

Justice Kagan's statements that "*Auer* deference is sometimes appropriate and sometimes not"[38] and "this Court has cabined *Auer*'s scope in varied and critical ways – and in exactly that measure, has maintained a strong judicial role in interpreting rules", encourages judges to apply the requirements of *Auer* deference more energetically than they have been.[39] In describing situations in which *Auer* deference would *not* apply, Justice Kagan gives the following examples: a situation in which a court applies the traditional terms of statutory construction to determine that a rule is *not* genuinely ambiguous (in other words, a court can't just take the agency's word for it that the regulation is ambiguous)[40], the agency's interpretation of a regulation must be reasonable[41], "the agency's interpretation must in some way implicate its substantive expertise"[42], a new interpretation must not cause "unfair surprise" to regulated parties, and "[t]hat disruption of expectations may occur when an agency substitutes one view of a rule for another."[43]

Justices Gorsuch, Thomas, Kavanaugh, and Alito would have gone farther than Justice Kagan (and the Chief Justice, who provided the crucial vote for her opinion). These four would overrule *Auer*. Justice Gorsuch writes for these four justices:

> Still, today's decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitation on *Auer* that the Chief Justice claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled – in truth, zombified.[44]

All of this suggests that Professor Melnick's question about the legally binding nature of guidances from ED OCR were not answered decisively by *Mortgage Bankers Association*. And indeed, it would be surprising if they had been. After all, as a political science professor with an interest in administrative law, Professor Melnick is undoubtedly well aware of recent Supreme Court decisions in this area. In the post-*Kisor* world, interpretive rules like the Dear Colleague Letters that emanated from the Obama Office for Civil Rights may be more likely to run afoul of an invigorated judicial role. *Auer* deference, after all, was how the Dear Colleague Letter regarding transgender bathroom access initially managed to survive the Fourth Circuit. Many of Justice Kagan's *Kisor* guidelines for when *Auer* deference should not apply would seem to apply to that

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[37] Kisor v. Wilkie, 139 S.Ct. 2408 (2019).
[38] Kisor v. Wilkie, 139 S.Ct. 2408 (2019).
[39] Kisor v. Wilkie, 139 S.Ct. 2418 (2019).
[40] Kisor v. Wilkie, 139 S.Ct. 2415 (2019).
[41] Kisor v. Wilkie, 139 S.Ct. 2415-2416 (2019).
[42] Kisor v. Wilkie, 139 S.Ct. 2417 (2019).
[43] Kisor v. Wilkie, 139 S.Ct. 2418 (2019).
[44] Kisor v. Wilkie, 139 S.Ct. 2425.

particular guidance when OCR declared that a regulation allowing separate bathroom facilities for the two sexes really means that a biological girl must be allowed access to the boys' bathroom and locker room.[45] Such an interpretation would at a bare minimum seem to implicate "reasonableness," "unfair surprise," and "disruption of expectations".

Chapter 4: U.S. Department of Health and Human Services, Office for Civil Rights

Policy Priorities

This section of the report casts a jaundiced eye toward HHS OCR's efforts to enforce statutes protecting religious freedom and conscience rights. The report lumps the establishment of the Conscience and Religious Freedom Division with statements from advocacy organizations claiming that LGBT people are routinely discriminated against when seeking medical treatment.[46] By lumping these two things together, the report implies that religious liberty and freedom of conscience are merely excuses to discriminate against LGBT individuals. This is another installment in the Commission's multi-year campaign advocating for nondiscrimination to supercede religious liberty. The report says:

> In a 2018 report, Human Rights Watch found that LGBT people seeking medical care are routinely discriminated against because of their sexual orientation or gender identity, including being denied services and encountering discriminatory language. Discriminatory treatment often results in barriers to healthcare treatment for LGBT people or reluctance to seek care. The result of this policy, says Shabab Mirza, an LGBT research assistant at the Center of American Progress, is that LGBT people frequently report poorer health than their non-LGBT peers. LGBT advocates fear that creation of CRFD along with a rollback of section 1557 of the Affordable Care Act will increase discrimination against the LGBT community. Rea Carey, executive director of the National LGBTQ Task Force says that, "Health professionals have a duty to care for all their patients regardless of one's gender identity, sexual orientation, faith, creed, race, political views, gender or disability, and no one should be denied care for being who they are." In a statement to the Commission, the National LGBTA Task Force wrote that failure to provide equal access to health care has negative impacts on community members and is not an effective way to enforce civil rights, explaining that 33 percent of transgender patients had at least one negative experience in a healthcare setting within the past year related to their gender identity.[47]

Unsurprisingly, the report tries to steal several bases here. Just as in the Commission's recent school suspension report where "disability" was used to suggest children with physical disabilities

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[45] G.G. *ex rel* Grimm v. Gloucester County Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016).
[46] Report at n. 1400-1419.
[47] Report at n. 1414-1419.

rather than emotionally disturbed children[48], "healthcare" here is undefined, leaving the casual reader to imagine that lesbians seeking treatment for bronchitis are routinely denied antibiotics. The cited Human Rights Watch report is more honest:

> The [Obama-era rule interpreting Section 1557 of the Affordable Care Act] ensures that transgender people cannot be denied care – ***including transition-related care*** – because of their gender identity. It clarifies that transgender people should be treated in accordance with their gender identity, and that insurance providers cannot presumptively deny coverage for transition-related care or refuse treatments to transgender people in a discriminatory manner. [emphasis added][49]

The Commission majority once again uncritically adopts the party line of the transgender lobby. There is no consideration of the possibility that medical professionals can in good faith disagree with the desires of LGBT individuals, whether on medical, conscience, or religious grounds. A profoundly radical idea – that it is unremarkable and healthy to take hormones to feminize or masculinize one's appearance, to remove healthy organs because of deep discomfort with one's body – is presented with no discussion or debate. In fact, the Commission has never considered this, and simply presents the policy positions of transgender organizations as if they are normative.

This is not speculation about what could happen in the future. Earlier this year, a biological woman who now presents as a transgender man sued a Catholic hospital in California because the hospital refused to perform a hysterectomy.[50] As the ACLU notes in its complaint, Catholic hospitals must abide by Catholic teaching as authoritatively issued by Catholic bishops, and performing a hysterectomy for transition-related purposes violates Catholic teaching for two reasons: 1) Catholic teaching forbids direct sterilization; 2) Catholic teaching forbids assisting in sex reassignment because the Church considers it a rejection of one's God-given sex.[51]
The Commission majority, along with the ACLU[52], Human Rights Watch, and similar groups, wants to make it illegal for Catholic hospitals to follow Catholic teaching. Even if one grants the debatable premise that it is best for a person suffering from gender dysphoria to remove healthy

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[48] *See* Dissenting Statement of Commissioner Gail Heriot in in Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities, July 2019, U.S. Commission on Civil Rights, at 188-189, https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf; *see also* Dissenting Statement of Commissioner Peter N. Kirsanow in Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities, July 2019, U.S. Commission on Civil Rights, at 197-198, https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf.

