New York University Annual Survey of American Law

is in its seventy-fifth year of publication.
For what avail the plough or sail
Or land or life, if freedom fail?

EMERSON
NEW YORK UNIVERSITY
ANNUAL SURVEY OF AMERICAN LAW
2019–2020 BOARD OF EDITORS

Editor-in-Chief
Sander Saba

Managing Editors
Ekaterina Chernova
Kathleen M. Lewis
Sidney Moskowitz
Yianni Tsemelis
Kasi L. Wautlet

Development Editors
Yosef Baruh
Kelly Nabaglo
Aaron Mattis

Inclusivity Editor
Karen Luo

Solicitations Development Editors
Tiffani Chanbroo
Daniela Serna
Elina Sigal

Executive Article Editors
Dino Ilievski
Sasha Kawakami
Karen Luo
Jessica Rubin
Elizabeth Samios
Iroh Umoru

Articles Editors
Joshua Barkow
Lauren Rachel Bobersky
Samuel Boorstein
Melanie D. Borker
Amanda DeMasi
Gabriel Eisenberger
Joanna M. Foley
Kimberly Fayette
Jack Barnett
Samuel Boissard
Rebekah Boulos
Dominic Budetti
Emma Carlin
Catherine Cazes
Francesca D’Agostino
Allison M. DeJong
Spenser Easterbrook
Sarah Emerich
Amanda Estves
Laura A. Figueroa
Rafi Friedman
Amy E. J. Garland

Solicitations Notes Editors
Baker MacDonald
Andrew B. Fink
JosephRé Combo

Staff Editors
Hannah Goldberg
Kristen Liang
Elizabeth A. Morgan
Joel Naiman
Yelena Nazarian
Gabrielle N. Pacia
Jordana Palgon
Meghan Patzer
Hannah Grace
Samuel Ison
Jason Kaplan
Maggie Kiley
Michael Kim
Estefania Laureano
Zoe Lillian
Elie Lipnik
Alex Lupnai
Kate MacAdam
Seth Massey
Harshil Mehta
Arjun Mocherla
Adriana Morton

Notes Editors
Audrey Cranberry-Hannigan
Jonathan P. Vardeh Jaffe
Alyssa Waaramaa

Online Editors
Karen Luo
Iboh Umodu
Joseph Shui

Inclusivity Editor
Elizabeth Samios
This Volume of
New York University Annual Survey of American Law
is respectfully dedicated to

JUDGE ROBERT A. KATZMANN
JUDGE ROBERT A. KATZMANN

Robert A. Katzmann is the Chief Judge of the U.S. Court of Appeals for the Second Circuit. He was born in 1953 in New York City and received his B.A. from Columbia University, where he graduated summa cum laude. He earned a master’s degree and a Ph.D. in government from Harvard University before receiving his J.D. from Yale Law School in 1980, where he was an Article and Book Review Editor on the Yale Law Journal. After graduation, he clerked on the U.S. Court of Appeals for the First Circuit. Prior to his appointment to the bench, he worked as a fellow and acting program director at the Brookings Institution, and was a professor at Georgetown University, University of California, Los Angeles, and the University of Oregon. He is the author and editor of numerous books on the federal judiciary, regulatory bureaucracy, and the relationship between the courts and Congress.

Chief Judge Katzmann was appointed to the U.S. Court of Appeals for the Second Circuit in 1999 by President Clinton. He served as a judge on the Second Circuit until 2013, when he became Chief Judge. Moved by the inadequate legal representation of noncitizens in his early years on the bench, he organized an interdisciplinary Study Group on Immigrant Representation. From this study group emerged the New York Immigrant Family Unity Project, the first government-funded program of legal counsel for detained noncitizens. He spurred the creation of the Immigrant Justice Corps, a non-profit fellowship program for recent graduates that aims to meet the need for high-quality legal representation for immigrants. He also created “Justice for All: Courts and the Community,” a civic education initiative of the Second Circuit, which aims to bring the courts closer to their communities. He has served on many judicial committees, including as Chair of the U.S. Judicial Conference Committee on the Judicial Branch (by appointment of the Chief Justice), as a member of the Executive Committee of the U.S. Judicial Conference, and as Chair of the Supreme Court Fellows Commission.
DEDICATEES
OF
NYU ANNUAL SURVEY OF AMERICAN LAW

1942  Harry Woodburn Chase  1980  Edward Weinfeld
1944  Manley O. Hudson  1982  Shirley M. Hufstedler
1945  Carl McFarland  1983  Thurgood Marshall
1946  George B. Galloway  1984  Hans A. Linde
   Robert M. LaFollette, Jr.  1985  J. Skelly Wright
   A.S. Mike Monroney  1986  William Wayne Justice
1947  Roscoe Pound  1987  Frank M. Johnson, Jr.
1949  Herbert Hoover  1989  Barbara Jordan
1950  Bernard Baruch  1990  Harry A. Blackmun
1951  Robert P. Patterson*  1991  Martin Lipton
1952  Phanor J. Ede  1992/93  John Paul Stevens
1953  Edward S. Corwin  1994  Judith S. Kaye
1954  Arthur Lehman Goodhart  1995  Hillary Rodham Clinton
1955  John Johnston Parker  1996  Sandra Day O’Connor
1957  Herbert F. Goodrich  1998  Janet Reno
1958  Harold H. Burton  1999  Alexander L. Boraine
1959  Charles E. Clark  2000  Desmond M. Tutu
1960  Whitney North Seymour  2001  Norman Dorsen
1961  Austin Wakeman Scott  2002  Laurence H. Tribe
1962  Fred H. Blume  2003  John Sexton
1963  Laurence P. Simpson  2004  Richard Posner
1964  Edmond Cahn*  2005  Antonin Scalia
1965  Charles S. Desmond  2006  Ronald Dworkin
1966  Tom C. Clark  2007  Stephen G. Breyer
1968/69  Russell D. Niles  2009  Patricia M. Wald
1969/70  Jack L. Kroner*  2010  Arthur R. Miller
1970/71  Frank Rowe Kenison  2011  Cass R. Sunstein
1971/72  Robert A. Leflar  2012  Derrick Bell*
1972/73  Justine Wise Polier  2013  Guido Calabresi
1973/74  Walter J. Derenberg  2014  Chief Judge Diane P. Wood
1974/75  Robert B. McKay  2015  Judge Jack B. Weinstein
1976  Herbert Peterfreund  2016  Sonia Sotomayor
1977  Charles D. Breitel  2017  Judge Pauline Newman
1978  Henry J. Friendly  2018  Judge Paulette Newman
1979  David L. Bazelon

* In memoriam
SUMMARY OF CONTENTS

TRIBUTES

Introduction by Leonid Grinberg 1
Justice Sonia Sotomayor 3
Justice Ruth Bader Ginsburg 6
Professor Nancy Morawetz 8
Professor Lindsay Nash 10
Professor Peter L. Markowitz 12
Judge Ann Claire Williams 14
James C. Duff 17
Professor Paul Light 20
Russell Wheeler 23
Judge Guido Calabresi 26
Acknowledgment by Judge Robert A. Katzmann 28

ARTICLES

THE GOVERNMENT SPEECH-FORUM CONTINUUM: A NEW FIRST AMENDMENT PARADIGM AND ITS APPLICATION TO ACADEMIC FREEDOM

Wayne Batchis 33

NOTES

SEXUAL MISCONDUCT & SECURITIES DISCLOSURE IN THE “#MeToo” WORLD

Michael D. Rebuzz 85

THE GUIDANCE DOCUMENT DILEMMA: REFORMING THE FDA’S USE OF GUIDANCE DOCUMENTS FOR THE 21ST CENTURY

Chase Weidner 137
TRIBUTE TO JUDGE ROBERT KATZMANN

LEONID GRINBERG

Thank you, Dean Morrison. On behalf of the NYU Annual Survey of American Law, welcome, everyone, to our 75th Dedication. The Dedication is the Annual Survey’s flagship event. It dates back to the journal’s founding in 1942.

Each year we look for an individual who, throughout his or her career, has made a significant impact on American law. We try to pick someone not only brilliant and accomplished, but also passionate—passionate for the law and its progress, for advancing legal scholarship, and for promoting justice. We also look for dedicatees who are multifaceted—whose lives included many endeavors and focuses, who have left their marks on the world in a variety of ways. And finally, we look for someone who makes a good role model—who can teach us not only to be good lawyers, but also good citizens and effective leaders.

As you can see in your programs, and as Dean Morrison said, we have honored many luminaries over the years, and Chief Judge Katzmann stands rightfully in their company. We also have an incredible panel of speakers assembled here today, and they can expand on Judge Katzmann’s accomplishments far better than I. But, we all know that you can learn a lot about a person in the more mundane moments, so I want to share my personal experience interacting with the judge over the past few months. First of all, being Chief Judge of the Second Circuit must not take up too much time, because Judge Katzmann responds to emails faster than anyone I have ever met. And I know it’s him and not his clerks writing, because all the emails are signed simply “Bob.” Throughout this process, Judge Katzmann made time for all my questions, no matter how small. One morning, I even woke up to a voicemail from the judge, clarifying an earlier point he had made in a previous conversation. And my first thought was, “wow, I have a voicemail from Chief Judge Katzmann!” and my second thought was, “wow, it is a good thing I actually check my voicemail.”

Now, as it turns out, Judge Katzmann has himself spoken as a dedicatior at this event three times in the past. On two of those occasions, in fact, we were celebrating individuals who will be speaking in his honor today. And if you read his remarks from those events, you will get a sense of the man I am proud to say I have gotten to know just a little over the past few months — a man who is quick to
praise and cast a glowing light onto others, who is eloquent and witty but never ostentatious, and who more than anything cares deeply about other people. Even with regards to this event today, he has fretted to make sure that no one feels left out (including the students on the journal), has repeatedly apologized for taking up my time, and has expressed sincere surprise that so many people are excited to celebrate his accomplishments.

Despite his remarkable career, Chief Judge Katzmann remains one of the most humble people I have ever met, and I cannot be more honored that he is this year’s Annual Survey dedicatee. And so with that, I’ll turn it back over to Dean Morrison to introduce our first speaker, Justice Sonia Sotomayor.
TRIBUTE TO JUDGE ROBERT KATZMANN

JUSTICE SONIA SOTOMAYOR

Bob, I am so happy to be here. Bob and I call each other brother and sister. I’m sure Gary, Martin, and Susan didn’t know they had a fifth sister, but they do. This should not be surprising to anyone who knows us both, as the difference in our biological parents is unimportant to the similarities we share. We both are children of this amazing city, and we both stem from extraordinary parents.

The world knows about my special mom. Fewer people know about how special Bob’s parents are. Bob’s father, John (who’s sitting in the first row), is a refugee from Nazi Germany, and his mother, Sylvia, is the daughter of Russian immigrants. They are both here to celebrate with him tonight and should be celebrated with Bob for the amazing way they raised him and his three equally accomplished siblings. I think they deserve a round of applause.

Like my mother, Bob’s parents devoted themselves to creating an environment where their children could thrive. It was by his parents’ example that Bob learned the core values he possesses that we all so admire. First, the importance of education. Second, a deep commitment to hard work. And third, the centrality of treating people with dignity and kindness. In all he does, Bob brings these values to life.

With respect to education, Bob has always had an innate passion for learning. By the time Bob and I crossed paths at the Yale Law School—just as an aside, for months I thought I saw Gary Katzmann, his twin brother, in every place Yale had. And I’m sure, repeatedly, I called out, “Hello Gary,” until I saw double of them one day. But he was there. The three of us were there—and that was about twenty—and he was about twenty-five years old and already held a bachelor’s degree from Columbia University, a master’s degree and PhD in government coming from Harvard University. Bob’s passion for education, however, is not limited to expanding the breadth of his own knowledge, but also to ensuring that others share in his joy of learning. Over the years, he has taught courses and seminars to law students, and he is a devoted mentor to his law clerks—many of whom are in the audience and so many that we share in common.

Recently, he established the Second Circuit’s civic education initiative—Justice For All: Courts and the Community. Through
this program, Bob has opened the doors to the courthouse to students, teachers, and the broader community with the goal of increasing public understanding of the courts and bringing the courts closer to the community. I am incredibly proud of this work. And I am so respectful that Bob found the perfect legacy for an extraordinary chief judgeship.

Now, indeed, in everything Bob does, he brings a dedication to doing it well and getting it right, which brings me to his second core value: a deep commitment to hard work. After law school, Bob clerked for a year on the First Circuit and then joined the Brookings Institution, where he served in their Governmental Studies program. At Brookings, Bob wrote and edited several books and authored numerous articles. His work made significant contributions to the study of the interplay between courts and Congress, including the development of a special intergovernmental project that encourages judges from every circuit court to alert Congress to statutory drafting problems identified in judicial decisions. I learnt recently that the project begun in 1988 still continues today—with partisan support. That’s a miracle.

Bob’s deep-seated respect for the judicial process has served as the foundation for his distinguished service as a federal circuit judge, for the past almost twenty years, and has involved him in numerous judicial conference and Second Circuit committees that seek to improve the work of the court system. On top of his endless public interest activities, Bob is an exceptionally skilled jurist. Since he has been on the bench he has authored 190 published majority opinions. He has been affirmed by the Supreme Court five times and reversed only three. Don’t let that number worry you though, Bob. My court gets it wrong every now and then. I have personal experience with that. In addition to hearing and deciding cases, Bob continues to contribute to the development of legal theory, in particular in the realm of statutory interpretation where his expertise and governance is particularly valuable. One of his seminal books, *Judging Statutes*, was recently cited approvingly in a Supreme Court concurrence—guess who wrote it?—that takes on the strict textualism view that some of my colleagues have adopted.

Bob is relentless, always thinking, always striving to improve the legal system as a whole. In these efforts, however, Bob is incredibly humble and always lets the product of his work shine for itself. This brings me to the third and most important core value that Bob exemplifies: the importance of treating people with dignity and kindness. Bob always puts people first. Everything he does is geared towards helping people and strengthening their relationship with
one another. As both a scholar and a judge, Bob is keenly aware of the impact our institutions have on real lives. It was that awareness that called him to action when he noticed as a circuit judge that in case after case that appeared before him, individuals who were challenging immigration decisions had received no, or at best inadequate, legal representation. He didn’t simply shrug his shoulders when he saw this. As we will hear about in more detail today, he formed a committee to research immigrant representation, which ultimately led to a program that ensures that nearly every individual facing removal in New York City has access to a free, competent attorney. He also founded the Immigration Justice Corps, which is creating a pipeline of recent college and law school graduates to work in the field of immigrant rights. This work is being replicated around the country, as other cities and states strive to protect their immigrant communities.

What is more incredible about Bob is the humility that accompanies his work. At each stage of my judicial career, he has been instrumental in my nominations and confirmations. During my Supreme Court nomination, he spent weeks mimicking a role he had played for my colleague Ruth Bader Ginsburg, serving as a special advisor in preparation for and during my hearings. Yet, not once in all the years I have known him has he spoken about these efforts. That is because Bob does not talk about his efforts on behalf of so many people. He just sees what needs to be done, thinks creatively about a solution, dives in, and gets the job done to create a better world. That is what makes you special today, my brother.

We are here, Bob, to laud your accomplishments and air our gratefulness for everything you have done for all of us in this room and for the legal community as a whole. You are a preeminent leader as a scholar and peer, and thus a most deserving recipient of this award. I am honored to call you more than a dear friend, my brother. No matter how busy you are, you always make time for the people you love—especially your friends and your family, including your remarkable wife Jennifer Callahan. She shares your compassion for capturing the real experiences of people’s lives, as we have seen in her beautiful films. We are grateful to her for all that she does and for sharing you with the rest of us. Brother, you are the shining example of what a meaningful life can accomplish and of how care and compassion can serve the legal profession. I am so proud to be related to you and will always try to follow in your footsteps, knowing that you will always lead the way to what is right, what is just, and what is kind. I love you, Bob.
TRIBUTE TO JUDGE ROBERT KATZMANN

JUSTICE RUTH BADER GINSBURG

I had the great pleasure of administering the oath of office to Robert A. Katzmann on October 25, 1999, the date of his formal investiture as circuit judge of the United States Court of Appeals for the Second Circuit. On that occasion, I said, "as an insightful scholar of governance and interbranch relations, your new circuit judge has studied federal courts closely for many years, from many perspectives. He brings an enormous store of knowledge to his new commission, along with intelligence and personal qualities important in sound judging: an inquiring mind, extraordinary diligence, patience, and a readiness to listen and to learn."

In his more than seventeen years on the federal bench, now Chief Judge Katzmann has proved the accuracy of my forecast. Thriving in the work of federal appellate judging, he has played a lead role in maintaining the Second Circuit’s stature as a tribunal held in highest regard. Chief Judge Katzmann’s initiatives merit rousing applause.

Two standouts: first, in 2007, Bob delivered the prestigious Marden Lecture at the City Bar Association. His lecture called attention to the plight of immigrants seeking asylum or to stave off deportation. Immigrants without the wherewithal to engage competent counsel faced a dense thicket of laws and regulations and immigration judges overwhelmed by the mountain of cases assigned to them. Following the lecture, a prodigious effort on Katzmann’s part led to the creation of the Immigrant Justice Corps, composed of recent law graduates immersed in immigration law and then sent to community-based organizations to meet the huge need. Since its inception in 2014, the Immigrant Justice Corps has been a tremendous success. Its staff has grown to over eighty. Many serving the Corps are first-generation Americans. More than 3,100 complex cases have been launched by Corps lawyers in the past few years. In cases so far concluded, the Corps has achieved a stunning success rate of ninety-three percent. Altogether, the Corps has assisted more than 28,000 immigrants and their family members in obtaining benefits and avoiding deportation.

A second major initiative—Justice For All: Courts and the Community. This innovation invites the public, and particularly schoolchildren, into the courthouse to learn, firsthand, how our system of justice works. The program, superintended by Chief Judge
Katzmann and District Judge Victor Marrero, offers an introduction to legal research carried out in the court of appeals library, on-premises moot courts, and teacher training sessions. Also, curriculums tailored for teaching high school students. A New York Times article, reporting on the Justice For All Initiative, described Chief Judge Katzmann as “a soft-spoken man with a serene confidence. Someone who can talk quietly and still be heard.” That description is spot-on.

Putting to good use his education in political science and law, Bob has written several books. I will name just one of them: *Judging Statutes*, a 2014 publication. The book addresses a subject of vital importance to the judiciary and the public: when Congress enacts laws lacking clarity, as it often does, how should a judge determine what the lawmakers meant? Retired Supreme Court Justice John Paul Stevens praised the book for reinforcing the approach of jurists who find that a fair examination of legislative history helps them understand the work of their colleagues in Congress.

Peter Strauss, distinguished teacher of Administrative Law and Legal Method, in his review of Katzmann’s book, said that *Judging Statutes* should be required reading for all who teach in the field. I rank this slim, eminently digestible volume, as a gem.

I cannot resist telling you one thing more about Chief Judge Katzmann. When President Clinton nominated me for the good job I now hold, Senator Moynihan thought it would be useful for me to have a savvy, sympathique counselor as I made my way from one Senator’s office to another’s. Bob Katzmann was that counselor. He informed me, in short order, of the Senators’ interests, what subjects I might safely address, what topics were best avoided. From the beginning, through to the happy ending, Bob was at my side, constantly informing and encouraging me. I could not have been better advised.

You will not be surprised when I tell you that many of Bob’s law clerks clerk next for me. From OT 2013, until OT 2019, at least one Katzmann clerk has been, or will be, on my chambers crew.

For his intelligence and humility, his compassion and caring, and his keen appreciation that judicial decisions affect the lives of everyday people, Chief Judge Katzmann is very dear to my heart. I congratulate him on the dedication of the Annual Survey of American Law to him. May he long continue to engage in the art of judging, and to stay well as he thrives in the practice of good citizenship.
TRIBUTE TO JUDGE ROBERT KATZMANN

PROFESSOR NANCY MORAWETZ

So, I’m deeply honored to be here and part of this celebration of Judge Katzmann, and particularly the work he’s done on behalf of immigrants. You’ve heard about this already, but the three of us are here to tell more of the inside story of what happened here in the Second Circuit and the remarkable work that Judge Katzmann did.

The story begins over ten years ago when Judge Katzmann delivered the Marden Lecture at the Association of the Bar of the City of New York, and he chose, as his topic, the problems facing immigrants who were pursuing cases against deportation. And he was familiar with these cases from his perch on the Second Circuit, where he would see cases after they had come up through the system; but, he could see how much should have happened at the beginning of those cases, and that was what he directed his attention to.

What he saw was that, in many cases, that immigrants were represented by very bad lawyers, or by “notarios” (non-lawyers), or were trying to represent themselves in what is, in fact, an extremely complicated field. And so, what he saw was how the mistakes that were made at these very early stages of cases were having life-changing consequences, and really, very bad consequences, for these people as they appeared in the circuit.

And I just want to quote a little bit from the speech that he gave at that time, in which he was speaking about the poor quality of representation. These are Judge Katzmann’s words: “These attorneys do not even meet with their clients to flush out all the relevant facts and supporting evidence, or prepare them for their hearings. They are stall lawyers, who hover around the immigrant community, taking dollars from vulnerable people with meager resources. They undermine trust in the American legal system, with damaging consequences for the immigrants’ lives.”

And then, speaking about the records which he would see, he said: “What is filed and what is said have enduring effects. Immigration judges will often make findings of adverse credibility, based on the disparity between the two. Oftentimes, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured ade-
quate representation at the outset, the outcome might have been different."

And Judge Katzmann concluded by calling on the bar to change this situation. Those of us who worked on immigration cases were deeply grateful that Judge Katzmann had chosen to speak on this topic. We knew, from whenever we were in court, that we would see lawyers doing a terrible job for their clients, or we would see immigrants trying to represent themselves, when laws are just so complicated they couldn’t possibly do it well.

And we also knew that there was a complete mismatch between the need for representation and the potential supply of lawyers who would gladly do this work, but for the inability of nonprofits to hire them. And in particular, those of us who teach in immigration clinics knew that every year, we were graduating lots of students who were eager to take up this work and were trained to take up this work, but only a few of them could possibly hope to work in immigrant defense.

And so what happened next was really remarkable. It was literally ten years ago, I think next month, that I got an email inviting me to a meeting of maybe nine or ten lawyers that was just people wanting to talk about this problem. These were friends of Judge Katzmann, who were bringing together some lawyers on this issue. And at that meeting, people talked about all sorts of ideas, and it all sounded like a great thing that people cared about this; but, it was really very, very difficult to believe that it would ultimately amount to anything, because the problem was just so, so great. And I leave it to my colleagues to pick up this story and tell you what happened.
TRIBUTE TO JUDGE ROBERT KATZMANN

PROFESSOR LINDSAY NASH

So thanks to Nancy and to the NYU Annual Survey of American Law for the privilege to speak here about Judge Katzmann, who’s been a personal mentor to me and a real source of inspiration about the good that one person, albeit an extraordinary person, can do.

So while the group that initially came together was a small group of eleven lawyers, it quickly grew into a coalition of actors from the public, private, and non-profit sectors, and it became known as “the study group on immigrant representation.” This group included people from judges to prosecutors to advocates. But what unified them was first, a deep admiration for Judge Katzmann, and second, a desire to do something about the crisis in immigrant representation that he had identified. So bringing these leaders together, as he predicted, quickly began to spark change. He realized that while some of the most troubling aspects of the system were obvious to those of us working in the field, what we needed was rigorous study of the problem and potential solutions if we were going to make the problem meaningful to a broader audience. As he often said, quoting his own mentor, everyone is entitled to their own opinion, but not everyone is entitled to their own facts, and he knew that we needed the facts.

So this understanding lead to the New York Immigrant Representation Study, in which study group members worked together to collect a broad set of data on the impact and quality of counsel in immigration proceedings. And when we completed the study, the findings were unambiguous, and the disparity was even greater than we had anticipated. The data showed that individuals who are not detained, and who had counsel, prevailed about seventy-four percent of the time, but individuals who were detained and unrepresented succeeded only three percent of the time. So all of this meant that for the first time ever, we had real numbers to quantify the impact of counsel, an undeniable support for what we had long felt: that the assistance of counsel, particularly for people who are detained, significantly impacts the immigrant’s ability to access justice. The findings in this initial report laid the groundwork for what has been a transformation in the field. Following this report, members of the study group created a blueprint for a solution, and that solution was a public defender type system that would guarantee
that no detained immigrant would be forced to face deportation proceedings alone simply because they couldn’t afford an attorney. The community that Judge Katzmann catalyzed then lead the way in putting this plan into action. It quickly grew into the system that many of us now know, which is the New York Immigrant Family Unity Project. This is the first of its kind system of deportation defense that provides representation to all non-citizens in New York who are detained, indigent, and facing deportation.

The recognition of the importance of competent counsel also lead to the creation of the Immigrant Justice Corps, another pioneering initiative in the immigration arena. Understanding the value of providing counsel to a broad array of noncitizens, and the need to raise the quality of the immigration bar more generally, Judge Katzmann conceived, and launched, the first and only fellowship program for college and law school graduates to focus on immigrant representation.

Unsurprisingly, the impact of these initiatives had a huge impact. I’ll turn over to my colleague, Peter Markowitz, in just a second to describe this impact. But first I want to say that as someone who has worked with Judge Katzmann over the years in the study group, and on a daily basis as his law clerk, there’s no one better suited to serve as an inspiration, as a mentor, and as an exemplar for generations of lawyers, both now and in the decades to come.
TRIBUTE TO JUDGE ROBERT KATZMANN

PROFESSOR PETER L. MARKOWITZ

Thank you Nancy, and thank you Lindsay, and thank you to the NYU Annual Survey of American Law, both for honoring Judge Katzmann and for allowing me an opportunity to speak about somebody who really has transformed the field in terms of immigrant access to counsel.

It’s hard to overstate the impact that Judge Katzmann has had in a relatively short time, since he delivered that Marden lecture, a decade ago. It was in those ten years we have seen an absolute explosion in both the quality and the quantity of lawyers that are available to poor immigrants. And at the epicenter of that explosion are the two programs that you’ve heard so much about, that grew out of Judge Katzmann’s work, both the public defender system and the fellowship program, the Immigrant Justice Corps.

I recently had the opportunity to participate in an evaluation of the public defender system and prior to the program, as you’ve heard, the majority of the immigrants facing deportation who were detained didn’t have any counsel whatsoever and they were forced to defend themselves in one of the most complex arenas of law, against trained federal prosecutors, often while detained—always while detained for these people, and often not speaking the language. The deck was stacked against them and they had virtually no chance of success. Only three or four percent of them would be able to defend themselves and win their deportation case.

