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Journal

Yale Law Journal, 128(2019)

Author

Emerson, Blake

Publication Date

2019

THE YALE LAW JOURNAL

BLAKE EMERSON

The Claims of Official Reason: Administrative Guidance on Social Inclusion

ABSTRACT. Under the Obama Administration, agencies issued guidance concerning sexual assault and harassment on college campuses, transgender rights, the use of arrest and conviction records in employment decisions, and deferral of deportation proceedings against undocumented immigrants. These actions have been either set aside by circuit courts or rescinded under the Trump Administration, in part on the grounds that they were issued without notice-and-comment rulemaking. Nonetheless, courts have blocked the Trump Administration's rescission of the deferred-action program because the government failed to consider the "serious reliance interests" the program had generated.

This Article examines the legal validity and effect of these recent administrative actions concerning civil rights and social inclusion. In doing so, it addresses some of the most difficult and disputed questions in administrative law: what is the appropriate scope of the "guidance exemption" from notice-and-comment rulemaking and what kinds of legal effects can guidance generate? Drawing on the philosophy of law, the Article argues that guidance can provide a privileged reason for agency action but cannot categorically mandate or prohibit any course of public or private conduct. Such nonbinding action can nonetheless generate legally cognizable interests when individuals and institutions rely on the guidance to make plans and investments, or to see their status or the harms they suffer recognized. These reliance interests must be taken into account if the policy is to be rescinded.

This argument has concrete consequences for the staying power of the policies federal agencies put in place during the Obama Administration. More broadly, it sheds light on problems of internal administrative procedure and judicial review of administrative action, as well as fundamental issues in jurisprudence concerning "the force and effect of law."



AUTHOR. Assistant Professor of Law, UCLA School of Law, and Special Counsel to the Administrative Conference of the United States. Contact: emerson@law.ucla.edu. The author would like to thank the following people for their feedback on drafts and conversations about the argument: Tom Adams, Alexandra Brodsky, Beth Colgan, Kristen Eichensehr, Timothy Endicott, Kenneth Graham, Mark Greenberg, Waheed Hussain, Jeff Kaplan, Máximo Langer, Ron Levin, Catherine Lhamon, Jerry Mashaw, Gillian Metzger, Jon Michaels, Jennifer Mnookin, Sophia Moreau, Ben Nyblade, Anne Joseph O'Connell, K-Sue Park, Nick Parrillo, Adam Perry, Celene Reynolds, Larry Sager, Jocelyn Samuels, Laura Schaefer, Andrew Sepielli, Alicia Solow-Niederman, Kevin Stack, Catherine Valcke, Adam Winkler, Moran Yahav, Steve Yeazell, and Noah Zatz. Thank you also to Jane Farrell, Catherine Gardner, and Laure Kohne for their research assistance, and to Bradley Polivka, Zoe Jacoby, and the staff of the *Yale Law Journal* for their editorial input. The views stated in this Article do not represent those of the Administrative Conference of the United States or the federal government.



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INTRODUCTION

During Barack Obama's presidency, administrative agencies issued several controversial guidance documents that attempted to push the boundaries of social inclusion. The Department of Education issued a Dear Colleague letter interpreting statutory and regulatory norms against sex discrimination in education to encompass an obligation on federal-education-grant recipients to adjudicate claims of sexual assault and harassment.¹ The Equal Employment Opportunity Commission (EEOC) issued guidelines on when the use of arrest-and-conviction records in employment decisions may constitute racial discrimination under Title VII of the Civil Rights Act of 1964.² The Departments of Justice and Education jointly issued guidance on the application of the civil rights laws to transgender persons.³ In each case, the agencies implemented regulatory laws that concern racial or gender inclusion in various social spheres. The resulting guidance documents sought to delineate the scope of that inclusion. They stated that schools must ensure that campus interactions do not create a hostile environment that excludes people from access to education because of their sex; federal grantees must ensure transgender persons are not excluded from facilities that are consistent with their gender identity; and employers should ensure that

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1. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/8RKM-7LQB>] [hereinafter *2011 Dear Colleague Letter*]. Dear Colleague letters are a common form of guidance issued by the Department of Education. The Trump Administration rescinded the 2011 Dear Colleague Letter in 2017. Office for Civil Rights, *Dear Colleague Letter from Acting Assistant Secretary for Civil Rights Candice Jackson*, U.S. DEP'T EDUC. (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/RTD7-GHLX>] [hereinafter *Sept. 2017 Dear Colleague Letter*].
 2. *Enforcement Guidance No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [<https://perma.cc/YZ3M-8NMF>] [hereinafter *Arrest and Conviction Guidance*].
 3. Civil Rights Div. & Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Catherine E. Lhamon & Principal Deputy Assistant Attorney General for Civil Rights Vanita Gupta*, U.S. DEP'T EDUC. & U.S. DEP'T JUST. (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/3BHZ-2QP3>] [hereinafter *2016 Dear Colleague Letter*]. The Trump Administration rescinded the 2016 Dear Colleague Letter in 2017. Civil Rights Div. & Office for Civil Rights, *Dear Colleague Letter from Acting Assistant Secretary for Civil Rights Sandra Battle and Acting Assistant Attorney General for Civil Rights T.E. Wheeler, II*, U.S. DEP'T EDUC. & U.S. DEP'T JUST. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/2VMK-LXEK>] [hereinafter *Feb. 2017 Dear Colleague Letter*].

they do not, without sound business justification, exclude persons arrested for or convicted of a crime from labor-market participation.

The Obama Administration's deferred-action immigration programs likewise sought to extend the sphere of political recognition. The Department of Homeland Security (DHS) issued enforcement memoranda, listing criteria to be considered in deferring deportation proceedings against persons who unlawfully entered the United States as children,⁴ or who entered unlawfully and have children who are citizens or lawful permanent residents.⁵ The former policy, known as Deferred Action for Childhood Arrivals (DACA), states that its purpose is to specify how the government should "enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home."⁶ The latter policy, known as Deferred Action for Parents of Americans (DAPA), similarly declares that "[t]he reality is that most individuals" who may qualify for deferral "are hard-working people who have become integrated members of American society."⁷ Both DACA and DAPA therefore invoke these individuals' social grounding in the United States as a reason to allow them to remain in the country and gain a qualified, protected status—a claim their longstanding presence in the territory makes upon the American people and government.

Such policies on social inclusion were noteworthy for not only what they expressed but also how they expressed it. They were issued not through regulations with the force and effect of law, but rather through Dear Colleague letters, enforcement memoranda, and enforcement guidance, all of which lack binding legal status.⁸ The distinction between regulations and guidance is grounded in the Administrative Procedure Act of 1946 (APA), which lays out procedural re-

4. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/5G4N-VNRZ>] [hereinafter DACA Memo].

5. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. 4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf [<https://perma.cc/Z7B9-K5MG>] [hereinafter DAPA Memo].

6. DACA Memo, *supra* note 4, at 1.

7. DAPA Memo, *supra* note 5, at 3.

8. See, e.g., *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002).

quirements for agency rulemaking, including provision of notice and opportunity for public comment.⁹ The APA exempts from these requirements interpretive rules and “general statements of policy.”¹⁰ The courts have interpreted this “guidance exemption”¹¹ to apply to agency documents that lack legal force either because the agency does not “intend[] to bind itself”¹² by those documents or because they do not have “binding effect.”¹³ Whether guidance issued without notice and comment is procedurally valid therefore depends in the first instance on whether it has such binding qualities.¹⁴ If it does, then the guidance may be an invalid legislative rule, issued outside the procedures required by the APA. Disputes over guidance documents thus often turn on whether their terms are binding or whether they are applied in a binding way to the regulated public.

The DACA Memorandum, for instance, does not seem to require an immigration official to take a particular action. It instead lists several criteria that “should be satisfied before an individual is considered for an exercise of prosecutorial discretion,” and it underscores that each candidate for deferred action should be evaluated “on an individual basis.”¹⁵ Rather than explicitly commanding a particular result, the guidance articulates relevant considerations for the conduct of immigration enforcement. The DAPA Memorandum likewise provides for a process “similar to DACA, for exercising prosecutorial discretion . . . on a case-by-case basis.”¹⁶ The Fifth Circuit nonetheless held that the

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9. 5 U.S.C. § 553(c) (2018). For rules that by statute are required to be “made on the record after opportunity for a hearing,” formal adjudicatory procedures are required. *Id.* §§ 553(c), 556, 557.
 10. *Id.* § 553(b)(A). “[R]ules of agency organization, procedure, or practice” are also exempt. *Id.* Those are beyond the scope of this article.
 11. See generally Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263 (2018).
 12. *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).
 13. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987); see also *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014).
 14. In this Article, “procedural validity” refers to whether the agency document has been issued through the process required by law, such as notice-and-comment rulemaking or formal rulemaking. If an agency is obliged to issue a document through such a process, but issues it without taking such steps, that document is procedurally invalid. If, by contrast, an agency complies with all procedures required by law, the document is procedurally valid. A document may be procedurally valid but substantively invalid, where, for example, the document’s provisions take into account policy considerations that the agency’s statutory authority forbids it from considering. The substantive validity of guidance documents is generally beyond the scope of this Article.
 15. DACA Memo, *supra* note 4, at 1–2.
 16. DAPA Memo, *supra* note 5, at 4.

DAPA guidance was likely unlawful because it was “binding as a practical matter.”¹⁷ Likewise, DACA and the Dear Colleague letters on sexual harassment and transgender rights have been rescinded by the Trump Administration in part on the grounds that they were procedurally suspect or invalid.¹⁸ Institutions and persons who benefited from or relied upon DACA have successfully challenged the Trump Administration’s rescission of the guidance as itself unlawful, on the grounds that the relevant agencies have failed to offer a well-reasoned explanation for the rescission.¹⁹

This struggle over guidance on social inclusion is primarily a political battle over the meaning of civil rights and the boundaries of the American political community. But it also concerns the contested meaning and boundaries of law itself in the administrative state. Although guidance is a “nonlegislative” form of agency action²⁰ that “lack[s] power to control,”²¹ it is nonetheless a kind of law. Administrative law scholars have long recognized the significance of the “internal law” of administration—the set of rules and standards that agencies use to limit or shape their own discretion, to notify private parties of the agency’s official policy position, and to structure their internal organization.²² Some scholars argue that such nonbinding documents are crucial bulwarks of the rule of law in the administrative state: they concretize abstract statutory commands and conferrals of power, and they regularize the discretionary application of statutory

17. *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) (citing *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002)), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

18. *Sept. 2017 Dear Colleague Letter*, *supra* note 1, at 2 (“The Department imposed these regulatory burdens without affording notice and the opportunity for public comment.”); Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/5YNT-TJ7A>] (rescinding DACA in part on grounds that “the Fifth Circuit concluded that implementation of the program did not comply with the Administrative Procedure Act because the Department did not implement it through notice-and-comment rulemaking”); *Feb. 2017 Dear Colleague Letter*, *supra* note 3, at 1 (stating that previous guidance did not “undergo any formal public process”).

19. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1046 (N.D. Cal.) (finding that the rescission of DACA was unlawful under the APA), *aff’d*, 908 F.3d 476 (9th Cir. 2018); *accord NAACP v. Trump*, 298 F. Supp. 3d 209, 236–37 (D.D.C. 2018).

20. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004).

21. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

22. See, e.g., BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW CONCERNING THE RELATIONS OF PUBLIC OFFICERS* 14 (1903) (“The internal law governs the processes by which the laws in general are carried into execution by the officers of the administration.”).

requirements.²³ Where agencies possess vast statutory authority and time constraints preclude legislative rulemaking or formal adjudication on every contested question, guidance documents can help ensure “equal treatment” according to general, publicly available norms.²⁴

Other commentators, however, worry that agencies use guidance to circumvent the rulemaking process, thus coercing the public to conform to administrative policies that have not been vetted by public comment, exhaustively justified in a regulatory preamble, or subjected to pre-enforcement review. Most famously, Robert A. Anthony asserted that although “nonlegislative rules by definition cannot *legally* bind, agencies often inappropriately use them with the intent or effect of imposing a *practical* binding norm upon the regulated or benefited public.”²⁵ Philip Hamburger has gone so far as to claim that agencies frequently use guidance as a means of “extortion,” imposing “under-the-table threats of an executive or judicial nature.”²⁶ Guidance is therefore characterized either as essential to the rule of law or as its anathema.

The legal status and appropriate use of guidance thus remain “baffling” problems “enshrouded in considerable smog.”²⁷ The basic quandary is that courts generally treat guidance as valid if it is not binding,²⁸ yet guidance only seems to achieve its rule-of-law objectives—namely, notice and consistent treatment—if it *does* bind administrative behavior.²⁹ Unless officials are meaningfully

23. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 15 (1983) (“Might there not be an internal law of administration that guides the conduct of administrators?”).

24. Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 808 (2001).

25. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1315 (1992).

26. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 260 (2014).

27. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (first quoting 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7:5, at 32 (2d ed. 1979); and then quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975)).

28. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

29. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL] (defining “interpretive rules” as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers” and defining “general statements of policy” as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power”); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law Before and After the APA*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* 163, 165–66 (Nicholas R. Parrillo ed., 2017) (“Major efforts at administrative reform [surrounding the enactment of the APA]

constrained to follow the guidance, it will not apprise the public of the agency's position or guarantee uniformity and regularity in the handling of particular cases. But if guidance constrains agency behavior in this way, the public may feel coerced to conform to its terms in order to avoid predictable official sanctions. How can this conundrum be unraveled?

Some decisions from the U.S. Court of Appeals for the D.C. Circuit follow Anthony in maintaining that guidance is impermissibly binding if "affected private parties are reasonably led to believe that failure to conform will bring adverse consequences."³⁰ That kind of coercion is likely to take hold where the guidance does not leave agency officials' enforcement discretion intact.³¹ The Department of Justice under the Trump Administration has taken this line in instructing Department components not to use guidance documents to "effectively bind private parties" or to "coerc[e] persons or entities outside the federal government into taking any action or refraining from taking any action beyond what is required by the applicable statute or regulation."³² However, other D.C. Circuit decisions focus on whether agency procedure and practice would allow a departure from the position stated in the guidance.³³ On this approach to guidance, "regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall," but such incentives do not amount to impermissibly binding effect.³⁴ The Administrative Conference of the United States has taken a similar position in its recent Recommendation on "Agency Guidance

recognized the critical role internal controls played in achieving agency regularity and accountability While the eventual compromise struck in the APA brought greater external constraints on agencies, the APA did not seek to significantly displace or preempt internal administrative law.").

30. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (quoting Anthony, *supra* note 25, at 1328-29).

31. *See Appalachian Power Co.*, 208 F.3d at 1021; *Cnty. Nutrition Inst.*, 818 F.2d at 946.

32. Office of the Att'y Gen., *Memorandum for All Components: Prohibition on Improper Guidance Documents*, U.S. DEP'T JUST. (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> [<https://perma.cc/GP4M-SNNJ>].

33. *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974) ("Often the agency's own characterization of a particular order provides some indication of the nature of the announcement. The agency's express purpose may be to establish a binding rule of law not subject to challenge in particular cases. On the other hand, the agency may intend merely to publish a policy guideline that is subject to complete attack before it is finally applied in future cases. When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy.").

34. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014).

Through Policy Statements,”³⁵ based on a groundbreaking study by Nicholas Parrillo.³⁶ The Recommendation endorses the foundational principle that “[a]n agency should not use a policy statement to create a standard binding on the public.”³⁷ However, it also states that it is “sometimes appropriate” for agency guidance to “bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement.”³⁸ Such internal procedures may indeed have coercive consequences, where the agency’s statutory powers create strong incentives to comply with the policy that binds frontline agency personnel.³⁹ But the Recommendation implies that these practical effects do not amount to binding either official or private conduct in an impermissible manner.

A related area of disagreement in both the case law and the commentary is whether an interpretive rule can have greater binding effect than a policy statement can.⁴⁰ Anthony took the position that “[a]n agency may nonlegislatively announce or act upon an interpretation that it intends to enforce in a binding way, so long as it stays within the fair intendment of the statute and does not add substantive content of its own.”⁴¹ John Manning, however, has observed that because the distinction between questions of law and of policy has eroded in administrative law, it is doubtful that a justiciable line can be drawn between guidance documents that are merely “interpretive” and those that involve interstitial lawmaking.⁴² Ronald Levin accordingly proposes a unified approach to the guidance exception, based on a comprehensive survey of the case law and institutional pronouncements on the subject. On his view, a document should qualify

35. Administrative Conference of the United States: Adoption of Recommendations, 82 Fed. Reg. 61728, 61734 (Dec. 29, 2017) (documenting Administrative Conference Recommendation 2017-5: Agency Guidance Through Policy Statements).

36. Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, ADMIN. CONF. U.S. (Sept. 18, 2017), <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-draft-report.pdf> [<https://perma.cc/DH7T-86UF>].

37. Administrative Conference of the United States: Adoption of Recommendations, 82 Fed. Reg. at 61736.

38. *Id.*

39. *Id.*

40. See, e.g., *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) (“While an agency’s decision to use ‘will’ instead of ‘may’ may be of use when drawing a line between *policy statements* and legislative rules, the endeavor miscarries in the interpretive/legislative rule context. . . . [A]n interpretation will use imperative language—or at least have imperative meaning—if the interpreted term is part of a command” (citation omitted)).

41. Anthony, *supra* note 25, at 1313.

42. Manning, *supra* note 20, at 923-27.

for the exception to APA rulemaking if it does not constitute a “binding norm.”⁴³ A norm is not binding if the agency remains “open to reconsidering [its] position later,” irrespective of any mandatory language the document may use.⁴⁴ The case law remains highly inconsistent on this issue of whether interpretive rules may have binding qualities.⁴⁵

The law and commentary on guidance thus raise fundamental questions of legal theory: What does “binding” mean? And how, if at all, might a document qualify as a form of law if it is not binding? As a discipline rightly concerned with practical problems of policy implementation, administrative law has shied away from in-depth engagement with such questions about the nature of law, legal reasoning, and normativity. But these are precisely the problems that arise at the boundary between rules that bind and those that do not. Examining the distinction between binding rules and nonbinding guidance will shed light on how norms can shape official and private behavior without constituting a command. It will reveal a set of legal interests that fall short of rights and duties but that nonetheless deserve consideration in the reasoning of state actors.

Determining the boundary between binding law and nonbinding guidance is of more than theoretical interest.⁴⁶ As the Trump Administration works to undo, or perhaps amend, the Obama Administration’s handiwork, the durability of the earlier policies on social inclusion will turn in part on the legal validity of

43. Levin, *supra* note 11, at 292 (quoting *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974)); *see also* *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987).

44. Levin, *supra* note 11, at 291.

45. *Compare* *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 681 (6th Cir. 2005) (“An interpretative regulation is binding on an agency . . .” (emphasis omitted)), *and* *Metro. Sch. Dist. v. Davila*, 969 F.2d 485, 493 (7th Cir. 1992) (“All rules which interpret the underlying statute must be binding because they set forth what the agency believes is congressional intent.”), *with* *Viet. Veterans of Am. v. Sec’y of Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988) (“[T]he agency remains free in any particular case to diverge from whatever outcome the policy statement or interpretive rule might suggest.”), *and* *Health Ins. Ass’n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (“A rule may be interpretive even though it ‘interprets’ a vague statutory duty or right into a sharply delineated duty or right. Yet the interpretation in a sense changes the legal landscape.” (citations omitted)).

46. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (“[W]e need to know how to classify an agency action as a legislative rule, interpretive rule, or general statement of policy. That inquiry turns out to be quite difficult and confused. It should not be that way. Rather, given all of the consequences that flow, all relevant parties should instantly be able to tell whether an agency action is a legislative rule, an interpretive rule, or a general statement of policy—and thus immediately know the procedural and substantive requirements and consequences. An important continuing project for the Executive Branch, the courts, the administrative law bar, and the legal academy—and perhaps for Congress—will be to get the law into such a place of clarity and predictability.”).

the guidance issued, as well as on the legally protected interests that the guidance generated.⁴⁷ This Article argues that these policies were issued in a procedurally lawful manner and that they have induced private interests that may need to be taken into account if the policies are to be rescinded. This argument will have broader implications for how we think about the legal status, social effect, and judicial review of guidance more broadly.

Guidance, the Article contends, is lawfully deployed when it offers a “privileged” reason for official action.⁴⁸ That is, a regulatory norm issued outside the rulemaking process is procedurally valid when the terms and use of such guidance permit the agency to deviate from it in the face of strong countervailing considerations. Guidance thus falls outside the realm of authoritative legal action since it does not exclude any other practical reasons from consideration by the issuing agency.⁴⁹ At the same time, however, guidance does offer a presumptively valid reason for officials to act within the policy domain it describes. It often functions as a “rule of thumb” that tells agency officials what they should *usually*—but not necessarily always—do when a case arises under circumstances to which the guidance applies.⁵⁰ This perspective on guidance generally accords with the “weight of opinion” among administrative law scholars and authorities: it recognizes the “legitimacy of guidance” as an appropriate means for agencies to implement policy, but it insists that guidance’s legal effect must fall short of the force of law.⁵¹

Where this Article breaks new ground is its exploration of the relationship between guidance, official reasoning, and private practical judgment. Several prominent accounts of guidance’s appropriate use aim to strike a balance be-

47. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1032-46 (N.D. Cal.) (finding that DHS’s assertion that DACA was unlawful was without legal basis and that the rescission of DACA was unlawful in part for failing to consider reliance interests DACA induced), *aff’d*, 908 F.3d 476 (9th Cir. 2018).

48. *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006); *see infra* Section II.B.

49. *Cf.* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 42 (1986) [hereinafter RAZ, *THE MORALITY OF FREEDOM*] (considering when an arbiter’s decision may be justifiably challenged for practical reasons); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 142-43 (1975) [hereinafter RAZ, *PRACTICAL REASON AND NORMS*] (considering in what context practical reasons hold weight).

50. I use the concept of the “rule of thumb” somewhat differently from RAZ, *PRACTICAL REASON AND NORMS*, *supra* note 49, at 58-59, who treats rules of thumb as exclusionary reasons. *See infra* Section II.B.

51. Levin, *supra* note 11, at 277, 286.

tween competing objectives of uniform administration and freedom from informal government coercion.⁵² My approach instead assesses guidance practices according to the normative quality of official reasoning. This shift in emphasis ultimately strengthens guidance's legal credentials, anchoring its legitimacy in the rights and duties of public office rather than merely in the demands of efficient management and the benefits of predictability. At the same time, this shift renders guidance more subject to demands for reasoned justification. If we take the legal status of guidance seriously—as a form of internal administrative law that can rightfully shape official and private deliberation—then we must also ensure that the use of guidance is properly respectful of the social interests that it touches.

Guidance offers a privileged reason for agency action insofar as the issuing official has set out the policy or interpretation in the exercise of her statutory duties. This legal obligation distinguishes her communicative acts from those of a private person. Unlike a private person's contribution to public discourse, guidance documents are issued by officials who have a duty to act for reasons grounded in the law. Performance of this duty implies a concomitant discursive right to have their official interpretations heard, and treated as presumptively valid, by other officials. This right is strongest where the issuing official supervises a subordinate official to whom the guidance is directed. The duties of the

52. See, e.g., Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432–33 (Jan. 25, 2007) (“Guidance documents, used properly, can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties . . . Poorly designed or misused guidance documents can impose significant costs or limit the freedom of the public.”). Similarly, Levin has characterized the “high degree of agreement” among “institutional pronouncements” on guidance from the Office of Management and Budget, the Administrative Conference of the United States, and the American Bar Association, among others, as follows:

Guidance documents are not supposed to have the force of law, and agencies should not treat them as if they were binding. Thus, agencies should find reasonable ways to put the public on notice of the non-binding nature of those pronouncements. Moreover, when the agency actually applies them, it should refrain from acting as though they do have the force of law. On the other hand, guidance is a legitimate tool of administration, and the expectations just stated should not be interpreted in a manner that would impede agencies from using these documents to inform staff members, as well as the public, about the manner in which the agency contemplates implementing its programs. Indeed, agencies *should* adhere to the positions expressed in their guidance documents to the extent necessary to honor expectation interests. If these messages seem mixed, at least part of the explanation is that their authors have self-consciously sought to strike a balance among competing objectives.

Levin, *supra* note 11, at 278, 286.

issuing office incorporate the right to direct the subordinate official in order to maintain the integrity of the statutory norms administered by the agency. Otherwise, unjustified variation in enforcement would replace the uniformity of law with unbridled discretion. But the nonbinding character of the norm requires that justified deviation be countenanced. Internal directives may permissibly bind frontline personnel only if there is an opportunity for a supervisor or the agency itself to depart from the guidance if there are weighty reasons to do so. For courts, executive officials' discursive rights have a somewhat weaker persuasive authority, since the executive official exercises no supervisory right over those of a coordinate branch of government. But courts still must respect the office's statutory right to issue the guidance as one factor in assessing the overall weight owed to the position the guidance states, in addition to the factors of its persuasiveness, its consistency with past pronouncements, and the extent to which it falls within the agency's expertise. A court may depart from the position stated in the guidance only if such factors overcome the presumption that the agency's view is correct.

The initial focus here is on how one office's guidance affects other officials and how that process shapes governmental conduct. However, as noted above, guidance also speaks to the regulated public and affects the conduct of private parties. Indeed, as we have seen, Anthony famously argued that agencies sometimes unlawfully use guidance to "bind the public."⁵³ He meant that guidance may coerce parties to follow certain courses of conduct while bypassing the procedural rigors of rulemaking or adjudication.⁵⁴ Without disputing that guidance can sometimes coerce or otherwise influence private parties, I deny that such effects render guidance unlawfully binding. The appropriate question in determining guidance's procedural validity is whether it leaves the agency free to exercise discretion or instead impermissibly determines the agency's final disposition of all the cases to which it applies. When guidance determines agency action in this binding way, it runs afoul of the APA, because it claims the authority of a rule with the force of law without issuing from any procedure that would give it that status.