[49] "You Don't Want Second Best: Anti-LGBT Discrimination in US Health Care," Human Rights Watch, July 23, 2018, https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care.

[50] Nicole Russell, *Why this transgender man sued a Catholic hospital for refusing to do a hysterectomy*, Washington Examiner, March 28, 2019, https://www.washingtonexaminer.com/opinion/why-this-transgender-man-sued-a-catholic-hospital-for-refusing-to-do-a-hysterectomy.

[51] Oliver Knight v. St. Joseph Northern California, Case No. DR190259, March 21, 2019, 4-6, https://www.aclunc.org/docs/KnightvStJosephHealth.pdf.

[52] *Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threat to Women's Health and Lives*, ACLU, May 2016, https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied.

body parts, there are non-Catholic hospitals at which a person can get this surgery. Our progressive friends want to dragoon hospitals that were established and funded by Catholic religious orders and laypeople, and force them to practice medicine the way they want.

As HHS OCR noted in its response to an earlier draft of this report, it is disingenuous for the Commission to imply that protecting religious freedom and conscience diverts from HHS OCR's core mission. The federal government has long protected rights of religious freedom and conscience. It is not a lesser civil right.[53]

Furthermore, in the previous administration, HHS discriminated against the U.S. Conference of Catholic Bishops (USCCB) in awarding contracts to help victims of human trafficking. Catholic teaching prohibits the use of some reproductive products and services. Therefore, the USCCB did not refer victims of human trafficking for these products or services. Although the USCCB had received HHS contracts for assisting human trafficking victims since 2006, in 2011 the Obama Administration discontinued the contract. According to the Washington Post, "senior political appointees awarded the new grants to the bishops' competitors despite a recommendation from career staffers that the bishops be funded based on scores by an independent review board".[54] In short, HHS does not have a history of being overly solicitous of religious liberty.

Additionally, HHS enforces laws that protect the conscience rights of healthcare providers, not just religious rights. This is important because, although the Commission majority does not acknowledge it, there is debate over whether hormone treatments and sex-reassignment surgery are the best treatment for individuals suffering from gender dysphoria. This is particularly true in cases where children and adolescents are suffering from gender dysphoria, because blocking puberty or administering cross-sex hormones may render these children permanently sterile.[55]
It is important that HHS OCR protect the religious and conscience rights of medical professionals in regard to LGBT issues. Much like the Commission majority, there are individuals and institutions who want to force dissenters into acquiescence. For example, the former head of the

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[53] Correspondence from U.S. Dep't of Health and Human Services to U.S. Commission on Civil Rights, Re: Technical Corrections to USCCR's 2019 Federal Civil Rights Enforcement Report, August 19, 2019, at 2 (on file). For more than 155 years, Congress has offered protections in a variety of contexts, including: exempting religious objectors opposed to bearing arms from military service; exempting conscientious objectors from combat training or military service; exempting law enforcement employees from participating in executions "if such participation is contrary to the moral or religious convictions of the employee"; exempting education institutions from sex discrimination bans under Title IX of the Education Amendments of 1972 where such ban "would not be consistent with the religious tenets" of the institution; prohibiting coercion of persons to undergo … sterilization procedures by threatening loss of benefits and attaching a criminal punishment of a fine of up to $1000, imprisonment for up to one year, or both, to violations of that prohibition; and preventing the Federal government from imposing substantial burdens on religious exercise absent a compelling government interest pursued in the manner least restrictive of that exercise.
[54] Jerry Markon, *Health, abortion issues split Obama administration and Catholic groups*, Wash. Post, October 31, 2011, https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAXV5xZM_story.html.
[55] Josephson v. Bendapudi, Case No. 3:19-mc-99999, March 28, 2019, https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4

University of Louisville's Division of Child and Adolescent Psychiatry and Psychology, Dr. Allan Josephson, is suing the university. Despite a stellar career as Division Chief, the university demoted and then fired Dr. Josephson after he served as an expert witness and spoke publicly about his view that children suffering from gender dysphoria should be given psychiatric help to hopefully reconcile them to their biological sex, rather than pursuing hormone and surgical treatments that have irreversible consequences.[56] There is no indication that Dr. Josephson's beliefs about the proper treatment for children with gender dysphoria is religiously-based, rather than being a scientific and medical judgment. In fact, shortly before he was demoted, "Dr. Josephson outlined a proposed program for treating youth experience gender dysphoria that involved cooperation between identified leaders from child psychiatry and pediatric endocrinology."[57]

It is also worth noting that, unlike the Obama Administration's HHS OCR, the Trump Administration's HHS OCR is not trying to force hospitals and medical personnel to all do things a certain way. The Trump Administration's HHS OCR is not prohibiting hospitals from conducting sex-reassignment surgeries or prohibiting doctors from prescribing hormone therapy.

Section 1557 (Defining the Scope of the Meaning of Sex Discrimination)

The report criticizes HHS's decision to revise Section 1557 of the Patient Protection and Affordable Care Act (Obamacare), stating:

> One of the most critical revisions proposed was the redefinition of "sex" to refer only to the biological and anatomical differences between males and females as determined at their birth. Unlike under the Obama Administration, "gender identity" would no longer be a protected class under the scope of Section 1557's civil rights statutes and Title IX's prohibitions of discrimination on the basis of sex.[58]

This is wrong. The proposed revision of 1557 does not redefine sex "to refer only to the biological and anatomical differences between males and females as determined at their birth."[59] Although proposed Section 1557 does repeal the definition of "on the basis of sex" that included "gender identity" as a protected class, it does not replace it with a statement that "sex" is defined on a biological or anatomical basis. The proposed rule does not define "sex"[60] because, HHS notes, the Supreme Court is likely to soon issue a decision that helps clarify whether "sex" includes gender identity.[61]

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[56] Josephson v. Bendapudi, Case No. 3:19-mc-99999, March 28, 2019, https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4.
[57] Josephson v. Bendapudi at 139.
[58] Report at n. 1401-1402.
[59] Report at n. 1401.
[60] 84 FR 27857.
[61] 84 FR 27857; 84 FR 27855.

Housing of Illegal Immigrant Children

The report states:

> "The history of complaints regarding the sexual abuse of migrants, particularly minor migrants, in HHS custody through the shelters that ORR operates, is concerning. . . . During the past four years, the federal government received over 4,500 complaints of sexual abuse of immigrant children in detention facilities. "From October 2014 to July 2018, the HHS' Office of Refugee Resettlement received 4,556 complaints, and the Department of Justice received 1,303 complaints." Numbers increased after President Trump's "zero tolerance policy" was put in place in April 2018 []. The New York Times reported that from March to July 2018, ORR recorded 859 complaints of sexual abuse of minors, "the largest number of reports during any five-month span in the previous four years."[62]

Obviously everyone opposes sexual abuse of anyone, especially minors. The way this report is written, however, suggests that complaints of sexual abuse of minors are a new development in the Age of Trump. Obviously that is not the case, since the Obama Administration was in power from October 2014 until the end of January 2017.