And it was, as Judge Katzmann noted, as he predicted in his Marden lecture, perhaps if we could add counsel—adequate counsel at the earliest stages—the outcome would be different, he told us ten years ago. And how right he was. When we added lawyers to the mix and we were able to evaluate the outcome the results were staggering. Instead of succeeding four percent of the time, immigrants right now at the Varick Street immigration court, just blocks from [NYU] here are winning forty-eight percent of the time. And what that means is that before the program was in place, that Judge Katzmann catalyzed, many unrepresented immigrants who were detained, in fact, forty-four percent of them, were getting deported not because they didn’t have a legal right to remain in the United States, but because they didn’t have a lawyer who could help them vindicate that right. And that doesn’t happen anymore here in New York.
The Immigrant Justice Corps, as you’ve heard, has been equally transformative. It served thousands of immigrants and—it’s a statistic that’s already been said but it’s eye popping enough to note again—the Immigrant Justice Corps lawyers have won ninety-three percent of the matters that have come before them. And as importantly, they’re up to now almost 200 fellows, with ninety-six percent of their justice fellows remaining in the immigration field beyond the fellowship. What drew Judge Katzmann, as we’ve heard, to this problem originally is the deplorable state of the lawyering he observed in the cases that came before him. His fellows are now repopulating that field, at a nice clip, with highly trained, highly ethical, and highly motivated lawyers.

As members of the study group, we get calls all the time asking how do we replicate these programs in other parts of the country. And they ask us how it happened and we tell them the story that you’ve heard here today about Judge Katzmann’s visionary leadership, the way he inspires and empowers those around him, and the way he makes us believe that justice is possible even in the face of seemingly impossible odds. And the refrain from them is inevitable, “but we don’t have a Judge Katzmann in Philadelphia, or Austin, or San Francisco.” And they don’t. But, nevertheless, Judge Katzmann’s example has rippled across the country and we see major advances in replication efforts in places like California and Wisconsin, but not only there, in places like Texas and Georgia, too, and many others.

There are many people who helped shape the landscape and transformation that we’ve described, but there is one person who I can say with confidence is the catalyst for this remarkable progress. It has been one of the defining honors of my career to get to work with Judge Katzmann. He is a national treasure. Really tenacious and kind, powerful and gentle, grand and modest. So, thank you, Judge Katzmann.
TRIBUTE TO JUDGE ROBERT KATZMANN

JUDGE ANN CLAIRE WILLIAMS

Thank you, Dean, good evening. We’re here for Bob Katzmann, good evening, let’s hear it. Now, we know that Bob Katzmann is one of the most influential judges in America, one of the best judges in America, and one of the finest human beings I have had the privilege to know and love. Do you all agree? And why do I know he’s best? I think of the words of Dr. Martin Luther King, who said, “human progress is neither automatic nor inevitable. Every step toward the goal of justice requires the tireless exertions and passionate concern of dedicated individuals.” Key words: every step; towards justice; tireless exertions; passionate concerns; and dedicated individuals. That’s who judge Bob Katzmann is. Because every step he takes furthers the goals of justice. Every step tireless, passionate and dedicated, champion of justice. Where did this justice-stepper come from? Well his parents, as Justice Sotomayor said, John and Sylvia, here today, as Bob says, and I quote, “my parents were the most important influences on my choices and career path. Their values of integrity, hard work, modesty, and concern for others very much shaped my worldview.” Lessons that we should all live by. Your lessons.

I first met your son when we were baby circuit judges, but I really didn’t get to know him until our paths crossed when I was president of the Federal Judges Association, and he served on the judicial branch committee. We were working on cost of living pay adjustments for the federal judiciary. I really got to know him well when I joined the committee in 2008. What is the judicial branch committee’s mission? Well, we call it the committee that cares, that deals with the care and feeding of federal judges. Bob recognized the financial sacrifices federal judges make serving on the bench. He wanted to make sure our families had adequate pay, insurance, and medical benefits. His passion and tireless effort, the coalitions he built with the Federal Judges Association, the magistrates and the bankruptcy judges, other concerned groups, corporations, and unions, along with our brilliant administrative office staff, culminated in us getting a catch-up-cola. We had many calls on the weekend and after hours. He always picked up the phone. Tireless. Dedicated. Stepping.

But he also knew as we worked on these issues that the committee was charged with maintaining good relationships with members
of Congress. Not an easy thing. That was a sweet spot for Bob, who was the only federal judge in America with a PhD in political science, who has studied, as you have learned, the judicial process, published books, articles on the inner workings of the courts, the intersection of the courts and Congress, and has served on other outside committees that focused on the judiciary. As chair of the committee, he expanded those relationships, carrying on the work of Judge Brock Hornby, having open dialogues and programs that fostered understanding in Congress. Not just going to Congress to ask for something, or telling them their legislation was a bad idea, which we have done.

He believes that human connections matter. His passion, tireless dedication spread to all of us, taking those steps toward justice. He was also instrumental in growing the dialogue between the press and the judiciary. We complain as judges “well the press doesn’t get it right. We write such clear and lucid opinions, and they say, ‘we don’t understand the opinions, and really we don’t understand the process and, more importantly, we don’t have access to the judiciary.’” Gone are the days when I grew up as a baby Assistant U.S. Attorney where we had a press corps in the courthouse, three reporters from three papers. Now there’s no one.

Now, as a result of his efforts, the committee goes to different cities, putting together journalists and judges. The public benefits, the judiciary benefits, and the journalists benefit. That human connection, making steps toward justice. Finally, opening up the courts, which you’ve heard about. There was a feeling for many years that the courts were not as open to the public as they needed to be. Many of us ran individual programs in our own courthouses for students and teachers and other groups, but there was no real consistency across the federal judiciary, and civics have been dropped from the curriculum of all the schools in America. Often, I was asked, “did I know Judge Judy?” I was not happy with that question, but I also—it also—indicated what people didn’t know in America. Didn’t know. Who were the federal judges? What do they do? That’s why Justice O’Connor started the iCivics Project so many years ago, and Justice Sotomayor serves on that board. The AO began to develop programming. All the federal judges’ associations producing programming, working together, under the umbrella of the committee, of our committee, to open doors, under Bob’s leadership. He asked us to stand up and we did.

Now, how did he do it? I gotta tell you that sometimes working with judges is like herding cats. Just because he has on a black robe, doesn’t mean things happen. And that’s a lesson for all of you stu-
dents, as well as lawyers, and judges, in the room. The lesson of the power of one, which has been mentioned, Bob knows how to bring together many ones to make things happen, and so can you.

Here’s the thing about Bob. He makes, and takes, the steps himself. He leads by example. He is a do-er. That’s a second Bob lesson. We can all be do-ers. We can all make that step. Take those steps. His brainchild in the Second Circuit—covering Connecticut, Vermont, and New York—Justice For All, that you’ve heard about, is the most comprehensive project in the federal courts. And I looked on the website, he’s got all the judges involved in civic outreach. Tours, contests, speakers, ceremonies, interactive programs for kids and trial reenactments, pairing with organizations like the Just The Beginning foundation, that honor Constance Baker Motley in 2016, making justice real for the people we serve, not just for those who appear in court or in jury duty. Judges, stepping up, listening to his call, because he is a leader, we all want to follow. Stepping toward justice.

For this, and many other reasons, I believe Bob is one of the most influential judges in America and one of our best, and on top of that, a fine human being and a wonderful, dear friend. Really, a brother of the heart to me. He cares so much, and that matters, and that’s the third lesson. Caring about others. At every meeting, every time I run into Bob, he’s asking me, “how’s David, how’s the family, how’s Claire doing?” remembering things about our lives, not just with me and the judges, but with the marshals, the staff, and I’ve seen him in his own building, the cleaning people that work there every day. His kindness, humility and grace combined with his tireless exertion, passionate concern, and dedication, make Bob Katzmann a justice champion and a worthy recipient of this wonderful honor that you have bestowed on him. Stepping up for justice. Leading the way in the struggle for equal justice for all. I love you, Bob.
TRIBUTE TO JUDGE ROBERT KATZMANN

JAMES C. DUFF

Thank you very much, Dean. It is an honor to be included in this august group. To honor even a portion of Bob Katzmann’s career in law, Chief Judge Robert A. Katzmann, Professor Robert A. Katzmann, in six minutes is impossible, and I’m so glad that there are numerous speakers here today, this afternoon, to attempt to do this justice. It was very astute, I think, of NYU to select so many people to speak about Bob, because Bob has done so much for so many.

Bob is a giver. He gives superb legal judgment to vexing legal problems on the bench as Chief Judge of the Second Circuit, and as those of us who are here today know, he gives his time and his good counsel greatly, and cheerfully, and freely to his friends and his colleagues. He helps them with their own wide-ranging endeavors on and off the bench. You’ve just heard the testimonies of two justices that he helped to get to the Supreme Court, and giving them good counsel. He does both within and outside the judicial branch. He shares his vast insights into problems and he connects people with those who can help them, and you’ve seen that in a grand scale, with regard to his work on immigration and those who spoke so beautifully about that project today.

Today, the giver gets to be a receiver. He’s on the receiving end of well-deserved recognition for his many gifts to our judiciary and to our country. Others have spoken wonderfully about the specifics of some of his work, including the Justice For All, Courts and the Community, and so I won’t go into all of the specifics again, but Bob believes, as Thomas Jefferson did, that an educated public is the best way to preserve our liberties, and it is the best way to preserve the independence of our courts. I would like to speak more briefly and generally about Bob’s work in promoting both public and governmental understanding of the courts in very personal ways.

Justice Robert Jackson authored a well-known concurring opinion in the steel seizures case in 1952, in which he articulates so well the separate but interdependent nature of our three branches of government. Justice Jackson writes, and I’ll quote, “while the Constitution diffuses power, the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.” Imagine that. “It enjoins upon its’ branches
separateness but interdependence, autonomy but reciprocity.” There are many institutional examples to demonstrate this. Justice Jackson focused on those involving intersection of presidential and congressional power in the context of that case. There are, of course, examples between the judiciary and the other branches, too, including the appointment and confirmation powers and the fact that the judicial branch receives its’ budget from Congress. But in addition to these institutional examples, there are human ones.

To me, Bob Katzmann personifies, breathes life into, those institutional principles, and by that I mean he not only recognizes the theoretical value of separate but interdependent, he also works hard—works very hard as others have mentioned this evening—at putting these principles into practice to make ours a workable government. His outreach to the other branches, in particular to Congress, both in formal and informal ways, has yielded great benefit to our judicial branch, and thus to our country.

He embarked on this mission early on, even before he was appointed to the bench, by penning a very useful and instructive book, one of many he’s written, called *Courts and Congress*. He did this in 1997, and he has continued to work in this field and, early on, even before he was appointed to the bench, I mentioned, he authored that book, but he’s continued to do so while on the bench, through his work as the chair of the judicial conference committee on the judicial branch and his creation of the Judicial Congressional Dialogue Series, in which members of Congress and judges meet, often in conjunction with a program of mutual interest, but they meet to become more acquainted. That’s Bob’s personal touch. He’s now doing and continuing this outreach through his work on the executive committee of the judicial conference’s executive committee. His skilled leadership is fueled, not only by his intellect, but also by his personal relationships. This is true within our branch. It is also true inter-branch, and I venture to say that he has helped every one of our speakers today, and probably many of you in the audience, on some endeavor of yours. He certainly has helped me throughout my career, and it is that personal touch and outreach to others, especially to those in the other branches of government, that ranks among his highest achievements. He does so not for personal gain, but for that of others, and for good, for the good of our branch of government, and thus for the good of our country.

It is somewhat ironic that, by putting so much effort into the interdependent nature of our government, by communicating personally with those in the other branches, that Bob helps us preserve
a crucially important degree of independence in our branch. Inter-
dependence is one thing, but invading our space is quite another,
and Bob recognizes the important differences between the two. He
employs his significant skill in communicating in ways that protect
our branch and a degree of our independence. I speak specifically
with regard to our battles to hold off congressional efforts to im-
pose an Inspector General over the judicial branch. He has earned
the respect and the trust of those in all three branches of govern-
ment, and, accordingly, his views are given great weight. We’re very
fortunate indeed to have Bob in a leadership role in the judiciary.
Thank you, Bob, for giving your wonderful talents and your intel-
lect to our country, and to making ours a workable government.
TRIBUTE TO JUDGE ROBERT KATZMANN

PROFESSOR PAUL LIGHT

As a professor of public service here at NYU and a long-time student of institutions and policy, I’m an admirer of Judge Katzman’s scholarship. I might say that, unlike my books, which people put down and can’t pick up, people pick up Bob’s books and they go out and make a difference. It’s a wonderful thing. His books are inspirational and deep, and they are superbly well-written. We in academia sometimes pride ourselves on being unintelligible. It’s a sign that our work must be good because you cannot understand it. Bob’s work is imminently approachable and understandable. And I might say that his work is not just an example, you read his work not just for what it contains, but how it’s written. I don’t think many people talk much about what a gifted writer Judge Katzman is. I love reading his work, and I want to just talk ever so briefly about it.

I first met Judge Katzman at the Brookings Institution when I was a guest scholar way back when. And I had the pleasure, I was not forced, I had the pleasure to read his book on regulatory bureaucracy. It was an early sign of what was to come. It was thoughtful and rigorous. It was respectful of the human element in policy making, which is always important. And it was beautifully written. As I said, many talk about what Judge Katzman writes, but too few recognize his gift with words and meanings. His introduction to the 1981 book, On Regulatory Bureaucracy, is a perfect example. Just a quick sentence, “Anti-trust is a banner under which many march, but for different reasons.” It’s a perfect sentence that invites you into his list, and it has a comfortable gait, if I may use that term. I don’t know whether you do it, it has a nice pull and flow. And he takes us into his list: “politicians interested in combating inflation, consumer groups convinced that large manufacturers charge excessive prices, populists fearful that corporate giants corrupt the political process, businessmen” and so forth and so on. It’s an inviting invitation to the book. It comes early, and it says “you can read this book and I’ll force you to learn what’s in it.” Or I’ll invite you to learn, perhaps, a better way of putting it.

Three decades letter we see the same elegant dance in Judging Statutes, a book that rightly prompted one endorser to celebrate “a judicial craftsman at the top of his art.” If I may be so bold to correct a blurb-er, and we love blurb-ers, I would say that craftsman is not quite the right word. Judging Statutes is not just a work of art, but
it's a form of artful work. I don’t know what to call you as a writer, but it’s more elegant than a simple craftsmanship. Once through the brief beginning of *Judging Statutes*, Judge Katzman asks all of us to join his search for understanding. The writing is still fresh. How many books in the interim? The writing is sharp, it’s inviting, it’s fast, and I use the word fast, it pulls you through. You don’t have to read the sentence two or three times, you get it. But there’s a new pronoun in play. Judge Katzman is writing with the pronoun “I.” And there is a new punctuation in use, the question mark. It’s self-reflective. He’s saying, “I’ve been through this, I’ve taken this journey. Come with me. Let me explore this with you.” “How should I, as a judge,” he says, “interpret statutes? Should the judge confine herself to the text, even when the language is ambiguous? Should the judge, in seeking to make sense of an ambiguity or vagueness, go beyond the text of the statute to legislative materials? And if so, which ones? Should the judge seek to ascertain Congress’s purposes and intentions?” Again, we have sort of the art of literary construction. And it’s a pull and it invites us in. We are told that even judges might wonder about construction. And then we are given an accessible text and we journey with him. He’s not lecturing to us. He’s inviting us along.

I admire his writing for more than his art. And I think it’s a steady yellow pad that you work on. I’ve seen you carry them all over the place. Yes or no? You don’t have to tell me. And I sometimes wonder how he might frame our friendship years from now, if and when he pens an autobiography. I don’t need to dwell on the basics of Judge Katzman’s work tonight. It’s firmly grounded, carefully sourced, a lot of footnotes, appropriately so. But I do wonder how he is able to maintain such focus as he handles the deep inventory of facts that he brings to bear. I mean, it’s intimidating. So, when I sit down to write, I over-footnote, I over-source, I still don’t get anywhere. And that book is no lighter to pick back up. I don’t know who his muse might be in all of this, though I have some clues from time to time. I think he gets inspiration from many places, many people, and some very close friends. At any rate, whatever or whomever the source of his inspiration, his research and reflection is now preparing a new generation of jurists and scholars for an uncertain, possibly trying, time. And that’s the ultimate contribution of all of us in this room. We develop, and mentor, and encourage public service. And we inspire public service through our own impacts, artful or not, in our lives. We call others to join us, we take those steps, and we call others to our cause. It’s like solving a puzzle, but with much greater consequence.
Happily, those of us who have read Judge Katzman’s work and admire his gift do not have to wait long for his next contribution. I’m just guessing. It may come tomorrow, we just don’t know. But we can rest assured that it will provoke, invite, cajole, entreat, and challenge us. How was that, five commas? Maybe one too many.

It’s a joy to be here tonight. I love Bob Katzman like a brother, and his brother like a brother, I think, and we know where that comes from. At any rate, my love to you Bob, and Jennifer, for sure.
TRIBUTE TO JUDGE ROBERT KATZMANN

RUSSELL WHEELER

Thank you, thank you, Dean Morrison. It’s a privilege to be here to salute my friend of over 30 years, Bob Katzmann. I’ve been asked to talk about his scholarship on inter-branch relations. I am, in that regard, speaking as I do, sort of like a legislator speaking late at a courthouse dedication. You’ve heard everything that needs to be said, you just haven’t heard from everybody that’s here to say it. So here it goes.

It’s hard to talk about Bob’s inter-branch scholarship though without recognizing he’s also an interbranch practitioner. He knows the judiciary, obviously, but he knows the Congress very well too from his mentor, Daniel Patrick Moynihan, a lion of the Senate. Also Judge Frank Coffin, who is a judge on the First Circuit, chaired the judicial branch committee, to which Jim and Duff and Ann Williams have referred, which is charged with the care and tending of the Congress from the judiciary’s perspective. Judge Coffin was a leading judge, he’s also represented Maine in the House of Representatives.

So, Bob has grounding there. His first book on inter-branch relations captures really his whole approach to that field. Not so much the title of the book. The title of the book is Judges and Legislators. It’s the subtitle, “Toward Institutional Comity.” I should say that’s comity with a “t,” I’m sure sometimes he thought it was more appropriate comedy with a “d.” But any event, that’s the approach, institutional not personal.

That book was followed, as has been said, in 1997 with Courts & Congress, which he wrote at the dawn of what turned out to be one of these contentious periods, especially contentious periods, in the relationship between courts and Congress. The Jeffersonian Era, The Post-Dred Scott Era, The Progressive Era, and of course, some of us remember, the Impeach Earl Warren Era.

But he saw things coming. He identified, even then, what he called “the sources of strain”: conflict over resource allocation, the perennial problem of judges’ and legislators’ compensation, early efforts to restrict jurisdiction, and the brewing and, in some cases, full-blown breakdown of the judicial confirmation process. But his goal in the book was not so much to criticize as to provide avenues of cooperation. And in that book, he described—he’s described it elsewhere—but he described the project to which Justice
Sotomayor referred. That he and Judge Coffin, former Representative Robert Kasten of Wisconsin, the judges on the DC circuit, and also the legislative leadership and their staff, to encourage circuit judges to send to Congress opinions that identify technical glitches of one kind or the other. Gaps or ambiguities. One sent in a 2009 opinion that exposed an ambiguity in the Immigration and Nationality Act, about the 7-year residency requirement that was a condition for waiver of alien admissibility. You'll never guess what judge sent that opinion in, who's very interested in immigration.

And since that project was revitalized in 2007, over 50 opinions have gone to Congress through a very precise protocol that Bob and Judge Coffin and others worked out, which makes clear that the purpose of this enterprise is not to rub Congress's nose in the messes of its own making, or to get, even get statutory language changed, but to help Congress. And the main consumer of these opinions, which come in once every two or three months, is used by the Legislative Council, the people on both sides of the capitol who actually draft the legislation. They use these opinions as teaching tools for their staff about how to avoid ambiguities, if they can be avoided. Sometimes it's impossible, of course, so it's a contribution.

Now, people have talked at length over Judging Statutes, and I won't go into great detail about it. I would note it grew out of the Madison Lecture that Bob delivered here at NYU Law School. And its purpose, as he said, or its main goal reflects his view, as I'm quoting here, that “judges and legislators need to understand and respect one another’s institutional processes.” The book was published in 2014. It became required reading when the Supreme Court was trying to figure out whether the Affordable Care Act’s phrase “an exchange established by the state” meant, obviously, exchanges established, insurance exchanges, established by the individual states or also by the federal government. When the decision was announced, more than a few pundits said to their listeners on radio and television that, if you want to understand what this is about, go read Judging Statutes. And it has recurred again, as Justice Sotomayor said, she referred to it in the Digital Reality decision last month at the Supreme Court, where she said, “considering legislative history shows respect and promotes comity with a co-equal branch of government.”

Now, a legal journal picked that up, and the author said, referred to Judging Statutes and said, referred to it, I quote here, “an excellent rejoinder to Scalia.” And it is that. It is a response to the textualism and the aversion to legislative history by Justice Scalia. But what I would note is, as obvious as that is, you don’t find that
phrase in the title of the book, you don’t find it in the subtitle of the book, there is no subtitle, you don’t find it in the preface, in which Bob explains what led him to write the book. Now obviously Justice Scalia, if you look at the index, and of course that’s how we in Washington read non-fiction books, we look at the index, Justice Scalia appears plenty of times—it would be surprising if he didn’t—but not a lot more than references to some of the other members of the Court. What that indicates, again, is that Bob looks at this stuff on an institutional basis, not a personal basis. Institutional respect, not personal antagonisms, which is a lesson that a lot of others in our national government could take some benefit from.

So, thank you Bob.
TRIBUTE TO JUDGE ROBERT KATZMANN

JUDGE GUIDO CALABRESI

It is a great joy for me to be back here for the third time. Each time has involved people of whom I am terribly fond—myself, of course, but, even more, Sonia Sotomayor and Bob Katzmann—my student, my colleague, and now my magnificent Chief Judge.

What is it that makes Bob so very, very special? I believe it is that he, more than anyone else I know, demonstrates in his work and, indeed, in his life that the “liberal dilemma” can be solved. What do I mean by the liberal dilemma?

Let me be clear at the outset that I am not using the word “liberal” in an ideological sense, with a capital “L.” I am using it as representing a way of thinking, that is, liberal with a small “l.”

It is often said that liberals, because they determinedly wish to be open to “the other side,” to be willing, indeed anxious, to hear from the opposition and to leave open the possibility of being convinced, are ineffective in furthering the causes they believe in. How can one always be polite, open, yes, even gentle, and still effectively bring about the policies and programs one thinks are essential? It seems impossible. Yet this is precisely what Bob accomplishes, seemingly without any strain, but, in fact, as the result of extraordinary ability, together with amazing work, self-training, and discipline.

Let us go back to what was, for me, the beginning of my acquaintance with and appreciation of Bob, when he first arrived as a law student at Yale. There is often something, even in the early exams of law students, that foretells what they will be like. Sam Alito wrote a perfect Torts exam, which, however, took not a single chance. It was elegant, lucid, and conservative to the core. Sonia Sotomayor right from the start demonstrated daring imagination and empathy, while others, who could afford to be far less risk averse, hid behind doctrinal niceties.

What of Bob? There is something more unique than rare in the powerful gentleness that Bob demonstrated right from the start. There always was a careful recognition of what could be, indeed should be, said for the other side. And yet, in the end—no, not just in the end but throughout—there could be no doubt as to where Bob stood and why. There was unmistakable power in Bob’s “gentleness;” power made even more effective because of that gentleness. This very American child of refugees exemplified even then
the seeds of what would make him a wonderful scholar, a great judge, and a truly superb Chief Judge.

It is worth dwelling a bit on Bob as a scholar, because, there too, one sees the remarkable capacity to see more than one side of the issue and yet not be weaker for it. Bob was not, is not, the kind of all-too-typical scholar whose work, however brilliant, is self-contained and self-defined. Bob’s scholarship is profoundly “connected and connecting,” and of the world! It comes out of the maelstrom that is Washington and reflects all that truly goes on there. It is scholarship that listens to, converses with, and takes into account the other side. This is so whether it deals with relations between courts and legislatures, interchanges with the executive, or with what interpretation truly is. But once again, his scholarship has an unmistakable point of view that is all the more powerful because it is centered in a willingness to dialogue.

And that, of course, is what makes Bob Katzmann such a blessing as Chief Judge. Our Court is quite diverse in viewpoint and in personalities. And yet, there is no one among us who does not feel listened to and cared for by Bob. At first, some of my colleagues mistook this care, this gentleness, for possible weakness and tried to push their own agendas through the seemingly too kind Chief. Boy did they learn better! Bob seems gentle, indeed is gentle, but don’t for a moment try to push him around. You will be in for a mighty strong surprise. Yet that surprise is itself delivered in so kindly a manner that those who sought to take advantage can find nothing to complain about.

Bob’s qualities as Chief are seen not just in the Court, but in his work outside. What he has done to help immigrants get decent legal help would, as others have noted, justify today’s honor by itself. But here too, notice that the way it was done was always careful—full of care—and doubly effective for its gentle persistence. The same is true of Bob’s marshalling all of us to be teachers to young and old of what judges do and why. . . what he did never overstated and was always immensely effective as a result.

Let me end by saying it straight out: I love you Bob, with that special love a teacher has for a student who has gone beyond him. But I also love you because you show in all you are and all you do that the liberal dilemma can be solved, that one can be at the same time truly open and gentle and yet all the more effective for it.

“Si monumentum quaerat, circumspice.”

If you seek a monument showing it is possible, to solve the liberal dilemma, just look around you at Bob and his accomplishments.
ACKNOWLEDGMENT

JUDGE ROBERT A. KATZMANN

Thank you. Thank you all. This has really been an extraordinary evening and I’m really overwhelmed by it. This place, Greenberg Lounge, has special meaning for me. It was here that I had the privilege of giving the Madison lecture some years ago, and it was here that Dean Morrison generously hosted an event when we had the publication of *judging Statutes*, and it was here that I had the privilege of participating in past Annual Survey tributes to Justice Breyer, Sonia, Guido, never thinking that I would be back here for this program. For many years I’ve taught and learned from NYU students, and so being recognized by the Annual Survey is particularly meaningful to me. Indeed, some years ago I actually had the pleasure of writing an article with Frank Coffin, “Workplace of Governance,” for the Annual Survey and I’m so grateful to you, the Annual Survey, for this evening. NYU and its deans over the years have been very welcoming, John Sexton, Ricky Revez, Trevor Morrison. I’ve enjoyed very much participating in the Institute of Judicial Administration programs under the leadership of Oscar Chase, Troy McKenzie, Sam Estreicher, Tory Whitman and Alison Schifini and I think that Evan Chesler might be here, and he was chair of that board.