The external effects of guidance on the regulated public are more nuanced than being simply binding or nonbinding. Guidance can appropriately express the official's "internal point of view" of the law so that private parties understand, and in some cases adopt, this view.⁵⁵ Where private parties adopt the position expressed in the guidance, the guidance may constrain them: it may lead them to exclude certain considerations that would otherwise be relevant to their

53. See Anthony, *supra* note 25, at 1312.

54. *Id.* at 1317.

55. H.L.A. HART, *THE CONCEPT OF LAW* 88 (1961); see *infra* Section II.A.

conduct. But this only happens when the private person's other, preexisting commitments—legal, professional, moral, or strategic—give that guidance authoritative status for them. Because this constraining effect turns on the disposition of the private parties, rather than on the intent or practice of the official, it should not render the guidance unlawful. The complementary relationship between official discourse and private practical judgments makes guidance a coordinate rather than purely hierarchical exercise of power. It can thus be misleading to focus analysis on whether guidance binds *the public*, since this terminology tends to elide legal compulsion—which a guidance document cannot lawfully accomplish—and other forms of lawful influence on private reasoning that can empower or constrain actors in the private sphere. By increasing the interchange and overlap between the official reasoning of agency officials and the practical reasoning of private persons, guidance can widen the channels of mutual influence between the state and civil society. As private persons take up and react to a guidance's interpretations and policies, they are able to participate in an official discourse outside of formal opportunities to influence or contest governmental action. Guidance's discursive influence only becomes legally problematic when agency procedure prevents private parties from challenging the interpretations and policies the guidance sets out or when it precludes the agency from departing from the guidance's terms. In such cases, the agency ceases to speak with the public and instead commands them.

Nevertheless, guidance documents may sometimes speak in binding language so long as the opportunity remains to challenge those mandatory terms. Thus, when an agency issues an interpretive rule that constructs mandatory language in a statute or regulation, it will often be appropriate to use mandatory language. In such cases, the agency is providing notice to the public of precisely how it understands otherwise binding terms. The official duty to implement the law brings with it a right to put forward interpretations of the law that others must take seriously. But this right to interpret the statutes and the rules the agency administers does not preclude challenges to this interpretation or force it upon other actors, such as courts, who also possess authority to interpret the law. This perspective casts doubt on certain strands of the Court's deference jurisprudence, which will accept an agency's interpretation of its own regulations unless it is "plainly erroneous or inconsistent with the regulation."⁵⁶ The Court has

56. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

already significantly qualified this principle⁵⁷ and is reconsidering it again this term.⁵⁸

Once guidance has been issued, it may generate “serious reliance interests that must be taken into account” by other officials.⁵⁹ Although those reliance interests may be pecuniary, I draw on some indications in the recent case law on deferred action to argue that reliance interests may also include nonpecuniary expectations. Such interests consist in the institutional recognition that the guidance has provided to actors: acknowledging aspects of their identity as worthy of legal protection, articulating certain harms as legally cognizable, or granting relief from a legal sanction that would otherwise be triggered by their activity or status. Social actors can experience benefits and burdens, and perhaps even new self-conceptions and modes of interaction, because of newly recognized substantive and procedural interests. Social movements embracing and opposing such interests can articulate new claims and challenges on the basis of the institutional and cultural dynamics the guidance channels.

When a guidance generates such reliance interests, any change in official policy must be justified with a reasoned explanation that gives due weight to those interests. Failure to engage with them and to explain why other considerations overcome them should render the change in policy arbitrary and capricious and therefore unlawful.⁶⁰ An official justification for a change in policy can draw on the existing social and political discourse around the wisdom and the justice of the previous policy. Guidance then permissibly intervenes in public deliberation. In embracing, rejecting, or elaborating guidance’s claims, courts, private institutions, social movements, and individuals jointly articulate legal norms. Guidance can thus serve the mediating role of refining and critiquing existing, binding obligations and lay the groundwork for the modification of such obligations.

This Article will develop these arguments through a discussion of guidance on social inclusion and the judicial, academic, and social reaction such guidance has generated. It will draw on general principles of administrative law and the

57. E.g., *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012).

58. *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017), *cert. granted in part sub nom. Kisor v. Wilkie*, 139 S. Ct. 657 (Dec. 10, 2018). *Auer*, *SmithKline*, and *Kisor* are discussed in Part IV, *infra*.

59. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *see infra* Part IV.

60. *See, e.g., Encino Motorcars*, 136 S. Ct. at 2126 (“In explaining its changed position, an agency must also be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” (quoting *Fox Television*, 556 U.S. at 515)); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (noting that policy “change that does not take account of legitimate reliance on prior interpretation may be ‘arbitrary, capricious, [or] an abuse of discretion’” (alteration in original) (citation omitted) (quoting 5 U.S.C. § 706(2)(A))).

philosophy of law to articulate the conception of guidance summarized above. The argument turns to the foundational jurisprudence of Joseph Raz and H.L.A. Hart to explicate these issues. I deploy Raz to define the bounds of legal “authority” and to position guidance as a legal norm that lacks such authority but nonetheless can influence practical reasoning. I then turn to Hart’s idea of the “internal point of view” to explain officials’ obligatory and evaluative attitude toward the law and how guidance might communicate that perspective to other actors. Though both Raz and Hart embrace a positivist view of the law, denying that there is any necessary connection between legal and moral norms, I neither embrace nor deny that view here. Instead, I draw on their insights regarding legal norms and practical reason to explain how guidance can properly influence official and private judgment without having “the force of law.” This provides the conceptual foundation for a wider exploration of how guidance can influence private conduct and generate private reliance interests in the official recognition that the guidance may afford.

The argument proceeds in four parts. Part I introduces the problem of guidance with *Texas v. United States*, the Fifth Circuit decision holding the DAPA guidance likely unlawful because it is “binding.”⁶¹ I draw on Raz’s conception of legal authority to distinguish guidance from other forms of law, arguing that guidance gives a privileged reason for courts, the agency, and other officials to act. Guidance can properly bind frontline agency officials but not the agency itself or reviewing courts. Part II then uses Hart’s concept of the “internal point of view” to explain how guidance can communicate public officials’ understanding of the law, giving guidance a privileged status for some private persons and generating legal consequences within and without the government. I then evaluate guidance’s effects on private reasoning and legal consequences through a discussion of the EEOC’s Arrest and Conviction Guidelines and Texas’s suit to enjoin them.

Part III considers the problem of interpretive rules, and whether they should be considered any differently from “general statements of policy” for purposes of agency enforcement or judicial deference.⁶² It explores this problem through Obama Administration guidance documents implementing Title IX of the Education Amendments of 1972. I argue that regulatory interpretations should receive the same doctrinal treatment as other forms of guidance but can use binding language so long as agency procedures afford an opportunity to challenge interpretations before the formulation of a binding order. Courts should treat

61. *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

62. See 5 U.S.C. § 553(b)(A) (2018).

such interpretive rules as persuasive authority, not as regulations that deserve deference. The *Auer* doctrine, which grants deference to agency interpretations of their own regulations,⁶³ should thus continue to give way to a unified approach for all guidance documents.⁶⁴ Finally, in Part IV, I turn to the reliance interests that guidance generates, considering theories of interpersonal and legal recognition. Guidance can induce material and ideological investments on the part of the individuals it recognizes as well as the institutions and communities that take actions based on that recognition. Such reliance interests need to be taken into account by officials who would withdraw the guidance. Failure to do so may make the rescission of the guidance unlawful.

I. GUIDANCE AND OFFICIAL CONDUCT

This Part examines how guidance can properly constrain officials without binding them. Section I.A introduces the problem with the example of the Obama Administration's deferred-action programs and the ensuing litigation. The primary purpose is not to relitigate these cases⁶⁵ but to use them to highlight the practical and theoretical dilemmas guidance poses. Deferred action remains a politically charged topic, raising issues as far-reaching and fundamental as the benefits of citizenship, the content of national identity, and the scope of humanitarian obligations. Because the Obama Administration implemented DACA and DAPA through guidance rather than a legislative rule, the political dispute crystallized around the doctrinal problem of distinguishing these categories of agency action from one another. Administrative law has therefore channeled the flow of substantive values into a narrow procedural capillary—the guidance exception to notice-and-comment rulemaking.⁶⁶

63. An agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

64. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 616-17 (2013) (Scalia, J., concurring in part and dissenting in part) (calling for *Auer* to be overruled); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012) (adding a new exception to *Auer* deference); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) ("I have become increasingly doubtful of [*Auer*'s] validity.").

65. See *Texas*, 809 F.3d at 148. For a critique of *Texas*, see Brief of Administrative Law Scholars as Amici Curiae in Support of Petitioners, *Texas*, 136 S. Ct. 2271 (No. 15-674). For a sympathetic treatment, see Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183 (2015).

66. See MASHAW, *supra* note 23, at 19.

The effort to distinguish rules from guidance has proven “quite difficult and confused.”⁶⁷ The guidance case law turns on the distinction between rules that are binding and those that are not, but the meaning of “binding” remains elusive and subject to varying interpretations.⁶⁸ In Section I.B, I use the works of legal philosopher Joseph Raz to develop a clearer understanding of this essential criterion. Drawing on his conception of legal authority, I argue that a nonbinding legal norm is one that does not exclude any reasons or courses of conduct from consideration in the official disposition of a particular case. Such guidance nonetheless carries legal weight because it conveys to other officials a privileged reason for action. Guidance can appropriately and powerfully structure official decision-making by creating a presumption that reasons offered in the guidance will carry the day. This presumption should only be overcome if other considerations substantially outweigh those reasons.

This account focuses on the internal effects of guidance on official decision-making: how the reasoning of one agency official properly influences the reasoning of others and how it influences the judicial interpretation of law. But this leaves out the “external” effects of guidance on those outside the government, such as citizens, regulated parties, and other private persons. I turn to these external effects in Part II.

A. The Problem Presented: Deferred Action and Texas v. United States

The DAPA program and the ensuing litigation over its validity acutely raised the analytical, normative, and practical problems with administrative guidance. DAPA expanded on the DACA program, which set out criteria and general procedures for deferring removal proceedings against undocumented immigrants who entered the United States as children.⁶⁹ The DAPA Memorandum widened the parameters set by DACA and provided that deferred action could be granted to undocumented immigrants whose children were citizens or lawful permanent residents.⁷⁰ Beyond gaining temporary reprieve from deportation, a recipient of deferred action would be able to apply for work authorization and would for the period of deferral be considered “lawfully present,” thus qualifying for certain Social Security and Medicaid benefits.⁷¹

67. Nat’l Mining Ass’n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014).

68. See, e.g., Pac. Gas & Elec. Co. v. Fed. Power Comm’n, 506 F.2d 33, 38 (D.C. Cir. 1974).

69. See DACA Memo, *supra* note 4, at 1.

70. See DAPA Memo, *supra* note 5, at 2–3.

71. See Texas v. United States, 809 F.3d 134, 148 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

Both DACA and DAPA were implemented through “enforcement memoranda” issued by the Secretary of Homeland Security. Despite the legal consequences that might flow from a grant of deferred action, each memorandum explicitly stated that the programs did not confer any “substantive right.”⁷² Each one insisted, repeatedly, that deferred action should be conferred by DHS personnel on a “case-by-case” or “individual basis.”⁷³

Shortly after DAPA was issued, Texas and twenty-five other states challenged the policy, arguing that it was unlawful under the APA.⁷⁴ The district court agreed, issuing a nationwide preliminary injunction on the program.⁷⁵ On appeal, the U.S. Court of Appeals for the Fifth Circuit, and an equally divided Supreme Court, affirmed the district court’s judgment.⁷⁶ The case was remarkable in several respects. In issuing a nationwide preliminary injunction, the district court portended the powerful role that such equitable relief would play in constraining executive power during the Obama and Trump Administrations.⁷⁷ It also stretched administrative law doctrines of reviewability nearly to their breaking point.⁷⁸ But the DAPA policy itself was something of a novelty. While deferred-action programs dated back decades and had been ratified in legislation, DAPA was unmatched in its massive scope, reaching over four million undocumented immigrants.⁷⁹ In *Texas v. United States*, then, judicial power countered the executive’s ambition with its own.

For the purposes of this Article, the Fifth Circuit’s crucial holding was that the DAPA challengers were likely to succeed on the merits of their claim that

72. DACA Memo, *supra* note 4, at 3; DAPA Memo, *supra* note 5, at 5.

73. DACA Memo, *supra* note 4, at 2; DAPA Memo, *supra* note 5, at 2-5.

74. See *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134, *aff’d by an equally divided court*, 136 S. Ct. 2271.

75. *Id.* at 677-78.

76. *Texas*, 809 F.3d at 146.

77. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2096-97 (2017).

78. Courts are generally reluctant to review the exercise of prosecutorial discretion not to enforce the law, since such decisions generally fall within the APA’s exemption from review of matters “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2) (2018); see *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (“[A]n agency’s decision not to institute enforcement proceedings [is] presumptively unreviewable under § 701(a)(2).”); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (“[A]n agency’s decision not to prosecute or enforce . . . is a decision generally committed to an agency’s absolute discretion.”).

79. See Memorandum from Karl R. Thompson, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to the Sec’y of Homeland Sec. & the Counsel to the President 12-20, 30 (Nov. 19, 2014), <https://www.justice.gov/file/179206/download> [<https://perma.cc/2PSG-KYB2>].

“DAPA violated the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment rulemaking.”⁸⁰ In notice-and-comment rulemaking, agencies publish proposed regulations, accept public comments, and then finalize a regulation after considering those comments.⁸¹ The APA, however, exempts from rulemaking “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁸² If the DAPA Memorandum fell under this exception, it therefore would have been proper for DHS to forego the notice-and-comment procedure.

The scope of the guidance exception is famously difficult to define.⁸³ The general test in the case law, however, is clear⁸⁴: a policy statement cannot be “binding.”⁸⁵ This binding-norm test has been articulated in different, sometimes

80. *Texas*, 809 F.3d at 149.

81. *See* 5 U.S.C. § 553.

82. *Id.* § 553(b)(A).

83. *See* *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975) (noting that the definition of an exempt “general statement of policy” is “enshrouded in considerable smog”); Levin, *supra* note 11, at 265 (“The challenge of distinguishing rules from guidelines has puzzled . . . much of the administrative law community. Indeed, the question of whether a supposedly informal pronouncement of an administrative agency is actually a rule that should have been adopted through notice-and-comment procedure may well be the single most frequently litigated and important issue of rulemaking procedure before the federal courts today.”).

84. The discussion in this Part focuses on the case law on “general statements of policy.” The more conflicted case law on “interpretative rules” is discussed in Part III.

85. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (noting that valid guidance “does not impose any rights and obligations” and “genuinely leaves the agency and its decisionmakers free to exercise discretion” (quoting *Am. Bus. Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980))); *see also* *Catawba County v. EPA*, 571 F.3d 20, 33 (D.C. Cir. 2009) (“[W]hether an agency action is the type of action that must undergo notice and comment depends on ‘whether the agency action binds private parties or the agency itself with the ‘force of law,’—that is, whether ‘a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect.’” (citations omitted) (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382, 382–83 (D.C. Cir. 2002))); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (“If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties . . . to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes ‘binding.’”); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (“Pronouncements that impose no significant restraints on the agency’s discretion are not regarded as binding norms. As a general rule, an agency pronouncement is transformed into a binding norm if so intended by the agency.”); *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of

conflicting ways, and the Fifth Circuit focused on one of the most demanding. To qualify for the guidance exception, the agency's pronouncement must not "impose[] any rights and obligations," and it must "genuinely leave[] the agency *and its decision-makers* free to exercise discretion."⁸⁶

The government argued that the DAPA Memorandum fell under the guidance exception. The Memorandum expressly stated that it does not create any "substantive rights," and that "prosecutorial discretion" is to be exercised on a "case-by-case basis."⁸⁷ Nevertheless, the Fifth Circuit affirmed the district court's finding that the DAPA Memorandum was likely "binding as a practical matter" because it was likely to be "applied by the agency in a way that indicates that it is binding."⁸⁸ To reach this conclusion, the district court extrapolated from the implementation of DACA, to which the DAPA Memorandum analogized its own procedure.⁸⁹ The district court emphasized that only five percent of DACA applications had been denied and that the Memorandum's operating procedures contained "no option for granting DAPA to an individual who does not meet each criterion."⁹⁰ The Fifth Circuit determined that this evidentiary record was sufficient for the district court to conclude that there was a substantial likelihood "DAPA would not genuinely leave the agency and its employees free to exercise discretion."⁹¹

I will return to the subsequent litigation over these deferred-action programs in Part IV. For now, I want to step back and look at the broader question *Texas* raises: what does it mean for an order to leave an official "free to exercise discretion," as opposed to "binding" her to pursue a particular course of conduct?⁹²

policy as law because a general statement of policy only announces what the agency seeks to establish as policy." (citations omitted)). See generally 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 4.4, at 440-59 (6th ed. 2019).

86. *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) (emphasis added) (quoting *Cnty. Nutrition Inst.*, 818 F.2d at 946), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

87. DAPA Memo, *supra* note 5, at 2, 4-5.

88. *Texas*, 809 F.3d at 171 (quoting *Gen. Elec.*, 290 F.3d at 383).

89. DAPA Memo, *supra* note 5, at 4.

90. *Texas v. United States*, 86 F. Supp. 3d 591, 669 & n.101 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, *aff'd by an equally divided court*, 136 S. Ct. 2271.

91. *Texas*, 809 F.3d at 176.

92. *Cnty. Nutrition Inst.*, 818 F.2d at 946.

B. Law Without Force: The Normative Weight of Official Duty

Guidance jurisprudence is so unsettled in part because its binding-norm test raises fundamental questions about the nature of legal obligation that administrative law has so far been loath to confront. Until we become clearer on the meaning of binding law, it will be impossible to determine under what conditions an official document properly lacks such force and to understand guidance's legal status when it lacks constraining power. It is precisely that legal but nonauthoritative power that this Article aims to explore.

To address these bedrock issues concerning legal normativity, I turn to the jurisprudence of Joseph Raz. His influential understanding of the relation between authority and practical reasoning lays the groundwork for this Article's analysis of guidance's legal status. Raz argues that a legal norm is "authoritative" or "binding" if it provides a reason for action that excludes consideration of some other reasons.⁹³ For example, the Second Amendment is binding in the sense that a legislature could not constitutionally violate the "right to keep and bear arms," even if on the balance the legislature found the right contrary to public safety.⁹⁴ Similarly, a law imposing a mandatory minimum sentence upon conviction for a crime binds a sentencing judge. The judge cannot lawfully sentence the person to a shorter sentence, even if she reasonably determines that the statutory minimum sentence is disproportionate to the offense. This exclusionary

93. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 29 (2d ed. 2012) ("The law has authority if the existence of a law requiring a certain action is a protected reason for performing that action; i.e. a law is authoritative if its existence is a reason for conforming action and for excluding conflicting considerations.").

94. See U.S. CONST. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table."). Whereas Raz describes legal authority as excluding certain reasons, Justice Scalia here describes the constitutional authority of the Second Amendment as excluding "certain policy choices." The one description can be assimilated to the other. For example, a legislator is not excluded by the Second Amendment from considering the reason of public safety in regulating gun possession. But in the event of conflict between the reason of public safety and the reason of "the existence of the Second Amendment," the latter excludes the former reason from determining what the legislature may constitutionally do. Some constitutional rights are adjudicated by balancing the private right against the governmental interest. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976). In that event, neither side of the balance excludes the other; instead, it is the balancing test itself that excludes practical consideration of any factor other than the elements of the test. In what follows, I describe binding legal authority as excluding either certain practical reasons or courses of conduct from consideration, since it is often more obvious that courses of conduct are being excluded than that reasons themselves are. The exclusion of courses of conduct generally means the exclusion of those practical implications of reasons that would conflict with the practical implications of the authoritative norm.

quality of law is sometimes obscured by the incorporation of a plastic norm into a legal rule. But in such cases, that open-ended analysis will still exclude certain considerations that might otherwise be relevant. For example, although the “reasonable person” standard in tort is supposed to be context-dependent, it does not take into account mental or emotional disability, unless the actor is a child or the person is incapacitated.⁹⁵ Raz’s understanding captures the feature of legal practice where an actor says, “It’s not up to me, or you – the law says so.” Law can then serve the social function of reducing the costs of argument, disagreement, and conflict in some areas, reaching like results in like cases and more efficiently coordinating individual and collective plans.⁹⁶ It does so at the expense of a more fine-grained analysis of the merits of each case.⁹⁷

Statutes play this exclusionary role for administrative agencies and courts. For the agency’s part, statutory law is the source and outer boundary of its public rights, powers, and duties. An agency must follow the terms of a constitutionally valid statute; it cannot act beyond the powers the statute confers upon it or consider factors the statute does not allow it to consider.⁹⁸ The statute therefore categorically excludes various reasons and courses of conduct from the agency’s consideration.

For the judiciary’s part, a statute’s delegation of rulemaking power to an agency creates an exclusionary constraint on the courts’ own statutory interpretation.⁹⁹ The *Chevron* doctrine requires courts to defer to an agency’s reasonable interpretation of a statutory ambiguity if the agency issues that interpretation through its delegated lawmaking authority.¹⁰⁰ Even if a court would have reached a different conclusion as to the best interpretation of the law, it must nonetheless accept the agency’s interpretation so long as it is reasonable.¹⁰¹ A valid regulation thus excludes from the reviewing court’s consideration some reasons that would otherwise appropriately inform its decision. It does not exclude from the court’s consideration all of those “traditional tools of statutory construction” that a court uses to determine the meaning of the law.¹⁰² Nor does

95. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11(1) (AM. LAW INST. 2005).

96. See RAZ, *supra* note 93, at 31.

97. *Id.*

98. 5 U.S.C. § 706(2)(C) (2018); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

99. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

100. *Id.* at 844.

101. *Id.* at 843-44.

102. *Id.* at 843 n.9.

it exclude from consideration the reasons the court would use to determine whether the agency's interpretation was reasonable, including a review of the logical consistency of the agency's justification for the interpretation. But it does exclude some reasons, such as first-order policy judgments, scientific conclusions, or moral imperatives that are not exclusively endorsed by the statute itself.¹⁰³ Because the legislature has delegated lawmaking power to the agency, rather than the court, the agency's determinations bind the court within its sphere of statutory authority and exclude some otherwise acceptable interpretations.

Chevron applies primarily to rules and adjudicative orders that have "the force of law."¹⁰⁴ Such rules are binding on the agency and may be enforced against it.¹⁰⁵ By contrast, *Chevron* deference does not ordinarily apply to guidance. This means that the position an agency has staked out in a guidance document does not exclude the court from reconsidering the factual and normative judgments the agency has made. For example, in *General Electric Co. v. Gilbert*,¹⁰⁶ the Supreme Court declined to defer to the EEOC's guidance that Title VII of the Civil Rights Act of 1964 covers discrimination on the basis of pregnancy.¹⁰⁷ The Court observed that "Congress, in enacting Title VII, did not confer upon

103. The difference between the included reasons that bear on a finding of "reasonableness," on the one hand, and the excluded reasons that a court might have otherwise used to fill out statutory gaps, on the other, is that the former are second-order evaluations of the agency's explanation, such as whether the agency has "articulate[d] a . . . 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); see Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 883, 887-88 (2001) (noting that *Chevron* step two overlaps with the arbitrary-and-capricious test). The latter excluded reasons are the first-order reasons the statute permits the agency to rely on within the scope of its discretion, e.g., efficiency, consistent treatment, or distributive justice. A reviewing court could find that the agency's argumentative use of these reasons was so internally contradictory as to render its interpretive choice unreasonable, or it could find that the agency had invoked a policy consideration that the legislature had explicitly excluded from the agency's consideration. But the court could not engage in a fresh reexamination of the relative strength of these primary reasons to determine if the agency's action was lawful.

104. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

105. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006) ("Agencies must comply with their own regulations."). Agencies sometimes use waivers to depart from legislative rules. But these waivers, if they are valid, are either permitted by the underlying statute or regulation or through an adjudicatory procedure that carries the same binding force as a regulation. See Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHI.-KENT L. REV. 1359, 1361-62 (1997).

106. 429 U.S. 125 (1976).

107. 29 C.F.R. § 1604.10(b) (1975).

the EEOC authority to promulgate rules or regulations.”¹⁰⁸ The EEOC guidelines therefore were “not controlling upon the courts by reason of their authority.”¹⁰⁹ Nonetheless, they did constitute a body of experience and informed judgment to which courts and litigants might properly resort for guidance. “The weight of such a judgment in a particular case,” the Court said, “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹¹⁰

This standard is often called “*Skidmore* deference,” but, as Peter Strauss has suggested, it is better understood as “*Skidmore* weight.”¹¹¹ Unlike *Chevron* deference, which requires a court to accept the agency’s interpretation within the “space” of delegated lawmaking power, *Skidmore* weight merely acknowledges that an agency’s nonbinding legal guidance will “warrant respect.”¹¹² The language from *Skidmore* that *Gilbert* invoked, however, does not clarify whether such “respect” is any different in kind or degree from the respect a court would owe to the opinion of a private party in, say, an amicus brief. Elsewhere in *Skidmore*, the Court suggested that there is indeed a difference between a reason offered by an official and the very same reason offered by a private person:

[T]he Administrator’s policies are made in pursuance of official duty They do determine the policy which will guide applications for enforcement . . . on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.¹¹³

There are two related claims here. The first is that an official’s pronouncement is “made in pursuance of official duty.”¹¹⁴ As such, when that official directs her pronouncement to another official within her agency or to a court, it deserves special consideration in light of the public trust vested in the issuing official’s

108. *General Electric*, 429 U.S. at 141.