The report also fails to note that in the vast majority of complaints, the alleged perpetrator is a fellow minor detainee, not an adult staff member. According to the data published by Axios, of the cases reported to DOJ from October 2014 to July 2018, 851 complaints alleged that another minor was the perpetrator, and 178 alleged that an adult staff member was the perpetrator.[63] Obviously sexual abuse is terrible regardless of the identity of the perpetrator, but by only discussing a case where an adult staff member at a contract facility was convicted of sexual offenses, the report misleads the reader to believe this is a typical case.[64]

The report also fails to note that the very *New York Times* article on which it relies includes a statement from Commander Jonathan White of the U.S. Public Health Service that the "vast

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On April 22, 2019, the U.S. Supreme Court granted three petitions for writs of certiorari, raising the question whether Title VII's prohibition on discrimination on the basis of sex also bars discrimination on the basis of gender identity or sexual orientation. Because Title IX adopts the substantive and legal standards of Title VII, a holding by the U.S. Supreme Court on the definition of "sex" under Title VII will likely have ramifications for the definition of "sex" under Title IX, and for the cases raising sexual orientation or gender identity claims under Section 1557 and Title IX which are still pending in district courts.

[62] Report at n. 1338-1342.

[63] Caitlin Owens, Stef W. Kight, and Harry Stevens, Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody, AXIOS, Feb. 26, 2019, https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html.

[64] Report at n. 1344.

majority of allegations [of sexual abuse] proved to be unfounded.[65] This may or may not be accurate, but it should at least have been noted. I was unable to find data that evaluates how many of these claims were determined to be unfounded, but in 2013 GAO released a report on allegations of detainee sexual abuse. GAO reported:

> Of the 215 investigations of the allegations completed between October 2009 and March 2013, our analysis showed that 55 percent of the allegations were determined to be unsubstantiated (investigators could not determine if abuse had occurred), 38 percent unfounded (investigators determined that abuse had not occurred), and 7 percent – or 15 allegations – substantiated (investigators determined that abuse had occurred). Substantiated allegations included both allegations against staff members and allegations against fellow detainees[].[66]

Additionally, much of the deplorable increase in complaints of sexual abuse of minors is likely attributed to the increased number of minors arriving at the Southwest border. In FY 2016, the last time comparable numbers of illegal aliens were apprehended at the Southwest border, 408,870 illegal aliens were apprehended at the Southwest border. In FY 2018, 396,579 illegal aliens were apprehended at the Southwest border, following a dip to 303,916 in FY 2017. However, the demographic composition of illegal aliens changed between FY 2016 and FY 2018. In FY 2016, 59,692 unaccompanied children, 77,674 family unit members, and 271,504 single adults were apprehended at the Southwest border.[67] In FY 2018, 50,036 unaccompanied children, 107,212 members of family units, and 239,331 single adults were apprehended at the Southwest border.[68] If we assume that 40% of the individuals who showed up as part of family units were adults, that means that the number of minors arriving at the Southwestern border increased from 106,296 in FY 2016 to 114,363 in FY 2018. This does not fully account for the increase in complaints from approximately 275 in the second quarter of FY 16 to 514 in the second quarter of FY 18, but it is likely a contributing factor.[69]

Chapter 5: U.S. Department of Housing and Urban Development

In keeping with the theme of this report, HUD's 2015 Affirmatively Furthering Fair Housing (AFFH)[70] rule is treated as an uncontroversial clarification of what the Fair Housing Act had meant

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[65] Matthew Haag, Thousands of Immigrant Children Said They were Sexually Abused in U.S. Detention Centers, Report Says, *N.Y.* Times, Feb. 27, 2019, https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html.
[66] *Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse*, GAO, November 2013, at 16, https://www.gao.gov/assets/660/659145.pdf.
[67] United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, Statement by Secretary Johnson on Southwest Border Security, Customs and Border Patrol, https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.
[68] Southwest Border Migration FY 2018, Customs and Border Patrol, https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018#.
[69] https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html
[70] 80 FR 42271.

for fifty years.[71] In reality, AFFH is a sweeping governmental power grab that masks its radicalism in layers of bureaucrat-speak. Given the overwhelming number of topics covered in this report, the Commission staff may not have realized this is the case.

Nevertheless, it is important to be clear on what AFFH is. No one, to my knowledge, alleges that there are still racial covenants in the U.S. or that landlords specify the preferred race of would-be tenants. Disparate treatment discrimination in housing is more subtle these days. However, people still tend to live in neighborhoods populated primarily by people who share their income level. Many people also prefer to live in neighborhoods zoned for single-family homes, or that have a certain lot size. And many people live in neighborhoods populated primarily by people of their own race. As long as no one is being barred from buying or renting a home because of his race or religion, this should not be problematic. As Stanley Kurtz, a critic of AFFH, explained:

> Ultimately, [AFFH] amounts to back-door annexation, a way of turning America's suburbs into tributaries of nearby cities. . . .
> If you press suburbanites into cities, transfer urbanites to the suburbs, and redistribute suburban tax money to cities, you have effectively abolished the suburbs. For all practical purposes, the suburbs would then be co-opted into a single metropolitan region. Advocates of these policy prescriptions calls themselves "regionalists." . . .
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> AFFH obligates grantees to conduct all of these analyses [of race, ethnicity, poverty, etc.] at both the local and regional levels. In other words, it's not enough for, say, Philadelphia's "Mainline" Montgomery County suburbs to analyze their own populations by race, ethnicity, and class to determine whether there are any imbalances in where groups live or in access to schools, parks, transportation and jobs. Those suburbs are also obligated to compare their own housing situations to the Greater Philadelphia region as a whole.
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> So if some Montgomery County's suburbs are predominantly upper-middle-class, white, and zoned for single-family housing, while the Philadelphia region as a whole is dotted with concentrations of less-well-off African Americans, Hispanics, or Asians, those suburbs could be obligated to nullify their zoning ordinances and build high-density, low-income housing at their own expense. At that point, those suburbs would have to direct advertising to potential minority occupants in the Greater Philadelphia region. Essentially, this is what HUD has imposed on Westchester County, New York, the most famous dry run for AFFH.
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> In other words, by obligating all localities receiving HUD funding to compare their demographics to the region as a whole, AFFH effectively nullifies municipal boundaries. Even with no allegation or evidence of intentional discrimination, the

[71] Report at n. 1681-1693.

> mere existence of a demographic imbalance in the region as a whole must be remedied by a given suburb. Suburbs will literally be forced to import population from elsewhere, at their own expense and in violation of their own laws. In effect, suburbs will have been annexed by a city-dominated region, their laws suspended and their tax money transferred to erstwhile non-residents. And to make sure the new high-density housing developments are close to "community assets" such as schools, transportation, parks, and jobs, bedroom suburbs will be forced to develop mini-downtowns. In effect, they will become more like the cities their residents chose to leave in the first place.[72]

The report also does not even try to claim that "segregation" is the result of refusals to sell or rent housing on the basis of race. Instead, the report says, "Supporters of AFFH and AFH say that the AFH process forces municipalities to evaluate how housing remains segregated in the community, and that the delay of the rule will effectively halt progress towards desegregation. NFHA [National Fair Housing Alliance] states that minority neighborhoods often experience resource disparities when compared to more affluent or white neighborhoods."[73] Well, of course. The key word here is "affluent". Of course affluent neighborhoods have more resources than poorer ones. The principal benefit of affluence is having more resources! Poverty is not a protected class. And as I have noted in the past, it is unclear why a "geographic area with significant concentrations of poverty and minority populations" (the definition of "racially or ethnically concentrated area of poverty") is a more pressing concern than a racially mixed area of concentrated poverty or a predominantly white area of concentrated poverty.[74]

Racial imbalances that are the result of freely made choices are not problematic. But clearly, for the social engineers in the Obama Administration, they were.