Tonight I have many particular thanks to give. Dean Morrison, a very important scholar, you have been a great leader in legal education, as I can personally attest from our most recent work in the effort to bring some sanity to law clerk hiring, and you’ve provided tremendous service as a wise and active advisor to the Second Circuit across a wide range of activities, including our Second Circuit conferences and our civic education work. Thanks so, so very much. Leonid Greenberg, it was a joy to answer your phone calls, and your emails. You’ve got such a nice way about you that it makes the person on the other end want to be as helpful as possible, and you obviously have a great career ahead of you. Thank you for all of your efforts. Israel Rodriguez. Where is Israel? There he is in the back. Israel Rodriguez, your careful concern about every detail of this event is just awe inspiring. And I would never want to poach NYU Law School, but if ever you are interested in the federal service, let me know. [laughter]

To those who offered words this evening, I am honored beyond measure. First, Justice Sotomayor, my sister. An incredibly
generous friend through thick and thin, who is always there for me. That you would come, I know that you have an incredibly grueling schedule, that you are here really, really, moves me; I cherish knowing you. Justice Ginsburg has, for me, been an extraordinary inspiration, in all aspects of life, whose kindness and concern I treasure. She truly is a guardian angel who has meant so much to me. Guido Calabresi is not just my teacher but our teacher, and whose brilliant intellect and humanity are gifts to all of us that make us better, and it’s such an honor to have you here.

Judge Ann Williams, you are a role model for all of us. I will not try to sing, however, but you are a role model for all of us. And your passion for justice is so profound. Just to give an example, we had students from throughout the city that were mobilized through the Just the Beginning Foundation, which is one of many enterprises that Ann Williams has founded. You could look just about any important social group, litigation group of the last 25 years and they all bear the imprint of Ann Williams. And you are really an example above others of what one person can do. And I’m really just an Ann Williams groupie trying to do what I can to emulate and spread your message. And that you would come here, I know you’re on the way to Africa, is really so, so wonderful.

Jim Duff, in these times when there is so much cynicism about our institutions, I think of you. I think of you because I think that you are somebody whose dedication to making our systems of government work, whose understanding of the judiciary and leadership of the judiciary has had a profound impact. There is nobody in the last 50 years who has had more of an impact on the fair and effective administration of justice than you have. And so, I am also very grateful for our personal friendship of many years as well. Fun fact, Jim was good to come tonight, but he really won the lottery because he is going to see Bruce Springsteen on Broadway, and that was through a lottery ticket. He just threw his hat in and it happened.

To Nancy Morowitz, Lindsey Nash, and Peter Markowitz, whatever success the study group on immigrant representation has had, and the New York Immigrant Family Unity Project and the Immigrant Justice Corps have had, could not have happened without you. Nancy, you are one of the nation’s premier immigration law professors. And there are disciples populating law schools throughout the country. Whether it be Peter Markowitz, whether it be Michael Whishnie, your impact has been so very deep, and so I’m very grateful to you for participating tonight. Peter Markowitz, you are a wizard. Your work at the Greenberg Clinic at Cardozo has
been simply outstanding, and I’m so appreciative of your many contributions to the creation of every project that we’ve participated in, including the Immigrant Justice Corp. I believe that our executive director, Immigrant Justice Corps Executive Director Jojo Annobil, is here tonight and he can also tell you how great Peter Markowitz is. And as for the Immigrant Justice Corps I note that there are several graduates of NYU Law School and we just announced our new class, we have another graduate, and so we want to keep that coming. Lindsey Nash, you are a fantastic law clerk who played such a key role in the study group, but I think that apart from your excellence as a law clerk, your passion to do something for immigrants was always very, very palpable, and I’m so proud of you as I observe from afar what you do, and you really are making a difference in the lives of so many, and I’m so thrilled that you could be here this evening.

Russell Wheeler, the nation’s foremost scholar on the administration of justice, long time former Deputy Director of the Federal Judicial Center, President of the Governance Institute. For 30 years you have not only been a friend but a wise counselor, and there is not a single manuscript that I’ve tried to produce over the last 30 years that doesn’t have the imprint of Russell Wheeler, who has been a great friend but also just a wise counselor.

Paul Light is the country’s leading scholar on public administration. He’s won more awards from the American Political Science Association—he wouldn’t tell you this—than any living political scientist—and I think dead one too—I’m in awe of your contributions to—and to our friendship. One of my favorite Paul Light footnotes in one of his books, was—he was doing a book on popular culture and he footnoted me—it was in reference to my TV watching habits as a child. Nobody got it, but I thought it was very funny.

On an evening like this, I think of those, many no longer with us, who gave me a chance, who believed in me, whose support and encouragement were essential. And as I look into the audience, I see many family members who have been my foundation: my amazing, talented, extraordinary wife Jennifer, my brothers Gary and Martin, my sister Susan, my brother-in-law Neil, my sister-in-law Stacy, and my parents John and Sylvia, who believed that everything and anything in life was possible for their children. I see many here, really too many to mention, whose shoulders I’ve stood on and who have energized me and inspired me. From whom I have learned much, including many in my dear law clerk family, including many NYU graduates, and my superb judicial assistant from the very first day, Dominique Welch.
As I look into this room, and see the faces of new and old friends, each of you share a commitment to make the world a better place. Separately and together you are unstoppable forces for good. I want, always, never to disappoint you, as you have never disappointed me. To the students here, I say look around you and have conversations during the reception with the remarkable human beings around you; to the students here, I say whatever you do, remember your commitments as lawyers to work for justice, to serve those in need. There is no higher calling than to assist those in need.

As a great mentor of mine, who has been mentioned, Senator Moenhan said, "each of us has an obligation to each other and to the broader community to be reflective as to how we meet those obligations. Each of us has an obligation to do not what is easy, but what is right." So, I wish for you, each of you here, in all that you do, first, most importantly, good health, much fulfillment, and much happiness. I thank the Annual Survey for this evening, which I will always remember and savor. Thank you.
THE GOVERNMENT SPEECH-FORUM CONTINUUM: A NEW FIRST AMENDMENT PARADIGM AND ITS APPLICATION TO ACADEMIC FREEDOM

WAYNE BATCHIS

I. Introduction ......................................... 34
II. An Unresolved Question ............................. 36
III. Two Poles on the Government Speech-Forum Continuum .......................................... 38
IV. Public Forum Cases ................................. 42
   A. Moving Beyond the Quintessential Public Forum and the Problem of Scarcity ............. 42
   B. Slippery Slopes, Doctrinal Nuance, and the Proliferation of Forum Classifications ....... 45
   C. The Limited Public Forum: A Middle Ground along the Government Speech-Forum Continuum ...................................... 47
V. Government Speech Cases ........................... 50
VI. Evading Both the Public Forum and Government Speech .............................................. 55
   A. Subsidies for Legal Expression ................... 55
   B. Subsidies for Artistic Expression ................. 59
   C. Trademark Registration on the Continuum ...... 62
VII. The Case of Government Employees ................. 64
   A. The Garcetti-Pickering Landscape ............... 64
   B. The Unexpected Public Forum: Government Employees Speaking Outside of their Official Duties ........................................ 70
VIII. The Case of the Academic Public Employee ...... 72
IX. Academic Freedom as a Constitutional Right? ...... 77
X. Conclusion .......................................... 82

1. Director of Legal Studies and Associate Professor of Political Science, University of Delaware. Ph.D., Johns Hopkins University; J.D., University of Pennsylvania. I am grateful to the organizers of and participants in the Eight Annual Constitutional Law Colloquium in Chicago where I received excellent feedback on the ideas that generated this paper. I am especially indebted to Helen Norton for her thoughtful close reading of an earlier draft of the article.
I.
INTRODUCTION

In late 2017, two legal giants sparred on the virtual pages of Vox over the First Amendment status of academic freedom. To Robert Post, former Dean of Yale Law School, the conclusion was rather straightforward: there is simply no constitutional freedom of speech on state campuses.\(^2\) To Erwin Chemerinsky, Dean of Berkeley Law School, Post’s conclusion was sorely mistaken: First Amendment law "is clear that . . . faculty [may not] be punished for the views they express."\(^3\) How can two of the most preeminent First Amendment scholars stand in such stark contrast on a core issue of basic importance? Their disagreement turns on one of the central conundrums of First Amendment law: when the government acts (here in the form of a state university) it must invariably use its discretion to decide which messages it wishes to convey and which messages it would like to avoid because they run counter to its mission or goals. As Post reasonably asserts, “Universities, public or private, could not function if they could not make judgments based on content.”\(^4\) That said, courts have long accepted that the First Amendment has a role to play when the government makes public venues available for expression,\(^5\) when it supports expression with public money,\(^6\) when it dictates what books might appear in a public school library,\(^7\) when it hires and fires its own employees,\(^8\) and in many other instances in which the government must otherwise use its discretion. Hence, Chemerinsky’s response to Post: “It is a logical fallacy to say that because basic free speech principles sometimes do not apply on campus, they must never apply.”\(^9\)

The U.S. Supreme Court has not definitively resolved whether academic freedom is protected by the First Amendment. I argue in this piece that the dilemma in fact encompasses much more than


\(^4\) Post, supra note 2.


\(^9\) Chemerinsky, supra note 3.
academic freedom. There is a large doctrinal blind spot between the government-as-speaker and the government-as-the-creator-of-public-fora (venues for others’ speech). This blind spot obscures a significant swath of First Amendment law. Up to this point, this body of law has not been tied together. A broad range of First Amendment questions remain unmoored, relegated to ad hoc resolution or ill-fitting doctrinal classifications. The purpose of this article is to reassess an inherent and unresolved tension in First Amendment law between the government’s need to control its own message and the expressive constraints it imposes on those it controls. I assert that there is a better way to manage this tension. It may be reconceptualized as a spectrum that encompasses most, if not all, government-related speech and speech facilitation: a government speech-forum continuum.

This Article begins by setting the stage, framing the broad issue of expression-related government activity by reference to a narrow one: how the Supreme Court’s First Amendment jurisprudence has addressed public employee speech, and the implications for academic freedom. Next, I describe the First Amendment puzzle I seek to resolve and provide a new synthesis of what has been understood by the Court as two discrete doctrinal categories: government speech and the public forum. This is followed, in turn, by three sets of illustrative examples: an exploration of public forum cases that would have benefited from a concomitant government speech analysis; an examination of government speech cases in which the public forum doctrine is also relevant; and cases in which the Court largely failed to utilize either doctrine, but could have advanced clarity and doctrinal consistency by doing so. This Article then provides a more in-depth treatment of one such area in which the Court has declined to rely upon either government speech or the public forum: public employee speech. This leads to an exploration of how a reconceptualized understanding of public employee expression—utilizing the government speech-forum continuum framework—might apply when the public employee at issue is a college professor at a state university. I conclude by examining the deeply-rooted ideas behind academic freedom and ultimately determine that most state faculty expression should be treated as a limited public forum. When a public university professor speaks to his class or publishes the results of his research, the venue for his expression is a limited public forum—implicitly established by the state for certain limited purposes. In contrast, if that professor were instructed to administer or declare a particular university policy, this might reasonably be understood as government speech.
II. AN UNRESOLVED QUESTION

Just over a decade ago, in *Garcetti v. Ceballos*, the Supreme Court clarified the breadth of free speech rights enjoyed by public employees under the First Amendment. The answer, to the consternation of some, was not very broad. Indeed, as many courts and scholars have acknowledged, the 2006 decision “changed the law.”\(^\text{10}\) The Court converted what had been a case-specific balancing test to determine whether a public employee’s speech was protected into a less speech-protective black-or-white rule. It held: “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”\(^\text{11}\) While some benefits adhere to clarity in constitutional adjudication, the implications of this new rule were discouraging to proponents of broad constitutionally-protected academic freedom for faculty at state universities.

Nevertheless, for those concerned that the application of this principle to public higher education would mean the obliteration of core principles of academic freedom—and the longstanding assumption that the First Amendment plays a role in safeguarding the expressive freedom of faculty—there was a narrow ray of light. A few short lines of dicta in Justice Kennedy’s majority opinion suggested that the Court was not yet deciding whether its analysis in the case “would apply in the same manner to a case involving speech related to scholarship or teaching.”\(^\text{12}\) Since 2006, much scholarly and judicial ink has been spilled wrestling with the questions the Court seemed to subtly invite: whether *Garcetti’s* straightforward test should apply to faculty employed by state colleges and universities; if not, why not; and, if a different test is to apply in the academic context, what alternative test is appropriate. There is currently a circuit split on the matter, with some courts finding a straight reading of *Garcetti* to apply to faculty speech and at least two circuits disagreeing.\(^\text{13}\)


12. Id. at 425.

13. See Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008); *Demers*, 746 F.3d at 406; Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011).
In this Article, I argue that this way of framing the issue fundamentally misconceives the trajectory of First Amendment law and is less than ideal, regardless of how it is resolved. The academic speech dilemma posed by *Garcetti* should be understood in the context of a broader body of case law related to government-sponsored speech. Granted, the evolving web of First Amendment doctrine is notoriously complex and some have gone as far as to characterize it as distressingly incoherent. First Amendment law is, in part, a story of a Court making the best of a bad situation, struggling to resolve vexatious free speech questions rife with deep internal tensions—a jurisprudential realm lacking in easy answers and marked by unsatisfying tradeoffs. Nonetheless, when one pulls back from decades of arguably less-than-consistent case-by-case resolution, one can see order in the doctrinal chaos. Sensible patterns begin to emerge, and the Court gradually begins to tie together the doctrinal loose-ends. This, I contend, is precisely what is occurring in the awkward continuum of settings in which the government plays a key role in the speech conveyed: conditions in which the government might itself be said to be transmitting a message, controlling a message, shaping or encouraging (through subsidies or other means) certain messages and not others, or in some sense simply facilitating speech.

The problem in First Amendment doctrine inheres in the fact that, in a democracy such as ours, government is ubiquitous. It intrudes into all spheres of life, and, at times, has very specific ideas to convey in doing so. It frequently enlists individuals and institutions to propagate particular messages both directly and indirectly through subsidization of particular activities. In other instances, government takes responsibility for establishing and regulating the social infrastructure that makes free interpersonal interaction possible and effective in the first place. It acts, in other words, as a speech facilitator. However, even when it does so, it often limits or defines in various ways the type of expression it intends to facilitate. In between, there is a mind-boggling array of variations as to how these roles may play out, and how they may blend together, each with different First Amendment implications.

This Article seeks to conceptualize expression-related government activity as a spectrum or continuum rather than as rigid doc-

---

trinal categories. It uses this framework to explore the question of academic freedom at state institutions of higher learning. Although the doctrinal concepts of “government speech” and “public fora” serve important functions, the government, of course, is not a person. To say that the government “speaks” is a convenient and useful fiction, but a fiction nonetheless. A government must speak through its agents. Whenever it does so, it affirmatively uses government resources to empower individual speech. The greater the extent to which the message of this individual speech is constrained, dictated, or circumscribed by the government, the closer we might say the expression moves toward the Court’s doctrinal category of government speech. A public forum similarly entails an affirmative use of government resources to empower individual speech. However, even a traditional public forum, a locus of free expression like a public park, is never fully “public.” To some degree, speech that occurs there is necessarily constrained by government, if merely by virtue of the very decision to initially establish a two-acre park rather than a four-acre park, thus permitting a protest of only half the number of participants otherwise possible. The looser the constraints associated with the governmental action or law—based on the text of a law itself, the real-world application, the context, or the social norms or traditions that attach to the particular expression—the more likely a court would justifiably apply public forum analysis. Yet, as we shall see, even under forum analysis, First Amendment protection varies depending upon the nature and context of the forum. I will argue that academic speech falls along this continuum and is well suited for the limited public forum variant of forum analysis.

III.
TWO POLES ON THE GOVERNMENT SPEECH-FORUM CONTINUUM

We might imagine two poles, one at each end of a continuum. At one pole is the ‘government-as-speaker’ (justifying use of the government speech doctrine) and, at the other, the ‘government-as-speech-facilitator’ (calling for the use of the public forum doctrine). What has become clear from the Court’s evolving freedom of speech jurisprudence is that the First Amendment plays almost no role at the former pole, and a critical one at the latter. However, what Court doctrine has over time come to characterize largely as binary is, in truth, a matter of degree. Utilizing the Court’s established doctrinal framework, I argue that a large segment of the Supreme Court’s First Amendment case law should, in fact, be
rationalized as falling somewhere along a continuum. Conceptualizing expression-related government activity as a continuum, rather than a dichotomy, allows for a more nuanced and frank assessment of the relative First Amendment stakes involved. This approach offers clarity in a much larger class of expression than is currently understood to fall within the doctrinal realm of either government speech or forum analysis. This continuum is broad enough to encompass categories such as public employee speech, government-subsidized speech, and government programs that confer select benefits to speakers, such as trademark registration. This Article will conclude with the following question: where along this continuum does speech by faculty at state institutions of higher learning fall? But, before I arrive at this question, we must first explore how, and why, this continuum offers such a helpful explanatory rubric for a large body of First Amendment law, much of which fails to directly—or implicitly—rely upon such an overarching conception.

The pole of “government-as-speech-facilitator” actually has a long-standing historical, doctrinal legacy from the standpoint of the First Amendment (which itself only became truly invigorated approximately 100 years ago, when the Supreme Court first begin to wrestle with and acknowledge the First Amendment’s role in protecting free expression). The public forum doctrine sprang to life in 1939 and was, in its most basic sense, a simple recognition that important speech has traditionally occurred in certain types of public places. The Court, in an opinion written by Justice Owen Roberts, explains that “streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

Thus, Roberts asserts that “[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions . . . must not, in the guise of regulation, be abridged or denied.” It is a proposition that might appear intuitive at first glance. The founding fathers could not have been clearer about the primacy they placed on expressive freedom. It would indeed be ironic if the mere fact of government ownership and control over traditionally expressive public places could justify shutting down free expression or, perhaps even more troublingly, justify acts of blatant content and viewpoint discrimination that would stifle some messages and favor others. If free expression is truly a central value
of American democracy, venues where so much critical speech has historically occurred must be protected. The public forum doctrine was born of this compelling rationale.

It would gradually become apparent, however, that the seemingly straight-forward nature of the public forum principle—applying to quintessential public places like a town square, a sidewalk, or a city park—may, in fact, be deceptive. As a First Amendment doctrine, the public forum guarantee is a much more radical entitlement than one might expect. Most First Amendment law takes the form of a negative right: a freedom from government. After all, the language of the First Amendment is explicitly restrictive; it tells us that “Congress shall make no law . . . abridging the freedom of speech,”17 not that “Congress must make taxpayer-funded parks and sidewalks available for an unlimited range of expression by private individuals.” The public forum doctrine effectively established an affirmative governmental obligation to serve as a speech-facilitator. In other words, the doctrine gave rise to the notion that the government, as a property owner, is in control of and responsible for financing and maintaining a public facility, yet simultaneously constrained by the First Amendment as to how the public facility may be regulated. On its face, this may not appear problematic. However, as we acknowledge that government must choose when, where, and what kinds of forums to establish, the questions become more complex. And as we move away from the relatively straight-forward “quintessential” scenario, we find that there is a wide diversity of forums—owned by the government—in which the public, or select portions of the public, are permitted to speak in various ways and for various purposes. As we shall see, the Court has accommodated this complexity by adopting additional public forum categories, such as the designated and limited public forums.

Eventually, however, we must acknowledge the other end of the continuum: “government-as-speaker.” Government is often charged with communicating what the law requires, such as a sign reading “Speed Limit 65,” or with communicating policies the public desires, such as a cautionary television advertisement depicting a fried egg sizzling on a pan and warning, “this is your brain on drugs.” Yet, in contrast with the longstanding public forum doctrine, the Court has only recently identified what has become known as the “government speech doctrine.”18 This doctrine, also like the public forum doctrine, may appear deceptively straight-for-
ward: it simply asserts that the First Amendment does not act as an impediment to government expression. And why should it? Law-making itself is about promoting a very specific vision of the public good. The government should not be required, for example, to run a supplementary advertisement attesting to the benefits of illegal drugs in response to the requests of those who would like it to convey these alternative ideas. The government may discriminate on the basis of content and viewpoint; it may choose one message and reject others.

But here again, complexity emerges. Delivering a governmental message means enlisting others to convey it. It may mean employing civil servants who will propagate the government’s ideas. It may mean contracting out the work to an artist to paint a patriotic mural in a public building, or paying an actor to perform at a public event, or providing a speaking fee to an inspirational self-help guru to raise the morale of government workers. In such circumstances, it is the rare case that government acts with pure, let-the-message-fall-where-it-may neutrality. In a democracy, the people elect individuals with particular messages to convey particular ideas. At the same time, the extent to which the content and viewpoint of government speech is strictly dictated when conveyed by agents of the state (if we are to refer to these actors as agents, which itself is contestable) varies. The government might pay an artist to paint that “Speed Limit 65” road sign or pay that artist to be an artist and produce artwork for the public good regardless of its content or viewpoint. Are both instances government speech? If the latter is not, what is it? My contention would be that it is closer to the public forum pole of our continuum.

Nonetheless, the Supreme Court has not characterized First Amendment matters as falling on a government speech-forum continuum. This is understandable. First Amendment doctrine evolves over time, and, as mentioned above, the very concept of a government speech doctrine is quite new. So what we find is that the Court sometimes classifies expression as government speech, sometimes classifies a matter as a public forum issue, and sometimes sees neither. It is now time to connect the dots. Understanding that a large subset of First Amendment cases in fact fall along this continuum would offer a number of benefits: it would promote clarity and consistency, help make sense of disparate case law and

20. See infra Part IV.A.
21. See infra Part IV.C.
jurisprudence that can seem to lack coherence, and facilitate a more nuanced doctrinal recognition of concomitant government speech and private speech interests.

Doctrinal principles and tests accumulate over time. This is for good reason. The Court must struggle with unanticipated variations on distinct First Amendment problems that appear to call out for new solutions. However, the resulting doctrinal clutter—what Schauer has referred to as doctrinal overlap—may ultimately produce greater inconsistency and confusion, and permit increased opportunities for results-oriented, doctrinal cherry-picking by judges.22 I will begin by looking at three examples: cases in which the Court sees only a public forum, cases in which the Court sees only government speech, and instances in which it sees neither (but should). I will then address where academic speech by tenured professors should fall along this continuum.

IV. PUBLIC FORUM CASES

A. Moving Beyond the Quintessential Public Forum and the Problem of Scarcity

In 1975 the culture wars were in full swing, and it is difficult not to see the decision in Southeastern Promotions v. Conrad in light of the dominant cultural conflict of the time. A theatrical production company sought to bring the controversial rock musical “Hair” to Chattanooga, Tennessee—a production that included nudity, vulgar language and significant sexual content.23 The city denied the production use of a municipal theater. It reasoned that the musical “would not be ‘in the best interest of the community.’”24 In striking down the city’s decision as a violation of the First Amendment, the Court was, on the surface, simply taking the next logical step in the quintessential public forum reasoning. As Justice Douglas put it, “[a] municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk.”25

22. Frederick Schauer, Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment, 2015 Sup. Ct. Rev. 265, 267 (2015) (“Just as Karl Llewellyn famously observed that the selection between equally applicable but mutually exclusive canons of statutory construction might be the consequence of a judge’s desired outcome rather than methodological preference, so too might the selection of a frame of doctrinal analysis be the consequence of a different kind of outcome preference.”).


24. Id.

25. Id. at 563.
Nevertheless, the inherent challenges of applying the public forum principle beyond the most obviously and traditionally public, open spaces quickly bubbled to the surface, and the problems were not just definitional. Although Justice Rehnquist, in dissent, rejected the majority’s characterization of “a community-owned theater as . . . the same as a city park or city street,” his view does not appear to be driven entirely by First Amendment minimalism—that is, a raw desire to restrictively cabin a protective First Amendment principle. To Rehnquist, there was a substantive difference between the quintessential public forum of Hague and the municipal theater in Conrad. Applying the same principles here as would apply in a public park might have absurd consequences. Why? A public theater “must of necessity schedule performances by a process of inclusion and exclusion.” Rehnquist asked, “May an opera house limit its productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come first served basis?” Applying the public forum doctrine under these circumstances, in other words, “seems to give no constitutionally permissible role in the way of selection to the municipal authorities.”

In 1975, there was no “government speech doctrine” as we understand it today. The Court had not conceptualized government speech as its own First Amendment classification. But what Justice Rehnquist was essentially conveying was disagreement with the majority as to where Chattanooga’s actions fall on the governmental speech-forum continuum. The City of Chattanooga was doing what governments do: it was using taxpayer money to promote a particular policy, establishing a venue for “productions suitable for exhibition to all the citizens of the city, adults and children alike.” In one regard, it was establishing a forum for public expression. The stage was to be used by a wide variety of theater companies, each with its own independent-of-government artistic voice. In another regard, the city, by making policy choices as to what range of uses were “suitable,” was itself speaking. By making restrictive choices as to what kind of expressive activity would take place in the forum, the city was conveying its own distinctive message.

One might be tempted to retort that this is no continuum. It is black or white. For First Amendment purposes there either is a pub-

26. Id. at 570.
27. Id.
28. Id. at 572-573.
29. Id. at 573.
30. Id. at 569.
lic forum or there is not. The majority and the dissent simply disagree as to how ‘public forum’ should be defined. One might find Rehnquist’s position to be persuasive because, with just one stage and 365 days in a year, a government that runs a theater must inevitably make choices—and choices require determining what speech stays and what speech goes. Thus, the argument might run, such a forum cannot be a true public forum in the same sense of a public park or sidewalk. However, this binary framing is neither an ideal doctrinal approach nor an accurate representation of reality.