109. *Id.* at 141-42 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

110. *Id.* at 142 (quoting *Skidmore*, 323 U.S. at 140).

111. Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143 (2012).

112. *Id.* at 1145; see *Skidmore*, 323 U.S. at 140.

113. *Skidmore*, 323 U.S. at 139-40.

114. *Id.* at 139.

office.¹¹⁵ All administrative officials must take an oath to “well and faithfully discharge the duties of the office.”¹¹⁶ As Richard Re has argued, this affirmation constitutes a voluntarily assumed moral obligation, a promise to the public to uphold the law.¹¹⁷ With the official’s assumption of this duty comes a concomitant right to a presumption that her construction of the law is sound.

The official has a right to have her opinion taken seriously by other officials because such comity is necessary to the performance of her own duty.¹¹⁸ Unless her claim has special purchase on the conduct of other officials, the coordinating function of legal order will give way to the disorder of discretion. The fact that an official has interpreted or applied the law she administers in a particular way is thus a valid reason for other officials to act in conformity with that interpretation or application, apart from the first-order merits of the issuing official’s view. Such other first-order reasons may be convincing enough to overcome the reason proffered by the fact that the issuing official has expressed a position in performance of her legal duties. But the official’s view should prevail even if, had she offered the same argument as a private person, first-order deliberative judgment might have yielded the opposite conclusion. As the Court has long held, a “public officer authorized by law” has a much wider set of responsibilities and powers than a private person to determine how public rights established by statute should be applied and enforced.¹¹⁹

The official is also entitled to this benefit of the doubt by other officials because they have similar duties to uphold the law. If an official treated another official’s pronouncement no differently than the argument of a private person, then she would undermine her own claims to authority, by virtue of her office, within the official community vis-à-vis the regulated parties. The institutional and professional incentives of the civil service to “insist that agency leaders follow the law” buttress the presumption that a tenured or politically appointed official issuing guidance will do so in a way that is consonant with her statutory

115. See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 147 (2006) (“[P]ublic trust remains the keystone of administrative governance.”).

116. 5 U.S.C. § 3331 (2018).

117. Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 303 (2016).

118. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1919–20 (2015) (“[C]ourts should give agencies more leeway to issue informal guidance without running afoul of the APA’s notice-and-comment requirements, on the grounds that such guidance is a crucial part of agency efforts to fulfill their internal oversight responsibilities and curtail lower-level discretion.”).

119. *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283–85 (1856).

powers, mandates, and limitations.¹²⁰ For these reasons, as Judge Edwards put it in *Center for Auto Safety v. National Highway Traffic Safety Administration*, guidance offers “a privileged viewpoint in the legal debate.”¹²¹ It is “privileged” in the sense that the position it states cannot be lightly dismissed by officials in the agency, across the executive branch, and in the judiciary.

This argument does not rest in the first instance on claims about agency expertise or hierarchical command. It is grounded directly on the duty of officials to implement the law and on the coordinating function of law that Raz identified. As Bruce Wyman observed, “[I]n administration many officers are found together. The purpose of the law of administration . . . is the science of common action.”¹²² Administrative law serves to bring consistency to the exercise of discretionary power. It requires the regular application of statutory and regulatory norms. Officials within an agency and between departments of government must therefore endeavor to give effect to one another’s understandings of their legal duties, to the extent that such comity is consistent with any applicable binding legal norms.

This claim raises the second argument from *Skidmore*. The Court observed that “[g]ood administration of the Act and good judicial administration” require that enforcement of the statute by the agency and the judiciary be brought in line unless there are “very good reasons” to do otherwise.¹²³ This is because the coordinating function of law favors consistency over variance. If the agency and the court were to take the statute to mean different things, then a single coordinating norm would give way to two—the norm understood by the agency and the norm understood by the court. Neither of these norms could be treated as truly exclusionary, since the other one would remain valid in an overlapping institutional field. Any actor who has business with both the agency and the court would have to weigh the one norm against the other in determining how to act. In cases, then, where a statute provides for both administrative and judicial enforcement, the agency’s and the court’s construction of the law should be the same, all else being equal. Guidance should thus have strong persuasive authority for a court.

Normative coordination becomes yet more essential within an agency. A court evaluates guidance from the standpoint of a coordinate branch of government with independent constitutional stature. It has legitimate reason to interrogate rigorously the legal warrant of executive action. Officials within an

120. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 543 (2015).

121. 452 F.3d 798, 808 (D.C. Cir. 2006).

122. WYMAN, *supra* note 22, at 14–15.

123. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

agency, by contrast, generally are engaged together in implementing a common set of statutory norms. They therefore have a comparatively stronger obligation to interpret and apply the law in the same or similar ways, in order to ensure that these legal rules retain the generally applicable character of rules on their way from statute, to regulation, to guidance, to a discrete act of adjudication or enforcement. There is a robust legal interest in giving consistent answers to contested questions that arise in similar cases, rather than deliberating anew in each case. It is here that the hierarchical quality of bureaucracy plays its role. An agency that adjudicates hundreds of thousands of claims per year will spend excessive time and resources deciding each claim if it has no concrete standards to which it can appeal, and the answers generated would likely be inconsistent with one another.¹²⁴ Maintenance of rule-governed official conduct instead requires some criteria to guide and cabin the exercise of discretion. It is therefore appropriate for guidance issued by an office with supervisory authority to influence the behavior of subordinate officials much more powerfully than the pronouncements of judicial tribunals in a separate department of government. As the U.S. District Court for the District of Columbia has held, guidance can establish “a rebuttable presumption, which preserves the agency’s discretion to deviate” from its terms.¹²⁵ Gillian Metzger and Kevin Stack accordingly describe guidance as offering a “*presumptively overriding (or presumptively primary)* reason for action” to lower-level officials.¹²⁶

One way of describing this presumption is as a “rule[] of thumb.”¹²⁷ Guidance provides agencies with a standard to apply in a given kind of situation, while also leaving open the possibility of departing from it if the balance of relevant reasons strongly suggests doing so. This kind of presumption is consistent

124. See MASHAW, *supra* note 23, at 104-07; see also *Annual Statistical Supplement to the Social Security Bulletin*, 2017, SOC. SECURITY ADMIN. 2.79 (Mar. 2018), <https://www.ssa.gov/policy/docs/statcomps/supplement/2017/supplement17.pdf> [<https://perma.cc/27DR-W6E3>] (reporting that in 2016 the Social Security Administration’s 1,340 administrative law judges adjudicated an average of 723 claims per judge).

125. *Catawba County v. EPA*, 571 F.3d 20, 34 (D.C. Cir. 2009) (emphasis omitted).

126. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1257 (2017).

127. RAZ, PRACTICAL REASON AND NORMS, *supra* note 49, at 59. Raz treats rules of thumb as a species of exclusionary rule. See *id.* at 60-61. I, however, am treating them as rules that should be followed until there is significant doubt about whether the rule is justified on the balance of first-order reasons. At that point, the rule of thumb becomes one reason among others for either taking or not taking a particular action. The rule of thumb may still tip the scales, in this case, and justify a different course of conduct than if it were not at hand. But it doesn’t exclude other reasons from consideration or operate at a different level of analysis from the other reasons that apply to the situation.

with the rule functioning as a binding norm for some of the individual actors who make up the legal agent. Recall that in *Texas v. United States*, the court concluded that DAPA's enforcement memorandum was probably binding because under DACA, deferred-action status was rarely denied, and there was a detailed manual for implementing a program that did not include an option to grant the status if the criteria were not met.¹²⁸ But these facts might only show that any reasons for granting or denying deferred action other than those delineated in the memorandum would rarely overcome the overriding, but not truly exclusionary, reasons endorsed by the memorandum. The precatory language of the guidance itself would support that conclusion. The fact that some initial denials of deferred action under the criteria were reversed by higher-level officials also casts doubt on the conclusion that the criteria were truly exclusionary.¹²⁹ The Fifth Circuit's analysis therefore significantly overstated the binding qualities of DACA and DAPA.

Guidance binds an official when that official will invariably adhere to its terms in the face of weighty countervailing considerations. But even that level of binding effect on some members of an agency's staff would not necessarily render guidance unlawful. The power to supervise the conduct of subordinate officials inheres in the statutory and ultimately constitutional duties of superior officials.¹³⁰ This ensures a level of regularity in the application of law that prevents a potentially ambiguous statutory norm from devolving into a wide range of discretionary and perhaps arbitrary outcomes. For this reason, a supervisor's duty to faithfully implement the law incorporates a right to direct the conduct of subordinates with respect to statutory duties for which the supervisor is responsible.

What the supervisory official may not do through guidance is tie the hands of the agency in whose name she acts and declare that deviation from the guidance would be impermissible under any circumstance. Exclusionary orders of that kind can be achieved only through an agency statement that has the force of law, such as a legislative rule or an adjudicative order.¹³¹ This latter kind of

128. 809 F.3d 134, 175 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); *see also* *Texas v. United States*, 86 F. Supp. 3d 591, 669 & n.101 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, *aff'd by an equally divided court*, 136 S. Ct. 2271.

129. *See Texas*, 809 F.3d at 175; *Texas*, 86 F. Supp. 3d at 669 & n.101.

130. Metzger, *supra* note 118, at 1879 (observing that the Take Care Clause "impl[ies] a hierarchical structure for federal administration, under which lower government officials act subject to higher-level superintendence").

131. *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("An administrative agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents."). Procedural rules may have the force of law as well. Thomas W. Merrill, *The Mead Doctrine*:

“agency self-regulation” acts as a precommitment mechanism, giving an official assurance that the agency will definitely behave in a certain way as long as the document is in effect.¹³² Such self-obligation is grounded in the due process principle that an agency must follow its own rules in dealing with the public.¹³³ An agency’s duty to follow its own rules does not apply to a valid guidance document, however.¹³⁴ That is because procedurally valid guidance will generally provide, or be used in a manner that demonstrates, that the agency is willing and able to deviate from its terms before taking an action that determines private rights and duties. That flexible mindset could be shown in practice by providing formal or informal opportunities for the issuing office or another designated office to consider and act on persuasive comments on or objections to the guidance from any affected party.

Both the White House’s Office of Management and Budget and the Administrative Conference of the United States adhere to this view, maintaining that a guidance document that lacks the force of law may nonetheless permissibly bind frontline agency personnel so long as the agency itself remains free to depart from it.¹³⁵ Likewise, the Food and Drug Administration (FDA), which was specifically empowered by Congress to issue “guidance,”¹³⁶ states in a regulation: “Although guidance documents do not legally bind FDA, they represent the agency’s current thinking. Therefore, FDA employees may depart from guidance documents only with appropriate justification and supervisory concurrence.”¹³⁷

Rules and Standards, Meta-Rules and Meta-Standards, 54 ADMIN. L. REV. 807, 831 (2002); e.g., *United States v. Nixon*, 418 U.S. 683, 695 (1974) (stating that a regulation delegating authority from the Attorney General to the Special Prosecutor had “the force of law”).

132. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 861-62 (2009).

133. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954).

134. See Merrill, *supra* note 105, at 596.

135. Administrative Conference of the United States: Adoption of Regulations, 82 Fed. Reg. 61728, 61736 (Dec. 29, 2017) (“Although a policy statement should not bind an agency as a whole, it is sometimes appropriate for an agency . . . to direct some of its employees to act in conformity with a policy statement. . . . [A] policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement. Agency review should be available in cases in which frontline officials fail to follow policy statements in conformity with which they are properly directed to act.”); Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3436 (Jan. 25, 2007) (“[G]iven their legally nonbinding nature, significant guidance documents should not include mandatory language such as ‘shall,’ ‘must,’ ‘required’ or ‘requirement,’ unless the agency is using these words to describe a statutory or regulatory requirement, or the language is addressed to agency staff and will not foreclose consideration by the agency of positions advanced by affected private parties.”).

136. 21 U.S.C. § 371(h) (2018).

137. 21 C.F.R. § 10.115(d)(3) (2018).

The distinction between “the agency” and its “frontline” decision makers is crucial. By giving guidance that binds its lower-level personnel, an agency may reserve its statutorily vested discretion while ensuring that that discretion is exercised uniformly at the interface between public officers and the private persons over whom they exercise power.¹³⁸ Hiroshi Motomura describes this kind of official practice as “macro discretion,” in which the agency sets general priorities for enforcement.¹³⁹ Because of the resistance of frontline personnel to deferred-action policies, “it took the adoption of DACA as a formal program to limit unpredictable and arbitrary decisions and to bring some consistency and predictability to the nationwide pattern of prosecutorial discretion decisions.”¹⁴⁰ Adam Cox and Cristina Rodríguez accordingly defend DAPA and DACA by arguing that in limiting the discretion of “the faceless prosecutor,” the programs advanced rule-of-law values such as transparency and consistency.¹⁴¹ Like a constitution, a statute, or a regulation, internal administrative law orders governmental action according to reasons. But unlike these other forms of law, internal administrative law does not exclude any other reasons from consideration in the

138. The statement in *Community Nutrition Institute v. Young*, relied on in *Texas v. United States*, that a guidance document must “genuinely leave[] the agency and its decision-makers free to exercise discretion,” *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) (quoting *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995)), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016), has been much criticized, on the grounds that it would cause agencies either to leave their frontline officers with unfettered discretion or to conceal the principles that were in fact constraining their discretion. See 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.3, at 424 (5th ed. 2010); Levin, *supra* note 11, at 303 (“The . . . reasoning of *Community Nutrition* has met with severe criticism on the ground that it interferes with salutary efforts by agency leadership to prevent staff members from administering programs in an arbitrary or unequal fashion.”); accord Brief of Administrative Law Scholars as Amici Curiae in Support of Petitioners at 15–16, *Texas*, 136 S. Ct. 2271 (No. 15–674). But note that *Community Nutrition* does not technically conflict with the proposition that guidance may bind frontline personnel, so long as that decision might be reversed by a superior official. A statement of policy that did not leave *any* of the agency’s “decisionmakers,” including superior officers and political appointees, free to exercise discretion with regards to its subject matter would indeed be binding, and therefore invalid, unless promulgated through notice-and-comment or other rulemaking procedure.

139. HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 27 (2014) (emphasis omitted).

140. *Id.* at 205.

141. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 224 (2015); see also Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 63 (2015) (agreeing that DAPA and DACA are “programmatic mechanisms to ensure the consistent, transparent and accountable exercise of prosecutorial discretion”); Hiroshi Motomura, *The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2015) (explaining the important role of discretion in immigration law and asking whether exercise of such discretion respects rule of law).

final administrative or judicial disposition of an individual case. Instead, it offers a privileged consideration—privileged by virtue of the concomitant rights and duties of the office that issued it—that ought not be overcome except for “very good reasons.”¹⁴²

In determining whether guidance is procedurally valid, courts also often ask whether the guidance document in question binds the public as well as whether it binds the agency or officials within it.¹⁴³ The binding effect on the public should not, however, form an independent basis for assessing guidance’s procedural validity. To be sure, guidance unlawfully binds the public if the agency treats the guidance as determinative of private legal rights and duties.¹⁴⁴ When an agency uses guidance in that manner, the public is bound simply because the guidance binds the agency in its determination of the legal status of private parties. Guidance is impermissibly binding if the agency says it cannot depart from it, or never does depart from it, even in the face of weighty reasons. When an agency insists on guidance with that kind of rigidity, the guidance functions as a legal rule that determines outcomes. Agencies are supposed to create such rules only through their delegated rulemaking and adjudicatory authority, not through guidance documents that are exempt from such procedures.

There is another sense of “binding the public” that looks beyond agency statements and action to the likely effects of guidance on regulated persons. Yet that application of the term confuses legal obligation with coercive effects. The D.C. Circuit at one point endorsed Robert Anthony’s view that a document is binding “if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences.”¹⁴⁵ This principle sweeps far too broadly. The APA, as amended by the Freedom of Information Act, states that an “opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency” only if properly published.¹⁴⁶

¹⁴². *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹⁴³. *Catawba County v. EPA*, 571 F.3d 20, 33 (D.C. Cir. 2009) (“[W]hether an agency action is the type of action that must undergo notice and comment depends on ‘whether the agency action binds private parties or the agency itself with the “force of law.”’” (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002))).

¹⁴⁴. *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 39 (D.C. Cir. 1974) (noting that “[w]hen the agency states that in subsequent proceedings it will thoroughly consider not only the policy’s applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy” and not a “binding norm”).

¹⁴⁵. *Gen. Elec.*, 290 F.3d at 383 (quoting Anthony, *supra* note 25, at 1328–29).

¹⁴⁶. 5 U.S.C. § 552(a)(2)(E) (2018).

This indicates that an agency *can* use a published guidance document to provide at least partial justification for an enforcement action and thus can use it to indicate to private parties that adverse consequences may flow from their failure to comply with the document.¹⁴⁷

This statutory provision makes explicit what was left implicit in the APA's original guidance exception: guidance can appropriately constrain and justify government conduct in a way that alters private conduct. One of the most important, widely acknowledged functions of guidance is thus to provide notice to affected parties of the agency's policy.¹⁴⁸ But guidance will fail to provide such notice if it does not in fact accurately communicate how enforcement discretion will ordinarily be exercised. A general statement of policy must provide some reliable indicator of official behavior if it is to inform people of the agency's likely actions and allow people to act on that basis. The rule-of-law interests in equal, predictable, and consistent treatment similarly require that guidance faithfully represent how the agency intends to proceed. Guidance "facilitates long range planning" and "promotes uniformity in areas of national concern" only if it has a general and material influence on the behavior of public officials.¹⁴⁹ When private parties react to such guidance by conforming their conduct to it, that is not necessarily an indication that they have been improperly coerced. As I will argue in Part II, the external effects of guidance on private conduct may turn on the normative commitments of the affected parties rather than be driven solely by an effort to avoid government sanction.

While predictable administration is itself a practical good, I have argued that guidance's authority within the official community has deeper, deontological roots. When one official with authority to implement the law concludes that its faithful execution requires a certain policy, that conclusion has particular weight for other officials with obligations to interpret and enforce law. The degree of weight it is due will depend on the institutional positions of the issuing official and the official who applies or evaluates the guidance. The force of guidance will only be persuasive for a court, whereas it may be controlling for subordinates

¹⁴⁷. Strauss, *supra* note 24, at 811-12.

¹⁴⁸. See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007) ("Guidance documents, used properly, can . . . enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties."); Anthony, *supra* note 25, at 1317 ("The use of nonlegislative policy documents generally serves the important function of informing staff and the public about agency positions, and in the great majority of instances is proper and indeed very valuable."); Metzger & Stack, *supra* note 126, at 1258 (noting that internal administrative law, including guidance, "provide[s] the public and agency staff with notice of the agency's views, including the reasons for the agency's position").

¹⁴⁹. *Pac. Gas & Elec.*, 506 F.2d at 38.

within the agency of an office that issues it. By creating a zone of generally consistent but nonetheless flexible official reasoning tethered to the binding norms of law, guidance extends the reach of legal norms while reducing their obligatory power at the margins.

Courts therefore need a test for the guidance exception that allows guidance to promote the uniform application of law without converting it into an authoritative rule. The appropriate test is whether the guidance, by its terms or in its operation, leaves open the possibility that a private party could contest its substantive validity and appropriateness in a proceeding before the agency or that the agency on its own initiative could depart from it. That is, the agency must remain open to the argument that the guidance abuses discretion, misconstrues the agency's legal authority, is not well justified, or otherwise should not be used to resolve a case to which it would normally apply. As the D.C. Circuit has held, a general statement of policy cannot be "finally determinative of the rights or issues to which it is addressed."¹⁵⁰ This does not mean that the agency can place no weight upon guidance in resolving a particular case.¹⁵¹ Ronald Levin notes that guidance can properly play a "role in the agency's deliberations or written explanation."¹⁵² If guidance only creates a "rebuttable presumption" that a final action will be taken, then it is not binding in the relevant sense.¹⁵³

II. EXTERNAL EFFECTS OF GUIDANCE

Thus far I have focused primarily on how guidance operates as law inside the state. This analysis, on its own, might give the appearance that guidance is merely talk between officials and not something that persons outside the government need to concern themselves with. As the implementation of DACA makes clear, however, guidance is often much more than an intramural affair. Through the DACA program, DHS granted deferred action to over seven hundred thousand people, and DAPA might have done the same for over four million.¹⁵⁴ These deferred-action statuses would, by the operation of independent statutory authority and regulatory provisions, enable recipients to apply for other legal benefits.¹⁵⁵ The internal circulation of nonbinding directives thus

^{150.} *Id.*

^{151.} See, e.g., *Steeltech, Ltd. v. EPA*, 273 F.3d 652, 655-56 (6th Cir. 2001).

^{152.} Levin, *supra* note 11, at 298.

^{153.} *Catawba County v. EPA*, 571 F.3d 20, 34 (D.C. Cir. 2009) (emphasis omitted).

^{154.} See *Texas v. United States*, 86 F. Supp. 3d 591, 607, 609, 670 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

^{155.} See *Texas*, 809 F.3d at 148.

yields major social and legal consequences. These consequences arise in part because of the coercive powers that guidance conditions, channels, or holds in check.¹⁵⁶ But I aim to situate this coercive potential in a broader, intrinsically communicative power: guidance can properly specify, or even alter, the normative commitments of private parties without carrying the mandate of binding law.

To explain guidance's normative status for private parties, I turn to the jurisprudence of H.L.A. Hart, whose landmark work, *The Concept of Law*, has set the stage for contemporary debate concerning the relationship between "law, coercion, and morality."¹⁵⁷ In Part I above, Raz's concept of authority helped to distinguish binding legislative rules from guidance. While the former excludes certain reasons and courses of conduct from official consideration, the latter provides reasons for official action but does not exclude any other reasons or courses of conduct. Hart's concept of the "internal point of view" of law clarifies what it means for guidance to serve as a reason for action of this sort. For Hart, law is normative in the sense that it not only predicts government behavior but is treated as obligatory or evaluative. Agency officials hold this point of view by virtue of the duties of their office. They issue guidance to explain to others what they take these obligations to mean. Private parties may in some cases adopt this point of view so that they too take an internal perspective on regulatory norms. They may treat the existence of the guidance as a reason to act or not to act in their businesses or in their relations with others. And they may do so even though the guidance lays no claim to binding authority.

Guidance therefore has consequences for private parties' practical reasoning. Nonbinding policies can alter private persons' conceptions of their legal interests and liabilities such that they adjust their conduct to conform to the position stated in the guidance. Guidance thus helps shape public legal discourse and practice beyond the walls of the state without committing the agency or the public to any obligatory standard of conduct. As we will see in Part IV, this conclusion has implications for the durability of guidance and the terms on which it may be rescinded.

I lay the groundwork for that discussion by introducing Hart's idea of the internal point of view in Section II.A. In Section II.B, I explain how guidance's effects on private practical reasoning relate to the finality and ripeness doctrines

¹⁵⁶ Parrillo, *supra* note 36, at 14.

¹⁵⁷ HART, *supra* note 55, at vii.

of pre-enforcement judicial review. “Legal consequences” may “flow” from guidance without generating a determinate right or obligation.¹⁵⁸ The legal consequences consist of alterations in official legal reasoning that trigger alterations in private practical reasoning. But these consequences fall well short of binding alterations in legal obligations. Guidance can thus be “final agency action” and yet fall within the APA’s exemption from notice-and-comment rulemaking.¹⁵⁹ However, guidance is often not “ripe” for judicial evaluation where the agency’s application of it to a particular party would turn on unresolved factual issues.¹⁶⁰ The more guidance takes the form of an open-ended list of factors to be considered in handling particular cases and the less it lays down categorical principles that apply to frontline officials, the less appropriate it is to evaluate its merits prior to enforcement.

A. *Externalizing the “Internal Point of View”*

H.L.A. Hart famously argued that a theory of law focused solely on its coercive power — “orders backed by threats” — misses something important about legal practice. “[W]here rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying such sanctions.”¹⁶¹ Law speaks in the language of “shall,” “right,” “duty,” and “wrong,” because of this normative content. Those who recognize this evaluative dimension of legal rules have an attitude that Hart calls the “internal point of view.”¹⁶² Where a legal system exists, at least some persons treat its rules as norms to guide and judge conduct. This does not necessarily mean that they must be motivated to use the law in this way by a belief

158. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

159. *See* 5 U.S.C. § 704 (2018).

160. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

161. HART, *supra* note 55, at 24, 82.

162. *Id.* at 86-88; *see also* Jeffrey Kaplan, *Attitude and the Normativity of Law*, 36 LAW & PHIL. 469, 474 (2017) (“[T]he internal point of view involves taking some pattern of behavior as a standard against which behavior is evaluated.”).

that its norms are morally obligatory.¹⁶³ But it does require a “critical reflective attitude to certain patterns of behavior as a common standard.”¹⁶⁴

According to Hart, the internal point of view need not be accepted by all persons to whom the rules apply. People might simply obey the law because of fear of sanction, autonomous moral judgments, or for some other reason. The internal point of view, however, “must be effectively accepted as common public standards of official behavior *by its officials*.”¹⁶⁵ At a minimum, the people who interpret and apply the law must reason on the basis of the rules. Otherwise, those rules will not govern their conduct and their coercive powers will operate without law. In a “healthy society,” where the people believe the law is legitimate, they too will adopt the internal point of view and conclude that they ought to act a certain way because the law says so, not merely because someone in a uniform with a gun might make them.¹⁶⁶

Hart’s observations help make sense of the expressive function guidance can play. Especially where guidance is directed to private parties, rather than solely to persons within the agency, it can extend the internal point of view to a wider circle of persons. Some private actors would then share with officials the sense that regulatory requirements are obligatory, rather than mere notice of when the state will use its coercive power. In this way, guidance can link the discourse of the state with the discourse of civil society, increasing the evaluative interchange between the public and its government. As noted in Part I, all administrative officials take an oath that they will “well and faithfully discharge the duties of [their] office.”¹⁶⁷ An office that issues guidance is often an office whose duties

163. HART, *supra* note 55, at 198–99 (“Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive themselves as morally bound to do so, though the system will be most stable when they do so.”); Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 *RATIO JURIS* 164, 170 n.3 (2016). Some positivists do think that the internal point of view consists in a sense of moral obligation, but only from that internal perspective. *E.g.*, SCOTT J. SHAPIRO, *LEGALITY* 186 (2011) (“According to [the legal point of view], those who are authorized by the norms of legal institutions have moral legitimacy and, when they act in accordance with those norms, they generate a moral obligation to obey.”); *see also* Jules Coleman, *Authority and Reason*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 287, 312 (Robert P. George ed., 1996) (“[T]he practice of giving reasons is public and itself presupposes the moral values of autonomy and equality. The commitment to equality follows from the fact that a practice of offering reasons and inviting criticism can arise only among people who believe that they owe it to others to justify their actions to others.”).

164. HART, *supra* note 55, at 56.

165. *Id.* at 113 (emphasis added).

166. *Id.*

167. 5 U.S.C. § 3331 (2018); *see supra* text accompanying note 116.

are specifically legal: to interpret, implement, and enforce statutory law and the regulations that flow from it, with an eye to the purposes the underlying law is meant to accomplish.¹⁶⁸ Therefore, these officials *must* treat the law they enforce as a norm to guide their conduct, and not merely as a threat to be avoided. When they issue guidance that reaches a public audience, they can convey this point of view to that audience.

Private persons may simply treat the guidance as a prediction about how the agency is likely to use its enforcement powers and plan accordingly. In that case, the internal, official point of view has been communicated but not accepted. But it is also possible that guidance will have more normative purchase. First, a private party might fundamentally seek to avoid regulatory sanctions, but their way of doing so is to adopt a general norm: follow the guidance. In that case, they have “accepted” the norm in Hart’s sense.¹⁶⁹ If they determine on their own that the best way to go forward is to conform to the guidance, then the guidance becomes a norm for them, even if their reasons for adopting that norm are purely instrumental.¹⁷⁰ Even in cases where coercive pressures motivate behavior, guidance can take on normative characteristics. Once people respond to that coercive pressure by using the guidance as an evaluative yardstick for their own or others’ conduct, the nonbinding norm has been internalized as a standard of conduct.

A second possibility is that some people may have professional and organizational commitments to the guidance. As Nicholas Parrillo has observed in a detailed empirical study on the use of guidance, “[p]ractical day-to-day decisions on a firm’s adherence to guidance often fall to employees whose backgrounds, socialization, or career incentives may motivate them to follow guidance.”¹⁷¹ The growth of corporate compliance departments has created a professional cadre who must usually treat guidance as a norm with which to evaluate the conduct of other persons within their firms, rather than only as a prediction about how the government will act if the firm behaves in a certain way.¹⁷² A compliance officer’s obligations and powers as an employee of the firm

168. Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 363 (2012).

169. HART, *supra* note 55, at 56; Green, *supra* note 163, at 170 & n.3.

170. See RAZ, THE MORALITY OF FREEDOM, *supra* note 49, at 53 (“[T]he normal way to establish . . . authority . . . involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.” (emphasis omitted)).

171. Parrillo, *supra* note 36, at 56.

172. See Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2124-25 (2016) (“Formal legal rules may be more precise in defining firms’ responsibilities and, in any event, contain an avenue of appeal to public authority—the courts—when

are intrinsically linked to the officer's ability to communicate and instill the content of guidance as a standard to which corporate behavior ought to conform.

Finally, some people may consider the underlying statute to be worthy of obedience, either because they believe they have a general duty to obey the law, or because the content of that particular statute is consonant with their personal obligations. When an agency whose duty is to implement a law expresses what it thinks the law means, these persons are likely to treat such guidance as clarifying their existing obligations.¹⁷³ Knowing less about the content and mechanics of the law than the agency but still committed to the law's general principles, such persons may understand the guidance to have concretized some of their abstract rights and duties. Because of the general terms in which regulatory laws are drafted, this normative clarification may go so far as to alter the substance of individuals' normative commitments from what they were before.

In this last case, at least, the guidance may have a moral impact on a private person.¹⁷⁴ Suppose, for example, that employer *M* has already accepted the general norm, expressed by the Civil Rights Act of 1964, that she may not take an employment action on the basis of an individual's race or sex.¹⁷⁵ She wants to ensure that her clients and employees are safe, so she currently has a policy not to hire any person who has a criminal record. Enrolled to receive an equal employment opportunity compliance newsletter, she learns that the EEOC has just

they are unclear in meaning or overbroad in scope. By contrast, governance structures are designed to supply constraints that exceed basic legal commands. The compliance function, in particular, is designed to inculcate norms of behavior that exceed narrow legal obligations." (footnote omitted)); Rory Van Loo, *Regulatory Monitors*, 119 COLUM. L. REV. 369, 399 (2019) ("[T]he compliance department has emerged, in many firms, as the co-equal of the legal department." . . . Compliance departments review employees' practices or consumer complaints not only to ensure that the company is not breaking the letter of the law as determined by the legal department but in many cases to tell the company how to 'comply with the spirit of the law.'" (first quoting Griffith, *supra*, at 2077; and then quoting Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 149 (2014))).

173. Cf. ANNA STILZ, *LIBERAL LOYALTY: FREEDOM, OBLIGATION, AND THE STATE* 55 (2009) ("[For] Kant . . . the precise content of [natural duties of justice] requires further specification in terms of positive law, and this content must be imposed from a public and objective perspective."). I do not mean to adopt Stilz's or Kant's position that the state is necessary to fulfill prepolitical natural rights and duties. But their argument that positive law is necessary to render preexisting obligations intelligible applies equally well to guidance: if we accept positive law as morally binding, then we may need official guidance from the state to define the precise content of that positive moral obligation.

174. See Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014). A similar story could also be told about the compliance officer.

175. 42 U.S.C. § 2000e-2(a) (2018).

issued guidance on the use of arrest and conviction records in employment decisions.¹⁷⁶

M learns from the guidance that “[a]rrest and incarceration rates are particularly high for African American and Hispanic men” and that “African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population.”¹⁷⁷ She also learns the existing, binding law that even a facially neutral policy, like refusal to hire persons convicted of a crime, may constitute unlawful discrimination if it produces a racially disparate impact, and is not “job related” and “consistent with business necessity.”¹⁷⁸ She thinks that her safety concern might qualify as “job related” until she reads that such a “blanket exclusion” may in certain circumstances lead EEOC to conclude that the policy was unlawfully discriminatory.¹⁷⁹

Worried that she was incorrect about the content of her obligations, *M* looks for guidance on how to proceed. She sees that

the Commission believes employers will consistently meet the “job related and consistent with business necessity defense” [if] . . . [t]he employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job . . . and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.¹⁸⁰

M’s friend had told her to do roughly the same thing just last week, but she dismissed her argument on the grounds that it would be too burdensome, and, anyway, she has no obligation to hire criminals. She takes the same argument more seriously, however, when it comes from a government body with responsibility to enforce the law. Thus, now that EEOC has articulated the same claim as her friend, she changes her policy to conform to the guidance because she finds that her other reasons are insufficient to overcome the presumption that the EEOC’s specification of her obligation not to discriminate was correct. In this case, the fact that the EEOC has defined “job related” changes her “moral

176. *Arrest and Conviction Guidance*, *supra* note 2.

177. *Id.* § II.

178. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971).

179. *Arrest and Conviction Guidance*, *supra* note 2, § V.B.7.

180. *Id.* § I.

profile.”¹⁸¹ Unlike other forms of law, the guidance does not “exclud[e] the relevance of other considerations,” but it nonetheless may “change what we are obligated to do.”¹⁸²

This kind of influence falls short of legally binding effect. The guidance does not require any particular course of action from a private person. It does not make conduct lawful or unlawful, but it may nonetheless shape individuals’ practical reasoning, in terms of what they ought to do strategically, to advance their own ends; professionally, to meet the duties of their private office; or morally, to fulfill their all-things-considered obligations. This influence arises because the terms of the guidance intersect with autonomous judgments and commitments in a way that can shape reasoning and conduct. Guidance’s legal consequences within the official community thus create a wider set of normative consequences for persons more broadly.

B. The Reviewability of Guidance: Title VII Enforcement Policy

Nonbinding guidance can alter private persons’ conception of the law and their related social and moral obligations. People can adopt the position stated in the guidance either as a prudential means to achieve their own objectives, or because the guidance triggers them to act on existing obligations, or because they credit the guidance with having reasonably specified the content of those obligations. These effects come into play where, as explained above, the private party is primed to treat guidance as informative or useful for their practical reasoning. The significance of these effects will turn on a number of factors beyond the issuing agency’s control, such as the underlying powers conferred on the agency by statute, the extent to which professional norms require conformity to official pronouncements, and the degree to which the statute has bearing on the moral obligations of any particular person. Under some circumstances, at least, these exogenous factors could induce a major shift in social behavior without the agency taking any further formal action to enforce the guidance’s terms. If the guidance puts forward a legal position that is erroneous, then, it may cause individuals to take action not required or even foreclosed by law.

These effects and risks raise the issue of whether guidance may be judicially reviewable under the APA prior to enforcement. The two reviewability doctrines most applicable in this context are finality and ripeness. The former ensures judicial review only of agency actions that actually affect the legal rights of private persons, while the latter limits review to those issues that are appropriate for

¹⁸¹. Greenberg, *supra* note 174, at 1308.

¹⁸². *Id.* at 1304-05.

review and that do not require further factual development. This Section analyzes such questions of finality and ripeness with regard to guidance, concluding that the internal legal consequences of guidance on official reasoning often make it final, but that guidance with flexible and precatory terms will rarely be ripe for review.

An agency action becomes “final” when it is the “‘consummation’ of the agency’s decision-making process” and is “one by which ‘rights or obligations have been determined’ or from which ‘legal consequences will flow.’”¹⁸³ Because guidance is a nonexclusionary legal norm, it does not determine any rights or obligations. That kind of exclusionary force is generally the province of regulations and binding adjudicatory orders. Nonetheless, legal consequences may flow from guidance where the guidance alters the way agency personnel will evaluate the conduct of regulated parties and where private parties adopt the position stated in the guidance for strategic, professional, or moral reasons. When the guidance does not have the character of an interim document that holds the place of a rule, but rather represents the agency’s considered position for the foreseeable future, it represents the culmination of the agency’s decision-making process to the same extent that a rule does. Guidance can thus qualify as “final.”

Courts sometimes make the mistake of eliding the finality inquiry with a determination of the guidance’s procedural validity—that is, whether the guidance is impermissibly binding.¹⁸⁴ If the guidance is binding, these opinions suggest, it is final and procedurally invalid. If it is nonbinding, it is not final and its validity is not reviewable prior to administrative enforcement. This tendency to conflate finality and validity undermines the legitimate legal character and effect of guidance, leading courts sometimes to treat guidance as both reviewable and invalid when it structures agency discretion or substantially affects the regulated public.

It is essential to distinguish the valid legal effects of guidance—effects on official and private reasoning—from categorical alterations in legal duties that cannot be accomplished through guidance. In fact, the finality doctrine’s distinction between the determination of rights and duties and the generation of legal con-

183. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (emphasis added) (first quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); and then quoting *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

184. See, e.g., *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014); *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011); *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (2006); *Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 14–16 (D.C. Cir. 2005) (“[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review.”).

sequences ably maps onto this distinction. Guidance will often have legal consequences that satisfy the finality inquiry without thereby converting it into a procedurally invalid legislative rule. Consider, for example, Texas's suit against the EEOC over the agency's Arrest and Conviction Guidance.¹⁸⁵ Some Texas state agencies have a blanket policy not to hire persons convicted of a felony.¹⁸⁶ An applicant denied employment on that ground filed a charge with the EEOC.¹⁸⁷ While it is unclear whether this applicant or his attorney actually knew about the EEOC's recently promulgated Guidance, Texas claimed that the charge showed that the Guidance's "impact on the State is far from theoretical."¹⁸⁸ It is reasonable to assume, as Texas argued, that someone with a criminal record who was denied employment would take the new guidance as a cue that their claim of unlawful discrimination was colorable. Indeed, the Guidance states that it is in part "intend[ed] . . . for use . . . by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records."¹⁸⁹

Texas claimed that the Guidance—which it labeled the "Felon-Hiring Rule"—violated the APA, because it was a procedurally invalid legislative rule, issued without notice and comment.¹⁹⁰ The district court dismissed Texas's suit on finality and ripeness grounds,¹⁹¹ but a panel of the Fifth Circuit reversed and

¹⁸⁵. *Texas v. EEOC*, No. 5:13-CV-255-C, 2014 WL 4782992 (N.D. Tex. Aug. 20, 2014), *rev'd*, 827 F.3d 372, 376 (5th Cir.), *reh'g en banc granted, opinion withdrawn*, 838 F.3d 511 (5th Cir. 2016) (en banc).

¹⁸⁶. *Texas*, 827 F.3d at 376.

¹⁸⁷. First Amended Complaint for Declaratory and Injunctive Relief at Exhibit C, D, *Texas*, No. 5:13-cv-00255-C (Mar. 18, 2014), 2014 WL 1372008 [hereinafter First Amended Complaint].

¹⁸⁸. *Id.* at 14.

¹⁸⁹. *Arrest and Conviction Guidance*, *supra* note 2.

¹⁹⁰. First Amended Complaint, *supra* note 187, at 14-17.

¹⁹¹. *Texas*, 2014 WL 4782992, at *4.

remanded,¹⁹² concluding that the Guidance was indeed final agency action.¹⁹³ In particular, the court found that the Guidance’s “provisions are taken to be conclusive,” providing a “safe harbor” for employers who conform to terms of the Guidance.

The assertion that the Guidance creates “legal consequences” is important because it maintains that legal effects can follow even where an agency lacks any power to enforce the law against a party to the dispute. The EEOC does not have authority to sue a state for a violation of Title VII; that power lies with the Attorney General, to whom the EEOC may refer complaints against public employers if it determines that there is “reasonable cause” to believe that the charge has merit.¹⁹⁴ Moreover, a reasonable-cause determination does not carry legal weight in court—judicial proceedings to enforce Title VII are *de novo*.¹⁹⁵ How, then, could the EEOC’s guidance generate legal consequences? The Fifth Circuit reasoned:

[B]y binding itself to the Guidance’s standards and directives, the EEOC has assured employers nation-wide, public and private, that, so long as they conform their conduct to the Guidance’s “safe harbor” requirements, they will not be deemed to be in violation of Title VII by EEOC

192. *Texas v. EEOC*, 827 F.3d 372 (5th Cir.), *reh’g en banc granted, opinion withdrawn*, 838 F.3d 511 (5th Cir. 2016) (en banc). The Fifth Circuit withdrew the panel opinion and remanded to the district court in light of *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), which held that the Army Corps’s “jurisdictional determinations” concerning whether property contained “waters of the United States” was “final agency action.” In its *per curiam* opinion, the court noted: “We recognize that *Hawkes* may or may not affect other issues raised in this appeal, and we leave it to the district court in the first instance to reconsider this case, and its opinion, in its entirety and to address the implications of *Hawkes* for this case.” *Texas*, 838 F.3d at 511. On remand, the district court ruled that the EEOC Guidance was an invalidly promulgated legislative rule, implying that it determined that the Guidance was reviewable final agency action. *Texas v. EEOC*, No. 5:3-CV-255-C, 2018 U.S. Dist. LEXIS 30558, at *6 (N.D. Tex. Feb. 1, 2018). I discuss the withdrawn panel decision in some depth below because it helps to explore the nature of the legal consequences that guidance generates, as well as how to properly approach pre-enforcement judicial review of guidance. I discuss the relationship between the withdrawn opinion, *Hawkes*, and the district court’s judgment on remand at note 215, *infra*.

193. *Texas*, 827 F.3d at 380 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

194. 42 U.S.C. § 2000e-5(b), (f) (2018).

195. *McCottrell v. EEOC*, 726 F.2d 350, 351-52 (7th Cir. 1983) (explaining that “a plaintiff is entitled to *de novo* review of his claims” in district court after the EEOC has completed its reasonable-cause investigation).

investigators. Thus, they will avoid referral to the U.S. Attorney General for prosecution.¹⁹⁶

There is much to dispute in the Fifth Circuit's reasoning, most obviously that the plain meaning of the provision at issue does not constitute a safe harbor that binds the agency.¹⁹⁷ At best it offers some suggestion as to where on the open waters of employment practices an enterprise is likely to find smooth sailing. There is no sense in which the Guidance "determine[s]" anyone's "rights or obligations."¹⁹⁸

Nonetheless, it is true that legal consequences, in the sense developed in this Article, flow from the Guidance. The Guidance is "intend[ed] . . . for use by . . . EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions."¹⁹⁹ Because it represents a presumptive reason for action by the Commission and its personnel, the EEOC's Guidance is likely to shape reasonable-cause investigations concerning complainants convicted of crimes or employer policies regarding arrest-and-conviction records. If the EEOC conducted such an investigation against Texas pursuant to a complaint and concluded that reasonable cause existed, officials in the Department of Justice would appropriately accord official respect to that determination in deciding whether to proceed with a public enforcement action. For Commission staff and other officials, it offers a privileged reason to make a decision, though it is not determinative of the exercise of the Commission's powers or of any private person's legal rights and duties. Likewise, the EEOC's Guidance

196. *Texas*, 827 F.3d at 386.

197. See *Arrest and Conviction Guidance*, *supra* note 2, § I (listing two circumstances where "the Commission *believes* employers will *consistently* meet the 'job related and consistent with business necessity' defense" (emphasis added)). One such circumstance is where the employer undertakes a "targeted screen." See *supra* text accompanying note 180. One can imagine situations where meeting the targeted-screen provision would not insulate an employer from a reasonable-cause determination and Title VII liability. For example, suppose that, in rendering individual assessments of a black applicant and a white applicant, each with a similar conviction record, the decision maker granted the white applicant a position and denied it to the black applicant. The fact that the employer complied with the targeted-screen provision would not insulate them from disparate treatment liability in that case. And there are other reasons aside from the plain meaning of the provision's text to conclude that it does not constitute a safe harbor. The EEOC has the statutory power to grant a safe harbor through a "written interpretation or opinion of the Commission." 42 U.S.C. § 2000e-12(b). The EEOC, however, has defined this term, by procedural regulation, in a way that excludes the Arrest and Conviction Guidance. 29 C.F.R. § 1601.93 (2018). Even if the language of the Guidance could reasonably be read as mandatory, then, it would probably not constitute a safe harbor.

198. *Texas*, 827 F.3d at 381.

199. *Arrest and Conviction Guidance*, *supra* note 2, § II.

could alter prospective employees' conception of their legal interests, leading them to complain about practices that the Guidance indicates would be unlawful. It could lead employers to conform their policies regarding arrest-and-conviction records to the practices outlined in the Guidance—either because they want to avoid sanctions or because, like the hypothetical employer *M*, they become convinced that the Guidance accurately articulates their existing obligations. Such changes in official and private practice are legal in character even though they do not amount to changes in the underlying, authoritative obligations.

As noted above, the case law on general statements of policy often takes a more rigid position. If the general statement of policy is nonbinding, it is not final and is unreviewable; if it is binding, it is reviewable and invalid.²⁰⁰ This forces courts into the position of either treating guidance as final because of its practically coercive effects or denying that practical effects on private parties are at all relevant to the existence of legal consequences.²⁰¹ This Article's approach makes space for a zone of legal consequences falling short of definitive changes in legal obligation, arising when the agency has stated its considered view of what sorts of public or private actions will advance the purposes of the statute. By aligning "binding effects" with the determination of rights and duties, on the one hand, and the effects of guidance with a wider set of "legal consequences," on the other, the finality jurisprudence might better grasp the nonexclusionary but legal character of such pronouncements.

While the Arrest and Conviction Guidance was indeed final, it is much harder to see how it meets the ripeness test for reviewability. The ripeness requirement is rooted in the Article III "Cases" or "Controversies" requirement,²⁰² which limits the judicial function to the adjudication of concrete legal disputes between litigants rather than general questions of policy that are the province of the political branches.²⁰³ Even where a court can constitutionally hear a challenge

200. See *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002); see also HARRY T. EDWARDS ET AL., *FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* 157 (2d ed. 2013) ("[A] true policy statement, meaning one that does not establish a binding norm and is not finally determinative of the issues or rights to which it is addressed, is not subject to judicial review under the APA.").

201. Compare *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 50 (D.C. Cir. 2000) (holding guidance final because a private party "must keep records and report to EPA unless it wishes to risk an enforcement action"), with *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review.").

202. U.S. CONST. art. III, § 1, cl. 1.

203. 2 HICKMAN & PIERCE, *supra* note 85, § 17.12, at 1605.

to agency action, it may elect not to do so on the prudential ground that the case will be *better* decided later.²⁰⁴ The ripeness inquiry requires courts “to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”²⁰⁵ An agency action is only ripe for review if it presents an issue that is “purely legal, and will not be clarified by further factual development.”²⁰⁶ A document will not be “ripe” for review prior to its application in enforcement proceedings if its impact on particular litigants is an “abstraction” and highly fact-dependent.²⁰⁷ In such cases, the validity of the guidance is not yet fit for judicial evaluation.²⁰⁸

Texas’s challenge to the Arrest and Conviction Guidance founders on the hypothetical and premature nature of its complaint. As Judge Higginbotham noted in his dissent to the panel opinion in *Texas v. EEOC*, “Texas has raised an abstract challenge that is unmoored from a specific ‘criminal record exclusion,’ or even a ‘class of criminal record exclusions.’ . . . Such a theoretical challenge is not fit for judicial decision.”²⁰⁹ To test whether the Guidance was invalid, the court would need to see how the Commission would apply the Guidance’s highly general and precatory terms to particular factual scenarios. For example, suppose the EEOC received a complaint from an African American applicant with a felony conviction whose application had been denied by a private employer with a policy not to hire persons convicted of felonies. Would the EEOC bring an enforcement action against that party? The Guidance indicates that such a decision would likely turn on a fact-intensive inquiry about the workforce and applicant data, the nature of the position to which the complainant applied, any substantial risks that employment of persons with criminal convictions might pose to other employees and clients, and any alternative policies that could serve legitimate employer interests.²¹⁰ Without that factual background, it is difficult, if not impossible, to determine how the very flexible standards established by the Guidance

204. HARRY T. EDWARDS & LINDA A. ELLIOT, *FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* 175 (3d ed. 2018) (citing *Simmonds v. INS*, 326 F.3d 351, 356–57 (2d Cir. 2003)).

205. *Id.*

206. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985).

207. *Texas v. United States*, 523 U.S. 296, 300–01 (1998).

208. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

209. *Texas v. EEOC*, 827 F.3d 372, 392 (5th Cir. 2016) (Higginbotham, J., dissenting).

210. *Arrest and Conviction Guidance*, *supra* note 2, § V.

would concretely affect a particular regulated party.²¹¹ If the EEOC actually referred the private complaint against Texas to the Justice Department and the Department elected to sue Texas, at that point the factual issues would be fully ventilated and the validity of the Guidance could be tested in the course of the lawsuit according to *Skidmore* weight principles.²¹²

Nor would Texas face any great “hardship” if the court did not pass on the merits of the Guidance prior to enforcement.²¹³ The EEOC has no adjudicatory power outside the federal sector, nor could it bring suit against Texas itself. Therefore the Guidance does not “as a practical matter require[] the plaintiff to adjust his conduct immediately.”²¹⁴ The only hardship Texas might suffer would result from the possibility of a future Justice Department suit, which might lead it to adjust its employment practices prospectively. In the gamut of administrative coercion, that hardship does not seem particularly burdensome, especially in light of the Guidance’s ancillary benefits to Texas. The Guidance provided notice about how the federal government and private parties might deploy Title VII in the kinds of cases it addresses. That notice could help Texas frame its answer to lawsuits challenging its employment policies concerning arrest and conviction records.

For these reasons, the Fifth Circuit panel’s rush to judgment on the validity of the Arrest and Conviction Guidance was premature. Its insistence on the Guidance’s reviewability produced ambivalent legal consequences on remand to the district court.²¹⁵ Texas sought declaratory relief that it “has a right to maintain and enforce its laws and policies that absolutely bar convicted felons (or

211. Cf. *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112 (9th Cir. 2009) (ruling that a pre-enforcement challenge to policy guidance was not yet ripe, when there were not yet examples of how the Department would use the guidance).

212. See *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (“[T]here clearly would be final agency action if the Commission filed a lawsuit against AT&T. (Of course, the Company could not challenge that decision as final agency action under the APA; it would instead simply defend itself against the suit.) At that point the agency would have decided not only how it views AT&T’s legal obligations, but also how it plans to act upon that view.”).

213. See *Abbott Labs.*, 387 U.S. at 149.

214. *Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 808 (2003) (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990)).