The Obama Administration's enthusiasm for racial bean-counting in the housing context manifested in bizarre ways. For instance, Dubuque, Iowa was not allowed to prefer its own residents over non-residents when providing housing assistance.[75] The people of Dubuque are too white, you see. Instead, HUD classified Dubuque as being part of the same "region" as Chicago, which is 200 miles away. HUD's racial alchemists then forced Dubuque to advertise the availability of public housing assistance in Chicago, where people in need of assistance were more likely to be African-American.[76] Never mind that Dubuque had plenty of its own residents languishing on the waiting list. Somehow this is going to usher in utopia.

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[72] Stanley Kurtz, *Attention America's Suburbs: You Have Just Been Annexed*, National Review, July 20, 2015, https://www.nationalreview.com/corner/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz/.
[73] Report at n. 1701-1702.
[74] 80 FR 42355.
[75] Letter of Findings of Noncompliance, Civil Rights Compliance Review of the City of Dubuque's CDBG and Section 8 Programs, June 17, 2013, https://nlihc.org/sites/default/files/Dubuque-LOF.pdf; *see also Our opinion: National Review right about HUD*, Telegraph Herald, Jan. 17, 2016, http://www.telegraphherald.com/opinion/article_43c9faf1-c767-525f-ac0e-2f1a6042620f.html.
[76] Voluntary Compliance Agreement Between the U.S. Dep't of Housing and Urban Development and Dubuque, Iowa, HUD Compliance Case Review Number 07-11-R001-6, Mar. 31, 2014, at 18, http://cityofdubuque.org/DocumentCenter/View/22707.

Similarly, Westchester County in New York ran afoul of HUD because the county was reluctant to strong-arm towns into changing their zoning requirements in order to build low-income housing.[77] HUD argued that local zoning practices excluded blacks and Hispanics. In HUD's view, the County also was insufficiently obsessed with ensuring the exact same racial balance in all the towns within its borders. The National Low-Income Housing Coalition, which is supportive of AFFH, described the dispute between HUD and Westchester County this way:

> [Assistant U.S. Attorney] Mr. Kennedy also noted that the AIs [Analysis of Impediments] failed to address why minority populations were so low in many of the towns compared to the minority population as a whole. For example, several towns have a minority population of 1.5% or less, while Westchester County's African-American population alone is 14.6% of the total. The federal attorney pointed out that there is a connection between the likelihood that minority families would need and use multifamily housing, while there is an absence of multifamily housing in many towns. Even when the County's "cherry-picked" data are considered, minority populations declined as lot sizes grew larger.[78]

In other words, HUD and the low income housing lobby want to use AFFH to force towns to build multifamily housing, even when the towns don't want to. There are pros and cons to building multifamily housing in areas previously zoned only for single-family housing, but without evidence that the refusal to change the zoning is motivated by racism, this should not be considered a violation of the FHA. Nor should it be any of the federal government's business. Zoning is as local an issue as it comes. If the residents of a town want to only have single-family housing because they want a less crowded, traditionally suburban way of life, that is their prerogative.

As is so often the case, the report repeatedly refers to "patterns of segregation", as did HUD when promulgating AFFH.[79] This is galactically dishonest. First, legal segregation is dead and gone, but using the term automatically conjures up thoughts of the Jim Crows era. As used by AFFH and this report "segregation" doesn't even mean areas that were predominantly populated by African-Americans before passage of the Fair Housing Act and that continue to be predominantly populated by African-Americans today. Instead, it essentially means any person who is not a white, able-bodied male. The final rule defines "segregation" thus:

The Affordable Housing section shall also include specific one year goals to Affirmatively Further Fair Housing, by including a plan to increase the number of minorities, specifically African American households, to be provided affordable housing through activities that provide rental assistance, family self-sufficiency programs, or homeownership assistance. This may include marketing and information sharing of the programs availability and participation benefits.

[77] It took Westchester County 11 attempts over 8 years to receive approval for its fair housing plans. *See* Joseph De Avila, *Westchester County Winds HUD OK in Housing Dispute*, Wall St. J., July 18, 2017, https://www.wsj.com/articles/westchester-county-wins-hud-ok-in-housing-dispute-1500407638.

[78] New Developments in Westchester County AFFH Court Settlement, National Low Income Housing Coalition, Apr. 30, 2019, https://nlihc.org/resource/new-developments-westchester-county-affh-court-settlement.

[79] Report at n. 1683, 1691.

> Segregation means a condition, within the program participant's geographic area of analysis, as guided by the Assessment Tool, in which there is a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area. For persons with disabilities, segregation includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual's needs in accordance with the requirements of the Americans with Disabilities Act, and section 504 of the Rehabilitation Act.[80]

This is clear in the Analysis of Impediments submitted by Westchester County, which painstakingly details the percentage of black and Hispanic residents in different parts of the county.[81] Given the massive demographic changes in the United States following immigration changes in the 1960s, the vast majority of non-whites who are not African-American never experienced racial covenants or legal segregation. Nor did their parents or grandparents, at least in this country. People live where they can afford to live. It is HUD, not these municipalities, that has a fixation on race.

Fortunately, HUD has announced its intention to revise AFFH. When HUD asked for comments on how to reduce the regulatory burden, "136 (45% of the total) discussed the AFFH rule."[82] Contrary to what the Commission majority might think, opposition to AFFH was not expressed only by coldhearted Dickensian landlords. A number of individuals who work for housing authorities wrote to express frustration with AFFH. The Director of Compliance and Training at the Dallas, Texas Housing Authority wrote, "[T]here is a mismatch between the depth of data and research required, and the expertise and funding with which housing agencies are equipped to pursue this analysis. . . . [T]he takeaway is that as it currently stands, this rule is impossible to satisfy for the majority of housing agencies without additional resources or funding."[83] The National Association for County Community and Economic Development wrote, "While we fully support AFFH as well as supported approaches to satisfying AFFH, the rule in its current state is overly burdensome and impracticable for many communities to implement."[84] The General Counsel from the Vermont Department of Housing and Community Development (Vermont, of

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[80] 80 FR 42355.
[81] Westchester County Analysis of Impediments, Supplement to Chapter 12 – Zoning Analysis, July 13, 2017, https://homes.westchestergov.com/images/stories/AIreport/ZAChap1220170713.pdf.
[82] 83 FR 40714.
[83] Jeni Webb, Director of Compliance and Training, Dallas Housing Authority, Comment to FR-6030-N-01, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 8, 2017, https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777.
[84] Laura DeMaria, Executive Director, National Association for County Community and Economic Development, Comment to FR-6030-N-01, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 14, 2017, https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777.