The finite availability of a theater as a site of public expression may seem to distinguish it from a public park, but, upon reflection, the distinction is really a matter of degree rather than of kind. The geographic space in a public park is also finite and marked by potential scarcity; the ability to effectively convey a message and be heard or observed is dependent upon the density of people and volume of spoken expression taking place in the space at a single moment. Regulation of large crowds, including necessary caps on the number of individuals who may be present in a park at one time, requires government choice of what speech to allow and what speech to curtail. Under the Court’s public forum doctrine, such regulation would need to be content and viewpoint neutral. But it cannot be the finite quality of the expressive platform that is the defining feature of a forum that is classified as non-public. All forums are ultimately finite. A more accurate characterization would be that there exists a governmental speech-forum continuum. Somewhere in-between 365 performances at a public theater by a diverse range of theatrical troupes who otherwise have little connection to the state, and one performance by a government employee reading from a script written by a government-employed playwright intending to further specific values, the expressive platform crosses from a public forum to government speech on the governmental speech-forum continuum. The objective here is not to specify precisely where this line should be drawn under all circumstances in which this continuum applies; this would be beyond the scope of this Article. The objective is simply to suggest that courts acknowledge the presence of this continuum, so they can more transparently flesh out, in a principled and consistent fashion, justifications for treating some speech as government speech and other speech as protected by a public forum.
B. Slippery Slopes, Doctrinal Nuance, and the Proliferation of Forum Classifications

One of the more common criticisms of the public forum doctrine, and the government speech doctrine as well, is the lack of a limiting principle. As dichotomous doctrinal categories, there is a temptation to utilize the classifications in areas where they arguably do not belong. Arron H. Caplan protests that “the public forum has been used for ill-fitting functions, much like using a hammer to drive screws or staples.” An overly expansive application of the public forum concept might mean that government is unreasonably thwarted from doing what it was elected to do: implementing policies with a particular viewpoint. Clearly, Justice Rehnquist felt this way about the Conrad Court’s determination that the city of Chattanooga was constitutionally prohibited from allowing only family-friendly productions in its municipal theater. Parallel concerns, but with fears of the very opposite type of adverse consequence, have been expressed with regard to the government speech doctrine. Mark Strasser cautions “that the Court must offer meaningful limitations on what can be characterized as government speech before that exception swallows up many of the protections offered by the First Amendment.” In other words, a world in which government is ubiquitous, and in which vast quantities of government action are construed to be government speech, may be one with a diminished expressive public realm. However, unlike the prescription offered by these and other commentators, I would suggest that the solution is not to work to contain and cabin public fora and government speech as discrete doctrinal categories, but to be more inclusive, and acknowledge these concepts as the two poles of a broad governmental speech-forum continuum. The Court’s gradual expansion of forum analysis—particularly the addition of the limited public forum concept—is a positive step in this direction.

The Court has not been blind to the incremental nature of government-controlled fora. As mentioned above, the Court over time carved out additional categories to accommodate variations among fora. The “nonpublic forum,” “designated public forum,” and “limited public forum” were eventually added to the Court’s public forum doctrinal repertoire, which was initially limited to the...
quintessential (traditional) public forum established in *Hague*. This nuanced expansion of the forum regime is largely consistent with the more capacious continuum theory presented here. However, as many commentators have pointed out, the Court has, unfortunately, been less than consistent with its use of public forum terminology, as well as the tests that govern the respective categories.\(^{33}\) The concept of a limited public forum shifted without acknowledgement by the Court sometime around 1990 from a category subject to the same First Amendment standard that applies to a traditional public forum to the test for a nonpublic forum.\(^ {34}\) Lower courts and scholars even differ on the number of doctrinally significant tiers that exist. Some reduce the number to as few as two, while others insist on the significance of the four discrete categories mentioned above.\(^ {35}\) The big picture, however, is that the Court has come to accept the idea that a government forum is a variable First Amendment concept that extends well beyond public parks and real property: a government may own and control property that is not open to the public for expression, identified as a “nonpublic” forum; it may intentionally create a new public forum that is not traditional in form, which would be deemed a “designated” public forum; and it may establish a forum that is “limited to use by certain groups or dedicated solely to the discussion of certain subjects,”\(^ {36}\) referred to as a “limited” public forum.

While some may bemoan the increasing complexity of the doctrine,\(^ {37}\) its expansion is likely reflective of a growing awareness of the ubiquity of government, and the need to maintain freedom of expression even in settings where government plays a significant role in structuring opportunities for communication. One scholar defined a forum as “a platform for expression by persons other than the owner of the platform.”\(^ {38}\) And while this definition is not a bad one, if we are discussing government fora we might be wary of the latter clause (emphasis added). Determining whether a speaker is “other than” the government will almost always be an exercise in line-drawing by courts. The more the forum is regulated, the range of expression constrained, the message dictated by government, the more a speaker resembles the government itself, and vice versa. A

\(^{33}\) Caplan, *supra* note 31, at 653.

\(^{34}\) *Id.* at 654.

\(^{35}\) *Id.*

\(^{36}\) Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 679 n.11 (2010).

\(^{37}\) See generally, Caplan, *supra* note 31, at 647.

\(^{38}\) *Id.* at 655 (emphasis added).
continuum approach captures both the reality of government speech and an increasingly complex public forum doctrine in a single theory.

C. The Limited Public Forum: A Middle Ground along the Government Speech-Forum Continuum

Upon reflection, all government speech is ultimately speech by proxy—someone who is given authority by law to speak on behalf of the government. As Schauer observes, “[b]ecause neither the federal government nor the states have a mouth with which to speak nor the fingers with which to wield a pen or tap a keyboard, . . . the government must speak through its employees, all of whom enjoy First Amendment rights in their individual capacities.”39 Thus, where government controls who may appear on stage in an important debate between political candidates,40 or structures and finances a system of student organizations at a state university,41 or allows drivers to express themselves on their government issued license plates,42 or subsidizes legal representation by attorneys who will use their professional discretion and judgment to express a legal argument,43 forum analysis is critical. It is essential if we are to have an honest discussion of the many varied ways government acts to promote policy messages, while at the same time not ceding to government complete freedom to deny free expression just because those who seek to express themselves do so in the context of a government program, institution or regulation. The Court’s relatively recent creation of the limited public forum concept is helpful in this regard. Although it has, up until now, only been used in a narrow set of circumstances, the limited public forum has the potential for a broader application. For some speech issues that fall along the continuum, this doctrinal formulation might be harnessed to strike an appropriate middle ground between a traditional public forum in which maximal First Amendment rights are afforded to individual speakers and the complete absence of First Amendment rights afforded to private parties where it is the government that is deemed the speaker.

39. Schauer, supra note 22, at 278.
41. See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Christian Legal Soc’y Chapter of the Univ. of Cal., 561 U.S. 661 (2010).
A Registered Student Organization (RSO) program, in which a state institution confers benefits to school-approved student groups, may seem at first glance to be quite different from the traditional image of a public forum described by Justice Roberts in *Hague*. However, the Supreme Court has identified such a program as a limited public forum. In *Christian Legal Society v. Martinez*, the Court addressed the constitutionality of a state law school’s RSO policy. Hastings Law School conditioned official recognition of student groups on their agreement to accept “all-comers,” which meant denying recognition to a religious organization that turned down students who did not share their beliefs about homosexuality. By its very terms, the program established by the public law school in California had a relatively narrow purpose, “encourag[ing] students to form extracurricular associations that ‘contribute to the Hastings community and experience.’” This is not a public space for all to say virtually anything like an urban park. Its government-designed intent was to promote a forum for Hastings-related student expression that would support the underlying educational mission of the law school. Along with such status, official student organizations were afforded “channels of communication,” such as an official Hastings organization email address and access to bulletin boards, a weekly newsletter, use of law school facilities, and an annual “student organizations fair.”

This broadly inclusive conception of the public forum was not new. Fifteen years earlier, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court similarly classified a student activities fund at a state institution in Virginia as a limited public forum. The Court quickly dispelled any doubt that even something as intangible as a monetary fund may constitute a public forum for First Amendment purposes. Justice Kennedy explained that the student activities fund “is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.” In *Rosenberger*, the Court struck down as unconstitutional a policy excluding religious activities from fund eligibility. As a limited public forum, the university was not permitted to discriminate against pub-

44. Christian Legal Soc’y Chapter of the Univ. of Cal., 561 U.S. 661 (2010).
45. Id. at 668.
46. Id. at 669.
47. Id. at 669-670.
lications with a religious viewpoint while reimbursing printing costs for organizations expressing other non-religious perspectives.49

Although the Court has not fleshed out in all particulars when and where a limited public forum designation is appropriate, it has provided this definition: a limited public forum exists when governmental entities open property “limited to use by certain groups or dedicated solely to the discussion of certain subjects.”50 As for its constitutional implications, in a limited public forum the government has greater, but far from complete, freedom to restrict speech: it may restrict both the content of expression and the identity of speakers allowed to utilize the forum, but may not impose restrictions that are unreasonable or viewpoint-based.51 This test stands in contrast with the more rigorous traditional public forum standard, which prohibits restrictions that are content-based, are not “narrowly tailored to serve a significant government interest, [and which do not] leave open ample alternative channels of communication.”52 As we shall explore later, the middle-ground status of a system of RSOs is appropriate for the very same reasons it is arguably appropriate for public educational institutions at large. As Justice Stevens explains, “[t]he campus is, in fact, a world apart from the public square in numerous respects, and... [all] organizations, must abide by certain norms of conduct when they enter an academic community. Public universities serve a distinctive role in a modern democratic society. Like all specialized government entities, they must make countless decisions about how to allocate resources in pursuit of their role.”53 As with the opinions a professor states in her classroom, academic freedom may extend to espousing a controversial viewpoint that is strongly opposed by the public at large, while at the same time not encompassing content that is irrelevant to the subject matter and scholarly discipline she was hired to teach and study. But before jumping ahead to the topic of academic freedom, let’s turn first to circumstances in which the public forum doctrine was not utilized by the Court, and where, in its place, the government speech doctrine was utilized.

49. Id. at 837.
50. Christian Legal Soc’y Chapter of the Univ. of Cal., 561 U.S. at 679 n.11. (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)).
51. Id. at 679.
53. Christian Legal Soc’y Chapter of the Univ. of Cal., 561 U.S. at 702 (Stevens, J., concurring).
V. GOVERNMENT SPEECH CASES

If there is scholarly agreement regarding the government speech doctrine, one consistent theme is that it is largely underdeveloped—Helen Norton has called it a doctrine “in transition.”54 This is hardly surprising; what is typically considered the seminal government speech case, Rust v. Sullivan, was decided just over twenty-five years ago, and it was only identified as a “government speech case” retrospectively.55 It was 2001 when the Supreme Court explicitly labeled the decision as a government speech decision, representative of a distinct First Amendment doctrine.56 What perhaps is surprising is that it took the Court so long to identify government speech after the Court first acknowledged the public forum doctrine more than three-quarters of a century ago. Government speech is effectively the limiting principle on that earlier doctrine. Nonetheless, in the past two decades, the Supreme Court has repeatedly affirmed that “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”57 From advertisements for beef,58 to permanently installed statues in public parks,59 to license plates bearing a prescribed set of messages,60 the government speech doctrine permits government to speak with one voice, without any First Amendment requirement that it welcome alternative viewpoints.

Rust involved a federal program that extended funds to health care providers to offer certain family planning related services.61 The law stipulated that the funds were not to be used “in programs where abortion is a method of family planning.”62 At issue in Rust were the regulations promulgated to clarify how this prohibition was to take effect. These regulations explicitly prohibited “counseling, referral, and the provision of information regarding abortion as a method of family planning.”63 To the dissenters, this was noth-

56. Id.
60. See Walker, 135 S. Ct. at 2246.
62. Id. at 178.
63. Id. at 193.
ing short of a “direct regulation of dialogue between a pregnant woman and her physician [with] both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy”—a clear violation of elementary First Amendment principles. To the majority, it was what would become known as government speech. Perhaps there was no need to slap a doctrinal label on its rationale, because it appeared so self-evident. The rule the Rust majority articulated was deceptively straight-forward: “The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.”

If this is to be seen as an early iteration of the government speech doctrine, it illustrates how much further the Court would need to move before it would fully flower. The Court was suggesting, perhaps somewhat disingenuously, that there was no viewpoint discrimination here. This was just a matter of a government choosing to fund one “activity” and not another. It just so happened that this “activity” involved paying professional health care providers to say certain things, but not others, even if in their professional judgment—and according to their “viewpoint”—they would best serve their patient by saying such other things. As the Court eventually settled into the idea of the government speech doctrine, it would do away with the pretense that there must be something “viewpoint-neutral” about government expression. Rust would evolve into the outright, unapologetic acceptance that a government takes viewpoint-specific positions when it enacts policies. These policies will frequently take the form of speech: expression that is exclusive, and exclusionary.

The second point one might make is how easily the stated rule in Rust could be applied to virtually any public forum context, and how, if so applied, it would lead to holdings that directly contradict the outcome of the Court’s public forum precedents, and, at the same time, potentially decimate the expressive freedom they protect. To illustrate this point, here is the Rust rule with Conrad-like

64. Id. at 204.
65. Id. at 193.
66. See Pleasant Grove v. Summum, 555 U.S. 460, 467-468 (2009) (A government is free “to select the views that it wants to express . It is the very business of government to favor and disfavor points of view.”).
facts inserted in italics: “The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest [such as a program intended to make theatrical productions more accessible to a community by establishing a municipal theater dedicated to wholesome family entertainment], without at the same time funding an alternative program which seeks to deal with the problem another way [such as the establishment of a municipal theater that may be utilized for a mix of provocative adult-themed musicals and wholesome family entertainment].”67 The doctrinal flip from public forum to government speech would appear to turn entirely on how one chooses to frame the government action at issue. And as a relatively new, underdeveloped doctrine, this choice does not appear to turn on a consistent, principled assessment of qualitative attributes.

The flip seems to apply just as neatly to a limited public forum context like that in Martinez. Imagine, for example, if a public law school—with the ostensible concern that too few legal resources rebound to the benefit of poor and marginalized Americans as a result of an elite legal culture dominated by a conservative pro-business perspective—established a registered student organization program to address this “problem.” Suppose further that it limits participation to student organizations that do not seek to promote capitalism and the free-market economy. In both this and the municipal theater case, under the Rust rule one could palatably argue that “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.”68 This latter student organization hypothetical might seem far-fetched, but it is in fact remarkably similar to an illustration the Rust majority cites to support its rule. It explained that “when Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”69

Is the majority in Rust thus reading the public forum doctrine out of the First Amendment? Not quite. In a short passage near the end of its opinion, the Court qualifies its newly articulated rule, explaining that the mere fact of government funding of a particular project is not “invariably sufficient” to allow for control of expres-

68. Id.
69. Id. at 194.
sion “outside of the scope” of that project. As an example of the type of circumstances in which, in contrast to the facts in Rust, government may lack the power to squelch particular speech, the court raises the public forum scenario, briefly alluding to the traditional public forum of Hague as well as the possibility of a designated public forum. This nod to the public forum doctrine, however, begs the most important question: How do we know when we are dealing with a public forum? As Frederick Schauer explains, the “problem of framing in law often arises as a consequence of multiple doctrinal approaches being potentially applicable to a single event or problem. Such doctrinal multiplicity . . . appears especially salient with respect to the First Amendment.” Here, the question of definition could not be more high stakes. The very opposite legal consequence would likely result were a court to declare this program a public forum. One could conclude that funding a range of expressive activities between a doctor and patient looks quite a bit like funding a range of expressive student organizations—which would, two decades later in Martinez, be declared to be a limited public forum. Granted, the limited public forum concept would continue to evolve in this period, and the Rust Court was perhaps constrained by the then-narrower understanding of forum analysis. Nonetheless, instead of acknowledging that government speech and the public forum are two sides of the same coin and tackling head-on the definitional challenges involved in differentiating these two doctrines as dichotomous concepts, the Court dodged, and for years to come confusion would reign.

The rigidity that accompanies the bimodal, either-or approach to government speech continues to this day, at times making justices on either side of the government speech aisle look like partisans who willfully disregard the inevitable nuance involved. For example, in the closely contested 5-4 decision of Walker v. Sons of Confederate Veterans, the majority presents its conclusion that a specialty license plate program in Texas is government speech as constitutional common sense. The Court upheld the constitutionality of a decision by the Texas Department of Motor Vehicles Board to reject a proposed specialty license plate design portraying a Confederate battle flag, despite the fact that motorists could “choose

70. Id. at 199.
71. Id. at 200.
72. Schauer, supra note 22, at 266.
74. Id. at 2253.
from more than 350 messages, including many designs proposed by nonprofit groups or by individuals and for profit businesses.75

Granted, the majority articulates many legitimate reasons why such a program should be treated as government speech. Justice Breyer tells us that “forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.”76 Yet, the majority’s simplistic dismissal of alternative characterizations feels vaguely dishonest. Can we truly say with a straight face that individual members of the public do not also speak when they voluntarily opt to install a select message on the back of their vehicle from among hundreds of choices? While it may have been appropriate to ultimately treat this as government speech for First Amendment purposes, this is clearly expression that falls along a government speech-forum continuum. It has attributes of both a public forum and government speech.77

Unfortunately, the dissenters in Walker are equally simplistic in their characterization. Writing for four dissenting justices, Alito’s alarmist opinion warns that “the precedent this case sets is dangerous. While all license plates unquestionably contain some government speech (e.g., the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages.”78 According to the dissenters, denying the Confederate Veterans the ability to post their message constitutes “blatant viewpoint discrimination.”79 If we place the majority and dissent next to one another we begin to see the futile circularity of their dichotomous arguments. The more the government does what the dissent presents as a constitutional wrong (discriminating on the basis of viewpoint), the stronger the majority’s argument becomes that it is a constitutional right (because this increased discrimination shows us that it is the government, not the public, that is speaking). Nonetheless, for purposes of this Article, Walker is an illuminating case and, perhaps, an encouraging one. First, the confrontation between the majority and dissent is perhaps

75. Id. at 2257.
76. Id. at 2250.
78. See Walker, 135 S. Ct. at 2255-56 (Alito, J., dissenting).
79. Id. at 2256.
the Court’s most vivid illustration to date of how a continuum approach might bridge the inevitable collision of two critically important doctrinal concepts. Second, although the Court does not present the public forum doctrine and government speech as two poles of a continuum, the majority and dissent do frame the issue as a question to be answered by either one of these two doctrinal concepts. Considering the Court’s past failure to acknowledge the important relationship between these two doctrines, this is a rare and refreshing move toward clarity.

VI.
EVADING BOTH THE PUBLIC FORUM AND GOVERNMENT SPEECH

As much as Walker might, in some small way, represent progress in the Court’s willingness to acknowledge the inherent tension between the public forum doctrine and the government speech doctrine—if only for the fact that the majority and dissent took opposing positions on this front—there is unfortunately a large set of outstanding decisions that evade the doctrines completely. This section addresses these cases: circumstances in which use of the public forum or government speech doctrines would be particularly helpful. It also provides an illustration of how utilizing a government speech-forum continuum in a broad range of First Amendment cases would help clarify the constitutional interests at stake.

A. Subsidies for Legal Expression

A decade after Rust was decided, the Court in Legal Services Corporation v. Velazquez would reach the very opposite holding as Rust, despite the case’s strikingly analogous facts. The Court would also remain even more opaque about the doctrinal basis for its decision, and once again skirt the public forum issue. In Velazquez, the Court addressed a government program that provided funding, not for the services of health care providers, but for lawyers who would represent indigent clients who were determined to be ineligible, or no longer eligible, for welfare benefits. Akin to the limitation imposed on doctors in Rust with regard to abortion counseling, in Velazquez the government program prohibited representation that sought to challenge “the constitutional or statutory validity” of the welfare law itself.81 The Velazquez Court—while affirming Rust as

81. Id. at 539.
standing for the principle that viewpoint-based government speech is to be free from First Amendment scrutiny—struck down the law on First Amendment grounds, insisting that the legal advocacy funded here was not to be regarded as government speech.82 The reason: the “program was designed to facilitate private speech, not promote a governmental message.”83 Scalia in dissent finds this supposed distinction from Rust “so unpersuasive it hardly needs a response.”84 Unfortunately, Scalia’s approach is no more satisfactory.

The reality is, in most circumstances in which a government funds professionals to provide services, whether they are lawyers, doctors, architects or visual artists, government is facilitating private expression. At the same time, as acknowledged in Rust, there is typically a defined scope to the work. The government, in attempting to achieve a particular policy objective, will allocate finite funds to achieve a finite purpose. This suggests that such professionals will typically not be permitted to use these funds for any expressive purpose they wish; they will be expected to use their expressive skills to achieve only certain ends. Scalia’s Velasquez dissent errs in seeing pure dichotomy rather than an issue that must be settled along a continuum. The majority errs in failing to choose a clear doctrinal path at all and refusing to see this program as a kind of public forum. Instead, the majority flails about in multiple directions, tossing out a series of ad hoc reasons for striking down what it essentially upheld ten years prior in Rust.

Scalia’s dissent in Velasquez maintains that, because the legislation in question operated as a subsidy program, it should survive First Amendment scrutiny. Scalia likes tidy doctrinal solutions. A law is either a “subsidy program” or a “regulatory program,” he tells us.85 “Regulations directly restrict speech; subsidies do not,” he authoritatively opines.86 But things are not quite as simple as Scalia suggests. Even he is compelled to recall in the very same paragraph the time the Court declared a selective subsidy a viewpoint-based violation of the First Amendment. Alas, Scalia has a distinction for us: that case, Rosenberger v. Rector and Visitors of the University of Virginia, was one of the rare circumstances “when the government created a public forum.”87 A more illuminating way of phrasing this explanation however, might have been: this was one of those the

82. Id. at 541-543.
83. Id. at 542.
84. Id. at 554.
85. Id. at 552.
86. Id.
87. Id.
rare circumstances where we, the Court, decided to call a government subsidy program a public forum.

Scalia’s brief attempt to define what should or should not be placed within the judicially created classification of a public forum proves wanting. He explains that the restrictions imposed on this legal aid funding program suggest that this subsidy was not intended to “encourag[e] a diversity of views”—ergo it is not a public forum.88 However, here we return to the same circularity problem discussed above with regard to Walker. Furthermore, we might query: why not classify this as a limited public forum? The very definition of a limited public forum incorporates intentional restrictions on the public platform. It is certainly true that lawyers are constrained by professional responsibilities that require certain speech and forbid other speech—but an inclusive definition of a limited public forum, consistent with Martinez and Rosenberger, could incorporate such constraints. Recall that the Court has defined the limited public forum as one “limited to use by certain groups or dedicated solely to the discussion of certain subjects.”89

Some limitation on the diversity of views does not preclude the existence of a public forum. Indeed, the Court’s recognized category of “limited public forum” should suggest the very opposite. Oxford dictionary defines a forum as “a meeting or medium where ideas and views on a particular issue can be exchanged.”90 That diversity of views is simply limited to a certain range of subject matter or speakers, like the registered student organizations in Martinez. Attorneys have a vast array of communicative styles and approaches. When the government establishes a program that funds legal services, it subsidizes a platform that must accommodate a diversity of professional legal expression. Scalia has himself acknowledged in other contexts the degree to which legal representation can take a remarkably diverse range of forms. The Court has held that erroneously depriving a defendant of his choice of counsel cannot be considered a “harmless error,” and Scalia reasons that “[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of jury, presentation of the witnesses, and style of witness examination

88. Id. at 553.
and jury argument. Scalia’s rejection of forum analysis rests on shaky ground.

In Velazquez, Scalia further protests that the law struck down by the majority did not “discriminate on the basis of viewpoint, since it funds neither challenges to nor defenses of existing welfare law.” As to those two expressive positions, perhaps one might agree with his conclusion; however, one could just as easily argue that the true viewpoint discrimination lies in the way the law treats differently the viewpoint of attorney ‘A,’ whose professional opinion is that it is not in her client’s interests to argue either in favor of, or against the legality of the welfare law, and attorney ‘B,’ who believes that it is. In other words, contrary to Scalia’s claim, if Velazquez had been analyzed under the limited public forum rubric, one could certainly make the case that this selective limitation on funding was a restriction based on viewpoint, and therefore constitutionally suspect. And although the majority did strike down the law, it did not do so on this basis.

The majority quite rightly points out that the government funding scheme for legal services in Velazquez “facilitate[s] private speech.” Troublingly, however, it outright refuses to characterize the program as a type of public forum. The majority delicately explains that because “this suit involves a subsidy, limited public forum cases . . . may not be controlling in a strict sense, yet they do provide some instruction.” Why the reticence? Perhaps it is for fear of the clunky bimodal doctrinal structure it has constructed over time, and not a truly principled belief that because this is a so-called subsidy case it can’t possibly be a public forum case. The truth is there is little reason to treat them differently. Even a traditional public forum will necessarily involve a government subsidy, at minimum the opportunity cost of not selling off that public park or using it for some other non-expressive purpose. In most cases, public fora require regular infusions of taxpayer funds, whether it is for maintenance, gardening, policing or event planning. Of course, if from the First Amendment perspective, the public forum, or even the limited public forum, were not treated as such an either-or doctrinal proposition, but instead understood as part of a governmental speech-forum continuum, the Court could honestly appraise the situation and draw lines sensitive to the nature of the particular governmental action. Ultimately the Court would then begin to de-

93. Id. at 542.
94. Id. at 544.
velop greater consistency with regard to its treatment of governmental behavior that falls somewhere in the space between public forum and government speech. Unfortunately, government funding cases have instead come to form their own loose category of First Amendment analysis, injecting an unnecessary level of complexity and confusion into a range of cases that all comfortably fall somewhere along the government speech-forum continuum.

B. Subsidies for Artistic Expression

Another example of the Court’s evasion of both government speech and public forum analysis is found in the 1998 case National Endowment for the Arts v. Finley. There the Court tentatively upheld a federal arts subsidy that required applicants for funds to be judged, not purely on artistic merit, but also through “consideration [of] general standards of decency and respect for the diverse beliefs and values of the American public.”95 There was political context to this relatively innocuous-sounding criterion for allocating funds to artists: two controversial artists had provoked a contentious national debate after receiving government money, ultimately inspiring this newly amended law.96 In Finley, the majority awkwardly dances around the question of whether the law is viewpoint-based, rejecting a claim that the amendment is facially unconstitutional, but reserving the opportunity to revisit the question as-applied “where the denial of a grant may be shown to be the product of invidious viewpoint discrimination.”97 Without grounding the case in the space between government speech and the public forum, the Court scrambles in the doctrinal ether. It rejects the respondent’s argument that the funding program should be considered a limited public forum, unconvincingly distinguishing arts funding from the student activities fund in Rosenberger and the municipal theater in Conrad. It also declines to categorize the program as government speech.