215. The Supreme Court opinion that led the Fifth Circuit to withdraw the panel opinion and remand to the district court, *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), offers a much more compelling case for pre-enforcement review than the EEOC Guidance. The Clean Water Act “jurisdictional determination” that the Court determined was final had concrete legal consequences for particular private parties: a “negative” determination would bar the Army Corps of Engineers from bringing an enforcement action against the private party who received the determination for a period of five years. *Id.* at 1807. The EEOC Guidance does not shield any particular party from Title VII liability, nor does it provide that an

certain categories of convicted felons) from serving in any job the State and its Legislature deem appropriate” and injunctive relief preventing the EEOC from enforcing the positions articulated in the Guidance on the grounds that the Guidance violated the APA and was in excess of the Commission’s powers under Title VII.²¹⁶ The district court denied declaratory relief: “[A] categorical denial of employment opportunities to all job applicants convicted of a prior felony paints with too broad a brush and denies meaningful opportunities of employment to many who could benefit greatly from such employment in certain positions.”²¹⁷ This statement strongly implies that Texas’s blanket exclusion of felons from employment could constitute unlawful discrimination if it could be shown that the policy produced a racially disparate impact.

It is impossible to say what motivated the court to take this position, but it is plausible to think that serious engagement with the content of the Guidance, and the government’s defense of the Guidance during the litigation, convinced the court that a blanket exclusion might be inappropriate. “[T]here may well be instances in which otherwise qualified job applicants with certain felony convictions in their criminal histories pose no objectively reasonable risk to the interests of the State of Texas and its citizens.”²¹⁸ Indeed, the Guidance articulates that blanket exclusions not adequately tailored to the “risks” may doom an employer’s defense to a disparate impact claim.²¹⁹ The so-called “safe harbor” provision at issue explains how an employer could tailor the employment policy that was “targeted” to the relevant risks and provide an opportunity for individual reconsideration.²²⁰

In response to Texas’s argument that the Guidance contravened the APA, the court concluded that “[t]he Guidance . . . is a substantive [rule] issued without

employer could escape Title VII liability for a period of time simply by complying with its terms. The withdrawn panel opinion nonetheless had reasoned that the Guidance, like the jurisdictional determination at issue in *Hawkes*, “offers regulated entities a safe harbor from DOJ referral, and thus ultimately from liability, only if employers alter their hiring policies to comply with the Guidance’s directives.” *Texas v. EEOC*, 827 F.3d 372, 384 (5th Cir.), *reh’g en banc granted, opinion withdrawn*, 838 F.3d 511 (5th Cir. 2016) (en banc). While this analysis would not have bound the district court on remand, this broad reading of *Hawkes* may have influenced its implicit reversal of its initial conclusion that the Guidance was not final agency action or ripe for review. Compare *Texas v. EEOC*, No. 5:13-CV-255-C, 2014 WL 4782992, at *4 (N.D. Tex. Aug. 20, 2014), with *Texas v. EEOC*, No. 5:13-CV-255-C, 2018 U.S. Dist. LEXIS 30558, at *6 (N.D. Tex. Feb. 1, 2018).

216. *Texas*, 2018 U.S. Dist. LEXIS 30558, at *4-5.

217. *Id.* at *6.

218. *Id.* at *5-6.

219. *Arrest and Conviction Guidance*, *supra* note 2, § V.B.7.

220. *Id.* § V.B.8.

notice and the opportunity for comment.”²²¹ The court did not explain how it reached this conclusion, but its logic was probably similar to that in the DAPA case: that the Guidance was binding as a practical matter, and therefore the EEOC violated the APA by not using notice-and-comment rulemaking. But this would be an odd position because the EEOC does not have the authority to issue rules with the force of law under Title VII.²²² It would amount to saying that the EEOC cannot issue guidance at all, unless that guidance merely assembles quotations from the statute and court opinions without commentary or elaboration. The Supreme Court, however, has for over forty years treated EEOC guidance with wide-ranging, original, substantive content as an appropriate use of the Commission’s statutory powers²²³ even if the Court sometimes concludes that the position articulated in the guidance lacks the “power to persuade.”²²⁴

The arrest-and-conviction litigation thus shows how guidance comes in and out of the state and in and out of legal validity. The EEOC issues guidance; a private party whose situation is covered by the guidance brings a discrimination charge against Texas; Texas challenges the guidance; the district court seems to embrace the position taken by the guidance while holding that the guidance was procedurally invalid. This precarious legal position arises from the nonbinding legal status of guidance in general, which, because it has not been adequately understood, causes jurisprudential confusion. If, as I have argued, we treat guidance as a presumptively valid but not exclusionary reason for agencies to act, then matters would be clearer. EEOC’s guidance was final because it was the consummation of the agency’s policy-making process and because certain legal consequences flow from it. But it was not ripe for review prior to enforcement, given the fact-dependent inquiries that would arise if the guidance were applied to a particular party. Even if it were reviewable, however, it would nonetheless be a procedurally valid “general statement of policy” because the position it articulates does not create a definitive, exclusionary reason for the EEOC to exercise its powers.

221. *Texas*, 2018 U.S. Dist. LEXIS 30558, at *6.

222. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (“Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title.”).

223. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (“The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting [Title VII] to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference.”).

224. *Gen. Elec.*, 429 U.S. at 142.

III. INTERPRETIVE RULES AS NONBINDING GUIDANCE

This Article so far has treated “guidance” as an undifferentiated category of agency action that is exempt from the APA’s notice-and-comment rulemaking requirements. However, the APA distinguishes between “general statements of policy” and interpretive rules.²²⁵ According to the *Attorney General’s Manual on the Administrative Procedure Act*, general statements of policy “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”²²⁶ Interpretive rules, by contrast, “advise the public of the agency’s construction of the statutes and rules which it administers.”²²⁷ The import (or lack thereof) of the distinction between these two categories has been a maddening problem for administrative law scholars. Commentators have sharply disagreed on whether the two categories deserve to be treated differently in terms of their permissible binding effect on the agency or the public or in terms of the deference they are due in judicial proceedings.²²⁸ The case law has fared no better in reaching consensus.²²⁹

This Part argues that interpretive rules should be viewed in the same way as general statements of policy: they may bind agency personnel in some of their compliance and enforcement activities, but they may not bind the agency in its final determination of legal rights and duties. The argument here builds on the philosophical exposition of guidance in Parts I and II but delves deeper into policy implications in the realm of sex discrimination law. The aim is first to show by example how nonbinding guidance can shape the development of law. That historical influence has led to current controversies over the procedural validity of guidance on sexual harassment. I analyze those controversies using the perspective on guidance developed thus far.

The main difference between general statements of policy and interpretive rules is that the latter can use binding language when the statutory or regulatory

²²⁵. 5 U.S.C. § 553(b)(A) (2018).

²²⁶. ATTORNEY GENERAL’S MANUAL, *supra* note 29, at 30 n.3.

²²⁷. *Id.*

²²⁸. On whether interpretive rules may bind the agency, compare Anthony, *supra* note 25, at 1375-76, which states that interpretive rules may bind the agency, with Manning, *supra* note 20, at 893-931, which states that whereas a legislative rule can “bind[] with the force of a statute,” an interpretive rule cannot. On whether courts should defer to an agency’s interpretation of its own regulation, compare John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 616-17 (1996), which considers judicial deference to agency interpretations of regulations inappropriate, with Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017), which defends judicial deference to agency interpretations of regulations as appropriate.

²²⁹. See *supra* note 45.

norm being interpreted uses binding language. Such mandatory terms do not render the interpretive rule procedurally invalid unless the agency denies private parties the opportunity to contest its interpretation in its adjudication of their rights and duties. This is because issuing officials must be able to communicate interpretations to accomplish their statutory duty in the same way that the right to set forth appropriate enforcement policies is necessary to perform that duty. However, interpretive rules that use mandatory language are more likely than general statements of policy to meet the ripeness test for pre-enforcement review, since the application of such a uniform construction of the law to a particular case will often be less fact-dependent than the application of a flexible statement of policy would be. Even though the normative quality of interpretive rules grants officials wider leeway to speak in mandatory terms, those same qualities permit earlier review. Furthermore, courts should accord interpretive rules the same *Skidmore* weight that is appropriate for general statements of policy. The *Auer* deference regime for agency interpretations of regulations,²³⁰ which has come under serious pressure in recent Supreme Court opinions,²³¹ should be revised in favor of a uniform standard of review for all guidance documents. This Article's approach thus lends interpretive rules significant normative weight within agencies, and sometimes coercive power vis-à-vis the public, but nonetheless would permit earlier judicial review under a relatively nondeferential standard.

This Part will develop this view through a discussion of two episodes of regulatory interpretation at the Department of Education's Office for Civil Rights (OCR): guidance on sexual harassment and guidance on transgender discrimination.²³² In both cases, the guidance documents used binding language, but they did so permissibly because they interpreted binding regulatory language. Courts should treat such binding language as procedurally valid so long as the agency's adjudication procedures indicate that it would remain open to arguments challenging that interpretation before issuing a binding order. The courts might, however, conclude that the interpretation a guidance document puts forth is substantively incorrect.

230. An agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) ("[T]he ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

231. See *supra* note 64.

232. 2011 *Dear Colleague Letter*, *supra* note 1 (sexual harassment); 2016 *Dear Colleague Letter*, *supra* note 3 (transgender discrimination).

These issues are largely moot with respect to these two policies because the Trump Administration rescinded both interpretive guidances.²³³ Nevertheless, they are apt examples of this Article's argument. The validity or nonvalidity of the rescinded guidances may matter in future rulemakings on and judicial review of the topics.²³⁴ More generally, agencies are likely to use interpretive rules in similar ways in the future given how unclear the case law remains on the subject. Solving the puzzle of interpretive guidance continues to be a pressing doctrinal concern with potentially massive social consequences.

A. The Practice of Regulatory Interpretation: Title IX, Sexual Harassment, and Sexual Violence

Title IX of the Education Amendments of 1972 provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²³⁵ In 1975, the Department of Health, Education, and Welfare issued a regulation implementing this provision, requiring educational recipients of federal funds to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints.”²³⁶ This regulation, which remains in effect, was issued through notice-and-comment rulemaking, giving it the full force and effect of law.²³⁷ The underlying statutory enforcement mechanism is powerful: a recipient that fails to comply with its terms could lose its federal funding after a formal adjudicatory hearing.²³⁸ In the first two decades of its operation, the

²³³. *Sept. 2017 Dear Colleague Letter*, *supra* note 1 (rescinding the 2011 Dear Colleague Letter on sexual harassment); *Feb. 2017 Dear Colleague Letter*, *supra* note 3 (rescinding the 2016 Dear Colleague Letter on transgender discrimination).

²³⁴. Katie Reilly, *Read Betsy DeVos' Speech About Changing Obama-Era Policies on Campus Sexual Assault*, TIME (Sept. 7, 2017), <http://time.com/4932283/betsy-devos-title-ix-sexual-assault-speech-transcript> [<https://perma.cc/6NV7-64CG>] (“In order to ensure that America’s schools employ clear, equitable, just, and fair procedures that inspire trust and confidence, we will launch a transparent notice-and-comment process to incorporate the insights of all parties in developing a better way.”); *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP’T EDUC. (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/departments-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/389K-XG39>].

²³⁵. 20 U.S.C. § 1681 (2018).

²³⁶. 40 Fed. Reg. 24128, 24129 (June 4, 1975) (codified at 34 C.F.R. § 106.8 (2018)).

²³⁷. *Id.* at 24128.

²³⁸. 20 U.S.C. § 1682; 34 C.F.R. § 106.71.

regulation's most salient provision was arguably its prohibition of sex discrimination in athletics,²³⁹ which, though not strongly enforced, nonetheless created incentives for schools to give greater attention and financial support to women's sports.²⁴⁰

Administrative guidance and judicial case-law developments intertwined to extend Title IX to cover sexual harassment, showcasing how the claims of official reason can contribute to the development of binding law. In the 1970s, the courts developed the "hostile environment" doctrine as a theory of racial employment discrimination.²⁴¹ The EEOC subsequently applied this theory to sex in its (non-binding) Guidelines, interpreting sex discrimination to include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."²⁴² In *Meritor Savings Bank v. Vinson*, the Supreme Court adopted the EEOC's position using *Skidmore* weight.²⁴³ Despite the fact that there was no settled jurisprudence on hostile-environment discrimination with regard to sex, the Court determined that "[t]he Guidelines . . . appropriately drew from, and were fully consistent with, the existing case law."²⁴⁴

Given the central role that Title VII case law plays across the spectrum of race and sex discrimination jurisprudence, the hostile-environment approach migrated into the judicial and administrative interpretation of Title IX and its implementing regulations. The Supreme Court first recognized sexual harassment as cognizable under Title IX in 1992.²⁴⁵ In 1997, OCR issued "Sexual Harassment Guidance," which was not a legislative rule but was submitted for public comment.²⁴⁶ That Guidance, building on the jurisprudence of the preceding decade,

239. 40 Fed. Reg. at 24142 (codified at 34 C.F.R. § 106.41).

240. T. Jesse Wilde, *Title IX: Gathering Momentum*, 3 J. LEGAL ASPECTS SPORT 71, 71-74 (1993).

241. See, e.g., *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) ("[T]he phrase 'terms, conditions, or privileges of employment' in Section 703 [of Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.").

242. 29 C.F.R. § 1604.11(a) (1985).

243. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

244. *Id.* at 66.

245. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 63, 75 (1992).

246. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12034 (Mar. 13, 1997).

affirmed that “[s]exual harassment of students is a form of prohibited sex discrimination,” and it embraced the hostile-environment theory.²⁴⁷ Crucially, it linked this form of sex discrimination to the grievance procedures that the 1975 regulations required of federal education grantees. It stated that a school’s “non-discrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment.”²⁴⁸ The nonbinding guidance thus linked binding case law on hostile educational environments with the binding regulation on educational institutions’ internal equality compliance mechanisms.

OCR followed this up with its revised 2001 Guidance, which drew on case law to emphasize the importance of the Department’s administrative enforcement mechanisms. “[T]he process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.”²⁴⁹ Though operating under the distant (and never exercised) threat of a funding cut-off,²⁵⁰ this process—from reporting, to student complaints, to investigations, to voluntary complaint resolution agreements—would serve as the primary administrative mechanism to vindicate students’ interest in an educational environment free from sex discrimination.

This process kicked into high gear and gained social salience when student victims of sexual assault filed a deluge of complaints with OCR.²⁵¹ In 2011, OCR promulgated further guidance in the form of a Dear Colleague letter, which elaborated on the provisions of the 1997 and 2001 Guidances.²⁵² In May 2014, OCR

247. *Id.* at 12038.

248. *Id.* at 12044.

249. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP’T EDUC., at iii-iv (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/6RDA-9Y8S>].

250. Sarah L. Stafford, *Progress Towards Title IX Compliance*, 85 SOC. SCI. Q. 1469, 1470 (2004).

251. Alexandra Brodsky & Elizabeth Deutsch, *The Promise of Title IX: Sexual Violence and the Law*, DISSENT, Fall 2015, at 135, 138 (“Meaningful enforcement [of Title IX] has come only after years of worker and student organizing.”); *About The Chronicle’s Title IX Investigation Tracker*, CHRON. HIGHER EDUC. (2016), <https://projects.chronicle.com/titleix/about> [<https://perma.cc/JR7R-X87J>] (“[S]tudents employed Title IX as a vehicle for change, filing federal complaints against their colleges to allege missteps at nearly every juncture.”).

252. 2011 *Dear Colleague Letter*, *supra* note 1, at 11.

had 55 open investigations into universities for compliance with Title IX.²⁵³ As of this writing, 197 cases have been resolved and 305 remain open.²⁵⁴

The 2011 Dear Colleague letter significantly expanded upon the procedural specifications for the “grievance procedures” required by regulation, which had been elaborated in a more precatory manner in the 1997 and 2001 Guidances.²⁵⁵ One of the most contested provisions states that “in order for a school’s grievance procedures to be consistent with Title IX standards, the school *must* use a preponderance of the evidence standard.”²⁵⁶ The Department had developed this interpretation of the regulation in its prior enforcement activities²⁵⁷ and now gave public notice of this construction. Unlike the DAPA Memorandum or the Arrest and Conviction Guidance, this language is clearly exclusionary. The plain meaning of the provision is that a school cannot use any other standard of evidence in a Title IX grievance procedure, regardless of any compelling reasons it may have for doing so. And OCR seems to treat the requirement as binding in its compliance process, describing it as such in notices to schools under investigation and requiring in complaint settlements that schools change their evidentiary standards in grievance procedures from “clear and convincing” evidence to the preponderance standard.²⁵⁸

B. Binding Language in Nonbinding Interpretations

Jacob Gersen and Jeannie Suk have argued that this binding language and practice makes the 2011 Dear Colleague letter unlawful.²⁵⁹ They claim that the

253. U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations, U.S. DEP’T EDUC. (May 1, 2014), <https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [<https://perma.cc/9KWD-ZCYJ>].

254. *About The Chronicle’s Title IX Investigation Tracker*, *supra* note 251.

255. 2011 Dear Colleague Letter, *supra* note 1, at 4.

256. *Id.* at 11 (emphasis added); see also Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 908–10 (2016) (explaining that the preponderance of the evidence standard was controversial).

257. See Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1868 (2017) (discussing early agency investigations of sexual assault cases on college campuses).

258. See, e.g., Letter from Joel J. Berner, Reg’l Dir., U.S. Dep’t of Educ., Office of Civil Rights, to Martha C. Minow, Dean, Harvard Law Sch. (Dec. 30, 2014) (explaining that Harvard’s clear and convincing standard is “inconsistent with the preponderance of the evidence standard required by Title IX for investigating allegations of sexual harassment or violence”).

259. Gersen & Suk, *supra* note 256, at 908–10.

guidance runs afoul of the APA because it binds the agency and, therefore, affected members of the public.²⁶⁰ This position is dubious given a significant body of case law that permits interpretive rules to bind the agency that issues them.²⁶¹ Nonetheless, some court opinions do suggest that interpretive rules cannot be binding.²⁶² The 2011 Dear Colleague letter provides an opportunity to examine this vexing problem of administrative law. I conclude that the Title IX guidance was valid because its binding language reflected the binding language of the regulation it interpreted. Further, the agency's use of the guidance in complaint investigations and settlements was not dispositive of whether the agency would allow a party the opportunity to contest its interpretations in an adjudicatory enforcement proceeding. To the contrary, the statutory and administrative enforcement scheme clearly contemplates an opportunity to contest the agency's legal interpretation in such a proceeding. Gersen and Suk make the common error of mistaking coercive effects on the public for an impermissibly binding effect. But private coercion is a permissible and sometimes desirable consequence of a legal instrument that attempts to communicate and operationalize a uniform policy or interpretation of law among officials. The proper way to distinguish such permissible coercion from an impermissible binding effect is to determine

260. *Id.* at 908-09, 911.

261. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("[T]he power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."); *Wardner v. Shalala*, 149 F.3d 73, 82 (1st Cir. 1998) ("[An interpretive] rule may lack [the] force [of law] and still bind agency personnel."); see also *Dis-mas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 681 (6th Cir. 2005) ("An interpretative regulation is binding on an agency . . . by virtue of the binding nature of the interpreted statute."); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (noting that interpretive rules are "binding on the agency"); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) (observing that the "binding effect" test for validity of policy statements does not apply to interpretive rules); *Metro. Sch. Dist. v. Davila*, 969 F.2d 485, 493 (7th Cir. 1992) ("All rules which interpret the underlying statute must be binding because they set forth what the agency believes is congressional intent . . . Courts are not bound by an agency's interpretation . . . but parties regulated by the statute certainly are."); *Health Ins. Ass'n v. Shalala*, 23 F.3d 412, 423-24 (D.C. Cir. 1983) ("A rule may be interpretive even though it 'interprets' a vague statutory duty or right into a sharply delineated duty or right . . . Yet the interpretation in a sense changes the legal landscape. Just as a dollar is not exactly the same as a 50-50 chance at two dollars, a precise interpretation is not the same as a range of possible interpretations.").

262. *Hennepin Cty. Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996) ("An agency's interpretative rules . . . are nonbinding and do not have the force of law."); *Viet. Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537-48 (D.C. Cir. 1988) ("[T]he agency remains free in any particular case to diverge from whatever outcome the policy statement or interpretive rule might suggest."); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (noting that the "interpretative/legislative distinction" and the appropriate bounds of a "general statement of policy" both turn on whether the pronouncement in question is a "binding norm").

whether agency procedure or practice provide an opportunity for private contestation before the final determination of a party's legal interests.

The 1975 Title IX implementing regulation provides that “[a] recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [the regulation].”²⁶³ The 2011 Dear Colleague letter interprets this procedural provision, saying that “[g]rievance procedures that use [a clear and convincing evidence standard] are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX.”²⁶⁴ This is clearly binding language. But these mandatory terms reflect the exclusionary nature of the norms in the regulation. As Judge Williams put it in *American Mining Congress v. Mine Safety & Health Administration*, “an interpretation will use imperative language—or at least have imperative meaning—if the interpreted term is part of a command.”²⁶⁵ The command to establish a “grievance procedure” that is “equitable” permits the agency to state a command as to what this term means. OCR’s 2011 Dear Colleague letter interpreted “equitable” to require a preponderance of the evidence standard because courts and the agency use such a standard to adjudicate claims under Title IX.²⁶⁶ The suggestion was that it made sense to make the standard of proof uniform in this regulatory domain. This argument seems reasonable, if contestable. But the question here is not whether the interpretation was substantively correct. The question is whether the agency’s interpretation was procedurally invalid insofar as it used binding terms without proceeding through rulemaking or another procedure that would give the document the force of law.

The use of binding language to interpret binding regulatory terms serves important notice functions and furthers the issuing official’s obligation to faithfully implement the law. An agency may not penalize a private party for violating a rule when it does not have “adequate notice of the substance of the rule.”²⁶⁷ If the agency concludes from its enforcement experience that recipients’ obligation to establish an equitable grievance procedure requires the use of a preponderance of the evidence standard in that procedure, merely precatory language would fail

²⁶³. 34 C.F.R. § 106.8(b) (2018).

²⁶⁴. 2011 Dear Colleague Letter, *supra* note 1, at 10–11.

²⁶⁵. 995 F.2d at 1111.

²⁶⁶. 2011 Dear Colleague Letter, *supra* note 1, at 10–11.

²⁶⁷. *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

to disclose that conclusion.²⁶⁸ Parties would be unaware of the agency's true position — that such evidentiary standards are required under the regulation. Thus, where the substance of a rule is not immediately clear, interpretive rules can “provide fair notice of an agency's interpretation of its own regulations” so that private parties are not surprised by the requirements to which they are subject.²⁶⁹ Given the multiple possible meanings of the term “equitable” and OCR's intention to enforce the grievance-procedure requirement aggressively, it seems not only permissible but appropriate to put universities on notice of the Office's interpretation of this regulatory term. If OCR could not use binding language to interpret a binding rule in this way, it would be “drive[n] . . . into pure ad hocery — an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties.”²⁷⁰ The official will in fact be obliged to use binding language in an interpretive pronouncement when she comes to the conclusion that a binding statutory term carries a definite meaning. Using flexible language in that situation would obfuscate the official's judgment and create a false appearance of discretion where the agency believed none existed. Holding back from voicing her considered opinion would deprive other officials of her privileged point of view, and it would deprive private parties of information concerning the content and practical implications of their preexisting legal obligations.

Beyond the language of the 2011 Dear Colleague letter, the agency's compliance practice indicates that it treated the letter's provisions as mandatory. The “resolution agreements” that OCR has reached with universities to settle Title IX complaints consistently adhere to the terms of the 2011 Dear Colleague letter, such as its requirement of a preponderance of the evidence standard.²⁷¹ It should be neither surprising nor objectionable that voluntary agreements between OCR and universities under investigation would adhere to the terms of the letter. If

268. Catherine Lhamon, who was Assistant Secretary for Civil Rights at the Department of Education from 2013 to 2017, stated in an interview with the author that OCR had settled on the preponderance of the evidence standard prior to the 2011 Dear Colleague Letter. The Letter aimed to give notice of this interpretation, which emerged from OCR's prior investigation and compliance practice. Telephone Interview with Catherine E. Lhamon, Chair, U.S. Comm'n on Civil Rights (Aug. 9, 2018).

269. *Howmet Corp. v. EPA*, 614 F.3d 544, 554 (D.C. Cir. 2010).

270. *Am. Mining Cong.*, 995 F.2d at 1112.

271. Office for Civil Rights, *Resolution Agreement*, Harvard Law School, Complaint No. 01-11-2002, U.S. DEP'T EDUC. 3 (Dec. 23, 2014), <https://www2.ed.gov/documents/press-releases/harvard-law-agreement.pdf> [<https://perma.cc/H2K7-MWV8>]; see also Gersen & Suk, *supra* note 256, at 909 (noting universal university compliance with OCR's 2011 Dear Colleague Letter).

the voluntary agreements did not conform to the requirements stated in the letter, universities would be subject to the very “ad hocery” the interpretive-rules jurisprudence has sought to forestall.²⁷²

The binding or nonbinding quality of the 2011 Dear Colleague letter should not turn on whether the agency upholds the letter’s mandatory language in voluntary resolution agreements, but rather whether the interpretations put forward in the guidance would be open to challenge at some stage before a binding order is issued. According to several commentators, the proper way to distinguish interpretive rules from legislative rules is that the former must be open to contestation by a party subject to an enforcement action and cannot provide sufficient justification for issuing a final order.²⁷³ As Ronald Levin has argued, “interpretive rules are nonbinding in a procedural sense: they cannot cut off the right of private parties to be heard in administrative proceedings.”²⁷⁴

That is the correct approach, not only because of its concrete benefits for the predictable enforcement of law, but also because it respects administrative officials’ legal rights and duties. Allowing mandatory terms on the condition of challenge procedures enables agencies to give adequate and accurate notice of their construction of the rules and statutes they administer and to treat regulated parties equally and consistently. At the same time, it affords process to people who are adversely affected by the rules’ or statutes’ terms. But these general rule-of-law benefits express something deeper about the normative role of interpretive rules: because interpretive rules concern the proper construction of the law, they

272. *Am. Mining Cong.*, 995 F.2d at 1112.