all states!) recommended that AFFH be amended to "eliminate the requirement that States prepare an Assessment of Fair Housing":

> The Assessment of Fair Housing Tool developed by HUD for use by entitlement jurisdictions does not translate well to states. The local data that forms the basis of the Tool cannot be interpreted on the state level in the same way that it can within the densely populated environs of a city. We are concerned that the effort required to comply with this regulatory requirement will detract from our ability to perform our most important functions.
>
> In our view, the resources that would be needed to complete the Assessment of Fair Housing should be devoted to addressing the severe lack of affordable housing and funding other economic and community development projects. HUD estimates that the assessment will take 1500 hours, or 37 weeks of work for a full-time employee. That time and money could be better spent. . . .
>
> We are strongly committed to affirmatively furthering fair housing, but we do not see how this Tool will help us with those efforts. Additionally, in a state with a relatively low growth rate, the facts on the ground do not change rapidly enough to justify anew[sic] assessment once every five years, especially not where that assessment will divert the full-time attention of one of our very small staff for most of a year.[85]

Chapter 6: Department of Labor

The report notes that OFCCP has taken steps to protect the religious liberty of federal contractors. The report, of course, regards such actions with a jaundiced eye. The report notes that OFCCP recently issued a proposed rule to clarify the scope of the religious exemption available to federal contractors, which the report claims "would allow federal contractors to cite religious objections as a valid reason to discriminate against employees on the basis of LGBT status, sex, race, ethnicity, national origin, and other characteristics."[86]

This is spectacularly wrong, but perhaps it is understandable that the Commission got it wrong, since it relied on that well-known legal journal, *Buzzfeed*, for an explanation of the proposed rule. The introduction to the proposed rule states, "religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate on other protected bases."[87] This is discrimination on the

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[85] Dale Azaria, General Counsel, Vermont Department of Housing and Community Development, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 14, 2017, https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777.

[86] Report at n. 2032.

[87] 84 FR 41679.

basis of conduct and belief, not status. If an employee of a Baptist-run homeless shelter is proselytizing for the Seventh-Day Adventists while working with clients of the homeless shelter, the shelter is well within its rights to fire the person. Similarly, if the USCCB is running a program for unaccompanied alien children, and the "getting your life back on track" program includes "abstain from sexual activity until marriage, and *especially* while you are a minor," and the unmarried program director shows up pregnant – well, that is going to undermine the program's message.

This is why the proposed rule "proposes defining Religion to provide that the term is not limited to religious belief but also includes all aspects of religious observance and practice."[88] Otherwise, someone whose lifestyle choices violate their religion's moral teachings will claim that they are entitled to continue to be employed by the religious organization because they self-identify as a member of the religion. And on the other hand, someone whose religious beliefs are at odds with the organization's religious beliefs will claim that they are entitled to continued employment because they agree with the secular aspects of the organization's mission (this is what happened in *Spencer v. World Vision*).[89]

It is also important to note that OFCCP did not make up this exemption out of whole cloth. Rather, the proposed rule is based on a Ninth Circuit case, *Spencer v. World Vision*[90], that set out a test for establishing whether an entity qualifies for Title VII's religious exemption.[91] The fact that the proposed exemption is available to for-profit corporations as well as non-profit corporations is not nefarious. All entities that want to receive the religious exemption must meet a three-part test to qualify:

1) "[T]he contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor's only purpose."
2) "[T]he contractor must hold itself out to the public as carrying out a religious purpose."
3) "[T]he contractor must exercise religion consistent with, and in furtherance of, a religious purpose."

In short, my colleagues need not fear that Lockheed or Booz Allen Hamilton are suddenly going to seek and receive religious exemptions.

The report also says ominously that, "The proposed rule conflicts with a 2014 Executive Order that prohibited discrimination based on sexual orientation and gender identity by federal contractors."[92] Well, that's the thing about Executive Orders – they aren't laws. They only last as long as the executive branch cares to enforce them. In this instance, the executive branch has decided to add a regulation explaining how it will evaluate religious exemption claims. Religious

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[88] 84 FR 41679.
[89] Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011).
[90] Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011).
[91] 84 FR 41682.
[92] Report at n. 2034.

exemptions are required by Title VII, which is an actual statute, rather than an executive order. This proposed regulation will not affect the 2014 Executive Order as applied to contractors that do not seek a religious exemption.

Chapter 7: U.S. Equal Employment Opportunity Commission

Sometimes I wonder if the memory of anyone at the Commission extends more than a year into the past. Three pages into the section on the EEOC, the Commission states:

> These laws [Title VII, etc.] protect individuals from discrimination in employment based on race, color, religion, sex (including ***gender identity, sexual orientation,*** and pregnancy), national origin, age, disability, and genetic information. [emphasis added][93]

The problem is that a mere two years ago, the Commission issued a report entitled "Working for Inclusion" in which the Commission majority found that there are ***no*** federal statutes explicitly prohibiting discrimination on the basis of sexual orientation and gender identity, and stated that some federal courts have said that Title VII covers sexual orientation and gender identity while other federal courts disagree, and that DOJ now takes the position that Title VII does not encompass sexual orientation.[94] The entire point of the report was to urge Congress to pass legislation prohibiting discrimination on the basis of sexual orientation and gender identity.[95] The issue remains sufficiently unsettled that the Supreme Court is hearing a case this fall regarding whether Title VII covers discrimination on the basis of gender identity. Yet for some reason the Commission now blithely asserts that federal anti-discrimination laws cover sexual orientation and gender identity. I am aware that EEOC takes this position, but it is not based in the actual text – nor did the Commission think it was based in the text two years ago.

The Commission notes that EEOC issued proposed guidance in January 2017 defining sex-based harassment as encompassing gender identity, which it stated "includes using a name or pronoun inconsistent with the individual's gender identity in a persistent or offensive manner."[96]

Perhaps the anti-discrimination laws should cover sexual orientation and gender identity. But that is a decision for Congress, not agencies. Agencies can only enforce statutes passed by Congress, and they should only enforce the statutes *as written*, not as unelected bureaucrats within agencies wish to amend them. The Commission majority should not give agencies cover for abusing their authority.

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[93] Report at n. 2090.
[94] Working for Inclusion at 71-72.
[95] Working for Inclusion at 73.
[96] Report at n. 2257.