As to its rejection of the limited public forum framing, the Court reasons that the “NEA’s mandate is to make aesthetic judgments, and the inherently content-based ‘excellence’ threshold for NEA support sets it apart from the subsidy at issue in Rosenberger – which was available to all student organizations that were ‘related to the educational purpose of the University,’ . . . and from comparatively objective decisions allocating public benefits, such as access

96. Id. at 574-75.
97. Id. at 587.
to . . . a municipal theater.” Assuming that some student organizations could be deemed not to further the educational mission of a state university, is a governmental judgment of artistic excellence—which also involves a programmatic cut-off at which many will not receive government largess—truly distinguishable from a governmental judgment of educational purpose? Is the finite availability of a performance space for only ‘x’ number of performances a year truly distinguishable from the finite funds to be received by ‘x’ number of artists? If anything, the Court unwittingly makes the point that what distinguishes a government subsidy that is a limited public forum from one that is not is a question of degree—an insight that is deserving of, quite frankly, much more analysis than the paltry one paragraph the Court devotes to the question.

At the same time that the Court blithely rejects the characterization of this fund as a limited public forum, it also fails to place the program in the category of government speech. Perhaps this should not be surprising; Finley was decided only six years after Rust, and as mentioned previously, it would take a good deal of time for the Court to firmly establish that case as representative of a discrete government speech doctrine. However, although the Court does not use the phrase “government speech,” it turns for support to many principles that would prove to be the hallmarks of the doctrine. It emphasizes the vast discretion the government has in choosing to fund a particular art project, and the large number of considerations it may weigh in the process. The Court explains that, among other possible factors, these may include “the anticipated public interest in or appreciation of the work, . . . its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form.” All of these criteria would seem to involve choosing one policy goal over another. Government might choose to promote the expression of rural artists but not urban ones; or to promote art accessible to the intellectually disabled but not to the blind or to children under the age of six. Like in Rust, the government could be said to be speaking by defining the scope and priorities of the program. Indeed, the Court concedes that “absolute neutrality is simply inconceivable.” Yet the Court, sub silentio, rejects charac-

98. Id. at 586 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 824 (1995)).
99. Finley, 524 U.S. at 585.
100. Id.
101. Id. (internal citations omitted).
terizing this program as government speech. Instead it simply avoids the hard doctrinal questions, tells us that, when it comes to spending, “Congress has wide latitude,”\(^{102}\) and implies all the while that viewpoint discrimination is still not permissible. Yet it does not adequately explain why the discretion involved in arts funding is somehow not viewpoint discrimination.

Once again, the case includes a refreshingly candid retort by Justice Scalia, who has the temerity to call this what it appears to be on its face: a viewpoint-based program. However, Scalia’s prescription is both unacceptably simplistic and troublingly speech-suppressive. To Scalia, resolving the case is as simple as distinguishing a regulation from a subsidy. As the latter, “Congress did not abridge indecent speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of the statute.”\(^{103}\) Scalia brushes aside the challenger’s assertion that the arts funding program should be treated like the student organization fund in \(\text{Rosenberger}.\)\(^{104}\) As Scalia sees it, the only potential offense here is that some artists will be deprived of the benefit of having the people “taxed to pay” them to produce their art.\(^{105}\) “It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government.”\(^{106}\) The problem with this eminently reasonable sounding argument, however, is that its logic would apply to any public forum. One could just as easily assert that New Yorkers have the right to speak freely, but do not have the right to have the city pay for them do so in Central Park. All public fora are, in effect, government subsidies. One might acknowledge that the public forum concept has been inadequately theorized. However, at core the public forum doctrine rests on the premise that the government has an important role to play as an affirmative speech facilitator. Given government’s critical and monopolistic role in many spheres, in certain settings the First Amendment must be understood not just as a negative right, but a positive right as well. In short, \(\text{Finley}\) and other so-called subsidy cases should be viewed through the lens of a continuum in which a public forum and government speech are simultaneously at play. This would better facilitate an honest assess-

---

102. \textit{Id.} at 588.
103. \textit{Id.} at 595.
104. \textit{Id.} at 598.
105. \textit{Id.} at 586.
106. \textit{Id.} at 598.
ment of how the particular constitutional dilemma should be resolved.

C. Trademark Registration on the Continuum

Unfortunately, the Court’s most recent First Amendment decisions continue to reflect a stubborn resistance to doctrinal clarity in this area. In *Matel v. Tam*, the Court summarily rejects not just claims that the expression at issue constitutes government speech, but also that it should be treated as a government subsidy or—again *sub silento*—as part of a public forum. 107 A clause which had been part of federal law since 1946 barred “the registration of a trademark which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 108 On the basis of this provision, an Asian-American band called “The Slants” was denied registered trademark status. 109 The Court, in striking down the provision of federal trademark law, seemingly refuses to ground its decision in any established doctrine whatsoever, other than a context-free assertion that viewpoint-based discrimination is impermissible.

The Court’s unmoored posture is evident from the very beginning of the opinion, when it conclusively declares that the law “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expressed ideas that offend.” 110 If the late Justice Scalia were still alive to read such a declaration, one could imagine a snarky and unequivocal retort: of course, no speech whatsoever is being “banned” by virtue of this law. “The Slants” could go on calling themselves “The Slants” without any governmentally imposed adverse consequences. Under this law, they were not even denied potential trademark status. They were merely denied some of the legal perquisites that accompany federal registration. 111

Trademark registration, like a large class of government action discussed above, falls somewhere along the government speech-forum continuum. Unlike the classic ‘negative’ application of the First Amendment, in which the government seeks to punish or restrain individuals from speaking, this is about selectively conferring an expressive benefit. It is about a ‘positive’ right. Remarkably, the Court seems to conflate these two different strands of the First Amendment. 107. *Matel v. Tam*, 137 S. Ct. 1744, 1755 (2017). 108. *Id.* at 1753 (internal quotation marks omitted). 109. *Id.* at 1754. 110. *Id.* at 1751. 111. *Id.* at 1752-53.
Amendment jurisprudence. Indeed, the very structure of the Court’s opinion exposes this profound deficiency. Section III of the opinion begins the Court’s analysis of the constitutional issue: “Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment.”

It then proceeds to explain that “at the outset, we must consider three arguments” made by the government in defense of the law. In turn, it rejects these three arguments—government speech, government subsidy, and a new government-program doctrine—in subsections A, B, and C. The final section (IV) of the majority opinion is devoted to “confront[ing] a dispute between the parties on the question of whether trademarks are commercial speech”—which it tells us “it need not resolve. . . because the disparagement clause cannot withstand” even the relatively relaxed commercial speech review.

This is a sleight of hand. The commercial speech doctrine has been used in the classic ‘negative’ rights setting in which certain forms of advertising are prohibited, not when the government simply fails to make certain advertising more effective through a benefit conferred by its laws.

The Tam Court, in other words, tells us only what doctrines do not apply. Surprisingly, it does not devote a single section of its opinion to the alleged doctrine that does apply. The only reference to forum analysis is in a brief three-sentence paragraph in which it acknowledges that its limited public forum cases are “[p]otentially . . . analogous.” It is unclear why the Court does not take the next step and identify federal trademark registration as a limited public form, a classification that would seem on its face to be a good fit, and would serve to ground its otherwise untethered First Amendment analysis in preexisting doctrine. At best, perhaps the Court’s decision stands for a kind of blanket rule against “viewpoint” discrimination. But the cases and language it cites for this proposition are all inapposite—applying to circumstances where speech is “prohibited,” not where speech is discriminated against in the context of an affirmative government program. Broadly applying such a rule to positive rights would appear to make little sense, for it would make the limited public forum doctrine (which prohibits viewpoint discrimination) utterly superfluous. As previously discussed, the government selectively confers private expres-

112. *Id.* at 1757.
113. *Id.* at 1764.
114. *Id.* at 1749.
115. *Id.*
sion-related benefits all the time, whether it is in the form of a financial subsidy for democracy-promoting organizations or a college alumni license plate design. Tam once again illustrates the critical need for a coherent approach.

VII. THE CASE OF GOVERNMENT EMPLOYEES

This section addresses one final First Amendment area that would benefit from a continuum rubric. As with many of the cases discussed above, the Court’s public employee speech jurisprudence is notable for a troubling absence: it lacks an explicit grounding in either the government speech or public forum doctrines—and, certainly, there is no acknowledgment of the continuum that is the logical synthesis of these two doctrines. In this section I argue that public employee speech fits well within either the government speech or public forum rubric, depending upon the contextual factors at play.

A. The Garcetti-Pickering Landscape

In Garcetti v. Ceballos, the Court narrowed the prevailing First Amendment standard for protecting public employee speech. The aggrieved employee, Ceballos, worked as a deputy district attorney in Los Angeles, and argued that his First Amendment rights were violated when he was retaliated against for writing a memo critical of certain actions taken by the office.116 The majority rejected his argument, articulating a new bright-line rule denying First Amendment protection for public employee statements made “pursuant to their official duties.”117 Despite a failure to directly rely upon the government speech doctrine, a close reading of the controversial 2006 decision reveals a logic heavily informed by the budding doctrine. Indeed, the three Garcetti dissenters take time to briefly argue that construing the employee speech at issue in the case as “government speech” would be inappropriate118—implying that the unstated logic underlying the majority’s opinion is in fact rooted in principles emanating from the government speech doctrine.119 Perhaps the dissenters, who choose to refute the notion that such speech should be treated as the government’s voice, fail to notice the absence of the phrase “government speech” in the majority

117. Id. at 421.
118. Id. at 438 (Souter, J., dissenting).
opinion; and nowhere within the majority’s opinion does the Court cite the seminal government speech decision Rust v. Sullivan. Yet, the dissenters take on this argument nonetheless, asserting that “the interests on the government’s part are entirely distinct from any claim that Ceballos’s speech was government speech with a preset or proscribed content as exemplified in Rust.”

It is also notable that the majority’s opinion does not contain the phrase “public forum.” However, as with the funding of the professional speech of attorneys in Velázquez, when the government subsidizes professional speech, whether through direct employment or indirect grants, it is arguably establishing a forum. In this forum, individual speakers must use their discretion—based upon their professional judgment and unique personal style—to express themselves in a manner that is not, in many respects, strictly dictated by the government. Granted, this forum is constrained in scope, and, in this regard, it is shaped by the government’s policy objectives. But the government is hardly in complete control of the message. Indeed, Justice Breyer’s dissent points out that professional “speech is subject to independent regulation by canons of the profession. These canons provide an obligation to speak in certain instances. And where this is so, the government’s own interest in forbidding that speech is diminished.”

A public employee, in other words, may not merely have important independent reasons for diverging from a single message her government employer would like her to convey. The nature of the job itself—based on professional norms, societal conventions, and deeply rooted traditions—may be tethered to exogenous expectations that the employee be free, to some extent, to make her own expressive choices.

No doubt, there is room for disagreement as to whether one believes there is an inherent need for particular free speech protections for particular publicly employed or subsidized professionals acting in particular public roles; or whether, in contrast, as an employer, government should have total control over expression that is made pursuant to an employee’s official duties. But even if we agree with the latter proposition—as the Garcetti majority does—the potential public forum issue does not disappear. For public employees are also citizens, and, as citizens, they will likely also wish to express themselves outside of the context of their official duties. An employer may be just as likely to take retributive steps as a result of this sort of expression as with speech pursuant to official duties.

120. Garcetti, 547 U.S. at 438 (Souter, J., dissenting).
121. Id. at 446 (Breyer, J., dissenting).
And here, as I shall argue below, there are also strong reasons to characterize that expression as speech made under the protective shield of a limited public forum.

But for the moment, we should point out that public employee speech, rather than being understood as either a public forum or a government speech issue (or, in my terms, falling along the government speech-forum continuum), is currently treated as its own discrete area of First Amendment Law. Granted, like other categories of speech confronted by First Amendment law, there are distinctive attributes that attach to public employment. These qualities have historically shaped the Court’s unique doctrinal approach to public employee speech but do not prevent a reconciliation between the public employee speech jurisprudence and the government speech-forum continuum.

The public employee speech doctrine was established in 1968 by Justice Marshall in *Pickering v. Board of Education*, well before the advent of an identifiable government speech doctrine. As the Court explained, “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”122 In *Pickering*, a public high school teacher had been fired after sending a newspaper a letter critical of the Board of Education and district superintendent.123 Unlike *Garcetti*, the Court held that, despite the fact that the appellant was a public employee, his First Amendment freedom of speech was violated when he was terminated.124 The Court struggled to find an appropriate test that would accommodate the unique interests at stake. It recognized the legitimate interest all employers have, whether public or private, in regulating employee expression.125 At the same time, it asserted that some limits on this power when it comes to public employers were mandated by the principles underlying the First Amendment: “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”126 In this case, the Court reasoned that the teacher sought to communicate about a legitimate matter of public concern and that the interest of the school board in disciplining the em-

---

123. *Id.* at 564.
124. *Id.* at 565.
125. *Id.* at 568.
126. *Id.*
ployee was relatively minimal—i.e. the expression did not impede his performance or disrupt school operations. While the specific interests at play in *Pickering* might be unique to the public employee context, the broader point that both private interests and government interests are at play in a wide range of first amendment questions is the essence of the government speech-forum continuum.

In arriving at its holding, the *Pickering* Court also considered the distinct kind of punitive action that is the natural occurrence in public employee cases—an employee is fired, demoted, or otherwise deprived of a valued benefit of the job. Historically, the assumption may have been that when the government acts as an employer, it creates a benefit, and it can therefore freely revoke or otherwise regulate how that benefit is exercised. As then Judge Oliver Wendell Holmes Jr. memorably put it in 1892, an officer “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . The servant cannot complain, as he takes the employment on the terms which are offered him.”

Today, however, consideration of the nature of the government-imposed sanctions for objectionable expression often takes a back-seat as a variable in the Court’s First Amendment decisions. It is typically the nature of and context in which the particular speech is being suppressed, and not the repercussions to the offending speaker, that has been determinative in the Court’s modern free speech jurisprudence. Of course, there are differences between criminal sanctions, such as significant jail time, pecuniary civil penalties and fines, and the mere inability to enjoy or participate in a governmental benefit, such as trademark registration status, a subsidy for artists, use of a municipal performance space, or public employment. However, for Marshall, the differences were not material to the First Amendment analysis. While criminal penalties and monetary awards may have a “different impact on the exercise of the right to freedom of speech . . . the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.”

The dismissive century-old Holmesian approach to positive rights and the First Amendment described above is, in fact, strik-

127. *Id.* at 571-573.
ingly similar to another statement by the preeminent judge, made both before he was a justice on the U.S. Supreme Court and before his conversion into a First Amendment champion. In Commonwealth v. Davis, a case decided in the pre-public forum period, Holmes blithely analogized government property ownership to the rights of private property owners: “For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.” In other words, the ordinance—which prohibited public addresses without a permit—merely governed how property, here the Boston Common, could be used. The advent of the public forum doctrine would eventually reverse this presumption regarding public parks, but the underlying logic was clear: where government acts, rather than reacts, free speech principles need not apply. A government employee, such as a police officer, or government-owned property, such as a public park, are a consequence of affirmative action by a government. Therefore, government may define the scope of such acts of governmental creation as it sees fit. Holmes was essentially laying out the core principle behind a government speech doctrine that would not be explicitly established by the Supreme Court for another hundred years.

Thus, when in Pickering Marshall points to the unique nature of the government sanctions imposed as a public employer, he is in truth addressing a characteristic that all issues falling along the government speech-forum continuum share in common; namely, a tension between a government’s need to control its message by denying or depriving an individual of a governmental benefit and that individual’s right to speak freely in the context of a governmental program. The Garcetti Court reverts to a position that hews closer to Justice Holmes’ bright-line rule. It asserts that Pickering’s careful balancing test, which might serve to protect a public employee from sanctions for their expression, does not apply where statements are made “pursuant to their official duties.” To the majority, common sense principles of principle-agent theory suggest that, public or private, “[e]mployers have heightened interest in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate,

---

132. Id. at 512.
demonstrate sound judgment, and promote the employer’s mission.” Government employees are the face of government. Their speech may reasonably be understood as a direct statement of the message the government wishes to convey.

Of course, as Justice Souter points out in dissent, “[s]ome public employees are hired to ‘promote a particular policy’ by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto.” Taken to the extreme, the majority’s position could suggest that the mere choice to employ, or continue to employ, a particular individual, is itself a form of speech. After all, the type of people one employs—and viewpoints those people express in their spare time—might reasonably be seen as much a reflection of the employer as the employed. Thus, it is possible to view Garcetti as a clarification of the parameters of public employee speech along the government speech-forum continuum: when should public employee speech be treated as government speech, and when should it be treated like a limited public forum? Garcetti establishes a reasonable, but certainly debatable, standard for drawing the line. Some scholars have argued for a more nuanced assessment: while certain government employees’ speech may constitute a near-perfect proxy for government expression, other government employees are not at all the face of government. Helen Norton proposes that the First Amendment should “be understood to permit government to claim as its own—and thus control as government speech free from First Amendment scrutiny—only the speech of public employees that it has specifically hired to deliver a particular viewpoint that is transparently governmental in origin and thus open to the public’s meaningful credibility and accountability checks.” Utilizing a government speech-forum continuum would allow for a doctrinal acknowledgment of this range of employee speech—on the public forum side, providing First Amendment protection to the independent speech of a public employee, and, on the government speech side, allowing the government to control its message when appropriate. Unfortunately, the Court in Garcetti studiously avoids directly referring to either doctrinal pole by name, yet tellingly, it cites a limited public forum case, Rosenberger, for support.

134. Id. at 422-23.
135. Id. at 437 (Souter, J., dissenting).
137. Garcetti, 547 U.S. at 422.
B. The Unexpected Public Forum: Government Employees Speaking Outside of their Official Duties

Other than its new bright-line carve out, Garcetti expressly maintains the Pickering balancing formulation in cases where “an employee speaks as a citizen addressing a matter of public concern.”138 Thus, with this precedent in mind, the remainder of public employee expression, that speech that is not made pursuant to official duties, should be seen as falling on the limited public forum side of the government speech-forum continuum. Norton and other critics of Garcetti might (perhaps rightfully) disagree with the line the Garcetti Court drew. Nonetheless, by upholding this aspect of Pickering, the Court confirms that at least some employee speech is, in fact, protected speech. It is protected not just in the sense that the Westborough Baptist Church is protected from civil liability for its hate-filled messages at military funerals,139 or that Paul Robert Cohen is protected from a jail term for wearing a jacket bearing a vulgar message protesting an unpopular war,140 but in ensuring that the government continues to provide a benefit that it was not required to provide in the first instance—public employment. As with a public park, the government has established (and then subsidized) something it had no constitutional obligation to establish: a particular category of public employment. As with a public park, however, once it did so, it effectively created a platform for speech which was previously unavailable.

Now, one might protest this assessment. One might point out that this hypothetical public employee always had the right to free expression outside his or her role as public employee, and that the government has therefore not created a new platform for speech at all in the way it does when, for example, it builds a new public park or establishes student organization funds at public colleges. The Pickering balancing test, and the part of Garcetti that leaves it in place, simply maintains the status quo, the argument might run. This is not so. While it may not typically be conceptualized in this way, the government does indeed establish a platform for speech—a limited public forum—for certain public employee expression outside of their job. It would be a limited public forum because, as described above, the Pickering test does not protect all speech outside of work, but only expression relating to legitimate matters of public concern that do not, on balance, unduly interfere with the

138. Id. at 423.
government’s interests as an employer.\footnote{141} Yes, a public forum may constitute a physical place, but as Justice Kennedy has reminded us, a forum may just as well exist in a “metaphysical [rather] than in a spatial or geographic sense.”\footnote{142} A forum is simply a context in which speech takes place. And as far as the First Amendment is concerned, a forum may be defined as any such context for speech that would not exist in its current form but for government action (the First Amendment, of course, does not concern itself with purely private fora). Just contrast a public employee speaking on his own time, removed from the ambit of his employment, with a private employee doing the same. The Constitution offers protection to the former, but not the latter. There is no constitutional right to private employment; the First Amendment does not protect private employees from retribution by their employer for the things they say outside of their cubical. The constitutional protection in the case of the public employee, to the extent that it exists, is the public forum. Where constitutional protection is absent, it must be because the government itself is deemed to be speaking—and with government speech the state does resemble a private employer: free to speak or not by hiring, firing or disciplining employees at will.

On the public forum side of the continuum however, the public creation—whether it be government employment or a traditional public forum like a municipal park—is fundamentally different from its private corollary. A public park like Union Square may resemble a private park like Gramercy Park in that they are both located in Manhattan, both pleasantly verdant in appearance, and both frequently used for neighborly socializing. This is similar, to cite just one example, to the way public employment may look a lot like private employment when it comes to the importance of managerial control discussed in \textit{Garcetti}. The key difference is that the public park and public employment create a platform for free expression that is not established by a private park and private employment. Unlike with the public Union Square, the owners of the private Gramercy Park may refuse to readmit a park visitor who, for example, expressed a viewpoint outside the park that was critical of one of the park’s influential owners. Unlike with a private employer, in accord with the \textit{Pickering} balance, a public employer will likely not be permitted to terminate a public employee for expressing a viewpoint critical of an influential government official.
outside of work. In both the case of the public park and the public employee, the government has created a public forum for speech (even if it be a limited one) that would not exist, but for the fact that it is the government that created it. One might understandably protest that this framing gives the government too much credit: the state did not, after all, create the individual’s opportunity to speak away from work. It did, however, create the right to speak away from work without losing one’s job, a right, or forum for speech, noticeably absent in the private employment context. There is, in other words, every reason to treat public employee speech as falling along the government speech-forum continuum. While one might disagree with where the Garcetti Court drew its line to distinguish public employee expression that is to be treated as government speech from that which is protected by the shield of a limited public forum, the continuum rubric explains the framework within which the judgment must be made.

VIII. THE CASE OF THE ACADEMIC PUBLIC EMPLOYEE

This brings us to the case of the public employee whose very business is the vigorous and open exploration, and subsequent communication, of ideas. As a concerned Justice Souter put it in his Garcetti dissent, “I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’” Souter had good reason to believe that, in the academic setting, the First Amendment equation must be different. Not only has the Supreme Court itself suggested that a special kind of constitutional solicitude applies to the academic realm, numerous Circuit Courts have relied upon the First Amendment to directly protect faculty who were disciplined for their speech by a state college or university. Nonetheless, disagreement abounds both among the Courts and among constitutional scholars. Unfortunately, the arena in which these differing views are contested is typically defined by claims that are relatively unmoored to explicit First Amendment principles and doctrines.

As a broadly applicable principle, academic freedom in the United States has roots in the late nineteenth century, when the

143. Garcetti, 547 U.S. at 438 (Souter, J. dissenting) (internal citations omitted).
modern research university first began to emerge. Prior to this period, higher education was dominated by what might be referred to as “proprietary” institutions, controlled by religious organizations, private industry, or others “devoted to the inculcation of ideas” rather than “to critical inquiry.” In the United States, the foundational statement on academic freedom was, and arguably remains, the American Association of University Professors’ (AAUP) 1915 Declaration of Principles. There, the signatories, including luminaries such as John Dewey and Roscoe Pound, defined academic freedom as broadly constituting “three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action.”

The Declaration relies on a premise that is today deeply rooted in American culture, perhaps as deeply rooted as the quintessential public forum principle articulated by Justice Roberts in 1939—that an implicit public trust demands certain public spaces be preserved for free expression. The widely-accepted premise of the Declaration was simply that “education is the cornerstone of the structure of society and [that] progress in scientific knowledge is essential to civilization.” According to the Declaration, the role of the faculty then is “to impart the results of their own and their fellow-specialists’ investigation and reflection, both to students and to the general public, without fear or favor.” It goes on to analogize the academic freedom of faculty to the judicial independence of federal judges. “University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the [board of] trustees than are judges subject to the control of the President with respect to their decisions.”

Yet, if we fast forward to the present, there is a sharp split among scholars and jurists as to whether or not—and to what extent—the First Amendment should protect academic freedom.

146. Id. at 227.
149. See AAUP 1915, supra note 147, at 24.
150. Id. at 25.
151. Id. at 26.
Take, for example, the position of the constitutional scholar Kermit Roosevelt III, who rejects the claim that public university faculty should be exempt from the non-speech-protective *Garcetti* rule. His commonsensical observation “that the academic environment is one in which assessments of quality are vitally important”\(^{152}\) would likely garner few objections. Thus, many would likely agree with Roosevelt’s conclusion that “[t]here may be no such thing as a false idea, as far as the First Amendment is concerned, but in reality there is such a thing as a bad article or a soporific lecture, and schools cannot function if they are denied the ability to make that judgment.”\(^{153}\) On its face, the logic appears unassailable. Indeed, it is essentially the same argument made for the government speech doctrine: in order to be an effective employer and promote the policy it seeks to explicitly endorse, the government must be able to control the expression of its employees. Like defining the scope of the program in *Rust*—which provided funding for health care services not including abortion counseling—this will inevitably mean controlling and judging the content of speech. Yet Roosevelt does not identify faculty speech as “government speech” because, as discussed above, the Court itself never clearly frames its public employee speech doctrine in these terms.

More importantly, the intuitive, absolutist appeal of this government speech logic, whether or not explicitly addressed as such, begins to break down when it is viewed in broader doctrinal context. As repeatedly illustrated throughout this article, there is a fundamental tension between the very real need for government control over expression by government “agents” who to some degree and in some sense speak *for it* in the context of a government program, and the applicability of free expression principles *within the context* of a government program, whether it be a financial subsidy, a public park, or direct government employment. Without grounding one’s analysis in the government speech-forum continuum, resolving the question of whether academic freedom should have a place in the Court’s First Amendment jurisprudence becomes a game of pick-the-intuitive-argument-that-appeals-to-you-most.

Indeed, Roosevelt acknowledges the validity of the argument on the other side, the claim that “scholars should be free to explore controversial subjects, to criticize the government or other power-


\(^{153}\) *Id.*
ful figures, to follow their research wherever it leads.”154 But he concludes that the First Amendment is simply not the appropriate tool to address these concerns. But why not? As discussed above, in many other settings the Court has been willing to acknowledge the important role government plays in facilitating speech and the First Amendment protections that must extend to the fora it voluntarily establishes, including a fund for student organizations at public universities.155 Considering the foundational principles of free and open inquiry, debate, and exploration of controversial ideas that underlie our understanding of how higher education ought to work, it is reasonable to conclude that a public college constitutes a self-consciously established government forum for certain types of free expression—what is sometimes referred to as a designated public forum. The Court has defined a designated public forum as “property that the State has opened for expressive activity by part or all of the public.”156 At the same time, as alluded to by scholars such as Roosevelt and Post, because college administrators must still reasonably exert significant control over many aspects of academic life, including the range of academic subjects covered or quality of instruction, there is good reason to conclude that academic scholarship and teaching at a state university should be treated as a limited public forum.