273. Gersen himself seems to have endorsed this approach elsewhere. See Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1719–20 (2007) (“If the rule is nonlegislative, a party may challenge the validity of the rule in any subsequent enforcement proceeding.”); see also E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992) (describing the choice between issuing a binding rule or issuing nonbinding guidance as a choice between responding to challenges in the rulemaking phase or, in the absence of a rule, responding when particular cases are adjudicated under the guidance); William Funk, *When Is a “Rule” a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 664–67 (2002) (noting that interpretive rules cannot “provide the legal basis for assessing a violation of the . . . regulation” and that “the agency must be prepared to present evidence” that noncompliance with an interpretive rule constituted violation of the regulation); Levin, *supra* note 11, at 67 (justifying an agency’s use of general policy statements given affected persons “will be permitted to contest the agency’s position at a later stage in the agency’s implementation process [T]he agency will not qualify for the . . . exemption if the court concludes that the agency would not (or in actual practice does not) permit such contestation.”); Manning, *supra* note 20, at 931 (“[W]hen an agency invokes a nonlegislative rule during the course of adjudication, that agency ultimately must be able to justify its decision by reference to norms found elsewhere—either in the statute, an antecedent legislative rule, or adjudicative precedents interpreting those sources of authority.”).

274. Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1504 (1992).

are peculiarly within the province of an agency's legal officials. Although interpretive rules may often touch on matters of policy, such as allocations of resources, efficient administration, and permissible political considerations, they explicitly construct legal meaning. It is entirely appropriate for an official's considered judgment on the meaning of a statutory or regulatory term to powerfully influence and constrain the conduct of other officials, even in the absence of a procedure that would give that judgment the force of law.

As argued in Part I, officials' performance of ongoing statutory duties incorporates a right to communicate their understandings of statutory and regulatory norms to other officials. Where the official not only believes that good administration of the statute would benefit from a particular enforcement policy but also concludes that a provision of the law has a definite meaning, the official has the discursive right to make that view known. If the official were foreclosed from expressing her view, the law would be administered without the benefit of shared understandings of its best construction. Officials would act for reasons that could not be disclosed. They would have to infer standards of conduct from decisions in particular cases rather than read those standards on the face of publicly available documents. That publicity, in turn, facilitates contestation that would be impossible if the standards were not explicit. While officials may state that they take mandatory statutory language to have a particular meaning, they may not refuse to entertain any contrary views from the public. In this way, officials have the right to communicate their understanding but not to impose that understanding without the opportunity for contestation. Official reason makes claims but, at least outside the issuing agency, it cannot make demands.

This approach ably distinguishes interpretive rules from binding regulations. If an agency has issued a legislative rule with the force of law, it need not give affected parties an opportunity to contest the validity of that rule in an enforcement proceeding; the rule can provide a sufficient legal basis for an enforcement order.²⁷⁵ This makes the regulation exclusionary—even if the party could present strong reasons why the rule was inappropriate, the rule could sustain the enforcement action. If, however, the agency avoids the rulemaking process and issues interpretive guidance, the agency must be prepared to hear challenges to its interpretation and ground its enforcement action in other, binding sources of law—either the regulation or the statute that the interpretive guidance elucidates. It is in this sense that an interpretive rule, like a general statement of policy, lacks binding force.

275. *Heckler v. Campbell*, 461 U.S. 458, 467 (1982); *United States v. Storer Broad. Co.*, 351 U.S. 192, 205 (1956); *Am. Mining Cong.*, 995 F.2d at 1111-12.

There is no indication that OCR violated or would violate this principle. First, the 2011 Dear Colleague letter invited public comment on the guidance, thus affording private parties an early opportunity to challenge its interpretations.²⁷⁶ Second, though OCR's resolution agreements show that private parties acquiesced in its construction of the Title IX regulation, this does not mean that the parties were denied the opportunity to challenge that interpretation if they disagreed. According to Catherine E. Lhamon, who was Assistant Secretary for Civil Rights at the Department of Education between 2013 and 2017, universities under investigation did at times challenge OCR's interpretations.²⁷⁷ OCR officials listened to those concerns, but they consistently adhered to the stated terms of the 2011 Dear Colleague letter based on their considered understanding of statutory and regulatory requirements, their experience with prior investigations, and the need to give accurate notice of the Department's position.²⁷⁸

Even if OCR had not entertained objections during the settlement process, that process is not the correct point in the enforcement scheme to test the interpretation's binding force. A party under investigation is not required to enter into a resolution agreement. That decision is "voluntary."²⁷⁹ To the extent private parties are bound by those settlement agreements, they have chosen to bind themselves. The settlements are therefore willing agreements to adhere to OCR's understanding of the law, rather than to challenge it in an enforcement proceeding. Before such a proceeding can even begin, OCR must notify the party that such action is impending and state in that notice the "statutory basis for the investigation."²⁸⁰ The enforcement action itself would then provide the forum in which the substance of the interpretive guidance could be challenged.

The Department of Education can only terminate federal funds if "there has been an express finding on the record, after opportunity for hearing, of a failure to comply" with Title IX and its implementing regulations.²⁸¹ This means that the agency must engage in the trial-like procedures of formal APA adjudication

²⁷⁶ 2011 *Dear Colleague Letter*, *supra* note 1, at 1 n.1.

²⁷⁷ Telephone Interview with Catherine E. Lhamon, *supra* note 268.

²⁷⁸ *Id.*

²⁷⁹ Office for Civil Rights, *Case Processing Manual*, U.S. DEP'T EDUC. 15-16, 19-20 (Nov. 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [<https://perma.cc/ZN32-9JTW>]; *see also* 20 U.S.C. § 1682 (2018) (requiring the agency first to seek voluntary compliance).

²⁸⁰ Office for Civil Rights, *supra* note 279, at 20.

²⁸¹ 20 U.S.C. § 1682.

to take final action against a grant recipient.²⁸² The procedural regulations implementing Title IX also accord opportunities for a party to challenge OCR's findings: the agency must give notice of the "specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action."²⁸³ In the hearing, "the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice."²⁸⁴ The enforcement procedures to which OCR is bound, by statute and regulation, thus provide assurance that the substantive validity of the interpretive rule could be rigorously tested in an adjudicatory hearing. Because this opportunity is available, the interpretive rule is procedurally valid.

It is true that the severe penalty of termination of federal funds put great pressure on educational institutions to acquiesce in OCR's interpretation well before commencement of an enforcement action.²⁸⁵ Yet the agency cannot be faulted for Congress's considered choice to vest it with the authority to terminate federal funds and to enter into voluntary conciliation agreements. Moreover, the statutory scheme is carefully tailored to make that power difficult to wield, with its provisions for complaint resolution and formal adjudicatory hearings, as well as reports to Congress.²⁸⁶ The legislative plan practically ensures that most of the action will take place through investigations and voluntary measures, given the high bar the agency would have to clear to cut off funds, and the undesirability of actually taking such an extreme measure. A similar approach was used to great effect in the context of school desegregation in the 1960s, as OCR's precursor—the Office for Civil Rights in the Department of Health, Education, and Welfare—issued regulations and guidance that led southern school districts to increase racial integration dramatically under the looming threat of a funding cut-off.²⁸⁷

282. 5 U.S.C. § 554 (2018).

283. 34 C.F.R. § 106.71 (2018) (incorporating by reference 34 C.F.R. § 100.9(a)).

284. *Id.* § 100.9(d).

285. See Gersen & Suk, *supra* note 256, at 909.

286. 20 U.S.C. § 1682.

287. Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964, 45 C.F.R. § 181 (1966); Nondiscrimination in Federally-Assisted Programs of the Department of Health, Education, and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964, 29 Fed. Reg. 16298 (Dec. 4, 1964) (codified at 45 C.F.R. §§ 80.1-80.13); see also 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 235 (2014) ("Within a few months, [the Department of Health, Education, and Welfare's] funding threat allowed it to make more progress than the entire judiciary had achieved over ten years—tripling the percentage of southern blacks attending white-majority schools from 2 percent to 6 percent between 1964 and 1965 Despite the storm of protest, the revised

This kind of coercion does not make the 2011 Dear Colleague letter or 1960s desegregation guidelines impermissibly binding. Feeling government pressure to do something does not amount to being legally bound to do it. As the D.C. Circuit stated in *National Mining Ass'n v. McCarthy*, “while regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall . . . there has been no ‘order compelling the regulated entity to do anything.’”²⁸⁸ In the Title IX context, such an order could only come from the Department of Education after an adjudicatory hearing. As described in Part II, private parties may determine that they must follow the guidance because of their own strategic, moral, or institutional commitments. They can adopt the position stated in the guidance as a rule of private conduct, and in that case, they treat the guidance as a norm to govern their behavior. This is how guidance extends the “internal point of view” from government officials to private parties. But this process turns in part on the normative situation of the private parties and not merely on the incentives created by the guidance. As a matter of law, private parties have the option to test OCR’s interpretive assertions in either an adjudicatory hearing or, as noted in the next Section, pre-enforcement review. The coercive threat is real and salient, but not legally determinative.

Reasonable minds can disagree about the wisdom of empowering agencies to shape the conduct of private parties without the use of legally binding forms of action. Congress, however, has chosen to do so by granting the Department of Education an immense coercive power and leaving intact the agency’s general authority to issue nonbinding statements that interpret its own legislative rules. Whether Congress’s judgment was wise ultimately depends upon one’s assessment of the seriousness of the problem of sex discrimination, the capacity and willingness of private actors to take meaningful steps to address it without government intervention, and the expertise and judgment of the officials who constitute the agency.

C. Regulatory Interpretations Before the Courts

There are certainly risks posed by allowing agencies to offer nonbinding interpretations of law without recourse to notice and comment or adjudicatory hearings. Agencies may get the law wrong and, in the meantime, may coerce private parties into adopting a position that is either not required or even prohibited by law. Judicial review can ensure that interpretive guidance does not

guidelines actually worked – black attendance in southern white schools rose from 6 percent in 1965 to 14 percent in 1967.”).

288. 758 F.3d 243, 253 (D.C. Cir. 2014) (quoting *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004)).

impose such substantively incorrect or procedurally invalid requirements on the public. Interpretive rules may be challenged in pre-enforcement review²⁸⁹ or in review of an enforcement proceeding in which the rule has been relied upon.²⁹⁰

Interpretive rules that use mandatory language are much clearer cases for pre-enforcement review than general statements of policy are.²⁹¹ Whereas general statements of policy like the EEOC's Arrest and Conviction Guidance lay out context-dependent criteria for agency personnel to consider, interpretive rules like OCR's 2011 Dear Colleague letter convey categorical interpretations of law. Though such mandatory language is procedurally permissible as an interpretation of a binding term, application of that language to a particular party is unlikely to turn on facts developed in an administrative hearing. The validity of a legal interpretation is a "purely legal" issue, which is "appropriate for judicial resolution."²⁹² Because interpretive guidance offers a construction of the law, rather than outlining considerations relevant to how enforcement discretion is likely to be exercised, it reduces the relevance of factual variation between the parties to which the guidance might apply. The definitiveness of the language therefore renders the dispute "concrete" rather than "abstract."²⁹³

Further, where the mandatory language describes how private parties must act, such interpretations may "creat[e] a dilemma in which a party 'must choose between disadvantageous compliance and risking serious penalties' for noncompliance."²⁹⁴ Though the opportunity remains to challenge that interpretation in an administrative hearing, the mandatory terms of the guidance may combine with the agency's regulatory powers to alter the "primary conduct" of parties who are currently out of step with the agency's interpretation.²⁹⁵ A private party will suffer a significant hardship if pre-enforcement review is not granted, because it is likely to comply rather than risk the financial and reputational loss that challenging the interpretation might impose. Such burdens exist when the coercive threat is relatively intense. Where an agency carries a statutory mallet like

289. *See id.* at 251; *Pharm. Research & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs.*, 138 F. Supp. 3d 31, 41 (D.D.C. 2015) (citing *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011)).

290. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111-12 (D.C. Cir. 1993).

291. Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 380 (2011) (noting that ripeness appears to pose less of a barrier for interpretive rules than for general statements of policy).

292. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

293. *Id.* at 148.

294. *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1218 (D.C. Cir. 1984) (quoting 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25:6, at 369 (1983)).

295. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).

the Department of Education's power to terminate federal funds, a categorical statement about the circumstances in which that power could be used will create very strong incentives to comply rather than run the risk of an enforcement action. In such circumstances, pre-enforcement review provides a crucial check to ensure that the legal questions presented by the guidance are answered by the branch whose constitutional charge is the interpretation of law. Courts rely on this prospect of review to cabin the risk posed by nonbinding guidance. "[A]gency personnel at every level act under the shadow of judicial review. If they believe that courts may fault them for brushing aside the arguments of persons who contest the rule or statement, they are obviously far more likely to entertain those arguments."²⁹⁶

Current deference doctrine, however, has left a gap in this accountability structure. Under *Auer v. Robbins*, a court must uphold an agency's interpretation of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation."²⁹⁷ On its face this language appears to be inconsistent with the view of guidance put forward in this Article. If the Court consistently recognized the nonbinding character of all guidance, the *Skidmore* regime would govern its deference to any interpretive rules or general statements of policy. As I will discuss below, recent amendments to the *Auer* regime have already moved it in the direction of *Skidmore*.

The *Auer* doctrine has come under harsh criticism,²⁹⁸ not least by one of its principal architects – the late Justice Scalia. Under *Auer*, he observed,

Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.²⁹⁹

296. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

297. 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

298. See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) (criticizing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), upon which *Auer* relies to reach its holding).

299. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment).

A valid interpretive rule excludes the court from interpreting the regulation in a way that would otherwise be reasonable. This means that, under current doctrine, an interpretation within the space of regulatory ambiguity has the force of law.

This Term, the Supreme Court will consider whether to overrule *Auer* in *Kisor v. Wilkie*.³⁰⁰ The interpretation at issue in *Kisor*, however, was promulgated not in an interpretive rule, but rather in a binding adjudication that has the force of law.³⁰¹ The case therefore does not directly raise the problem posed by interpretive rules, which generally do not issue through a process that has the force of law. Indeed, the question posed by *Kisor* may be symptomatic of the doctrinal confusion that *Auer* has generated. *Auer* focuses analysis on the object of the interpretation – a statute or regulation – rather than on the procedural mechanism through which the interpretation was issued. But it is the latter that should be determinative. The deference regime should track the distinction between agency actions that carry the force of law, such as legislative rules and adjudicatory orders, and those that do not, such as interpretive rules.³⁰² Courts should treat agency documents as excluding certain reasons from their consideration only when the agency acts through a procedure that imparts the legal authority to bind.³⁰³

Auer has been defended on the largely pragmatic grounds of institutional competence: agencies administer their regulations and the courts are ill positioned to understand the full implications of a particular interpretation of a regulatory provision.³⁰⁴ Therefore, following the logic of *Chevron*,³⁰⁵ courts should presume that when Congress delegates rulemaking authority to the agency, it is

300. *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017), cert. granted in part sub nom. *Kisor v. Wilkie*, 139 S. Ct. 657 (Dec. 10, 2018).

301. See *id.* at 1363–64; Gillian Metzger, *Symposium: The Puzzling and Troubling Grant in Kisor*, SCOTUSBLOG (Jan. 30, 2019, 10:22 AM), <https://www.scotusblog.com/2019/01/symposium-the-puzzling-and-troubling-grant-in-kisor> [<https://perma.cc/VP4M-72CD>].

302. See *Perez*, 135 S. Ct. at 1208 (noting “the longstanding recognition that interpretive rules do not have the force and effect of law” (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979))); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (stating that “adjudication [and] notice-and-comment rulemaking” are methods by which agencies “make rules carrying the force of law”); see also *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 203 (1947) (“There is . . . a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”).

303. See *supra* Section I.B.

304. See, e.g., Sunstein & Vermeule, *supra* note 228.

305. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

also giving it authority to interpret both the regulation and the underlying statute. These institutional-competence concerns are real, though they likely vary in strength depending on the subject matter and the quality of the agency's decision makers. In addition, there is little evidence, as some critics have alleged,³⁰⁶ that *Auer* leads agencies to write regulations in an open-ended way so that they can make and change controversial policy more easily at the level of interpretation.³⁰⁷

The deeper problem is that *Auer* allows agencies to issue interpretations that lack the force of law but nevertheless receive the judicial deference otherwise reserved only for documents that have such force.³⁰⁸ If an interpretation carries significant policy implications, then it seems contrary to the spirit of the APA and reasoned administration more broadly to allow agencies to avoid public comment, issue an interpretive rule, and then see that interpretation given exclusionary, binding force in court. One need not assume agency bad faith or an unduly magnified role for reviewing courts to recognize an incongruity between the procedural informality of guidance and the extraordinarily deferential tone of the *Auer* doctrine.

Auer thus destabilizes the structure of legal authority in the administrative state. As discussed in Part II, rules that have the force of law can exclude otherwise valid considerations and courses of conduct from official consideration, while those without the force of law lack such obligatory power. The legal capacity to bar an official from acting on the basis of a set of otherwise valid reasons deserves consistent treatment different in kind from less authoritative norms. While courts must insist that binding rules comply with the statutory authority under which they are issued and conform with principles of reasoned decision-making, they may not reweigh the balance of first-order reasons the agency considered in reaching its interpretation. Nonbinding rules and other statements, by contrast, can and should be subject to reevaluation, with the understanding that the issuing official's statutory duties give her interpretation weight. By granting agencies at least as much leeway in some of their nonbinding interpretations as in their legislative rules, *Auer* undermines this fundamental distinction between binding and persuasive force. In doing so, it threatens to conceal from

306. See, e.g., *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

307. See Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85, 92 (2019) (reporting that, from 1982 to 2016, "agencies did not measurably increase the vagueness of their rules in response to *Auer*" and that "[i]f anything, rule writing became more specific over time despite *Auer*'s increasing prominence"). But see Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 716 (2014) (reporting that thirty-nine percent of respondent agency officials stated that *Auer* deference played a role in their rule-drafting decisions).

308. Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011).

view the valid legal claims of official reason. The crux of this Article's argument has been that law can operate in the absence of binding force by virtue of the communicative influence of official reasoning. Precisely because the communicative power of guidance operates in the absence of the power to bind, giving proper effect to guidance's legal status requires firm maintenance of the boundary between administrative acts that have the force of law and those that lack it.

In its future elaboration of deference principles, the Court should therefore uphold this distinction between agency procedures that convey legal force and those that convey legal opinions worthy of respect. An interpretation issued in a guidance document merits special judicial consideration short of the deference courts owe to legislative rules and adjudicative orders. It deserves the same official respect as a general statement of policy or an interpretive rule that directly interprets a statute—that is, it deserves *Skidmore* weight, or the “power to persuade.”³⁰⁹ This approach strikes a middle ground between holding that regulatory interpretations cannot use binding terms without being invalid, on the one hand, and treating such interpretations as “controlling unless ‘plainly erroneous or inconsistent with the regulation,’”³¹⁰ on the other.

The Supreme Court came close to embracing this approach in *Christopher v. SmithKline Beecham Corp.*, where it found that a regulatory interpretation advanced in an “uninvited *amicus* brief”³¹¹ from the Department of Labor did not represent the Department’s “fair and considered judgment on the matter in question,” and failed to provide adequate notice of the Department’s position.³¹² Consequently, the Court declined to use the *Auer* framework and turned instead to the *Skidmore* standard.³¹³ As Kristin Hickman and Richard Pierce have observed, this approach has “the potential to curtail substantially [*Auer*’s scope].”³¹⁴ Once a court must first determine how “fair” and “considered” an agency’s position is before granting deference, it is likely to perform the multi-factor analysis of persuasiveness that *Skidmore* requires. The Court would do well to extend *SmithKline* in this way and apply the *Skidmore* standard to all non-legislative rules. It need not necessarily overrule *Auer*, but rather continue to clarify its standards in a way that increases its alignment with *Skidmore*. Simply overruling *Auer* might send an unduly strong signal to lower courts to tighten their review of agency guidance documents or agency action more broadly. Such a

309. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

310. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

311. 567 U.S. 142, 152 (2012).

312. *Id.* at 155–56 (quoting *Auer*, 519 U.S. at 462).

313. *Id.* at 159.

314. 1 HICKMAN & PIERCE, *supra* note 85, § 3.8, at 373.

signal would undermine the justified claims of official reason to influence public and private judgment.

Moving towards a unified *Skidmore* standard for guidance might serve to focus courts' attention on the special claims that official reason makes on them. Once courts clearly separate the force of law from the respect that is owed to officials' nonbinding legal judgments, they might engage more robustly with the reasoning of administrative agencies. That engagement might give greater jurisprudential purchase to official reason and thus foster a public discourse on regulatory law that is more clearly normative than technocratic.

To understand the benefits of this approach, consider two court decisions dealing with the same regulatory interpretation: the 2016 Dear Colleague letter issued by the Departments of Justice and Education on Title IX's application to transgender students. The implementing regulations state that "[a] recipient [of federal financial assistance] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."³¹⁵ In the letter, "[t]he Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations."³¹⁶ Applying this definition of sex to the implementing regulations, the letter then says that "[a] school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity."³¹⁷

The U.S. District Court for the Northern District of Texas enjoined the letter, in part on the ground that it was a binding rule in disguise.³¹⁸ The court's approach holds the letter procedurally invalid because the Departments' interpretation "set clear legal standards" and had "drawn a line in the sand."³¹⁹ However, as noted above in the discussion of the Department of Education's sexual harassment guidance, setting clear legal standards is often in the nature of an interpretive rule that constructs mandatory language.³²⁰ As the D.C. Circuit has said, "[a] rule may be interpretive even though it 'interprets' a vague statutory duty or right into a sharply delineated duty or right."³²¹ Here, the Departments transformed the statutory and regulatory duties not to discriminate on the basis of

³¹⁵. 34 C.F.R. § 106.33 (2018).

³¹⁶. 2016 *Dear Colleague Letter*, *supra* note 3, at 2.

³¹⁷. *Id.* at 3.

³¹⁸. *Texas v. United States*, 201 F. Supp. 3d 810, 830 (N.D. Tex. 2016).

³¹⁹. *Id.*

³²⁰. See *supra* notes 263-270 and accompanying text.

³²¹. *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (quoting *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

sex into a more concrete duty to allow persons to use the restroom consistent with their gender identity. As long as private parties such as the plaintiffs would have had the opportunity to challenge the agencies' interpretation in administrative proceedings before the agencies finally determined that such parties were in violation of Title IX, the delineation of existing statutory and regulatory rights and duties was permissible.

In the event, the plaintiffs challenged the interpretive rule in pre-enforcement judicial review. As discussed above, such review should be available more often for interpretive rules that set out relatively sharp legal requirements than for general statements of policy that outline factors to consider in administering or complying with the law.³²² Pre-enforcement challenges to flexible policy statements are generally not as compelling, insofar as such documents leave open factual ambiguity about how the guidance will apply in a given case. By contrast, since interpretive rules can leave less uncertainty about their application in particular circumstances, challenges claiming that they are substantively inconsistent with the underlying statute should be afforded pre-enforcement judicial review. The reviewing court can then determine whether the agency's interpretation is consistent with the statutory authority it interprets—in this case, whether Title IX permits the implementing agencies to treat students' gender as their sex for the purpose of that Title. But it would be improper for the court to invalidate the agencies' interpretative guidance prior to enforcement on the ground that such guidance was impermissibly binding absent a clear finding that the agencies' procedure and practice would have denied the plaintiffs the opportunity to contest the interpretation. Without making such a finding, the District Court for the Northern District of Texas nonetheless treated the categorical nature of the transgender guidance to be fatal.³²³

322. See *supra* notes 291-296 and accompanying text.

323. The opinion states that “[d]efendants confirmed at the hearing that schools not acting in conformity with Defendants’ Guidelines are not in compliance with Title IX.” *Texas*, 201 F. Supp. 3d at 830. Yet this characterization is ambiguous. Had the defendants admitted that their internal agency adjudications would necessarily treat nonconformity with the guidance as conclusive of the plaintiffs’ Title IX liability, then the guidance would indeed be procedurally invalid. That is because such agency conduct would treat the guidance as categorically excluding certain reasons from officials’ practical deliberations. However, the guidance would be procedurally lawful if enforcement personnel would consistently defend—either before an Article III court or before an agency tribunal—the position that deviation from the guidance constitutes a Title IX violation. In the latter case, the guidance would not command a result in proceedings by which rights and duties are determined but rather seek to influence legal reasoning in such proceedings with persuasive force. Guidance may properly exercise such nonbinding power.

By contrast, the U.S. Court of Appeals for the Fourth Circuit in *G.G. ex rel. Grimm v. Gloucester County School Board* adopted the interpretations articulated in the very same guidance.³²⁴ Following the *Auer* approach, the court first determined that the Title IX regulation was ambiguous because “it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms.”³²⁵ The court, relying on dictionary definitions from the 1970s (when the regulation was issued), as well as the agency’s “fair and considered judgment,” concluded that the Departments’ interpretation “is to be accorded controlling weight.”³²⁶

G.G. shows the *Auer* regime beginning to give way to an analysis approaching *Skidmore* weight. The court did not stop at finding an ambiguity in the regulation and then determining whether the interpretation was “plainly erroneous or inconsistent with the regulation” or the statute.³²⁷ Taking the approach of *SmithKline*,³²⁸ it assessed whether the interpretation was indeed the product of the agency’s “fair and considered judgment,” including whether it conflicted with any prior interpretations, was merely a litigation position, or amounted to a “*post hoc* rationalization.”³²⁹ Of particular note is the court’s conclusion that the letter’s interpretation was “in line with the existing guidances and regulations of a number of federal agencies – all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.”³³⁰ With this statement, the court acknowledged the way in which guidance circulates within government, as officials recognize one another’s corresponding duties and rights faithfully to implement the law.