Chapter 8: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties

No one should be surprised that the chapter of this report concerning DHS CRCL is primarily concerned with the illegal immigration crisis at the border. If you approach this section with the assumption that the majority of the Commission prefers to eviscerate the immigration laws, everything will make sense. As far as the Commission is concerned, family separation at the border is entirely the fault of the Trump administration. The individuals who choose to cross the border illegally have no agency whatsoever. The report states:

> This [zero-tolerance policy] impacted thousands of families who had fled dangerous conditions in Central America and wanted to apply for asylum, which is a right under U.S. law no matter where a person enters. The Administration's new policy of "metering," or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings.[97]

This is misleading for at least two reasons. First, having "fled dangerous conditions" is not grounds for asylum. As it turns out, we have this somewhat radical thing called a "law" that spells out the circumstances in which individuals are eligible for asylum:

> The term "refugee" means (A) any such person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable to unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution ***on account of race, religion, nationality, membership in a particular social group, or opinion***, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing and who is persecuted or has a well-founded fear of persecution ***on account of race, religion, nationality, membership in a particular social group, or political opinion.***[98]

"My country is violent" is not grounds for seeking asylum, but that is the strongest reason the would-be asylum seekers (and their coaches in the open borders crowd here in the U.S.) can come up with. Individuals are only eligible for asylum if they are being persecuted ***on account of*** race, religion, nationality, membership in a particular social group, or opinion. There is no indication that the individuals flocking to our southern border differ, as a group, in race, religion, nationality, membership in a particular social group, or opinion from much of the rest of the population in Central American countries. Maybe they could claim "we have membership in a particular social group because we don't belong to gangs," but it isn't as if the entire population of Guatemala or

[97] Report at n. 2376-2377.
[98] Pub. L. 96-212.

El Salvador belong to gangs. We all know that what is really happening is that Central American countries are poor and they would rather live in the United States. As I have had occasion to remark elsewhere in this dissent, "Poverty is not a protected class." Nor is it grounds for asylum. If living in a country poorer than the United States was grounds for asylum, Germans would be eligible for asylum. Indeed, almost every human being on earth would be eligible for asylum.

Second, not only are the vast majority of these people not eligible for asylum no matter when or where they enter the U.S., but "metering" is not prohibiting them from *ever* entering the U.S. and making their asylum case.[99] It is only a way to control the flow of people into the United States. Additionally, the report claims that "The Administration's new policy of 'metering,' or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings."[100] This is flatly dishonest. The very government document cited for the proposition that metering may have increased the number of unauthorized crossings states that CBP has utilized metering at least since 2016. In other words, not only is metering not a new practice, but it started during the Obama Administration, not the Trump Administration.[101] And it is hardly an excuse to say that metering has caused people to cross illegally. The vast majority of the people arriving at the southern border do not have legitimate asylum claims, and they know it. Not only are they unwilling to wait in line to immigrate legally, but many of them are not even willing to wait in the much shorter line at the southern border to be processed in an orderly fashion. No one is forcing them to cross the border illegally. They choose to break the law.

The Commission majority would likely dispute my assertion that many of those claiming asylum at the southern border do not have a valid claim. Only 44.5 percent of asylum applicants who pass a credible fear interview show up in court to apply for asylum.[102] If you are truly worried that you will be subjected to physical persecution if you are returned to a country, you would be a little more on top of ensuring that you *actually applied* for asylum. After all, as we are told many times, these people undertake a treacherous journey from Central America to arrive at our southern border. If you can make it from Honduras to the United States, you can definitely show up in court to make your asylum claim – *if* you believe your claim is likely to be granted. If you know it is unlikely to be granted, you will probably vanish into the interior of the United States and hope to avoid removal. And this is exactly what the majority of those who have passed a credible fear interview do.

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[99] Anna Giaritelli, *DHS secretary defends metering asylum seekers at border: 'We're not turning anybody around,'* Wash. Examiner, March 6, 2019 ("All asylum seekers have the opportunity to present their case. We're not turning anybody around," Nielsen said. "What we are doing is exercising the statutory authority that enables us to, in conjunction with Mexico, to return to Mexico migrants who have arrived from that country, to await processing."), https://www.washingtonexaminer.com/news/dhs-secretary-defends-metering-asylum-seekers-at-border-were-not-turning-anybody-around.

[100] Report at n. 2377.

[101] DHS OIG, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, 5-6, OIG-18-84 (Sept. 2018)("CBP was regulating the flow of asylum-seekers at ports of entry through 'metering,' a practice CBP has utilized at least as far back as 2016 to regulate the flow of individuals at ports of entry."), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.

[102] Andrew R. Arthur, *Trump Baits the Press on Asylum No-Shows*, Center for Immigration Studies, Nov. 2, 2016, https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows.

Of those who do show up for their hearing after passing a credible fear interview, DHS notes that "many more fail to comply with the lawfully issued removal orders from the immigration courts and some families engage in dilatory legal tactics when ICE works to enforce those orders."[103] Furthermore, the number of those who do not show up for hearings or removal has ballooned. According to EOIR (Executive Office for Immigration Review), in 2006 there were 573 final orders issued in absentia for cases originating as credible fear claims. In FY 2017, this had exploded to 4,038 – which actually was a marked decline from FY 2016, in which 8,999 such orders were issued.[104] Only 16 percent of adults who initially receive credible fear determinations are ultimately granted asylum.[105]

Other parts of this section of the report are so dumb that anyone with an ounce of common sense can spot the problem.

> The overwhelming majority of persons crossing that [southern] border are persons of color, primarily from Latin America. For example, CBP data about Border Patrol arrests along both the southern (with Mexico) and northern border (with Canada) from FY 2015-2018 show that of a total 837,518 arrests, the great majority were made along the southern border. Data from the top five countries of origin shows that of those people arrested by the Border Patrol, 537,650 (64.2%) people were from Mexico, 110,802 (13.2%) were from Guatemala, 72,402 (8.6%) were from El Salvador, 68,088 (8.1%) were from Honduras, and 11,600 (0.01%) were from India. Those detained have been disparaged by the President's xenophobic comments, exacerbating a long-standing and recent history of discrimination against Latino immigrants, and implicating equal protection based on national origin. Their rights to family integrity are also at stake.[106]

Let me take a wild stab at this: the vast majority of arrests are made at the southern border because hundreds of thousands of Canadians are not rushing our northern border and vanishing into the interior of the United States, never to return. I'm not sure how the national origin of those crossing

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[103] 83 FR 45520.

[104] Credible Fear in the U.S. Immigration System, U.S. Dep't of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 5, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; *see also* Andrew R. Arthur, *Trump Baits the Press on Asylum No-Shows*, Center for Immigration Studies, Nov. 2, 2016, https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, *A One-Sided Study on Detention of Illegal-Immigrant Families*, Center for Immigration Studies, Sept. 14, 2018, https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families.

[105] Credible Fear in the U.S. Immigration System, U.S. Dep't of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 9, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; *see also* Andrew R. Arthur, *Trump Baits the Press on Asylum No-Shows*, Center for Immigration Studies, Nov. 2, 2016, https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, *A One-Sided Study on Detention of Illegal-Immigrant Families*, Center for Immigration Studies, Sept. 14, 2018, https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families.

[106] Report at n. 2386-2391.

the border illegally is supposed to affect our immigration enforcement decisions. "Oops, let that guy go, he's from El Salvador. We have to arrest a thousand more white Canadians today before we arrest anyone else from Mexico or Central America." (I will also note that the fact that almost 12,000 people arrested by the Border Patrol were from India, which is literally an ocean and a continent away, is evidence that those worried that our lax border security attracts lawbreakers from around the world have a point.) If people from Mexico and Central America are disproportionately inclined to break our immigration laws, how is the fault of the United States, Border Patrol, or President Trump?