When a state, of its own volition, decides to establish or maintain an institution of higher learning, it presumably does so with the background knowledge of the basic precepts of academia in mind. As articulated in the AAUP’s 1915 Declaration of Principles, the unimpeded search for truth, which is inherently expressive, is the well-established and long-standing essence of the university mission. Thus, when government overtly embarks on an academic endeavor with a tradition in which “the university teacher’s independence of thought and utterance”157 is central, there is every reason to believe that that government is establishing (or “designating,” in the Court’s terms) a limited public forum. If we add to that the explicit and implicit guarantees of a tenure system, the claim that the scholarship and teaching of tenured faculty constitutes a limited public forum becomes especially compelling, although we should not assume that the public forum is necessarily limited to tenured faculty. The academic setting stands in sharp contrast

154. Id.
157. See AAUP 1915, supra note 147.
from, for example, a 1992 case in which a plurality of the Court rejected the characterization of an airport terminal as a designated public forum.\(^{158}\) In *International Society for Krishna Consciousness v. Lee*, the plurality reasoned that "the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor . . . have [they] been intentionally opened by their operators to such activity."\(^{159}\) Of course, quite the contrary is true of the professoriate in the public university classroom, where there has been a longstanding historical tradition of intentionally granting broad expressive freedom both implicitly and explicitly (in the case of tenured faculty).

As confident as Roosevelt may be in concluding that academic freedom is generally not covered by the protections of the First Amendment, he exposes the inherent weakness of his seemingly clear-cut reasoning by conceding that this proposed exclusion of academic freedom from First Amendment protection would not, in fact, apply to every situation. He admits: "This is not to say that a tenure denial could never raise First Amendment concerns. Denying the math professor tenure because she criticized the governor in a letter to the editor would. . . . [S]ome degree of political partisanship in the assessment of academic merit would probably be unconstitutional."\(^{160}\) This is a conclusion made in the doctrinal ether. It is also an excellent illustration of why utilizing a government speech-forum continuum would be so helpful. If there is indeed a line that may not be crossed, even in light of Roosevelt’s curt conclusion that *Garcetti’s* non-protective test should apply to faculty scholarship, what is the basis for this line? Why is partisanship the cardinal sin, but not controversial views on religion, climate change, sexuality or race? Ad hoc assertions should not determine if and when the First Amendment protects individual expression. A continuum that would be fleshed out by courts over time in a principled manner would avoid this conundrum.

There is, in other words, a better way. And, thanks to the Court’s increased interest in elaborating on both the government speech and public forum doctrines in recent years, a doctrinal framework is already there. The public academic setting will necessarily include plenty of government speech that is outside of First Amendment scrutiny. The government must decide what kind of academic institutions to establish and maintain. Is there a need for an engineering program in the state? If not, few would deny that

---


\(^{159}\) *Id.* at 681.

\(^{160}\) Roosevelt III, *supra* note 152, at 657.
the government has the power to define the scope of a taxpayer-funded institution such that it excludes engineering as a topic of study. This is classic government speech. There are also, however, public fora to be found throughout the public campus. Yes, this may include a grassy quad where students and others rally, protest, and express their views, but it also would include the speech of a professor in her classroom. Granted, as a limited public forum, this professor might not enjoy the same level of freedom as someone voicing their opinion in a quintessential public forum like a sidewalk or town square. Even the AAUP’s Declaration rejects the notion “that individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university.”161 A faculty member at a state institution is, after all, paid in part by the taxpayers to serve a particular function. But even Roosevelt seems to concede that if the state government attempted to punish a professor for failing to toe the party line of whoever happens to be in power in the state government at the time—in their classroom or in their scholarship—the First Amendment should intercede. While we may certainly debate the contours of where the limited public forum begins and government speech ends, the government speech-forum continuum provides an effective doctrinal framework for evaluating when, where, and how the First Amendment applies in a state university setting.

IX. ACADEMIC FREEDOM AS A CONSTITUTIONAL RIGHT?

It is notable that just four years after the AAUP published its Declaration of Principle, Justice Holmes penned his famous dissent in Abrams v. United States. Therein, he laid out a “theory of our Constitution” that bore some striking similarities with that document’s justifications for academic freedom.162 Holmes’ theory was that an open marketplace of ideas was “the best test of truth,” and that “we should be eternally vigilant against attempts to check the expression of opinion we loathe.”163 Similarly, the AAUP Declaration proclaims that “the scholar must be absolutely free not only to pursue his investigations but to declare the results of his researches, no matter where they may lead him or to what extent they may come

161. See AAUP 1915, supra note 147, at 38.
162. Rabban, supra note 145, at 240.
163. Abrams, 250 U.S. at 630.
into conflict with accepted opinion." Of course, only the former statement professed to be constitutional interpretation. And one’s instinct might be to keep these two lines of thought, while akin to each other in many ways, distinct. The principles articulated in the AAUP’s declaration, after all, were never intended as legal analysis. But constitutional law does not occur in a vacuum. State action always has a context. And from airports to license plates to municipal theaters, context can make all the difference for compelling and legitimate reasons.

To what extent has the Court acknowledged a First Amendment right to academic freedom? Unfortunately, while the Court has at times loosely suggested that academic freedom is deserving of First Amendment protection, it has been far from clear as to how this protection works in practice. This is understandable. The Court is typically reticent about establishing new doctrines from scratch, particularly in areas as complex, sensitive and potentially intrusive as academic freedom. To enforce such a right, a court would be required to enmesh itself in the internal decision-making of a public university—parsing, for example, when it is or is not constitutional for university administrators or a state to discipline a faculty member for her speech. Presumably, courts would be required to wade into the innumerable factors that informed the decision: Did the expression take place inside or outside the classroom? Was the expression communicated in a piece of scholarly writing, in a letter to the editor of a local paper, on Facebook, or in a blog? Did the speech relate to the subject the professor was employed to teach and study? Was the retributive action viewpoint-based, content-based, or neither? All are challenging questions. However, the Court’s increased acknowledgement and use of the government speech doctrine and a nuanced public forum doctrine should suggest a doctrinal landscape that will not tolerate a failure of clarity. When the state is expressively proactive, its actions must fall somewhere along the government speech-forum continuum. Either it is in control of its message, and therefore outside of First Amendment coverage, or it has established some form of limited or broadly inclusive forum for expression, and the First Amendment applies. These are the only options. Contrary to the protestations of those who would worry that courts should not enter the academic thicket by constitutionalizing academic freedom, the Court’s current doctrinal trajectory essentially makes any other approach a form of willful avoidance.

164. See AAUP 1915, supra note 147, at 29.
So, when the Court has spoken on academic freedom and the First Amendment, what has it said? The first such instance was in 1957, in the case of *Sweezy v. New Hampshire*. At the time *Sweezy* was decided, the Court not yet created the government speech doctrine. Further, the Court’s First Amendment jurisprudence was, as a whole, far less developed than it is today. It is thus unsurprising that the decision avoided a bold or specific doctrinal carve-out for First Amendment protection of academic freedom. Instead, while a plurality of the Court, in an opinion by Chief Justice Warren, emphasized the critical importance of academic freedom and suggested that it was protected by the Constitution, it did so in what was effectively dicta.165 The case, a Red Scare era controversy in which a professor was extensively interrogated about the content of his lectures and contact with alleged Communists166, was ultimately decided on due process grounds.167 Thus, as Scott R. Bauries observes, “the decision itself was of less import than the rhetoric.”168

Yet the Court’s words, both in the plurality opinion by Warren and a concurrence by Frankfurter, suggested that academic freedom, in some capacity, falls within the ambit of the First Amendment. Warren proclaimed: “We believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression—areas in which the government should be extremely reticent to tread.”169 This was followed by expansive language extolling both the essential role higher education plays in a democracy and the imperative that colleges and universities be intellectually free.170 Justice Frankfurter’s words are even more impassioned, perhaps reflective of his former life as a professor at Harvard Law School. The scholarly work of academics, Frankfurter pronounced, “must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling.”171

Even stronger language was used by Justice Brennan a decade later in *Keyishian v. Board of Regents*. There, the Court struck down

166. *Id.* at 242-244.
167. *Id.* at 254.
170. *Id.*
171. *Id.* at 262.
as unconstitutional a state law that, among other things, required
each faculty member at public universities to sign a certificate at-
testing that he or she was not a Communist.172 Once again, the
Court’s holding did not turn on a clearly articulated First Amend-
ment doctrine addressing academic freedom. This time, the out-
come was dictated by the potential chilling effect of a vague and
overly broad law, as well as its deleterious imposition on associa-
tional rights.173 The Court acknowledged the critical fact that the
law pertained to public employees.174 Because the decision was pre-
Pickering, however, it did not rely upon that case’s eponymous bal-
ancing test to resolve the matter. Instead, the Court simply cited the
less ambitious conclusion that “the theory that public employment
which may be denied altogether may be subjected to any condi-
tions, regardless of how unreasonable, has been uniformly re-
jected.”175 As was true for most of the Court’s First Amendment
jurisprudential history, it largely glossed over the very difficult ques-
tions that inhere to any situation in which the government is arguably
either doing the speaking or using government resources to
establish a circumscribed platform for speech. Nonetheless, Justice
Brennan’s powerful, and now famous, words on the relationship be-
tween the Constitutional protection of free expression and the do-
main of higher education contained little subtlety. “Our Nation is
deeply committed to safeguarding academic freedom, which is of
transcendent value to all of us and not merely to the teachers con-
cerned. That freedom is therefore a special concern of the First
Amendment, which does not tolerate laws that cast a pall of ortho-
doxiy over the classroom.”176 What was unclear, however, was
whether and to what extent this rhetoric would eventually translate
into a First Amendment doctrine specifically tailored to academic
freedom, and if so, how it might work in practice.

In the post-Garcetti world, we are confronted with a choice. A
straightforward application of the Garcetti rule would mean that an
academic working at a state university as a public em-
ployee,conducting research and teaching classes pursuant to his
official duties, receives no First Amendment protection in the areas
traditionally understood to be protected under core precepts of ac-

---

173. Id. at 603-606.
174. Id. at 605.
175. Id. at 605-606.
176. Id. at 603.
academic freedom. The alternative view, one the Court in *Garcetti* reserved, would be that an exception to the rigid *Garcetti* rule should be carved out for academics. This approach was adopted by two circuit courts. In *Demers*, the Ninth Circuit simply asserted "that *Garcetti* does not apply to 'speech related to scholarship and teaching.'" Instead, the test in the case of public academics was to revert to a *Pickering* balance. In *Adams*, the Fourth Circuit did acknowledge some nuance in its academic carve-out, asserting that “[t]here may be instances in which a public university faculty member’s assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching. In that circumstance, *Garcetti* may apply to specific instances of the faculty member’s speech carrying out those duties.”

It is a sensible distinction. What goes unspoken is how well this logic would graft onto a government speech-forum continuum. The doctrinally unmoored exception these courts assert for academic scholarship and teaching has a “because-I-said-so” quality. Yes, because of everything we know and understand about the importance of academic freedom, we might feel comfortable with a carve-out for scholarship and teaching from *Garcetti*’s clear-cut rule. We might feel that it is correct from the standpoint of public policy. But from a First Amendment perspective, is this anything more than an ad hoc distinction? Framing the issue as one falling along the government speech-forum continuum would avoid this troubling conclusion. There is a sound and principled basis for drawing such a line protecting academic speech, one that could not be critiqued as a mere judicial favor to academia.

When a professor speaks to his class or publishes the results of his research, the venue for his expression is a limited public forum—implicitly established by the state for certain limited purposes. If that professor were instructed to administer or declare a particular university policy, this might reasonably be understood as government speech, like the artist with strict instructions to paint “Speech Limit 65” on a road sign. Where a government-funded artist is granted broad artistic license, however, like a faculty member’s

---

177. A similar approach was used by the Seventh Circuit in Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008).
178. Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011) (“We are also persuaded that *Garcetti* would not apply in the academic context of a public university.”); Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014).
179. *Demers*, 746 F.3d at 406.
180. *Id*.
181. *Adams*, 640 F.3d at 563.
teaching and scholarship—a role informed by the deeply rooted understanding of academic freedom—the expression falls on the limited public forum side of the continuum. The continuum is a simple acknowledgment that such distinctions are inevitable when the government plays an affirmative role in establishing speech opportunities. Sometimes that speech will be strictly reflective of what the government wants to say; sometimes, due to the explicit or implicit expressive freedom inherent in the speech opportunity, that speech will be understood as expression occurring in a limited or full public forum. Academic speech fits well within this rubric.182

X. CONCLUSION

This Article does not seek to answer all of the questions that would invariably arise if courts adopted the government speech-forum continuum framework. Indeed, such an ambition would be a fool’s errand. This task must fall to the courts. Common law principles suggest that the courts are the ones best equipped to be responsive and sensitive to context and precedent, and over time case-by-case to put meat on the bones of constitutional principles. However, what I do seek to offer is a synthesis of doctrinal elements that are, in fact, already on the table. Such a synthesis, I argue,

182. Some might reject the government speech-forum continuum by pointing to the complex organizational structure of colleges and universities, with their many potentially conflicting “speakers.” Academic freedom may in some cases be said to belong to the administration rather than individual faculty members. David Rabban has argued that “In order to engage in critical inquiry, professors need some degree of independence from their university employers, and universities need some degree of independence from the state. . . . [But in all cases] constitutional academic freedom promotes first amendment values of general concern to all citizens in a democracy.” Rabban, supra note 145, at 230. In some cases it would clearly be impossible to provide First Amendment protection to both the university in its corporate capacity (i.e. the administration) and individual faculty members, because the two forms of academic freedom would come into direct conflict. However, the classic understanding of academic freedom, consistent with the foundational justification for tenure protection, suggests that it belongs primarily to individual professors. And even if, in some cases, a forum for administrators were deemed established, this would not present a unique or insurmountable jurisprudential challenge. It is a complexity that is arguably no different from that found in many of the public forum cases discussed previously. For example, in Martinez, Hastings Law School might have argued that in its corporate capacity it should, as a First Amendment speaker, be free to assert complete control over the expression of officially recognized student organizations. See Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010). Courts would potentially be required to arbitrate conflicting speech claims under a government speech-forum continuum regime, but such conflicts would be nothing new.
would better ground a wide range of vexing First Amendment questions in a consistent and principled foundation, including the stubbornly unresolved issues surrounding academic speech at state institutions.

Many understandably welcome doctrinal advances that increase clarity in constitutional adjudication. When it comes to the First Amendment, I have argued that such advances can be found the Court’s relatively recent acknowledgment of a government speech doctrine. Such progress can also be seen in the public forum area, where the Court has in recent years expanded upon the concept of the limited public forum. What is missing, however, is the realization that these doctrinal concepts—the public forum and government speech—are two sides of the same coin; and that this coin is the currency of a much larger swath of First Amendment law than previously acknowledged. This simple insight would help courts resolve many First Amendment questions.

Areas as diverse as trademark registration, government subsidies, public employment, and academic freedom, might all be said to fall along the same doctrinal government speech-forum continuum. Such a synthesis would promote quality First Amendment jurisprudence by cultivating a body of precedent that would constrain and focus courts, and reduce the need for ad hoc decision making. The benefits would also be significant in areas where courts already squarely characterize the expression as either government speech or as taking place in a protected public forum. As I have attempted to show throughout this Article, understanding these doctrines as simple dichotomous categories understates the tension inherent in expression-related government activity. Certainly, courts would still be tasked with determining where along the continuum the speech falls, and thus which First Amendment rule must apply. However, viewing government speech and public fora as two poles in perpetual tension, rather than as simply two discrete categories, would make for a more transparent and honest judicial calculus.

The government speech-forum continuum is premised on the notion that, even in the clearest of cases, a public forum is not just a public forum, and government speech is not just government speech. There is always some element of the other. A choice of more than 350 themed license plate messages is neither 100% government speech nor a pure public forum. Employing a professor at a state university to teach American politics (but not post-Soviet Russian politics) is neither absolute government speech, nor does it establish an unconstrained public forum for whatever about which that professor may choose to talk. If we are truly honest, we would
acknowledge that these examples, and many more, contain elements of each pole. The government both controls the message and facilitates private speech. Courts must draw lines along the continuum, and these lines must be justified on principled, sensible, and consistent grounds, depending upon where a given scenario falls. Such line-drawing may be sensitive to context such that a different analysis may apply to the individual components of a particular situation. Academic content in a classroom versus administrative content in that very same lecture hall, for example, may merit different First Amendment treatment. Currently, courts are wedded to discrete categories that do not adequately reflect reality—there is either a public forum, government speech, or neither. A better approach is to openly confront the inherent tension between these two doctrines, and determine where such expression falls along the government speech-forum continuum.
INTRODUCTION

Beginning on October 5, 2017, the New York Times and the New Yorker reported that more than a dozen women accused Harvey Weinstein, former co-chairman of The Weinstein Company, of sex-

* J.D., 2019, New York University School of Law; B.A., 2013, Duke University. I would like to thank Professor Court Golumbic for his help in the development of this Note. Thank you also to the members of the Annual Survey of American Law for your valuable feedback.
ual harassment, assault, or rape. In all, more than eighty women (and counting) have made allegations of sexual misconduct against Weinstein. As a result, Weinstein was fired from his production company, divorced by his wife, sued in civil court, and investigated for and charged with several crimes. The allegations


2. This Note uses the term “sexual misconduct” as an umbrella term for all wrongful, improper, or unlawful conduct of a sexual nature.


against Weinstein also inspired actress Alyssa Milano to tweet on October 15, 2017, “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”9

#MeToo quickly accelerated into a movement that encouraged individuals to share their stories as victims of sexual misconduct. By October 16, 2017, “#MeToo” was used more than 500,000 times on Twitter and in 12 million posts on Facebook.10 As a result, the number of “public” accusations of sexual misconduct surged.11 Celebrities throughout media, sports, and politics were among those accused.12 Likewise, prominent executives of public companies were alleged to have committed sexual misconduct.13 The fall from grace for the accused was profound—many suddenly faced career-related, personal, and even criminal consequences.14

The #MeToo movement has had a negative impact on companies affiliated with individuals accused of sexual misconduct. Accusations of corporate sexual misconduct have led to employment arbitrations,15 civil rights inquiries,16 shareholders’ derivative ac-

11. See infra Appendix A.
14. Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, 2017 Person of the Year: The Silence Breakers, TIME, Dec. 18, 2018, at 36–37 (“[I]n the past two months alone, [the accusers’] collective anger has spurred immediate and shocking results: nearly every day, CEOs have been fired, moguls toppled, icons disgraced. In some cases, criminal charges have been brought.”).
tions,\textsuperscript{17} class actions,\textsuperscript{18} and regulatory investigations.\textsuperscript{19} Moreover, the fallout from sexual misconduct allegations damages companies’ brands with customers and job applicants.\textsuperscript{20} Public companies have often faced a significant decline in stock price.\textsuperscript{21}


\textsuperscript{19} Gaming regulators began investigating sexual misconduct allegations made against Wynn Resorts CEO Steve Wynn after allegations were described in a \textit{Wall Street Journal} article. Chris Kirkham, Elizabeth Bernstein & Rebecca Ballhaus, \textit{Steve Wynn Calls on Employees to Rally Behind Him During Company Meetings}, \textit{WALL ST. J.} (Feb. 2, 2018, 5:30 AM), https://www.wsj.com/articles/steve-wynn-calls-on-employees-to-rally-behind-him-during-company-meetings-1517567401 [https://perma.cc/TKD5-EEDD] (reporting that regulators in Massachusetts, Nevada, and Macau, along with the company’s board, were investigating the allegations).

\textsuperscript{20} See \textit{FTI Consulting & Mine The Gap, #MeToo at Work: Overall and Women by Industry Topline Report} (2018), https://www.gender.ficommunications.com/pdf/MeToo_at_Work-research.pdf [https://perma.cc/H8QA-2TPR] (survey showing that 55% of professional women are less likely to apply for a job and 49% are less likely to buy products or stock from a company with a public #MeToo allegation). See also Jeremy J. Sierra, Nina Compton & Kellilynn M. Frias-Gutierrez, \textit{Brand Response-Effects of Perceived Sexual Harassment in the Workplace}, 14 J. BUS. & MGMT. 175, 187 (2008) (finding that “perceived sexual harassment in the workplace has a negative effect on attitudes toward the brand, brand image, and intentions to work for prospective employees”).

\textsuperscript{21} See infra Appendix B.
Sexual misconduct raises an additional concern for public companies in the form of disclosure liability under federal securities laws (disclosure liability). Disclosure liability arises when a company neglects an affirmative duty to disclose a material fact,22 or when it voluntarily states a material fact untruthfully or incompletely.23 Securities laws are flexible enough to encompass sexual misconduct, however,24 because disclosure liability largely revolves around the concept of “materiality.”25 What is considered a “material” fact is not fixed, but instead incorporates new issues, like sexual misconduct, over time.26

Thus far, the business community appears to have overlooked this serious risk.27 Following the #MeToo movement, however, public corporations face a real risk that sexual misconduct will be deemed material and will give rise to obligatory disclosure. For one thing, sexual misconduct is now more likely to be reported and to

22. See SEC, FAST ANSWERS: FORM 10-K (2009), https://www.sec.gov/fast-answers/answers-form10khtm.html [https://perma.cc/G8NM-Q3LD] (“The federal securities laws require public companies to disclose information on an ongoing basis. For example, domestic companies must submit annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K for a number of specified events and must comply with a variety of other disclosure requirements.”).

23. Under Rule 10b-5, it is unlawful for any person “to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5(b) (2019).

24. In re ProShares Tr. Sec. Litig., 728 F.3d 96, 102 (2d Cir. 2013) (“[F]ederal securities laws are dynamic and respond to changing circumstances.”).


26. For example, the SEC in 2010 issued disclosure guidance regarding material events related to climate change. See, e.g., Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61469, Fed. Sec. L. Rep. (CCH) ¶ 88,853 (Feb. 8, 2010) (“In addition to legislative, regulatory, business and market impacts related to climate change, there may be significant physical effects of climate change that have the potential to have a material effect on a registrant’s business and operations.”).

27. See analysis infra Section II.A.
be considered a material factor in investor decision making.\textsuperscript{28} In
addition, the salacious and highly-charged nature of the issue makes it more likely that companies will face both public\textsuperscript{29} and private\textsuperscript{30} enforcement efforts when they fail to disclose sexual misconduct. While it can be difficult at times to comply with uncertain legal standards such as disclosure rules tied to a materiality standard,\textsuperscript{31} one can make generalizations about when and what companies need to disclose when there is proven or alleged sexual misconduct.\textsuperscript{32}

This Note will examine the disclosure challenges corporations face while grappling with sexual misconduct issues in the #MeToo world.\textsuperscript{33} Part I overviews the disclosure regime surrounding securities enforcement, including the relevant statutes, rules, concepts, and goals. Part II will discuss the #MeToo movement, its impact on disclosure liability, and trends in disclosure liability lawsuits. This

28. See analysis infra Section II.A.
29. See infra Section II.B.1.
30. See infra Section II.B.2.
31. See James J. Park, Rules, Principles, and the Competition to Enforce Securities Laws, 100 CALIF. L. REV. 115, 142 (2012) (noting that principle-enforcement, a broader and thus stricter form of enforcement, can lead to a "chilling effect where parties will be overly cautious for fear that they will be punished for acts that a regulator determines ex post is misconduct"); see also John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance with Legal Standards, 70 VA. L. REV. 965 (1984) (noting that uncertain legal standards incentivize over- or under-compliance).
32. See analysis infra Part III.
33. While this Note narrowly focuses on the #MeToo movement’s impact on sexual misconduct disclosure liability for corporations, commentators have also begun to explore the influence of #MeToo on other legal regimes and parties. For example, Tippett summarizes the implications of the #MeToo movement for employment law and employment practices. Elizabeth Chika Tippett, The Legal Implications of the MeToo Movement, MINN. L. REV. (forthcoming) (manuscript at 1), https://ssrn.com/abstract=3170764. Wexler et al. explore the meaning, utility, and complexities of restorative and transitional justice for dealing with sexual misconduct in the workplace. Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, #MeToo, Time’s Up, and Theories of Justice 1 (Univ. of Ill. Coll. of Law Legal Studies, Working Paper No. 18-14, 2018), https://ssrn.com/abstract=3135442. Finally, Hemel and Lund analyze strategically and normatively why corporate law should be invoked to remedy workplace-based sexual misconduct, and broadly discuss whether and when companies might face corporate liability in connection with such misconduct. Daniel Jacob Hemel & Dorothy Lund, Sexual Harassment and Corporate Law 1 (U. of Chi. Coase-Sandor Inst. for Law & Econ., Working Paper No. 661, 2018), https://ssrn.com/abstract=3147130. They conclude that sexual harassment law and corporate law can be complementary, and that the use of corporate law to regulate and remedy sexual harassment can benefit employees, shareholders, and society. Id. at 1, 69.
2019] SEXUAL MISCONDUCT & SECURITIES DISCLOSURE

Part will argue that the risk of sexual misconduct disclosure liability and enforcement is real and growing, despite the fact that public companies do not give it sufficient attention. Part III will recommend when and what companies should disclose with regard to alleged and proven sexual misconduct. Essentially, a corporation must first determine if sexual misconduct is a material event, the determining factors being whether a key executive or a significant number of lower-level employees are implicated. Then, a company must determine whether an affirmative duty to disclose is triggered. Even if not, companies should be mindful of Rule 10b-5 restrictions, as pre-detection statements can lead to a duty to correct or update, and post-detection statements must be made completely and truthfully. The Note concludes by recommending that companies err on the side of disclosure or at the very least incorporate sexual misconduct disclosure liability into their disclosure conversations, given the potent nature of sexual misconduct issues in the #MeToo world.