Nonetheless, the court retained the *Auer* regime by characterizing its inquiry as “highly deferential,” thus denying any role to the persuasiveness of the Department of Education’s position on transgender rights.³³¹ The consequence of this approach was that once the Trump Administration rescinded the guidance,

324. 822 F.3d 709, 722 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

325. *Id.* at 720.

326. *Id.* at 719, 721. It is telling that both the dissent in *G.G.* and the *Texas* district court also read dictionaries from the 1970s and came to the opposite conclusion concerning the regulation’s ambiguity. See *id.* at 736 (Niemeyer, J., concurring in part and dissenting in part); *Texas*, 201 F. Supp. 3d at 833.

327. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

328. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

329. 822 F.3d at 722 (citing *SmithKline*, 567 U.S. at 155).

330. *Id.*

331. *Id.* at 721 (quoting *Dickenson-Russell Coal Co. v. Sec’y of Labor*, 747 F.3d 251, 257 (4th Cir. 2014)).

the Supreme Court vacated and remanded the judgment “in light of the guidance document issued by the Department of Education and Department of Justice.”³³² Since the Fourth Circuit’s holding was based not on the persuasiveness of the official reasoning of the guidance, but rather on extraordinary deference, the rescission of the guidance left the court’s opinion no independent legs on which to stand. The law would be better served by requiring the agency more carefully to demonstrate thoroughness in its deliberation and then by treating its explanation as a privileged reason in determining the correct interpretation of the regulation.³³³ The agency’s understanding of the relationship between sex and gender identity might then enter the case law forthrightly as persuasive authority, rather than evaporating as soon as the guidance is rescinded. The legal practice of reasoned argument demands a more constructive process of incorporation and critique.³³⁴

IV. RELYING ON GUIDANCE

The Article thus far has explained the ways in which guidance can permissibly bind certain officials while acting as a privileged reason for others. Beyond its contribution to legal discourse within agencies and between agencies and courts, guidance can also externalize this internal point of view. Private actors who become aware of the guidance receive notice of the agency’s position and then may treat it as a norm for their own conduct or else use it strategically to achieve their own ends. In this Part, I will show how these external effects give guidance social purchase that endures after the guidance is formally rescinded by the agency. This argument is grounded on my earlier argument that guidance can influence the practical reasoning of private actors. These social effects arise because guidance can specify the contents of people’s preexisting normative commitments or otherwise trigger changes in their practical reasoning. Such social uptake becomes legally cognizable when it constitutes “serious reliance interests” in the government’s policy.³³⁵ If a guidance document induces serious reliance, then any change in the policy that disappoints such reliance must be

332. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017); see *Feb. 2017 Dear Colleague Letter*, *supra* note 3 (rescinding the 2016 transgender guidance).

333. See *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

334. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978) (“Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs.”).

335. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

justified with a reasoned explanation. The policy can change, but only if the underlying substantive disputes are adequately addressed by the agency in its contemporaneous explanation of the new policy.

A. Guidance and Social-Movement Mobilization

Parts I and II showed how guidance circulates as a privileged reason among officials and sometimes generates obligations and cognizable claims for individual private actors. I now look to broader relationships between social movements and administrative guidance. Political scientists, sociologists, and legal scholars have long been concerned with the dialectical relationship between the state and social movements.³³⁶ Social movements press claims upon the government and, if successful, generate new legal rights and duties. These entitlements in turn give the social movement institutional and discursive tools with which to enhance its material and ideological position. This dynamic is most clear when a social movement wins a set of binding legal rights, as when the Civil Rights Movement gave rise to the Civil Rights and Voting Rights Acts, which were then implemented expansively by civil rights bureaucracies with transformative social effects.³³⁷ But this process can also occur at a lower normative altitude when non-binding administrative policies induce private-compliance practices that attempt to vindicate the interests asserted by the movement.

336. See generally BRINGING THE STATE BACK IN (Peter B. Evans et al. eds., 1985) (discussing states as relatively autonomous actors that shape both social and political processes); WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 1-2, 31-33 (2010) (relating administrative reasoning to public discourse about shared norms); LORENZ VON STEIN, THE HISTORY OF THE SOCIAL MOVEMENT IN FRANCE, 1789-1850, at 51 (Kaethe Mengelberg ed. & trans., Bedminster Press 1964) (1850) ("The character of a nation's life emerges in the constant struggle between state and society."); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 267, 269 (1978) (arguing that "New Deal reform appears to have fostered the co-optation of the workers' movement," ultimately resulting in "an increasingly formalized and regulated institutional structure for the state administration of the class struggle"); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006) ("Social movements change the way Americans understand the Constitution. Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding—a dynamic that guides officials interpreting the open-textured language of the Constitution's rights guarantees.").

337. See generally ACKERMAN, *supra* note 287, at 160 ("During the civil rights revolution, both the Court and the political branches . . . engaged in an ongoing dialogue with the bureaucracy—modifying constitutional principles in the light of experience . . ."); HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, at 152 (1990) ("The Civil Rights Act of 1964 . . . would within [a] decade help transform the South

The various topics of the guidance documents considered in this Article all reflect movements for expanded social inclusion. The Department of Homeland Security issued the DACA Memorandum during the Obama Administration in response to political pressure from Dreamers and the immigrant-rights community.³³⁸ The 2011 Sexual Harassment Dear Colleague letter came after years of mobilization from feminist scholars and activists, as well as student campaigns to redress sexual assault.³³⁹ The Equal Employment Opportunity Commission issued its Arrest and Conviction Guidance in the wake of a “ban the box” campaign by localities to “end discrimination against ex-offenders.”³⁴⁰ The transgender guidance came in direct response to a North Carolina law banning transgender-consistent bathroom use, which in turn sought to preempt a local ordinance that required establishments to allow such use.³⁴¹ The ordinance was not anomalous but instead an instance of wider efforts across the country to recognize the sexual equality of transgender persons.³⁴²

into the most desegregated region in the country. Within that same decade, however, the Civil Rights Act’s attack on job discrimination would lead to a metamorphosis of executive and judicial behavior throughout the nation that was both unanticipated and unprecedented.”). This process of implementation can sometimes distort or undermine the movement that generated it. See, e.g., ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 31 (2016) (“[I]n a moment of possibility for both racial and economic justice, the unprecedented changes at the federal level that were born during the launch of the War on Poverty and the enactment of civil rights legislation created a seedbed for an increasingly punitive orientation in domestic urban policy.”). On the earlier civil rights movement, the role of the NAACP, and American state building, see MEGAN MING FRANCIS, *CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE* (2014).

338. See Roberto G. Gonzales et al., *Becoming DACAmented: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA)*, 58 AM. BEHAV. SCIENTIST 1852, 1853 (2014).

339. Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 822-23 (2017); Celene Reynolds, *The Mobilization of Title IX Across Colleges and Universities, 1994-2014*, 66 SOC. PROBS. 245, 264 (2019) (“Complaints citing sexual harassment started a general uptrend in 2006, proliferating at an even faster rate beginning in 2009, and approaching parity with athletics and academic filings by 2014. This provides additional evidence of a larger shift in legal consciousness: people are increasingly recognizing and claiming sexual harassment as actionable sex discrimination under Title IX.”); Tani, *supra* note 257, at 1855-60.

340. Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIM. & PUB. POL’Y 755, 757 (2007).

341. *United States v. North Carolina*, No. 1:16-cv-00425, 2016 WL 7335627, at *1 (M.D.N.C. Dec. 16, 2016) (describing the passage of HB2 in the North Carolina General Assembly and its preemption of “local and municipal ordinances”).

342. Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL’Y 1, 3-5 (2016).

Guidance in these areas is therefore not a detached technocratic intervention by the federal bureaucracy. It is in sync with, and sometimes directly motivated by, active civil society constituencies to whom the incumbent administration is politically responsive. This is why these policies are often accompanied by a speech from the President or a department head, such as the Attorney General.³⁴³ Politically accountable officials take ownership of the guidance³⁴⁴ so that affected constituencies who usually vote for those officials' party are more likely to turn out or so that people who benefit from the guidance will be brought into the fold. We can see this ownership claim in the lineaments of administrative procedure. OCR classified both its 2011 Dear Colleague letter on sexual violence and its 2016 letter on transgender rights as "significant guidance,"³⁴⁵ an official classification that allows the Office of Information and Regulation Affairs to review the guidance.³⁴⁶ Such centralized executive "process mandates" indicate a high degree of political interest in the subject matter in question.³⁴⁷

Recognizing these political dynamics might lead to the conclusion that guidance's social and legal force lasts only as long as its political proponents remain in office. But this is not necessarily so. First, guidance can provide mobilized constituencies with official support for their claims and some assurance that those claims will be taken seriously. In the context of campus sexual assault, for example, the 2011 Dear Colleague letter's interpretations, procedures, and standards empowered student activists to assert their rights and to demand change from their institutions.³⁴⁸ As universities made multimillion-dollar investments

343. See, e.g., Loretta E. Lynch, *Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals*, U.S. DEP'T JUSTICE (May 9, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint> [<https://perma.cc/8H3D-RSSA>]; Barack Obama, *Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/D4C7-2UWU>].

344. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2249 (2001).

345. 2011 Dear Colleague Letter, *supra* note 1, at 1 n.1; 2016 Dear Colleague Letter, *supra* note 3, at 1.

346. Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007); Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to the Heads and Acting Heads of Exec. Dep'ts & Agencies (Mar. 5, 2009), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2009/m09-13.pdf> [<https://perma.cc/5XN5-P397>].

347. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1162 (2014).

348. Office for Civil Rights, *Securing Equal Educational Opportunity: Report to the President and Secretary of Education*, U.S. DEP'T EDUC. 7 (Dec. 2016), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> [<https://perma.cc>]

and administrative changes in response to those developments, institutional inertia has increased the costs of changing course in the future.³⁴⁹ More broadly, it is plausible to believe that some individual students' and employees' reasoning about appropriate conduct and interactions will shift as a result of the cues they get from the university's enhanced commitments. As I argued in Part II, they might only shift their thinking strategically, adopting the positions that conform to the guidance in order to avoid sanctions. But it is possible that more profound changes in individual practical judgment may occur in reaction to the altered normative landscape. Some people may come to rethink the full implications of sex equality and what it means for the way they interact with their fellows. Thus when guidance issues from government-gray bureaus and lands on campus greens, the balance of social forces shifts. Students, instructors, and staff may interact with one another differently and evaluate one another's conduct by new standards, as schools promulgate policies and enact grievance procedures to conform to the guidance. The internal administrative practice and discourse thus reenters and modifies the social practices and discourse that summoned bureaucratic intervention in the first place.

The social conversation and conflict in turn comes back into administrative policy making. The Trump Administration has rescinded the 2011 Dear Colleague letter and issued a proposed rule to replace it.³⁵⁰ The proposed rule makes

/F5DK-MZP5] (noting an 831% increase in complaints to OCR concerning sexual violence at post-secondary educational institutions as compared to 2011, when the Dear Colleague Letter on campus sexual assault was issued); see also VANESSA GRIGORIADIS, *BLURRED LINES: RE-THINKING SEX, POWER, AND CONSENT ON CAMPUS* 80 (2017) ("In the [2011] Dear Colleague Letter, advocates found a powerful new set of standards, and campus administrators found overdue reforms."). According to the *Chronicle of Higher Education*, "the 'Dear Colleague' letter . . . made clear the Obama administration cared deeply about the issue. The message to colleges was unmistakable: We'll be watching you." Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault*, *CHRON. HIGHER EDUC.* (Feb. 8, 2017), <https://www.chronicle.com/article/How-a-20-Page-Letter-Changed/239141> [https://perma.cc/KD97-7LFW]. To many "scholars, victims, and advocates . . . the letter's unveiling felt deeply validating." *Id.*

349. See Wilson, *supra* note 348 ("Universities have hired Title IX coordinators to oversee procedures for adjudicating assault reports, in many cases overhauling those policies, and bought online prevention programs for undergraduates. Some institutions have spent millions of dollars on those efforts, plus more on outside lawyers to help them deal with U.S. Education Department investigations of their procedures.").

350. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018); *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP'T EDUC. (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [https://perma.cc/6XPC-Z85X] ("New Q&A will serve as interim guide until the conclusion of notice and comment rulemaking.").

a number of procedural and substantive changes from the position stated in the Dear Colleague letter and previous department policy. For example, it allows Title IX grievance procedures to use either a preponderance of the evidence standard or a clear and convincing evidence standard.³⁵¹ It also significantly narrows the scope of actionable sexual harassment liability.³⁵² Even before the proposed rule had been issued, professional compliance³⁵³ and advocacy organizations had already trained their constituencies to submit comments on the rulemaking. For example, Know Your IX—“a survivor- and youth-led project . . . that aims to empower students to end sexual and dating violence in their schools”—has issued a “Notice and Comment 101” explainer that advises students and other stakeholders on how to write comments that carry legal weight.³⁵⁴ At the close of the comment period, nearly 100,000 comments had been submitted.³⁵⁵ It seems likely that the dynamic interactions between the guidance and the movement will increase the quality of arguments raised in the comments and thus heighten the bar for justifying the regulation.

351. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61477.

352. For example, the Department had previously interpreted sex discrimination under Title IX to include “conduct of a sexual nature [that] is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program or to create a hostile or abusive educational environment.” Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12041 (1997). The proposed rule defines sexual harassment to mean, in relevant part, “[u]nwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61496.

353. See, e.g., *Raise Your Voice: Responding to the Upcoming Notice and Comment Period on Title IX Federal Guidance*, NAT’L ASS’N STUDENT PERSONNEL ADMINISTRATORS (NASPA) (Apr. 5, 2018), <https://www.naspa.org/rpi/posts/raise-your-voice-responding-to-the-upcoming-notice-and-comment-period-on-ti> [https://perma.cc/HCU5-BKEK].

354. *Learn About Know Your IX*, KNOW YOUR IX, <https://www.knowyourix.org/about> [https://perma.cc/JA2R-KXT8]; *Notice and Comment 101*, KNOW YOUR IX 2 (Mar. 2018), <https://www.knowyourix.org/wp-content/uploads/2018/03/Notice-and-Comment-101.pdf> [https://perma.cc/H62X-FUYK] (“[T]he comment process privileges the use of ‘objective’ evidence such as quantitative data Raise as many relevant issues as you can Clearly [o]rganize [y]our [c]omment[.] . . . If you disagree with a proposed action, suggest an alternative . . .”).

355. See Dep’t of Educ., *Title IX of the Education Amendments of 1972*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=ED-2018-OCR-0064> [https://perma.cc/W76C-WUF8]. I have submitted a comment on reliance interests generated by the policy, which draws on arguments from this Article.

B. Reliance and Reason Giving

Social salience is not the only factor that gives guidance an afterlife. Guidance may also gain enhanced legal status in and through its social uptake. As Karen Tani has observed in her study of administrative enforcement of Title IX, the procedural form of OCR's actions has "call[ed] into question the durability and strength of the rights they articulate."³⁵⁶ Civil rights guidance encapsulates broader dynamics of the modern American "policy state," which eschews categorical delineation of rights and duties and instead deploys more flexible instruments for accomplishing various political goals and social programs.³⁵⁷ Rights becomes "chips" rather than "trumps," in the sense that they do not categorically defeat outside interference but rather count in the balance of reasons that must be considered in assessing public or private conduct.³⁵⁸ I argue in this Section that guidance deals out a chip of this kind that must carry currency in administrative policy making, giving those who rely upon it some assurance that deviation from the guidance's terms will be for good cause. While guidance that specifies the content of a binding statutory or regulatory norm does not itself have the force of law, the social reception of such guidance can generate legally cognizable interests. The legal consequences that give guidance finality at the same time place demands on any efforts to rescind the guidance without good cause. Though this argument is grounded in the case law, the significance of reliance interests more broadly connects to the norm-altering capacity of guidance that this Article has articulated. Without binding anyone to pursue a particular course of conduct, guidance can significantly alter individuals' practical reasoning in a way that needs to be respected in future government policy making.

Agencies have a general duty to offer a "reasoned explanation" for a change in policy.³⁵⁹ This explanation must not only explain the grounds for the new policy but also acknowledge and address any considerations regarding the maintenance of the previous policy that continue to have force. Most importantly, as the Supreme Court said in *FCC v. Fox Television Stations, Inc.*, an agency must offer a "more detailed justification" for a change in policy than for a "new policy created on a blank slate" when "its prior policy has engendered

356. Tani, *supra* note 257, at 1854.

357. KAREN ORREN & STEPHEN SKOWRONEK, *THE POLICY STATE: AN AMERICAN PREDICAMENT* 27-29 (2017).

358. *Id.* at 41.

359. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82, 1000-01 (2005); see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

serious reliance interests that must be taken into account.”³⁶⁰ The Court elaborated on this point in *Encino Motorcars, LLC v. Navarro*, observing that such reliance interests can arise from guidance that lacks the force of law as well as from binding rules or orders.³⁶¹ Evaluating a regulation that departed from an interpretation put forward in an opinion letter that had been in effect for decades, the Court held that “[i]n explaining its changed position, an agency must also be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’”³⁶²

The theory of these cases seems to be that people are likely to make material and social investments because of the policies that are currently in place. Fairness requires that these investments be given due weight in deciding whether to depart from the policy. This does not mean that the policy cannot change. It means that “[s]udden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be ‘arbitrary, capricious, [or] an abuse of discretion.’”³⁶³ As Frank Newman once observed, “Agencies do not enjoy a ruthless discretion to ignore their pasts.”³⁶⁴

This principle has recently been enforced against the Trump Administration in its effort to rescind DACA. In both *NAACP v. Trump* and *Regents of the University of California v. United States Department of Homeland Security*, district courts concluded that the rescission of DACA was arbitrary and capricious under the APA, in part because of the government’s failure to take into account the reliance interests DACA generated.³⁶⁵ The memo rescinding DACA relied almost entirely upon the holding of *Texas v. United States*,³⁶⁶ concluding that DACA was unlawful for the same reasons DAPA (most likely) was unlawful.³⁶⁷ The court in *NAACP* found that “this scant legal reasoning was insufficient to satisfy the

360. 556 U.S. 502, 515 (2009).

361. 136 S. Ct. 2117, 2126 (2016).

362. *Id.* (quoting *Fox Television*, 556 U.S. at 515).

363. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742, (1996) (alteration in original) (citations omitted) (quoting 5 U.S.C. § 706(2)(A)).

364. Frank C. Newman, *Should Official Advice Be Reliable? – Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374, 376 (1953).

365. *NAACP v. Trump*, 298 F. Supp. 3d 209, 215–16 (D.D.C. 2018); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1045–46 (N.D. Cal.), *aff’d*, 908 F.3d 476 (9th Cir. 2018).

366. *See supra* Section I.A.

367. Elaine C. Duke, *Rescission of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,”* U.S. DEP’T HOMELAND SECURITY (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/54NX-RRFK>].

Department's obligation to explain its departure from its prior stated view [in an Office of Legal Counsel memorandum] that DACA was lawful."³⁶⁸ The court then turned to the reliance-interest doctrine:

The Department's failure to give an adequate explanation of its legal judgment was particularly egregious here in light of the reliance interests involved. The Rescission Memo made no mention of the fact that DACA had been in place for five years and had engendered the reliance of hundreds of thousands of beneficiaries, many of whom had structured their education, employment, and other life activities on the assumption that they would be able to renew their DACA benefits.³⁶⁹

In *Regents*, the District Court for the Northern District of California likewise found that "[t]he administrative record includes no consideration to the disruption a rescission would have on the lives of DACA recipients, let alone their families, employers and employees, schools and communities."³⁷⁰ The Ninth Circuit subsequently affirmed the preliminary injunction issued in *Regents*.³⁷¹ It focused on DHS's purely legal justification for the rescission – that DHS was compelled to rescind DACA because the program was unlawful. Holding that this conclusion was not well justified, the court found the rescission arbitrary and capricious in violation of the APA. Though reliance interests did not play a direct role in this holding, they did help frame the case. The opinion begins by describing the plight of plaintiff Dulce Garcia, saying she is "no different from any other productive – indeed, inspiring – young American," except for the fact that she is "an undocumented immigrant."³⁷² The court then writes:

Recognizing the cruelty and wastefulness of deporting productive young people to countries with which they have no ties, the Secretary of Homeland Security announced a policy in 2012 [DACA] that would provide some relief to individuals like Garcia, while allowing our communities to continue to benefit from their contributions Garcia, along with hundreds of thousands of other young people, trusting the government to honor its promises, leapt at the opportunity.³⁷³

³⁶⁸. 298 F. Supp. 3d at 238.

³⁶⁹. *Id.* at 240 (citations omitted).

³⁷⁰. 279 F. Supp. 3d at 1045.

³⁷¹. 908 F.3d at 520.

³⁷². *Id.* at 486.

³⁷³. *Id.*

The moral stakes of the case were thus framed in terms of both the plaintiff's "trust" that the government would adhere to its policy and her actions based on that trust—her reasonable reliance upon the government's acknowledgement of her presence in and contributions to the political community. With these interests in the background, the court looked on the government's argument about the unlawfulness of DACA with heightened scrutiny.

These decisions set out a broad understanding of reliance interests. The terms of DACA do not guarantee that the program will remain in place for any particular length of time or that renewals will be granted to DACA recipients. But because people made significant financial investments and life plans based on DACA, the courts held that taking it away would be highly disruptive—not only to the recipients, but also to a much wider class of persons and institutions. Unlike in contract law, therefore, these public reliance interests need not depend on a promise of performance.³⁷⁴ They require only that people have reasonably "changed [their] position" in response to the government's action and that the withdrawal of that action would now work a harm on them in their new situation.³⁷⁵ The inquiry turns on whether the administration of the program, to date, has created a situation where its discontinuation would upend many people's lives and institutions' functioning.

Attention to reliance interests reinforces our public law system's broader commitment to nonarbitrary administrative decision-making by demanding official regard for the legitimate expectations of affected parties. Both *NAACP* and *Regents* emphasized DACA recipients' and their communities' expectation that they could renew their status.³⁷⁶ That expectation was certainly one of the reasons why undocumented immigrants might have applied for DACA and why

374. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 52-57 (1936). The reliance interest conception developed in *Encino Motorcars* is much broader than the equitable estoppel principle, which, in very limited cases, would prevent an agency from taking action against a person who relied upon erroneous legal advice from an agency. See, e.g., *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 673-74 (1973) (holding that Army Corps of Engineers regulations were sufficiently misleading as to deprive the respondent of fair warning about "what conduct the Government intended to make criminal"). It is also broader than the common law and continental conceptions of "legitimate expectations," which likewise depend upon a reasonable expectation that a given procedure will be followed or privilege granted. See C.F. Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 CAMBRIDGE L.J. 238, 238 (1988). The *Encino Motorcars* principle is based on the extent to which the current policy has seriously altered the situation of the parties and revocation of the policy would work a serious harm.

375. Fuller & Perdue, *supra* note 374, at 54.

376. *NAACP v. Trump*, 298 F. Supp. 3d 209, 240 (D.D.C. 2018); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1031 (N.D. Cal.), *aff'd*, 908 F.3d 476 (9th Cir. 2018).

communities and institutions would have made plans and investments in the belief that DACA would continue. Because DACA by its terms did not confer any substantive right,³⁷⁷ however, the legal significance of their expectation cannot be grounded in any entitlement the program granted to them. Perhaps their reliance was merely misplaced. But these opinions and *Encino Motorcars* indicate otherwise. They suggest that it is reasonable to expect the government to continue doing what it is doing unless there are good reasons for it to change course. People can and should expect the government not to act arbitrarily.³⁷⁸ And once people act on that expectation, the interests and investments thereby created deserve at least some minimal protection. Protecting this expectation enables people and institutions to make plans against a relatively stable background of rules and official practices.

The opinions do not explain, however, how much consideration such reliance interests deserve. Both district courts found that the failure to discuss these interests at all was fatal, at least in the context of an otherwise poorly justified policy shift. Such a narrow ruling was appropriate to the facts of each case. Yet once we accept that reliance interests should be considered by the agency, it is hard to believe that a cursory mention of those interests would be sufficient. Especially where we are dealing with a policy change of “vast economic and political significance,” as the rescission of DACA might be,³⁷⁹ review of the bases for the rescission should be relatively intense.³⁸⁰ The agency would be well advised

377. DACA Memo, *supra* note 4, at 3.

378. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 466 (2003) (arguing that “the risk of arbitrary administrative decision-making” is a “concern of paramount constitutional significance”). Republican government, Philip Pettit has written, should be “arranged so that the presence of arbitrary will in the apparatus of state coercion is minimized.” PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 171 (1997). To satisfy this condition, government must use “a form of decision-making in which we can see our interests furthered and our ideas respected.” *Id.* at 184.