The report also says, "Their rights to family integrity are also at stake."[107] Sorry, no they are not. People go to jail and prison all the time, and that means they are separated from their children. Their right to family integrity isn't at stake ***because they broke the law.*** When Willie Sutton goes to prison for ten years for bank robbery, no one claims his right to family integrity is being violated. A decision from the Southern District of California, cited in this report, claims that the right to family integrity is being violated because the parents are separated from their children while awaiting adjudication of their asylum claims.[108] But that is simply because the government does not have sufficient family detention facilities, and we all have a strong interest in detaining these individuals, given the large percentage that abscond when released. The Commission majority, of course, would almost certainly not be satisfied by expanded family detention facilities so that families can be held together. Our 2015 report on detention facilities concerned (in part) family detention facilities, and the majority was unhappy about that too.[109]

Furthermore, many people who arrive at the border claiming to be families are not actually related. ICE instituted a pilot program earlier this year in which they did rapid DNA tests of adults and children whom they suspected might not be related. Thirty percent of those tested were not in fact related.[110] During one week in July, 102 tests were administered, and 17 of the tests showed no familial relationship.[111]

The rest of this section can be boiled down to, "No one should ever be deported, ever" – an approach that the majority believes applies to DACA recipients and TPS (Temporary Protected Status) recipients. The report states that "Federal courts are also hearing a series of allegations regarding retraction of Temporary Protective Status ("TPS") from African, Haitian and Central American immigrants, which also implicate substantive due process and equal protection concerns,

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[107] Report at n. 2391.
[108] Ms. L. v. U.S. Immigration and Customs Enforcement, 302 F.Supp.3d 1149 (S.D. Cal. 2018).
[109] *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*, U.S. Comm'n on Civil Rights, Sept. 2015, at 127 ("DHS should look at alternative to detaining families, such as releasing the families to custodial agents in the United States."), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf
[110] Anna Giaritelli, *DNA tests reveal 30% of suspected fraudulent migrant families were unrelated*, Washington Examiner, May 18, 2019, https://www.washingtonexaminer.com/policy/defense-national-security/dna-tests-reveal-30-of-suspected-fraudulent-migrant-families-were-unrelated
[111] Priscilla Alvarez, *ICE ramps up DNA testing for migrant families along the southern border*, CNN, July 22, 2019, https://www.cnn.com/2019/07/22/politics/ice-deploys-dna-testing-at-border/index.html.

including allegations that the retraction of TPS being motivated by racial animus."[112] Clearly the reader *must* believe these allegations, because oh my goodness, those countries are populated by People of Color!

If the termination of Temporary Protected Status is due to racism, DHS is doing a pretty poor job of it. On August 1, 2019, Acting DHS Secretary Kevin McAleenan extended TPS for Syrian nationals for 18 months.[113] On March 18, 2019, then-DHS Secretary Kirstjen Nielsen extended TPS for South Sudan for 18 months.[114] On July 19, 2018, then-Secretary Nielsen extended TPS for Somalia for 18 months[115], and on July 5, 2018, she extended TPS for Yemen for 18 months.[116] The only countries that are currently designated for TPS (some of which are currently mired in litigation due to the Secretary's efforts to terminate TPS) are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. Notice that there is not a single European or majority-white country on that list, and only one Asian country. DHS isn't treating people who are colloquially considered "white" with TPS status better than people of color with TPS status ***because there aren't any people in the former category***. Furthermore, the countries for which DHS has extended Temporary Protected Status are all countries populated by "people of color." DHS must have the most incompetent racists ever.

Furthermore, Temporary Protected Status is meant to be just that – temporary. The underlying statute repeatedly makes this clear: "the Attorney General . . . may grant the alien ***temporary*** protected status,"[117] "the Attorney General finds that there has been an earth, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but ***temporary***, disruption of living conditions in the area affected,"[118] "the foreign state is unable, ***temporarily***, to handle adequately the return to the state of aliens who are nationals of the state,"[119] "the Attorney General finds that there exist extraordinary and ***temporary*** conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety".[emphasis added][120]

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[112] Report at n. 2437.
[113] *Acting DHS Secretary McAleenan Announces Extension of Temporary Protected Status for Syria*, Department of Homeland Security, August 1, 2019, https://www.dhs.gov/news/2019/08/01/acting-dhs-secretary-mcaleenan-announces-extension-temporary-protected-status-syria.
[114] *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for South Sudan*, Department of Homeland Security, March 8, 2019, https://www.dhs.gov/news/2019/03/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected.
[115] *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Somalia*, Department of Homeland Security, July 19, 2019, https://www.dhs.gov/news/2018/07/19/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected.
[116] *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Yemen*, July 5, 2018, https://www.dhs.gov/news/2018/07/05/secretary-nielsen-announcement-temporary-protected-status-yemen.
[117] 8 U.S.C. § 1254a(a)(1).
[118] 8 U.S.C. § 1254a(b)(1)(B)(i).
[119] 8 U.S.C. § 1254a(b)(1)(B)(ii).
[120] 8 U.S.C. § 1254a(b)(1)(C).

The underlying statute also provides for the termination of Temporary Protected Status.[121] The statute also specifies that TPS is a nonimmigrant status, stating, "the alien shall not be considered to be permanently residing in the United States under color of law;"[122] and "for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant."[123]

Temporary Protected Status for Nicaragua and Honduras was first issued on January 5, 1999 because of damage caused by Hurricane Mitch.[124] When the Secretary issued the termination of TPS status for Nicaragua, it had been *almost 19 years* since the designation was issued. Whatever condition Nicaragua is in now, this is as good as it is going to get as far as Hurricane Mitch goes. According to the notice provided by the Secretary, conditions have markedly improved over the past decade – for instance, "Electrification of the country has increased from 50% of the country in 2007 to 90% today. . . . Internet access is also now widely available."[125] Likewise, although Honduras faces challenges, those challenges are unrelated to Hurricane Mitch and overall conditions have improved in recent years.[126] If Temporary Protected Status can't be terminated now, it can never be terminated.[127]

Much as in other aspects of immigration, the argument against terminating TPS benefits depends heavily on emotional appeals to the difficulties such a termination would cause U.S. citizen children of TPS beneficiaries.[128] The majority's default position seems to be that the immigration laws cannot be enforced if doing so might affect U.S. citizen children. This is the problem with not enforcing the immigration laws. If TPS for these countries had not been extended for decades beyond any reasonable "temporary" time frame, it would not be so disruptive for people to return to their countries. This makes it even more imperative to end more recent grants of TPS (like Nepal) in a timely manner. There should not be an assumption that TPS status will be extended indefinitely, which seems to be the desire of the Commission majority.[129]

There is nothing wrong with a U.S. citizen child returning to live with their parents in their parent's country of origin. No one is permanently barring them from the U.S. U.S. citizen children live in