I. SECURITIES DISCLOSURE STATUTES, RULES, AND CONCEPTS

A. Federal Securities Regulation in America: The Importance of Disclosure

Congress enacted the Securities Act of 1933 (the 33 Act) and the Securities Exchange Act of 1934 (the 34 Act) after the 1929 stock market crash and during the resultant Great Depression.35 The 33 Act enforces disclosure of material facts in connection with the distribution of new securities, while the 34 Act requires continuing disclosure from public companies.36 A key goal of both acts is to provide investors with information about securities and their issuers in order to prevent the fraudulent practices and speculative frenzy that were thought to have caused the 1929 stock market crash.37

34. 17 C.F.R. § 240.10b-5 (2019).
37. The 33 Act and the 34 Act were enacted “in an effort to eliminate certain abuses in the financial markets which were believed to have contributed to the famous stock market crash of October 1929, and to the devastating depression which followed.” Philip A. Loomis, Jr., Securities Exchange Act of 1934 and the Invest-
Prior to the 33 Act and 34 Act, states undertook regulation of corporate securities through the use of “blue sky” laws and stock exchanges’ required listing requirements.\textsuperscript{38} However, for a variety of reasons, these measures were largely ineffective.\textsuperscript{39}

Investigations by the Senate Banking and Currency Committee in the 1930s exposed a variety of private efforts to manipulate prices of specific stocks and the markets as a whole.\textsuperscript{40} The investigations also revealed that almost half of securities issued in the decade after World War I were worthless.\textsuperscript{41} These revelations galvanized broad public support for securities regulation and led legislators to believe that securities dealers had not conducted themselves in a fair or honest manner in the absence of federal regulation.\textsuperscript{42} Congress determined that the absence of a disclosure regime facilitated manipulation, speculation on inside information, and other improper practices.\textsuperscript{43}

The ultimate impetus for securities regulation, however, came from Franklin Delano Roosevelt. In his first month in office, Roosevelt campaigned for securities regulation in a message to Congress, recommending “legislation for Federal supervision of traffic in investment securities in interstate commerce.”\textsuperscript{44} The aim of the legislation would be to provide “full publicity and informa-

\textsuperscript{38} See Keller, supra note 36, at 344–47; see also Loomis, supra, at 226 (stating that the 33 Act and 34 Act combine “to establish a comprehensive scheme of disclosure to investors”).

\textsuperscript{39} Id. at 331–34 (“In reality, the laws proved quite ineffective for several reasons.”).

\textsuperscript{40} See Joel Seligman, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance 16–17 (3d ed. 2003) (including reports of insider trading by corporate executives and family members, and of a public relations person who paid over $300,000 to reporters to manipulate news coverage of public companies).

\textsuperscript{41} H.R. Rep. No. 73-85, at 2 (1933), \textit{reprinted in} 2 Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934, item 18 (comp. by J.S. Ellenberger & E. Malhar 1973) (“During the post-war decade some 50 billions of new securities were floated in the United States. Fully half or $25,000,000,000 worth of securities floated during this period have been proved to be worthless.”).

\textsuperscript{42} Id.

\textsuperscript{43} H.R. Rep. No. 73-1383, at 11 (1934) (“There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.”).

\textsuperscript{44} President Franklin D. Roosevelt, Address to Congress (March 1933), \textit{as reprinted in} Michael F. Parrino, Truth in Securities; An Introductory Guide to the Securities Act of 1933 23 (1968).
tion, and that no essentially important element attending the issue [of securities] shall be concealed from the buying public.” Yet, the legislation would not provide a guarantee to the public “that newly issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit.”

On May 27, 1933, less than two months after Roosevelt’s message to Congress, the 33 Act was written, passed, and ultimately reflected Roosevelt’s conception of the legislation. Indeed, the purpose of the 33 Act, as stated in its preamble, was “to provide full and fair disclosure of the character of securities sold in interstate commerce and foreign commerce and through the mails, and to prevent fraud in the sale thereof, and for other purposes.” But the 33 Act was actually rather limited in its official scope, dealing only with the issuance of new stock and imposing only civil liability for violations of the act.

Roosevelt returned to Congress in 1934 to ask for additional securities regulation, stressing the need for legislation that “has teeth in it.” Ultimately, the inadequacies of the 33 Act “and the need for an independent administrative body to enforce the federal securities laws, regulate stock market practices, and curb the evils in the stock exchanges themselves led Congress to enact the [34 Act].” The 34 Act addressed a number of securities-related topics, including the requirement of adequate disclosure by securities issuers. The 34 Act’s reporting requirements complement the registration requirements of the 33 Act to establish a comprehensive scheme of required disclosure. In addition, the statute created the Securities and Exchange Commission (SEC) and gave it certain rule-making and enforcement powers.

45. Id. at 24.
46. Id.
47. James M. Landis, The Legislative History of the Securities Act of 1933, 28 Geo. Wash. L. Rev. 29, 34 (1959). (“Our draft remained true to the conception voiced by the President in his message of March 29, 1933 to the Congress, namely that its requirements should be limited to full and fair disclosure of the nature of the security being offered and that there should be no authority to pass upon the investment quality of the security.”).
49. Seligman, supra note 40, at 95.
50. Keller, supra note 36, at 347.
51. See Loomis, supra note 37, at 217.
52. Id. at 226 (stating that the 33 Act and 34 Act combine “to establish a comprehensive scheme of disclosure to investors”).
53. Id. at 217.
The importance of disclosure to securities regulation has continued over time. After the 33 Act and the 34 Act, Congress passed several statutes that built on the securities disclosure regime, including the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisors Act of 1940. Most recently, Congress passed the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). SOX was passed in response to financial scandals, including the collapse of Enron, and was meant to supplement the 33 Act and 34 Act regulations. The bill was described as “sweeping” and President Bush called the legislation “the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt.” Among other requirements,

54. Trust Indenture Act of 1939, Pub. L. No. 76-253, 53 Stat. 1149 (1939). This Act specifies that trust indentures must, among other things, provide for the appointment of an independent trustee to represent the public bondholders. Id. This act was intended to address deficiencies prevalent in trust indentures at the time, including a lack of disclosure and reporting requirements. S. Rep. No. 76-248, at 5–8 (1939).

55. Investment Company Act of 1940, Pub. L. No. 76-768, 54 Stat. 789 (1940). This Act requires that certain defined investment companies register with the SEC and also regulates their disclosures to investors. Id. This act’s purpose is “to mitigate and . . . eliminate the conditions . . . which adversely affect the national public interest and the interest of investors.” Id.

56. Investment Advisers Act of 1940, Pub. L. No. 76-768, 54 Stat. 847 (1940). This act imposes a number of requirements (including registration) on certain investment advisers. Id.


60. Elisabeth Bumiller, Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud in Corporations, N.Y. TIMES (July 31, 2002), https://www.nytimes.com/2002/07/31/business/corporate-conduct-the-president-bush-signs-bill-aimed-at-fraud-in-corporations.html [https://perma.cc/326A-6SZP]. This act mandated a number of reforms to enhance corporate responsibility and combat corporate and accounting fraud, and created the Public Company Accounting Oversight Board to oversee the activities of the auditing profession. Id.
SOX mandated enhanced financial disclosures. Dodd-Frank, like the 33 Act and 34 Act, was passed in the wake of a profound recession, and it focused on, among other things, “improving accountability and transparency in the financial system.” Dodd-Frank also addressed disclosure issues by mandating that the SEC promulgate certain disclosure rules. Additionally, the SEC has promulgated disclosure rules on its own initiative. As former SEC Commissioner Troy Paredes acknowledged in 2013, “Disclosure is the cornerstone of the federal securities laws. For nearly 80 years, the SEC’s signature mandate has been to use disclosure to promote transparency.”

B. Materiality

The concept of materiality is a key component of the disclosure framework that governs public companies. It is included in the 33 Act, the 34 Act, and SEC rules including Rule 10b-5. Materiality seeks to filter irrelevant information from disclosure and is flexible enough to address new issues that emerge over time. In


62. The financial panic of 2008 has been called “the worst recession since the Great Depression.” INT’L BAR ASS’N TASK FORCE ON THE FIN. CRISIS, A SURVEY OF CURRENT REGULATORY TRENDS 27 (Oct. 2010).


64. See, e.g., Dodd-Frank Act § 953(b) (directing the SEC to require companies to disclose the annual total compensation of their median employee and chief executive officer, and the ratio of the two amounts); Dodd-Frank Act § 1502 (requiring public companies to make disclosures regarding their use of conflict minerals).

65. Rather than listing every SEC disclosure rule, I have cited two rules that are particularly relevant to sexual misconduct disclosure liability. See, e.g., 17 C.F.R. § 229.103 (2019); 17 C.F.R. § 229.303 (2019).


70. See TSC Indus. v. Northway, Inc., 426 U.S. 438, 448 (1976) (noting that materiality serves an important role in filtering information because “[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm than good”).

1976, the Supreme Court articulated the standard for materiality that is still widely used today: the materiality of a misrepresentation or an omission depends on whether there is “a substantial likelihood that [it] would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available” to a shareholder making a decision concerning their investments.72

Materiality is not a bright-line rule. Rather, it is a “fact-specific inquiry that requires consideration of the source, content, and context of the reports.”73 The Supreme Court in Basic Inc. v. Levinson stated that “[i]n the securities fraud context, any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.”74 The SEC, too, has stated that “an assessment of materiality requires that one views the facts in the context of the surrounding circumstances.”75 In essence, each company must make a personalized, fact-intensive analysis to determine whether a piece of information is material and should be disclosed. For example, the Second Circuit recognized that a 5% deviation is an appropriate numerical threshold for materiality in financial statements, but it is only a “starting place” and courts must consider both “quantitative and qualitative factors” in assessing materiality.76

The Supreme Court, in TSC Industries v. Northway, Inc., noted the importance of the concept of materiality as a filtering mechanism.77 More than ten years later, in Basic Inc. v. Levinson, the Court reemphasized that a key purpose of materiality analysis is preventing management from burying shareholders in an “avalanche of trivial information.”78 The SEC has also noted that “as a practical matter, it is impossible to provide every item of information that might be of interest to some investor in making investment and

72. TSC Indus., 426 U.S. at 449.
77. TSC Indus., 426 U.S. at 448 (“Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good.”).
78. Basic, 485 U.S. at 23.
voting decisions.” Indeed, the Supreme Court expressly rejected defining a “material fact” as any “fact which a reasonable shareholder might consider important.” Instead, materiality has been described as “a meaningful pleading obstacle.”

One common measure of materiality is the change in a company’s stock price following the public release of a material fact, which reflects a consensus from investors about what that information means for the company’s future. However, some courts have been less receptive to the idea that a market reaction, or the lack thereof, is always determinative of materiality. Indeed, district courts have observed that a change in stock price is not dispositive of materiality because, for example, a “material misstatement can impact a stock’s value . . . by improperly maintaining the existing stock price.”

Additionally, some statements or omissions can be categorically deemed immaterial as a matter of law because they present or omit information that obviously would not matter to a reasonable investor. For instance, “Immaterial statements include vague, soft, puffing statements or obvious hyperbole upon which a reasonable investor would not rely.” Furthermore, “It is well-established that general statements about reputation, integrity, and compliance

---


80. TSC Indus., 426 U.S. at 449.

81. In re ProShares Tr. Sec. Litig., 728 F.3d 96, 102 (2d Cir. 2013).

82. See, e.g., In re Merck & Co. Sec. Litig., 432 F.3d 261, 269 (3d Cir. 2005) (stating that the materiality of omissions may be measured after the fact by looking at the movement of the company’s stock price in the period immediately following full disclosure).

83. Cf. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 268 (2014) (holding that defendants can rebut the Basic Inc. fraud-on-the-market presumption if defendants introduce “direct evidence” that the alleged misrepresentation did not impact the market price even if plaintiffs have shown that all three prerequisites (publicity, materiality, and market efficiency) are satisfied; implicit in this idea is that there can be a material misrepresentation that does not impact the stock price).

84. McIntire v. China Media Express Holdings, Inc., 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014); see also In re Pfizer Inc. Sec. Litig., 936 F. Supp. 2d 252, 264 (S.D.N.Y. 2013) (“[A] misstatement may cause inflation simply by maintaining existing market expectations, even if it does not actually cause the inflation in the stock price to increase on the day the statement is made.”).

85. In re Ford Motor Co. Sec. Litig., 381 F.3d 563, 570 (6th Cir. 2004) (quoting In re K-tel Int’l, Inc. Sec. Litig., 300 F.3d 881, 897 (8th Cir. 2002)).
with ethical norms are inactionable 'puffery,' meaning that they are 'too general to cause a reasonable investor to rely upon them.' 86

Although sexual misconduct allegations have not traditionally served as a basis for securities disclosure liability, they certainly could do so today. The SEC has recognized that what is objectively important to a reasonable investor changes over time. Indeed, the agency has stated, "[F]ederal securities laws are dynamic and respond to changing circumstances." 87 There have been numerous instances of new developments being considered material facts when they had not been so previously. For example, although the 34 Act and Rule 10b-5 were enacted well before computers and the internet, they now cover and require public companies to disclose certain cybersecurity risks and incidents.88 The SEC has also provided guidance to companies with respect to changing issues that may be material to investors, including: (1) the introduction of the Euro in July 1998,89 (2) potential Y2K issues in August 1998, 90 and (3) climate change issues in February 2010.91

C. Affirmative Duty to Disclose

Securities disclosure is only required when there is a duty to disclose.92 A duty to affirmatively disclose material facts "may arise when there is insider trading, a statute requiring disclosure, or, an

86. Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014) (quoting ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 206 (2d Cir. 2009)).


88. SEC, DIVISION OF CORPORATION FINANCE, CF DISCLOSURE GUIDANCE: TOPIC NO. 2, CYBERSECURITY (October 13, 2011) ("Although no existing disclosure requirement explicitly refers to cybersecurity risks and cyber incidents, a number of disclosure requirements may impose an obligation on registrants to disclose such risks and incidents.").

89. SEC Staff Legal Bulletin No. 6, Fed. Sec. L. Rep. (CCH) ¶ 60,006 (July 22, 1998) ("We expect the conversion may be material to many European issuers, financial institutions, and domestic corporations with significant European operations, markets, investments, and/or contractual counterparties. These issuers may wish to consider the advisability of disclosure, even if the impact is not material.").

90. Statement of the Commission regarding Disclosure of Year 2000 Issues and Consequences, supra note 71 ("[W]e believe a company must provide year 2000 disclosure if . . . (2) management determines that the consequences of its Year 2000 issues would have a material effect on the company's business, results of operations, or financial condition.").

91. SEC, supra note 26.

92. The Supreme Court has long held that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5." Basic, Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988).
inaccurate, incomplete or misleading prior disclosure.93 Additionally, some SEC rules impose an affirmative duty to disclose certain material facts.94

Public companies have an affirmative duty to disclose certain information as required by the 34 Act and subsequent regulations imposed by the SEC.95 Typically, a public company must file: (1) an annual report each year on SEC form 10-K; (2) a quarterly financial report every three months on SEC form 10-Q; and (3) a report of major business developments filed within fifteen days of their occurrence on SEC form 8-K.96 SEC Regulation S-K, Items 103 and 303 are required parts of form 10-K and form 10-Q that can mandate disclosure.97 Although their disclosures may overlap to some extent, they are not identical.98 Item 103, entitled “Legal proceedings,” naturally mandates disclosure of “any material legal proceedings.”99 Item 303, entitled “Management’s discussion and analysis of financial condition and results of operations,” requires public companies to disclose “any known trends or uncertainties that have had or that the company reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.”100 Additionally, certain corporate actions, such as a corporate merger, can trigger duties to disclose information.101

93. *In re Dig. Island Sec. Litig.*, 357 F.3d 322, 329 n.10 (3d Cir. 2004).
94. See, e.g., 17 C.F.R. § 229.103 (2019) (mandating disclosure of “any material legal proceedings”); 17 C.F.R. § 229.303 (2019) (mandating disclosure of “any known trends or uncertainties that have had or that the company reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations”).
95. Section 13(a) of the 34 Act provides that every issuer of a security on a national securities exchange must file annual reports with the SEC in accordance with the SEC's rules and regulations and must file "such information and documents as the Commission shall require" in order to keep the issuer's registration statement "reasonably current." 15 U.S.C. § 78m (2019).
96. See SEC, supra note 22.
100. 17 C.F.R. § 229.303 (2019).
101. See, e.g., Article 11 of Regulation S-X, 17 C.F.R. § 210.11-01 (2014) (generally requiring the provision of pro forma financial information where a significant acquisition or disposition “has occurred or is probable”); Item 14 of Schedule 14A, 17 CFR § 240.14a-101 (requiring Article 11 pro forma financial information...
Section 10(b) of the 34 Act prohibits the use of “any manipulative or deceptive device or contrivance” in connection with the purchase or sale of securities that violates the regulations promulgated by the SEC.\textsuperscript{102} Congress intended for § 10(b) to serve as a “catch-all” provision, supplementing the other narrower sections’ prohibitions.\textsuperscript{103} The approach of “leaving many of the enforcement details to the rule-making power of the SEC” was “typical” of the 34 Act,\textsuperscript{104} and § 10(b) is not self-enforcing.\textsuperscript{105}

Therefore, the SEC promulgated Rule 10b-5 in 1942.\textsuperscript{106} Rule 10b-5 has been described as “by far the most important civil liability provision of the securities laws.”\textsuperscript{107} It can be enforced by the SEC in injunctive and civil actions\textsuperscript{108} and by the Justice Department in criminal actions for willful violations of the 34 Act.\textsuperscript{109} Additionally, the Supreme Court has implied a private cause of action from the text and purpose of § 10(b).\textsuperscript{110} Today, private enforcement of securities laws is characterized as a “supplement” to public enforce-

and extensive other information about certain extraordinary transactions if shareholder action is to be taken with respect to such a transaction).

\textsuperscript{102} 15 U.S.C. § 78j(b) (2012).

\textsuperscript{103} See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202 (1976) (“Of course [§ 10(b)] is a catchall clause to prevent manipulative devices.”) (quoting Stock Exchange Regulation: Hearing on H.R. 7852 and H.R. 8720 Before the H. Comm. on Interstate & Foreign Commerce, 73d Cong. 115 (1934) (statement of Thomas G. Corcoran)).


\textsuperscript{105} See Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952) (“Section 10(b) of the Securities Exchange Act does not by its terms make unlawful any conduct or activity but confers rulemaking power upon the SEC to condemn deceptive practices in the sale or purchase of securities.”).


\textsuperscript{110} See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 318 (2007) (“Section 10(b), this Court has implied from the statute’s text and purpose, affords a right of action to purchasers or sellers of securities injured by its violation.”); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (“It is now established that a private right of action is implied under § 10(b).”).
A viable claim under § 10(b) and Rule 10b-5 must contain six essential elements: “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.” This Note largely focuses on the first element, a material misrepresentation or omission by the defendant, because the facts necessary to proving it are particularly impacted by #MeToo.

Under Rule 10b-5, it is unlawful for any person “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security.” In other words, when a company makes a disclosure, even if it had no duty to make it, it assumes a duty to disclose all information necessary to make that statement not misleading. There is no per se duty to reveal even material evidence of wrongdoing, however, and Section

111. Tellabs, 551 U.S. at 313 (“This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC).”).

112. See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975) (“[L]itigation under Rule 10b-5 presents a danger of vexatiousness different in degree from that which accompanies litigation in general”).


115. To be sure, there are still high hurdles to recovery under Rule 10b-5. For example, a plaintiff must in their complaint “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2)(A) (2006). Nevertheless, to the extent that #MeToo results in more material misstatements or omissions, companies risk securities disclosure liability.

10(b) and Rule 10b-5(b) “do not create an affirmative duty to disclose any and all material information.”

An actionable material misrepresentation or omission under Rule 10b-5 has two components. First, applying an objective standard, the misrepresentation or omission must have been “material” to investors. Second, there must be a misleading misstatement or omission. A misstatement concerning “hard information” is actionable if the statement was “a material fact and . . . it was objectively false or misleading.” An actionable alleged misrepresentation concerning “soft information,” which “includes predictions and matters of opinion,” must be “made with knowledge of its falsity.” Indeed, “puffing”—expressing a general opinion rather than a knowingly false statement of fact—is not misleading, so there is no duty to correct such statements.

To summarize, securities regulation revolves around the concept of disclosure. The core principle of securities disclosure is materiality, which encompasses corporate sexual misconduct, especially in the #MeToo environment. Public corporations have certain affirmative duties to disclose that material information. In addition, Rule 10b-5 provides a secondary legal duty to disclose material information and to refrain from making material misstatements.

---

117. *Matrixx Initiatives*, 563 U.S. at 44.
118. For a complete analysis of this issue, see supra Section I.B.
119. See *Private Securities Litigation Reform Act of 1995*, 15 U.S.C. § 78u-4(b)(1)(B) (2012) (“[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”).
120. *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 470 (6th Cir. 2014).
122. *In re Omnicare, 769 F.3d at 470*. To show “knowledge of falsity” it must be proven that the “true facts” existed before the purportedly misleading statement. *See In reSplash Tech. Holdings, Inc. Sec. Litig.*, 160 F. Supp. 2d 1059, 1072 (N.D. Cal. 2001) (stating that a complaint in a securities disclosure case “must allege that the ‘true facts’ arose prior to the allegedly misleading statement”).
123. Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard, 845 F.3d 1268, 1275 (9th Cir. 2017). To be misleading, a statement must be “capable of objective verification.” *Id.*
RISK OF SEXUAL MISCONDUCT DISCLOSURE LIABILITY IN THE #METOO WORLD

In the wake of the #MeToo movement, public corporations face a real risk of sexual misconduct disclosure liability. For one thing, sexual misconduct in the #MeToo world is more likely to be reported and considered an important factor in investor decision making. Additionally, the highly publicized and incendiary nature of the issue makes it more likely that companies will face both public and private enforcement efforts when they fail to disclose such misconduct. These factors indicate that companies should pay careful attention to sexual misconduct disclosure issues, although thus far the evidence indicates that they do not.

A. #MeToo Movement and Public Corporations

The “Harvey Weinstein effect” and the #MeToo campaign created a wave of allegations that brought about the swift firings of many men in positions of power across the world. The movement has been described as a “tipping point” and “watershed moment” in America’s perception of sexual misconduct. Prominent men in media, sports, politics, and other industries have been among those accused during the #MeToo movement. Also implicated have been high-level executives at public companies such as Leslie

124. See infra Section II.A.
125. See infra Section II.B.
129. See Corey, supra note 12.
Moonves, former CEO of CBS Corp.;\textsuperscript{130} Brian Krzanich, former CEO of Intel Corp.;\textsuperscript{131} Steve Wynn, former CEO of Wynn Resorts;\textsuperscript{132} Steve Jurvetson, current board member of SpaceX and Tesla;\textsuperscript{133} John Lasseter, former executive at Disney;\textsuperscript{134} and Raj Nair, former President of Ford North America.\textsuperscript{135}

Sexual misconduct can harm a company in multiple ways, including “difficulties in attracting, retaining, and motivating talented workers to customer defections, ruined business deals, and lost revenue and profit.”\textsuperscript{136} Following the #MeToo movement, companies may face an increased risk of sexual misconduct disclosure liability because the overall number of sexual misconduct accusations and lawsuits could appreciably increase. In addition, sexual misconduct may now have a larger impact on a company’s value, thereby making it more likely that the sexual misconduct is “material.”


\textsuperscript{132} See Berzon et al., supra note 13 (reporting on the sexual misconduct accusations against Steve Wynn).


\textsuperscript{136} Crystal Kim, Leslie P. Norton & Lauren R. Rublin, Tipping Point, BARRON’S, Nov. 6, 2017, at 21–22.
1. Increased Sexual Misconduct Allegations

Harassment pervades the workplace. In a December 2017 survey conducted by American Management Association, 51% of female executives, managers, and professionals said they have been sexually harassed on the job, and a similar proportion said they have witnessed it.\footnote{See Joann S. Lublin, When #MeToo Becomes Catch-22, WALL ST. J. (Jan. 24, 2018 8:00 AM), https://www.wsj.com/articles/when-metoo-becomes-catch-22-1516798800 [https://perma.cc/C2BQ-5KVH] (citing unpublished AMA survey of 3,247 women and men). For a broader analysis of sexual harassment and assault both inside and outside of the workplace since the beginning of the #MeToo movement, see STOP STREET HARASSMENT, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT (Feb. 2018), http://www.stopstreetharassment.org/wp-content/uploads/2018/01/2018-National-Sexual-Harassment-and-Assault-Report.pdf [https://perma.cc/GF68-4BE8].} Another recent poll, from Microsoft Service Network (MSN), found that almost one in three people (31%) in the United States admit to having been sexually harassed at work.\footnote{See Rachel Gillett, Sexual Harassment isn’t a Hollywood, Tech, or Media Issue—It Affects Everyone, BUS. INSIDER (Nov. 30, 2017, 10:49 AM), http://www.businessinsider.com/sexual-harassment-affects-nearly-everyone-2017-11 [https://perma.cc/X4SY-ZW8V] (reporting on MSN’s polling results). See generally David M. Rothschild, Polling MSN in 2017, PREDICTWISE (June 5, 2017), https://predictwise.com/blog/2017/06/polling-msn-in-2017/ [https://perma.cc/Z56N-R568] (touting the accuracy of MSN polling).} In the past, workplace harassment has been underreported: the MSN poll also found that 73% of women who said they had been sexually harassed at work also said they never reported it.\footnote{See Gillett, supra note 138.}

The #MeToo movement could influence people to be more likely to challenge and report those incidences of sexual misconduct. In a national poll conducted in November 2017 by NBC News and SurveyMonkey, 46% of women responded that #MeToo stories made them more likely to speak up about sexual misconduct issues.\footnote{Sexual Harassment Poll Results, NBC NEWS — SURVEYMONKEY (Nov. 30, 2017), http://msnbcmmedia.msn.com/i/TODAY/Z_Creative/NBC%20News%20SurveyMonkey%20Sexual%20Harassment%20Poll%20Toplines%20and%20Methodology.pdf [http://perma.cc/2CW6-TDU9].} In a 2018 survey by Fawcett Society and Hogan Lovells, more than one in three British people (35%) said they were more likely to challenge inappropriate conduct since #MeToo.\footnote{#MeToo One Year On—What’s Changed?, FAWCETT SOC’Y, 8 (Oct. 2018), https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=8709c721-6d67-4df8-8e30-11347c56a7c5 [https://perma.cc/R5BB-4M2W].}

Early evidence signals that women are in fact reporting sexual misconduct more frequently since #MeToo. Sexual harassment charges filed with the U.S. Equal Employment Opportunity Com-
mission (EEOC) in 2018 have increased “by more than 12 percent from fiscal year 2017,” and Victoria Lipnic, the acting chair of the EEOC, believes this is a result of the #MeToo movement. Sexual misconduct-related calls to both corporate hotlines and community organizations have likewise been “surging.”

2. The Corporate Costs of Sexual Misconduct Allegations

Sexual misconduct can lead to a variety of direct and indirect costs for companies, including decreased productivity, reputational costs, and legal costs. And, in addition to its potential impact on the incidence of reporting sexual misconduct, the #MeToo movement appears to be increasing those costs for corporations. Despite this, companies do not pay sufficient attention to these issues.