379. See *Texas v. United States*, 809 F.3d 134, 183 (5th Cir. 2015) (describing DAPA as a “decision[] of vast economic and political significance” (internal quotation marks omitted) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014))), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

380. See Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2097 (2018) (“[I]t does not matter whether such a major policy decision is characterized by the agency as an enforcement memorandum, a rule, or a general statement of policy. If an administrative policy is promulgated under any of these headings, and a court determines that the policy shift implicates a question of deep economic and political significance, the agency must have documented a value-oriented process of public engagement for its interpretations of statutory ambiguities to qualify for judicial deference.”).

to open the process to public comment to ensure that all significant concerns and alternatives are considered. It would be wise to document a cost-benefit analysis that incorporates the personal dislocations and economic losses caused by the rescission.³⁸¹

Nonetheless, review of the factual bases of an agency's record is not *de novo*. The inquiry into the facts and policy judgments is to be "searching and careful" but "narrow," because "[t]he court is not empowered to substitute its judgment for that of the agency."³⁸² If the agency considered the reliance interests, avoided internal contradiction, and gave a plausible account of the relative weight of the various policy considerations, that could be sufficient to survive review. The same analysis, though, would not necessarily apply to the issuance of guidance on a blank slate. In that event, it would not usually be possible for any private parties to rely on the agency's simple silence or unexplained inaction on a particular topic. The government must generally stake an explicit position on an issue in order for cognizable reliance interests to arise.

A reason-giving requirement and judicial-review procedure would nonetheless have benefits for the deliberative quality of the decision. The time cost of reason giving might also allow for wider public deliberation and perhaps for a legislative solution. This cooling-dish effect would allow more time to reach a better resolution than sudden termination of a program without any replacement or alternative. Another benefit of a serious reason-giving requirement would be to ventilate the policy choices the agency made and expose them to judicial and public scrutiny.³⁸³ Requiring the agency to explain why it should place hundreds of thousands of people in jeopardy of deportation, despite their life plans and community ties, might expose otherwise concealed assumptions and motivations to rational consideration and critique. This would improve the voting public's ability to assess whether the administration's policy judgments conform to their own viewpoint. Translation of the heated, rhetorical argument for deportation into the cold calculus of bureaucratic reasoning could lead officials and the public to reconsider the proposal's merits, and thus press soft procedural brakes to reduce regulatory whiplash.³⁸⁴

There are certainly costs to imposing a reason-giving requirement on the rescission of guidance documents that generate serious reliance interests. It would

381. *Cf. Michigan v. EPA*, 135 S. Ct. 2699 (2015) (holding that an agency action was unreasonable under *Chevron* because the agency failed to perform a cost-benefit analysis).

382. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

383. *See, e.g., United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)) (stating that the rulemaking record should "enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did").

384. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996).

reduce agencies' ability to change policy swiftly in cases where their previous guidance had been longstanding or implicated major social and political questions. But it is worth underscoring that the demand for reasoned explanation does not apply to all guidance documents; reasoned explanations are only required where the reliance interests generated by the guidance are "serious." The case law indicates that the seriousness of reliance interests turns both on temporal duration and social effect. Where agencies adhere to a position over decades in a way that shapes the business model of an entire industry, *Encino Motorcars* instructs that the stakeholders deserve some explanation for the about-face. In the case of DACA, which was five years old at the time of *NAACP*, the social effects were intense enough to generate serious reliance interests over a relatively short period of time. Hundreds of thousands of people made major life decisions because of the program. Where courts draw the line between such serious reliance that requires attention on the record and lesser reliance that does not should be case sensitive and fact dependent. But we can clarify that inquiry by further examining the kinds of social effects that should be considered in assessing private reliance on guidance.

C. Reliance on Official Recognition

There is no doubt that economic effects do and should count in assessing whether reliance interests are sufficiently serious to deserve attention, but the analysis in the DACA rescission cases extends along another dimension of social consequences. The district court in *NAACP* emphasized that DACA recipients had "structured their education, employment, and other life activities" on the program.³⁸⁵ The district court in *Regents* similarly identified the "disruption a rescission would have on the lives of DACA recipients, let alone their families, employers and employees, schools and communities."³⁸⁶ The activities and relationships implicated surely involve economic investments—such as decisions to pay tuition, take out loans, buy supplies, or rent apartments. And the unanticipated disruption of such activities would have clear economic costs—tuition payments that cannot be recovered or loans that cannot be repaid. But only a cramped reading of these passages would limit the courts' concerns to the dollar value that rescission of DACA would cost its recipients and related parties. Decisions about education, employment, and other life plans often carry normative import beyond their economic value. They may represent evaluative judgments

³⁸⁵. *NAACP v. Trump*, 298 F. Supp. 3d 209, 240 (D.D.C. 2018).

³⁸⁶. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1045 (N.D. Cal.), *aff'd*, 908 F.3d 476 (9th Cir. 2018).

about the kinds of action, practice, and association we take to have moral, political, or aesthetic worth.³⁸⁷ Individuals then develop an interest in maintaining the social relationships that they take to have normative status. In this case, the reliance interest arises because of the way in which individuals' normative judgments shift in response to the guidance and not only how they respond instrumentally to the incentives that the guidance creates. When the state sustains those judgments and relationships by continuing to adhere to the policies that make them practically tenable, it conveys respect for affected persons' value choices, reasoning capacities, social attachments, and ways of life. It includes their reasons among its own set of considerations. When the state fails to adhere to its policies, without regard for the personal judgments and interests attached to them, it conveys disrespect, or at least indifference, to these choices and commitments.

Policies such as DACA therefore concern not only the pecuniary interests of economic actors but also the extent to which the state recognizes people's claims to social inclusion. The Ninth Circuit accordingly recognized that the fundamental question posed by the DACA litigation was "[w]hether Dulce Garcia and the hundreds of thousands of other young dreamers like her may continue to live productively in the only country they have ever known."³⁸⁸ The program allowed them to lay a claim on political belonging. When Dreamers relied on the program, this claim became a legally cognizable interest, requiring the state to give due consideration to their social status, presence, and participation.

Guidance on social inclusion thus generates a particular kind of reliance interest, which I call "reliance on official recognition."³⁸⁹ The interest in official

387. ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 6, 11, 12, 22 (1993).

388. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 520 (9th Cir. 2018).

389. I can only sketch the outlines of this view here. It can be justified on the basis of a Hegelian theory of freedom and law, though one does not need to endorse this theoretical framework in order to accept the general argument. See G.W.F. HEGEL, *THE PHENOMENOLOGY OF SPIRIT* 111 (A.V. Miller trans., Oxford Univ. Press 1977) (1807) ("Self-consciousness . . . exists only by being acknowledged . . ."); AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICT* 43 (1995) (arguing that, for Hegel, "all human coexistence presupposes a kind of basic mutual affirmation between subjects" and that "the transition to the social contract is to be understood as something that subjects accomplish in practice, at the moment in which they become conscious of their prior relationship of recognition and elevate it explicitly to an intersubjectively shared legal relation"); FREDERICK NEUHAUSER, *FOUNDATIONS OF HEGEL'S SOCIAL THEORY: ACTUALIZING FREEDOM* 14 (2003) (observing that for Hegel, "personal freedom must be supplemented by *social freedom*, which includes the ability of individuals . . . to find their own particular identities through their social participation"); ROBERT PIPPIN, *HEGEL'S PRACTICAL PHILOSOPHY: RATIONAL AGENCY AS ETHICAL LIFE* 198 (2008) (noting that for Hegel, "a free rational agent consists in being recognized as one, and one can only be so recognized if the other's recognition is freely given; and this effectively

recognition is a personal and associational interest in the government's acknowledgment that some aspect of a person's identity is worthy of official regard, or that some harms count as legal wrongs in the eyes of the state. Where social groups are marginalized, they often suffer what Miranda Fricker has called an "epistemic injustice," in which their status and their injuries are not adequately understood "in the practices through which social meanings are generated."³⁹⁰ Law has participated in creating these injustices, as it has placed racial and gender groups into hierarchical categories of inferior and superior, in which the perspectives and interests of subordinate parties are given an inadequate or distorted hearing, or no hearing at all.³⁹¹ Law can help to remedy the wrongs it has

means only if I recognize the other as a free individual, as someone to be addressed in normative not strategic terms"). This view has been embraced in some legal scholarship. See, e.g., Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1545 (2016) (describing how criminal law and perhaps other fields of law serve a "recognitional" function, in the sense that legal norms institutionalize shared ethical values through which persons can acknowledge one another as free and equal). Hegel's understanding of mutual recognition has played an important role in American civil rights discourse. One of the founders of the NAACP, W.E.B. Du Bois, built on Hegel's account of freedom and slavery to develop his path-breaking conception of "double-consciousness" — the self-understanding of African Americans living in a white-supremacist society. See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 5 (Penguin Books 1989) (1903); see also SHAMOON ZAMIR, *DARK VOICES: W.E.B. DU BOIS AND AMERICAN THOUGHT, 1888-1903*, at 139 (1995) (contending that for Du Bois, the struggle for recognition is "refigured in terms of the operations of power within the subjecting gaze" and that "Du Bois' description of otherness is dominated by the sense of the transformation of black self-consciousness within the 'glance' or 'eyes of others'"). Hegel's account of the struggle for recognition has also been critically appropriated by feminist and gender theorists such as Judith Butler and Simone de Beauvoir. See generally FEMINIST INTERPRETATIONS OF G.W.F. HEGEL (Patricia Jagentowicz Mills ed., 1996); KIMBERLEY HUTCHINS, *HEGEL AND FEMINIST PHILOSOPHY* (2003). It also influenced the American Progressives who founded our administrative state. See Blake Emerson, *The Democratic Reconstruction of the American State in American Progressive Political Thought*, 77 REV. POL. 545, 552 (2015) (describing how prominent progressives like John Dewey and Woodrow Wilson democratized Hegel's view that "the state is an ethical structure in which individuals' status as free beings finds recognition and expression"). Given these connections, the Hegelian view is particularly appropriate for understanding the reliance interests that civil rights guidance generates.

390. MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER & ETHICS OF KNOWING* 6 (2007); see also JUDITH BUTLER, *UNDOING GENDER* 30 (2004) (describing the "injustice" that "lesbian and gay politics" opposes as "[being] called unreal and [having] that call . . . institutionalized as a form of differential treatment" and thus becoming "the other against whom (or against which) the human is made").

391. See Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment*, 101 HARV. L. REV. 1331, 1372-73 (1988) ("Racism helps create the illusion of unity through the oppositional force of a symbolic 'other.' The establishment of this other creates a bond, a burgeoning common identity of all non-stigmatized parties — whose identities and interests are defined in opposition to the other Racist ideology replicates this pattern of arranging oppositional categories in a hierarchical order; historically, whites represented the dominant antinomy while Blacks came

previously perpetrated or condoned by recognizing the identities that have been forged and the harms that have been suffered in and around these hierarchies.³⁹² When it does so, members of subordinated groups benefit from the knowledge that the political community treats their lived experience as intelligible and morally significant. Official acknowledgment of their status and harms to that status may provide discursive currency to contest intrusions upon their interests.³⁹³

Where the government has provided such recognition through an interpretation of existing law, withdrawing this sphere of protection will itself work a harm. Once acknowledged as the persons they take themselves to be or as victims of particular wrongs, members of the previously un- or misrecognized group will see their status degraded if the government reverses course and states that that status carries no legal weight or that their harms are not harms in the eyes of the law. As Fricker puts it, “political freedom” cannot exist where a ruler possesses the “entitlement to rescind at will the freedoms bestowed upon the subject.”³⁹⁴ That kind of arbitrary power is fundamentally inconsistent with republican government. At a minimum, people should be entitled to a sound

to be seen as separate and subordinate.”); see also SUSAN MOLLER OKIN, *GENDER, JUSTICE, AND THE FAMILY* 5-6 (1987) (“We live in a society that has over the years regarded the innate characteristics of sex as one of the clearest legitimizers of different rights and restrictions, both formal and informal. While the legal sanctions that uphold male dominance have begun to erode in the past century, and more rapidly in the last twenty years, the heavy weight of tradition, combined with the effects of socialization, still works powerfully to reinforce sex roles that are commonly regarded as of unequal prestige and worth.”).

392. See SIMONE DE BEAUVOIR, *THE SECOND SEX* 74-75, 266 (Constance Borde & Sheila Malovany-Chevallier trans., Vintage Books 2010) (1949) (“It is thus true that woman is other than man, and this alterity is concretely felt in desire, embrace, and love; but the real relation is one of reciprocity . . . the relation is a struggle of consciousnesses, each of which wants to be essential, it is the recognition of freedoms that confirm each other, it is the undefined passage from enmity to complicity. To posit the Woman is to posit the absolute Other, without reciprocity, refusing, against experience, that she could be a subject, a peer.”); Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*, in NANCY FRASER & AXEL HONNETH, *REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE* 7, 29 (Joel Golb et al. trans., 2003) (“To view recognition as a matter of justice is to treat it as an issue of *social status*. This means examining institutionalized patterns of cultural value for their effects on the *relative standing* of social actors. If and when such patterns constitute actors as *peers*, capable of participating on a par with one another in social life, then we can speak of *reciprocal recognition* and *status equality*.”); see also Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1529 (2000) (describing how law can “recognize” harms).

393. See Miranda Fricker, *Epistemic Justice as a Condition of Political Freedom?*, 190 SYNTHESE 1317, 1324-27 (2013).

394. *Id.* at 1321.

explanation for why their condition should not have been given official protection in the first place, or else why other considerations now outweigh continued recognition. Such a right to justification would provide grounds for further deliberative contestation, in which the previous act of official recognition would enhance the discursive resources of its beneficiaries.³⁹⁵

Consider the example of transgender identity. Sexual identity is not a purely biological, individual, or even social category; indeed, the American administrative state has helped constitute sexual subjectivity and heteronormativity through its regulation of immigration and official conduct.³⁹⁶ But let us step back from the thicket of history and imagine how administrative guidance on sex discrimination recognizes transgender people. If *T* is transgender, but no one in society acknowledges transgender identity, then *T* may be unable to articulate that identity in their actions.³⁹⁷ Now consider how the political association of which *T* is a member might begin to recognize them in steps. Suppose *T* finds a way to break through the binary sexual discourse that aligns biological sex with gender, performing in ways that challenge and reconfigure received notions of womanhood and manhood.³⁹⁸ If *T* finds partner *P* who sees and embraces the transgender meanings of these performances, *T* and *P* can then act jointly to live a life more consistent with *T*'s identity. Suppose, further, that *T* finds a commu-

395. See Susan Dieleman, *Epistemic Justice and Democratic Legitimacy*, 30 *HYPATIA* 794, 801 (2015) (noting that “[t]he powerless . . . must make do with the social meanings available to them”).

396. MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 3-4 (2009).

397. Compare JUDITH BUTLER, *ANTIGONE’S CLAIM: KINSHIP BETWEEN LIFE & DEATH* 81 (2000) (“[H]ow are we to grasp this dilemma of language that emerges when ‘human’ takes on that doubled sense, the normative one based on radical exclusion and the one that emerges in the sphere of the excluded, not negated, not dead, perhaps slowly dying, yes, surely dying from a lack of recognition, dying, indeed, from the premature circumscription of the norms by which recognition as human can be conferred, a recognition without which the human cannot come into being but must remain on the far side of being, as what does not quite qualify as that which is and can be? Is this not a melancholy of the public sphere?”), with HEGEL *supra* note 389, at 279-84.

398. See Susan Stryker et al., *Introduction: Trans-, Trans, or Transgender*, 36 *WOMEN’S STUD. Q.* 11, 12 (2008) (resisting “applications of ‘trans’ as a gender category that is necessarily distinct from more established categories such as ‘woman’ or ‘man.’ Rather than seeing genders as classes or categories that by definition contain only one kind of thing . . . we understand genders as potentially porous and permeable spatial territories”); cf. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 44 (1990) (describing “the possibility of subverting and displacing those naturalized and reified notions of gender . . . through the mobilization, subversive confusion, and proliferation of precisely those constitutive categories that seek to keep gender in its place by posturing as the foundational illusions of identity”).

nity of persons who are either transgender or who recognize transgender identity. *T* will now be able to speak, act, and circulate freely within this community in a way that accords with their conception of who they are.³⁹⁹ The social sphere in which the content of *T*'s identity has free play has widened, giving them a larger set of options to pursue. This community will press its claims when others impinge on them.

Now consider what happens when this community becomes large, active, and vocal enough to bend the ear of an official of the state.⁴⁰⁰ The official says, "[W]e see you."⁴⁰¹ Henceforth, the official's office will interpret the legal prohibition on discrimination because of sex to encompass transgender identity.⁴⁰² There may be particular legal actions or material benefits that flow from this determination, but the mere fact that the public official has reasoned in pursuance of her official duties that "sex" encompasses transgender identity means that other officials must treat this determination as a privileged reason for action. That means that *T*'s claims will now circulate, not only within their community, but also within the offices of government. When this internal administrative law becomes external, through the mechanisms this Article has described, more private persons in society will begin to hear their claim as well. *T* and their community can then leverage this enhanced discursive position to argue for the extension of binding legal rights. To use Seana Shiffrin's terms, such official pronouncements can "deliberately alter the normative status of recipients."⁴⁰³ It is not merely, however, guidance's "generation and public declaration" that gives it legal purchase.⁴⁰⁴ The claims it stakes need to be not only expressed but also heard and acted upon for a legally cognizable interest to emerge. Once such reliance interests coalesce, any effort to withdraw official acknowledgment must meet the demand for reasoned explanation that is the hallmark of administrative legitimacy. As the Trump Administration contemplates a new regulation that

399. See B Lee Aultman & Paisley Currah, *Politics Outside the Law: Transgender Lives and the Challenge of Legibility*, in LGBTQ POLITICS: A CRITICAL READER 34, 44 (Marla Brettschneider et al. eds., 2017) (describing transgender youths' challenges with finding "social connectivity" and describing benefits associated with that connectivity).

400. Cf. *id.* at 35 (noting Vice President Joe Biden's remarks about the civil rights of transgender individuals after gay rights organizations began including them in their constituencies).

401. Lynch, *supra* note 343.

402. 2016 Dear Colleague Letter, *supra* note 3.

403. Seana Valentine Shiffrin, *Speaking Amongst Ourselves: Democracy and Law: Democratic Law*, TANNER LECTURES 51:26-:38 (2017), <http://tannerlectures.berkeley.edu/2016-2017-lecture-series> (select "Lecture One: Part One").

404. *Id.*

would define “sex” biologically,⁴⁰⁵ the notice-and-comment process and the judicial review thereof must make good on this requirement.

Guidance on social inclusion thus produces a state of “liminal legality” that recognizes the identity of persons, their claims to belonging, or the harms they suffer, yet fails to give that recognition the force of law.⁴⁰⁶ DACA, for instance, acknowledges that persons who unlawfully came to this country as children “know only this country as home.”⁴⁰⁷ It welcomes into the political community those who have spent their lives within its borders but on its margins. However, because the program is nonbinding, the commitment may not be durable. Such a status can dissipate into a condition of relative exclusion. Or it may develop into a full legal entitlement. It is characteristic of norms that regulate political membership to constitute some subjects as both inside and outside of the law.⁴⁰⁸ The DACA recipient does not win a permanent legal status but enjoys particular legal benefits for the duration of deferral. Similar dynamics occur in the field of personal identity. The 2016 Dear Colleague letter did not grant trans people a new slate of legal rights but instead attempted to shoehorn trans interests into the existing, binary suppositions of the Title IX regulations.⁴⁰⁹ The procedural form of guidance reflects the substantive ambiguities in these fields of law. Where the line between exclusion and inclusion has not yet hardened into a clear rule, administrative guidance outlines the contested threshold between the enforceable rights and duties of public law and the unwritten laws of personal self-understanding and social conscience.⁴¹⁰ The nonbinding yet legal status of guidance expresses the ambivalence of social movements as they attempt to redeploy

405. Erica L. Green et al., ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [https://perma.cc/762S-NR6N].

406. See generally Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709 (2015) (discussing “liminal legality” in the context of DACA).

407. DACA Memo, *supra* note 4, at 1.

408. MOTOMURA, *supra* note 139, at 22-25 (describing the “gray areas” of immigration law, such as “unlawful presence”).

409. See generally Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205 (2017).

410. Compare HEGEL, *supra* note 389, at 280 (analyzing the conflict between state and family in *Antigone* and observing that “because, on the one hand, the ethical order essentially consists in this immediate firmness of decision, and for that reason there is for consciousness essentially only one law, while, on the other hand, the ethical powers are real and effective in the self of consciousness, these powers acquire the significance of excluding and opposing one another: in self-consciousness they exist explicitly, whereas in the ethical order they are only implicit”), with BUTLER, *supra* note 397, at 30, 39 (2000) (“*Antigone* is only partially outside the law, and so one might conclude that neither the law of kinship nor the law of the state

the powers of state domination for the purposes of social emancipation.⁴¹¹ Guidance is the form of law that claims for justice will often take in an administrative state where civil rights discourse is deeply embedded and yet heavily disputed.

The endpoint of this Article's analysis is that such guidance and the liminal statuses it produces have some purchase on the public law that binds. Official recognition, once granted and incorporated into individual and institutional decision-making, demands due consideration by officials who would withdraw it. This is because people depend on official recognition for their freedom, as do their partners and their communities. This sphere of collective reliance deserves a fair hearing by a government that purports to exercise legitimate authority over all persons within its territory.

It remains to be determined what kinds of reliance interests are serious enough to trigger the requirement that those interests be considered by a decision maker who would change the policy. *Regents* and *NAACP* instruct us that the reliance interests generated by DACA qualify, as hundreds of thousands of people and countless institutions and communities shaped their plans and investment decisions on the basis of the guidance.⁴¹² Might this principle also extend to the Title IX sexual harassment guidance? The answer would depend on the degree to which that guidance altered the institutional and normative landscape for parties who are in Title IX's zone of interest. The guidance has led many universities to invest heavily in complaint procedures.⁴¹³ If numerous students

works effectively to order the individuals who are subject to these laws. But if her deviance is used to illustrate the inexorability of the law and its dialectical opposition, then her opposition works in the service of law, shoring up its inevitability The public law, however, as much as it opposes the nonpublic or non-publishable condition of its own emergence, reproduces the very excess it seeks to contain.”).

411. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 162 (1989) (“The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender—through its legitimating norms, forms, relation to society, and substantive policies.”); Wendy Brown, *Finding the Man in the State*, 18 *FEMINIST STUD.* 7, 9 (1992) (“[I]f . . . state powers are no more gender-neutral than they are neutral with regard to class and race, [a feminist] appeal [to the state] involves seeking protection *against* men *from* masculinist institutions, a move more in keeping with the politics of feudalism than with freedom.”); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 *HARV. L. REV. F.* 103, 103 (2015) (“[A]s feminists issue a series of commands from within the federal government about what the problem of campus sexual violence is and how it must be handled, and as they build new institutions that give life to those commands, they become part of governmental power.”).

412. *NAACP v. Trump*, 298 F. Supp. 3d 209, 240 (D.D.C. 2018); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1046 (N.D. Cal.), *aff’d*, 908 F.3d 476 (9th Cir. 2018).

413. See Gersen & Suk, *supra* note 256, at 897–905 (describing universities’ investments in complaint procedures resulting from Title IX guidance).

explicitly or implicitly relied on that institutional investment to vindicate their statutory rights, a change in policy that substantially detracted from that extension of procedural protection would need to take those interests into account. Thus, if the 2011 Dear Colleague letter significantly increased the number of student complaints, apprised parties of rights under Title IX of which they had been unaware, conveyed official recognition of the harms they suffered as victims of sexual assault, created a sense of security on campus that enabled students to participate as equals regardless of sex, or increased the social salience and acknowledgment of the wrongs of sexual harassment, then those interests would need to be addressed on the record if the policy were to be changed.

Such values as “equity, human dignity, [and] fairness,” are already recognized in the regulatory review process required for regulations and significant guidance.⁴¹⁴ The principle of *Fox Television* and *Encino Motorcars* that serious reliance interests must be taken into account when an agency changes course should incorporate this provision of regulatory review into judicial review.⁴¹⁵ Not all costs and benefits are strictly monetary; they can also include people’s sense that the government recognizes the harms they have suffered and will take steps to address them. An agency could reasonably find that other considerations—such as some conception of procedural fairness—required it to abandon or revise some aspects of the previous policy. But that determination would have to be justified by a careful, evidence-based balancing of the equities involved, and could not be sustained by mere conjecture.

I do not discount out of hand the possibility that administrative guidance on social inclusion might have negative side effects. Guidance on sexual harassment might lead persons wrongfully accused of sexual assault to lose their place in the educational institution of their choosing; guidance on transgender rights might reify the distinction between male and female or discount other identities; guidance on deferred action might encourage more unlawful immigration that poses risks to those who immigrate or to the political community as a whole; or guidance on the use of arrest and conviction records in employment decisions might reinforce stereotypes about race and crime. The point is that these kinds of concerns should be addressed explicitly, thoroughly, and on the record if the previous policy is to be withdrawn. Guidance on social inclusion can then inspire genuine public deliberation and clarify our collective identities, attachments, and interests as a people.

⁴¹⁴. See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); see also Exec. Order No. 13,777, 82 Fed. Reg. 12285 (Mar. 1, 2017) (leaving Executive Order 13,563 in place); Memorandum from Peter R. Orszag, *supra* note 346.

⁴¹⁵. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

CONCLUSION

Guidance deserves a particular kind of respect in official legal discourse. Because the administrative officials who author guidance have a duty to uphold the law, they have concomitant discursive rights that enable them to fulfill that duty. The basic rule-of-law interests in notice and in consistent treatment require that other officials should consider this guidance a presumptively valid reason for official action, which can only be overcome by particularly weighty countervailing considerations. This official respect can serve to externalize the official's internal point of view, as social actors take up the guidance for strategic, professional, or moral reasons. Once guidance has been externalized in this way, it generates reliance interests on the part of the individuals and communities who benefit from it, including their interest in the government's recognition of their identity, their claims, or the harms they have suffered. Therefore, when an agency seeks to rescind guidance, it must be prepared to justify its action with due consideration of the interests that the previous policy induced and recognized.