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[121] 8 U.S.C. § 1254a(b)(3)(B).
[122] 8 U.S.C. § 1254a(f)(1).
[123] 8 U.S.C. § 1254a(f)(4).
[124] 64 FR 526; 82 FR 59637; 83 FR 26074.
[125] 82 FR 59637.
[126] 83 FR 26076 (stating that Honduras is currently the third largest producer of Arabica coffee beans in the world and that drought conditions have improved in recent years).
[127] Similarly, Nepal was first granted TPS following an earthquake in 2015, but, as DHS notes, recovery efforts have succeeded to such an extent that more tourists visit Nepal now than prior to the earthquake. 83 FR 23706. Sudan may be a more arguable case for extending TPS benefits, as the termination of TPS status for Sudan admits that there is still fighting in two areas of Sudan, though not in the entire country. On the other hand, Sudan was first granted TPS in 1997, so again, after 22 years, this may be as good as it is going to get. 82 FR 47229.
[128] Ramos v. Nielsen, 336 F.Supp.3d 1075 (N.D. Cal. 2018).
[129] This is also why it is imperative to return the "asylum seekers" at the southern border to their countries of origin forthwith. The longer they remain here, the more pleading there will be that it is simply too disruptive to return them to their countries of origin.

their parents' (non-U.S.) countries of origin all the time, and children who are citizens of other countries (legally) live in the U.S. with their parents all the time.

In closing, I note that I do not blame the beneficiaries of TPS from trying to remain in the country, even though I don't think they have a leg to stand on. I wouldn't want to live in Nicaragua, Haiti, El Salvador, Nepal, etc. Yet it is ironic that the same people who are in high dudgeon over President Trump referring to "s***hole countries" simultaneously insist that we must never, ever, under any circumstances, return people to these wonderful countries in which everyone is clamoring to live.

Chapter 11: U.S. Department of Agriculture

The report mentions lawsuits brought on behalf of black, Hispanic, Native American, and female farmers that were settled during the Obama Administration. These settlements are commonly referred to as "*Pigford*."[130] The report does not mention that these programs were riddled with fraudulent claims and abuses. No less a progressive institution than the *New York Times* investigated the settlement and reported:

> In 16 ZIP codes in Alabama, Arkansas, Mississippi and North Carolina, the number of successful claimants *exceeded the total number of farms operated by people of any race in 1997*, the year the lawsuit was filed. Those applicants received nearly $100 million.
>
> In Maple Hill, a struggling town in southeastern North Carolina, *the number of people paid was nearly four times the total number of farms*. More than one in nine African-American received checks. In Little Rock, Ark., a confidential list of payments shows, 10 members of one extended family collected a total of $500,000, and dozens of other successful claimants shared addresses, phone numbers or close family connections. [emphasis added][131]

Pigford I was rife with fraud – as journalist Jim Bovard wrote, USDA "expected only a few thousand legitimate claims" from the *Pigford I* settlement.[132] USDA was in for a surprise:

> [M]ore than 90,000 blacks asserted that they were wrongly denied farm loans or other USDA benefits in the 1980s and 1990s. This was surprising because there were at most 33,000 black-operated farms nationwide in that period. But that number itself was wildly inflated by USDA methodology. Anyone who sells more

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[130] Report at n. 3183-3195.
[131] Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, *N.Y. Times*, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.
[132] James Bovard, The great farm robbery, *Wash. Times*, Apr. 3, 2013, https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/.

> than $1,000 in agricultural commodities – the equivalent of 150 bushels of wheat or one horse – is categorized by USDA [as] as bona fide farmer.[133]

The appropriate response to being fleeced was apparently, "Thank you sir, may I have another?" The government spent $1.25 billion in the *Pigford II* settlement, ostensibly to compensate still more black farmers who had not been compensated in *Pigford I*. $195 million was paid out to Hispanic and female farmers, and $680 million was paid out to Native American farmers.[134] To make it even worse, not enough Native American farmers could even be found to distribute all the money. The remaining $400 million was left "in the control of plaintiffs' lawyers to be distributed among a handful of nonprofit organizations serving Native American farmers."[135] Just because an organization is a non-profit doesn't mean someone isn't profiting. This is also an example of why former Attorney General Sessions was wise to end the practice of including payments to non-governmental third parties in settlement agreements.[136]

It might seem difficult for this story to smell worse, but it does. The settlement with Hispanic and female farmers was unnecessary. The Department of Agriculture had defended itself for ten years, and the plaintiffs had lost at every stage of litigation, including the Supreme Court. But the Obama Administration couldn't allow this to happen. Racial spoils for one non-white group must be available to all non-white groups. "New settlements would provide 'a way to neutralize the argument that the government favors black farmers over Hispanic, Native American or women farmers,' an internal department memorandum stated in March 2010."[137] As the Times reported:

> On the heels of the Supreme Court's ruling, interviews and records show, the Obama administration's political appointees at the Justice and Agriculture Departments engineered a stunning turnabout: they committed $1.33 billion to compensate not just the 91 plaintiffs but thousands of Hispanic and female farmers who had never claimed bias in court.
>
> The deal, several current and former government officials said, was fashioned in White House meetings despite the vehement objections – until now undisclosed – of career lawyers and agency officials who had argued that there was no credible evidence of widespread discrimination. What is more, some protested, the template for the deal – the $50,000 payouts to black farmers – had proved a magnet for fraud.[138]

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[133] James Bovard, The great farm robbery, Wash. Times, Apr. 3, 2013, https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/.
[134] Report at 3186-3192.
[135] Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.
[136] Memorandum, Prohibition on Settlement Payments to Third Parties, Office of the Attorney General, June 5, 2017, https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice.
[137] Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.
[138] Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.

A report cited by the Commission claims that "systemic racism at USDA has denied black farmers equal access to credit and crop insurance".[139] The report – again from the Center for American Progress – does not provide any evidence of continuing systemic discrimination against black farmers. The report only cites one recent case of alleged discrimination, in which a family of cane farmers claim that a bank and USDA denied them crop loans.[140] Legislation sponsored by Sen. Tim Scott allows "heirs' property," which is landed inherited by family members without a formal will, to receive assistance from USDA.[141] The CAP report also notes that black farmers have increased as a percentage of farmers, and they own more land.[142]

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[139] Report at n. 3200.
[140] Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/.
[141] Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/.
[142] Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/.

Rebuttal of Commissioner Peter N. Kirsanow

Commissioner Narasaki writes that the Declaration of Independence was followed by, “a Constitution that condoned the ownership, sale, and enslavement of Black men, women, and children for over 200 years.” N.b. The Constitution was ratified on June 21, 1788.[1] Slavery was formally abolished throughout the United States by the 13th Amendment, which was ratified on December 6, 1865.[2]

[1] The day the Constitution was ratified, National Constitution Center, June 21, 2019, https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified.
[2] 13th Amendment to the U.S. Constitution: Abolition of Slavery (1865), Our Documents Initiative, https://www.ourdocuments.gov/doc.php?flash=false&doc=40.