Workplace sexual misconduct results in decreased productivity from both its victims and observers. Victims of sexual misconduct often become less productive at work and more likely to miss


144. “Convercent Inc., an ethics- and compliance-software firm that operates reporting hotlines and portals for more than 500 companies world-wide, says the number of harassment reports it took in over the past year jumped 72% from the 12 months before.” Vanessa Fuhrmans, What #MeToo Has to Do with the Workplace Gender Gap, WALL ST. J. (Oct. 23, 2018, 4:16 AM), https://www.wsj.com/articles/what-metoo-has-to-do-with-the-workplace-gender-gap-1540267680?mod=djem10point [https://perma.cc/VQV4-X9WW].

work.\textsuperscript{146} Furthermore, several studies have found “ambient effects” on observers, with harassment resulting in lower morale and lower output.\textsuperscript{147} Likewise, victims and observers of sexual misconduct are more likely to quit their jobs,\textsuperscript{148} thereby increasing hiring costs and workplace disruption. While decreased productivity due to sexual misconduct existed prior to \#MeToo, the movement has begun to reveal the full extent of these costs.

Additionally, sexual misconduct allegations can harm a corporation’s reputation and impact its relationships with customers, job applicants, and business partners. Much publicity has accompanied \#MeToo allegations,\textsuperscript{149} thus increasing the reputational risk stemming from sexual misconduct. Moreover, the public now tends to believe allegations of sexual misconduct.\textsuperscript{150} Therefore, sexual misconduct allegations negatively impact a corporation’s reputation with consumers and job-applicants, because “perceived sexual harassment in the workplace has a negative effect on attitudes toward the brand, brand image, and intentions to work for prospective employees.”\textsuperscript{151} Furthermore, sexual misconduct allegations may result

\begin{footnotesize}
\begin{enumerate}
\item[146.] See Chelsea Willness, Piers Steel, & Kibeom Lee, \textit{A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment}, 60 PERSONNEL PSYCHOL. 127, 137 (2007) (collecting studies).
\item[147.] See id. at 149 (reporting results of meta-analysis).
\item[148.] A survey of female law firm associates found that “[c]hronically or observed [workplace] sexual harassment . . . increases the likelihood that the respondent reported an intention to quit her current workplace within two years by over 25%.” David N. Laband & Bernard F. Lentz, \textit{The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers}, 51 INDUS. & LAB. RELS. REV. 594, 604 (1998).
\item[149.] See Appendix A.
\item[150.] A December 2017 poll of American voters by PerryUndem revealed that 85% of respondents said they were more likely to believe women making allegations of harassment or assault than the men who deny them. \textit{PerryUndem Res. Comm., What a Difference a Year Makes: Polling Update on Sexism, Harassment, Culture and Equality} 13 (2017), https://www.scribd.com/document/366406592/PerryUndem-Report-on-Sexism-Harassment-Culture-And-Equality-compressed [perma.cc/J628-YXC5]. Additionally, sexual misconduct allegations are easier than ever to prove due to advances in technology. See Jena McGregor, \textit{Fear and Panic in the HR Department as Sexual Harassment Allegations Multiply}, \textit{Wash. Post}, (Nov. 30, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/11/30/fear-and-panic-in-the-hr-department-as-sexual-harassment-allegations-multiply/?noredirect=on&utm_term=.897479959fa [https://perma.cc/5Q6R-L6BU] (quoting a lawyer who said that clear evidence is now “often available in the form of emails, texts or other electronic posts” and “the days of he-said, she-said have essentially been eliminated by technology . . . somebody’s got a screenshot somewhere”).
\item[151.] Sierra et al., supra note 20, at 187; see also Ted Marzilli, \textit{Pandora Jewelers Takes Xmas Perception Lead Over Softening Signet Brands}, \textit{YouGovBrandIndex} (Dec.
in severed current or potential business partnerships: for example, Amazon cut off all ties with the Weinstein Company after the allegations against Harvey Weinstein emerged.\textsuperscript{152}

Workplace sexual misconduct inflicts further costs on companies by negatively impacting investor relations. Anecdotal evidence indicates that investors are now avoiding companies with a history of sexual misconduct.\textsuperscript{153} Additionally, some investors are now seeking to introduce and utilize “clawback” provisions to recoup losses related to workplace sexual misconduct.\textsuperscript{154}

Companies also face high legal costs when investigating, litigating, and paying sexual misconduct claims. In 2017, the EEOC resolved about 7,500 sexual harassment complaints, with employers paying $46.3 million in employee benefits through the Commission’s pre-litigation administrative enforcement process.\textsuperscript{155} And Twenty-First Century Fox paid $20 million alone to settle anchor

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{13} 2017, 8:05 PM), http://www.brandindex.com/article/pandora-jewelers-takes-xmas-perception-lead-over-softening-signet-brands [https://perma.cc/2M99-SSSS] (drawing a connection between allegations of sexual harassment against Signet Jewelry and a downturn in two of their key brand metrics with women).
\item\textsuperscript{153} Eve Ellis, a portfolio manager with Morgan Stanley’s Matterhorn Group, recently said that she generally avoids investing in companies facing class action or individual lawsuits dealing with gender because “[t]hey might cost a company money, and lead to reputational risk.” Kim et al., supra note 136, at 23. Calvert Investments, a “socially responsible” investment management company, has stated that it deliberately steers clear of companies with gender-related controversy. Id. This includes Dollar General, which settled a variety of discrimination and harassment suits over the last decade, and Uber Technologies, which recently fired their CEO after he failed to tame a corporate culture rife with sexual-harassment issues. Id.
\item\textsuperscript{154} For example, large investors and buyers in mergers-and-acquisitions are increasingly introducing clawback provisions to agreements that automatically fine companies whose employees engage in sexual misconduct. See Laurence Fletcher, Big Investors Seek a #MeToo Clawback, WALL ST. J. (Sept. 23, 2018, 10:07 PM), https://www.wsj.com/articles/big-investors-seek-a-metoo-clawback-1537754820 [https://perma.cc/SYL5-HJ25] (“[P]roponents of clawback clauses say inappropriate behavior by top executives is evidence of weak corporate governance and a flawed culture . . . [that] can manifest in legal costs, lost time, management distraction and negative publicity.”).
\end{itemize}
\end{footnotesize}
Gretchen Carlson’s lawsuit against former CEO Roger Ailes.\footnote{156} Even in cases where employers successfully defend workplace sexual misconduct lawsuits, employers frequently pay six figures or more in outside attorney’s fees and investigative costs.\footnote{157} As the number of sexual misconduct allegations rise, companies can expect total legal costs to rise as well. For example, the EEOC filed over fifty percent more harassment lawsuits in fiscal year 2018 as compared to fiscal year 2017.\footnote{158}

Additionally, efforts by legal defense funds and the finance industry since the beginning of the #MeToo movement are providing financial support to accusers to ensure that victims are able to fund their legal claims. For example, The Time’s Up Legal Defense Fund has raised more than $21 million to provide legal help to victims of sexual misconduct and it has received more than 3,500 applications since January 2018.\footnote{159} “Settlement-advance” companies, which have traditionally targeted personal injury and medical malpractice plaintiffs, are “racing to capitalize on sexual harassment lawsuits.”\footnote{160} Other lawsuit funding companies are pursuing sexual misconduct “litigation financing” opportunities.\footnote{161} In sum, companies now face increased legal costs because victims are more likely and better able to fight back with sexual misconduct lawsuits.


157. See Beth Braverman, The High Cost of Sexual Harassment, FISCAL TIMES (Aug. 22, 2013), http://www.thefiscaltimes.com/Articles/2013/08/22/The-High-Cost-of-Sexual-Harassment [https://perma.cc/GYM4-WU4Z] (stating that $100,000 legal bills are common and seven-figure settlements are possible).


159. American Business and #MeToo, supra note 145.


161. \textit{Id} ("In addition to providing cash upfront to sexual harassment plaintiffs, some firms are pursuing the more traditional form of litigation finance, providing money to law firms in exchange for a cut of potential settlements.").
Companies have not historically viewed sexual misconduct as an important corporate risk factor, and despite all indications that they should, companies still do not pay sufficient attention to these issues. According to a May 2018 survey by the American Psychological Association, less than one third of Americans said their employer had done something to deal with sexual harassment following #MeToo, and the most common approach was only to remind employees of existing harassment training or resources. Furthermore, a 2017 survey of 600 mostly female board members of public and private companies conducted by the Boardlist and Qualtrics found that 77% of boards had not discussed accusations of sexually inappropriate behavior or sexism in the workplace, 88% had not implemented a plan of action stemming from recent revelations in the media, and 83% had not reevaluated company risks related to sexual harassment or sexist behavior. One possible explanation for these lackluster statistics is the dearth of female representation in boardrooms: women still only occupy 16% of all available board seats of the 3,000 largest US companies, and the number of female Fortune 500 CEOs has fallen since the #MeToo movement started. Indeed, 624 of the 3,000 largest U.S. companies still have no female directors at all. Regardless of the “why,” the fact remains that companies are not properly acknowledging the risk of sexual misconduct disclosure liability.

Recent reports of sexual misconduct by Wynn Resorts’ CEO, Steve Wynn, illustrate the impact of sexual misconduct allegations on a corporation in the #MeToo world. On January 26, 2018, the Wall Street Journal reported on dozens of people’s accounts of decades of sexual misconduct by Wynn. Many investors quickly sold their Wynn Resorts stock, including the $2.6 billion Thornburg

162. Based on a 2017 search of 67,500 post-2009 corporate filings for the terms “gender,” “harassment,” and “discrimination,” gender was mentioned in the risk-factor section of only 166 (0.25%) 10-K filings. Kim et al., supra note 136, at 24.


164. Kim et al., supra note 136, at 24.


166. See American Business and #MeToo, supra note 145.

167. See Staley, supra note 165.

Global Opportunities Fund, which cited the harassment allegations against Wynn as a “material contributing factor” in the fund’s decision to sell its entire stake of 891,000 shares of Wynn Resorts stock (0.864% equity stake). The allegations also seriously tarnished Wynn Resorts’ reputation with gaming regulators, who vowed to investigate the company even after Steve Wynn’s resignation. Wynn Resorts’ stock price immediately tumbled from $200.60 on January 25 to $163.22 on January 26, interrupting what had previously been a sharp rise in the company’s stock.

The Wynn example also reveals how companies that do not take sexual misconduct disclosure seriously risk liability. In its most recent 10-Q filing, the company indicated, “If we lose the services of Mr. Wynn, or if he is unable to devote sufficient attention to our operations for any other reason, our business may be significantly impaired.”


173. Compare Wynn Las Vegas, Ltd., Current Report (Form 10-Q) at 52 (Nov. 8, 2017) (“A description of our risk factors can be found in . . . our Annual Report on Form 10-K for the year ended December 31, 2016. There were no material changes to those risk factors during the nine months ended September 30, 2017.”), with Wynn Las Vegas, Ltd., Current Report (Form 10-K) at 11 (Feb. 24, 2017) (“Our ability to maintain our competitive position is dependent to a large degree on the efforts, skills and reputation of Stephen A. Wynn.”).
person dependency, many of the sexual misconduct allegations against Wynn had been known to executives at Wynn Resorts for years, yet had not been explicitly disclosed to investors.\footnote{Steve Wynn’s ex-wife, a board member of Wynn Resorts, knew of a sexual misconduct settlement as early as 2009 and informed the General Counsel of Wynn Resorts of it in 2015. See Kirkham et al., supra note 169. Wynn Resorts also reportedly failed to disclose to gaming regulators a known $7.5 million sexual misconduct settlement against Wynn in 2013 “on advice of counsel.” Steve LeBlanc, Massachusetts Casino Panel: Wynn Settlement Was Kept From Us, U.S. NEWS & WORLD REP. (Jan. 31, 2018, 5:21 PM), https://www.usnews.com/news/business/articles/2018-01-31/massachusetts-gambling-regulators-to-review-wynn-allegations [https://perma.cc/P3XD-3NTT].} Wynn Resorts quickly filed 8-K Forms on January 29th and February 7th disclosing an internal investigation of the allegations and the firing of Wynn, respectively.\footnote{Wynn Resorts, Ltd., Current Report (Form 8-K) (Jan. 29, 2018) (“On January 26, 2018, the Board of Directors of Wynn Resorts, Limited announced that it formed a Special Committee of the Board comprised solely of independent directors to investigate allegations contained in a January 26, 2018 Wall Street Journal article.”); Wynn Resorts, Ltd., Current Report, (Form 8-K) (Feb. 7, 2018) (“On February 6, 2018, Wynn Results, Limited announced that Stephen A. Wynn has resigned as Chairman of the Board and Chief Executive Officer of the Company, effective immediately.”).} Given that key company executives had long known of the allegations and appreciated the obvious impact of their disclosure, Wynn Resorts’ shareholders should question why the allegations were not disclosed earlier.

B. Impact on the Enforcement of Sexual Misconduct Disclosure Liability

With the rise of the #MeToo movement, public corporations must also deal with stepped-up enforcement of sexual misconduct disclosure liability. The new reality of more instances of material sexual misconduct\footnote{See supra Section II.A.} coupled with the salacious, headline-grabbing nature of sexual misconduct allegations will motivate heightened enforcement.\footnote{See infra II.B.1.} Moreover, there has been an increase in securities disclosure enforcement overall, which may also lead to increased enforcement of sexual misconduct disclosure liability.\footnote{See infra II.B.2.}

1. Public Enforcement

While there are valid public policy reasons favoring the disclosure of alleged or proven sexual misconduct to investors,\footnote{See, e.g., H.R. REP. NO. 73-1383, at 11 (1934) (“There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.”).} the
prominent media attention given to sexual misconduct adds an extra incentive for public enforcers to address these issues.\textsuperscript{180} Although the SEC is the primary securities regulator whose jurisdiction is implicated, there are several other enforcement authorities, such as federal prosecutors and state attorneys general, who could conceivably have sufficient authority and motivation to respond to public revelations of corporate sexual misconduct. Companies confronting sexual misconduct allegations must therefore predict how these public enforcers might apply disclosure liability rules to a novel course of conduct.\textsuperscript{181} While it may be difficult at times to comply with uncertain legal standards, such as Rule 10b-5,\textsuperscript{182} companies must necessarily expect that law enforcement and regulators will use all of the tools at their disposal to respond to a public and politically-charged issue like sexual misconduct.

The SEC is unlikely to lead the charge in enforcing sexual misconduct-related securities enforcement. The agency is large and bureaucratic, and bureaucracies are by their very nature risk-averse.\textsuperscript{183} Further, given the SEC’s extensive rulemaking authority, it may be viewed as unnecessary and even undesirable for the SEC to attempt a novel form of securities enforcement such as a Rule 10b-5 action predicated on non-disclosure of sexual misconduct.\textsuperscript{184} Finally, as an

\begin{itemize}
\item \textsuperscript{180} Pessimists might argue that public allegations of sexual misconduct allegations might attract the attention of regulators seeking to make headlines through enforcement actions. Cf. James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy 19 (1962) (suggesting that public officials do not always act in the public interest, but rather act in the pursuit of private benefits).
\item \textsuperscript{181} See, e.g., William L. Cary, Corporate Standards and Legal Rules, 50 Cal. L. Rev. 408, 408 (1962) (urging attorneys to advise corporate clients to anticipate how standards will be applied).
\item \textsuperscript{182} See Park, supra note 31, at 142 (noting that strict enforcement can lead to a “chilling effect where parties will be overly cautious for fear that they will be punished for acts that a regulator determines ex post is misconduct”); see also Calfee & Craswell, supra note 31 (noting that uncertain legal standards incentivize over- or under-compliance).
\item \textsuperscript{183} See Park, supra note 31, at 146 (noting that the SEC is a large bureaucracy and “bureaucracies tend to be governed by rigid hierarchies that are risk adverse”).
\item \textsuperscript{184} See id. at 152 (“[R]ather than bringing an innovative case that would create controversy, the SEC can simply pass a rule prohibiting such conduct in the future.”). While politically independent, moreover, the SEC is often judged by the quantity of enforcement cases it brings rather than the prominence of those cases. See id. at 147 (noting that it is often said that the SEC is risk adverse because it is judged by the number of enforcement cases it brings).
\end{itemize}
industry regulator, the SEC must balance the needs of market stability with any possible interest in aggressive enforcement.185

Instead, companies should be more concerned that federal prosecutors will pursue sexual misconduct disclosure liability. Federal prosecutors have often sought out securities enforcement roles “through headline-grabbing convictions.”186 Some federal prosecutors’ offices also have elite securities lawyers, who may be better equipped to bring “edge” cases.187 Indeed, the SEC often refers difficult cases to federal prosecutors.188 Federal prosecutors also operate in a less bureaucratic environment than the SEC. Moreover, federal prosecutors have already indicated an interest in pursuing sexual misconduct disclosure liability enforcement with an investigation into the disclosure practices of Twenty-First Century Fox.189

185. Donald C. Langevoort, Managing the “Expectations Gap” in Investor Protection: The SEC and the Post-Enron Reform Agenda, 48 VILL. L. REV. 1139, 1143–44 (2003) (noting that the role of being the “investor’s champion” can conflict with enforcement that portrays the risks of investing as so severe that investors become discouraged and drop out the market).

186. Park, supra note 31, at 117. Some federal prosecutors have been accused of having political ambitions and the opportunity to pursue charges against a company for failure to disclose sexual harassment could be viewed as a convenient way to advance a personal political agenda in the #MeToo environment. See Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 HARV. L. REV. 469, 486 (1996) (“U.S. Attorneys are extraordinarily ambitious and frequently enter electoral politics after leaving office.”). But see Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. REV. 757, 777 (1999) (noting that U.S. Attorneys have a reputation for being objective).

187. See, e.g., A.C. Pritchard, The SEC at 70: Time for Retirement?, 80 NOTRE DAME L. REV. 1073, 1096–97 (2005) (“The Justice Department has many lawyers and investigators who are proficient at prosecuting securities fraud (e.g., the fraud unit of the U.S. Attorney’s office in the Southern District of New York.”).

188. Park, supra note 31, at 155 (noting that “the SEC often refers cases to federal prosecutors, recognizing their ability to seek greater sanctions and their skill at trying cases”).

189. About a year prior to the “pivotal” Weinstein allegations, key Twenty-First Century Fox employees Roger Ailes, CEO of Fox News, and Bill O’Reilly, a popular television host at Fox News, were publicly accused of committing sexual misconduct. See Emily Steel & Michael S. Schmidt, Bill O’Reilly Settled New Harassment Claim, Then Fox Renewed His Contract, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html [https://perma.cc/NZL2-NL8Y]. Twenty-First Century Fox was also accused of hiding numerous sexual misconduct accusations and settlements from the public. Id. Almost immediately, it was reported that a federal inquiry by the U.S. Attorney’s Office Southern District of New York was looking into, among other things, whether sexual misconduct settlement payments were masked as salary or compensation to skirt rules compelling public disclosure of the payments. See, e.g., Jim Dwyer & William K. Rashbaum, Federal Inquiry of Fox News Moves to a Grand Jury, but Without Preet Bharara, N.Y. TIMES (Mar. 13, 2017), https://www.nytimes.com/2017/
In addition to potential federal criminal scrutiny, companies should also recognize the risks posed by offices of state attorneys general that enforce their own states’ securities statutes. Because they are often elected, state attorneys general are generally viewed as more susceptible to political influence. They may be more inclined, therefore, to "cater to the public by aggressively pursuing unpopular companies," such as those accused of covering up sexual misconduct. For example, following the accusations against Harvey Weinstein, the New York Attorney General’s Office rapidly and publicly pursued sexual harassment and civil rights violations charges against the Weinstein Company.

2. “Private” Enforcement

The plaintiffs’ bar (private enforcement) has brought, and will continue to bring, sexual misconduct disclosure liability actions against public corporations. This is due to a confluence of factors including an aggressive plaintiffs’ bar, an increase in the impact of sexual misconduct allegations, a general rise in securities class actions, and the copycat nature of private enforcement. In fact, public
corporations may have more reason to fear private enforcement than public enforcement.

Private enforcers are aggressive in pursuing securities class actions. They can be unrelenting in their pursuit of innovative theories of wrongdoing. They are also highly profit-motivated and dogged when seeking new clients. Private enforcers are particularly motivated when there is a large stock price drop following public disclosure of information, and securities litigation often follows stock price declines. That is because a stock price drop is often, although not always, seen as evidence of materiality when there is a failure to disclose. Additionally, a bigger stock drop can mean larger damages penalties, which results in bigger attorneys’ fees and therefore an increased incentive for profit-motivated private enforcers to bring securities actions.


196. See, e.g., Park, supra note 31, at 159–60 (“[C]lass action attorneys are notorious for racing to the courthouse in search of the next case.”).


198. See, e.g., In re Merck & Co. Sec. Litig., 432 F.3d 261, 269 (3d Cir. 2005) (materiality of omissions may be measured after the fact by looking at the movement of the company’s stock price in the period immediately following full disclosure).

199. See Cornerstone Research, Estimating Recoverable Damages In Rule 10b-5 Securities Class Actions 2 (2014) (explaining that one way to determine damages is by looking at “actual share price declines attributable to revelation of the relevant truth regarding a misrepresentation made prior to the purchase of that share”).

ment, a single tweet alleging sexual misconduct can create a double-digit stock drop. On February 1, 2018, for example, shares in retailer Guess Inc. fell over 17 percent after a #MeToo tweet by model Kate Upton, who accused co-founder Paul Marciano of sexual misconduct. Thus, the issue is ripe for private enforcement efforts.

Aside from the factors that would make sexual misconduct issues inherently attractive to the plaintiffs’ bar, the number of securities class actions, both traditional and untraditional, is rapidly rising. In 1995, Congress enacted the Private Securities Litigation Reform Act (PSLRA) in part to combat plaintiffs’ lawyers’ abuse of 10b-5 suits. Studies show that the PSLRA has achieved its goals in part, but the number of securities class actions has dramatically risen in recent years. The number of companies faced with these lawsuits has also risen, nearly doubling from 2014 to 2017. Part of

201. Cf. infra Appendix B.
202. See Guess Shares Slump After Model Kate Upton Tweets About Exec, REUTERS, (Feb. 1, 2018, 2:35 PM), https://www.reuters.com/article/us-guess-stocks/guess-shares-slump-after-model-kate-upton-tweets-about-exec-idUSKBN1FL6BK [https://perma.cc/BDQ2-ZTCP] (“Guess Inc shares fell more than 17 percent on Thursday following a tweet by model and actress Kate Upton accusing the company’s co-founder of using his power to harass women.”); Kate Upton (@KateUpton), TWITTER (Jan. 31, 2018, 2:09 PM), https://twitter.com/kateupton/status/9588246191206924832?lang=en [https://perma.cc/Q8EG-2Y2Q] (“It’s disappointing that such an iconic women’s brand @GUESS is still empowering Paul Marciano as their creative director #metoo”).
203. H.R. REP. NO. 104-369, at 31 (1995), as reprinted in 1995 U.S.C.C.A.N. 730, 740 (“Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets.”).
205. Plaintiffs filed more federal securities class actions in 2017 than in any year since the enactment of the PSLRA. See Boettrich & Starykh, supra note 194, at 2. Four hundred thirty-two federal securities class actions were filed in 2017, a 44% increase over 2016 and an 89% increase over 2015. Id. Part of this increase can be attributed to a dramatic growth in merger-objection cases, which were historically filed in state courts, but are filed there less often after recent state court rulings. Id. at 4–5. However, the probability of a firm being targeted in a securities action with “core” allegations has also increased. Id.; see also CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2017 YEAR IN REVIEW 3 (2018) (finding that 2017 was a record year for the percentage of U.S. exchange-listed companies sued under “core filings” (defined as those filings with Rule 10b-5, § 11, or § 12(2) claims)).
206. See Boettrich & Starykh, supra note 194, at 3.
this increase is attributable to the rise of “emerging” law firms that are more likely to bring securities cases based upon “business disruptions or disasters,” rather than the more traditional “financial misstatement” rationale. Accordingly, the recent increase in class actions is driven in part by exactly the type of firm that would use a non-traditional issue, such as non-disclosure of sexual misconduct, as a basis for a disclosure liability suit.

Moreover, the future resolution of sexual misconduct disclosure cases has the potential to serve as a blueprint and lure for privately enforced sexual misconduct disclosure litigation. Securities class actions premised on non-disclosure of sexual misconduct have been filed against companies such as Signet Jewelers, Wynn Resorts, and CBS. These cases will serve as a model for other private enforcers to follow in future instances of sexual misconduct non-disclosure. For example, Shira Scheindlin, a former judge in the U.S. District Court for the Southern District of New York, stated that the CBS lawsuit foreshadows a litigation trend. Moreover, a successful settlement or verdict will further entice other profit-motivated private enforcers to file similar suits.

In sum, the above-delineated factors combine to make it more likely that public enforcers and private litigants will pursue public corporations for sexual misconduct disclosure violations. These factors have created an environment where sexual misconduct disclosure liability is a reality that public corporations must face, before it is too late.


208. Compare id. (defining Pomerantz LLP as an “emerging firm”), with CBS Complaint, supra note 18 (shareholder class action suit, arguing the company misled investors by failing to disclose sexual harassment allegations against CEO Leslie Moonves, filed by Pomerantz LLP).


210. Wynn Complaint, supra note 18.

211. CBS Complaint, supra note 18.

212. Kristen Rasmussen, Does Investor Litigation Over #MeToo Stand a Chance?, LAW.COM: CORPORATE COUNSEL (Sept. 4, 2018, 3:55 PM), https://www.law.com/corpconse… [https://perma.cc/W8X5-6AVB]. (“If they bring this, there will be other firms that use it as a model, and consider bringing it in similar situations. . . . Once you see one, you will see many.”).

213. See, e.g., Park, supra note 31, at 159–60.
III.
DISCLOSING SEXUAL MISCONDUCT: WHEN AND WHAT SHOULD BE DISCLOSED

Companies would avoid much, if not all, potential sexual misconduct disclosure liability if they prevented the root problem of sexual misconduct.214 However, in view of the fact that sexual misconduct is an unfortunate, prevalent phenomenon in the workplace,215 companies should be prepared to include it in their disclosure discussions. Since much of the disclosure is guided by questions of materiality and a duty to disclose, a discussion of the sexual misconduct facts relevant to that analysis follows.

A. When is Sexual Misconduct Material?

The core purpose of securities disclosure is empowering and protecting investors.216 Materiality serves an important purpose in requiring companies to filter irrelevant information and to disclose only information that has a “substantial likelihood” of altering the “total mix” of information available to investors.217 In other words, companies need only to focus on disclosing information that is pertinent to investors.

In general, material sexual misconduct can be sorted into two main buckets: (1) sexual misconduct implicating a key executive and (2) sexual misconduct implicating a significant number of em-


215. See Lublin, supra note 137 (citing AMA survey that found that about 51% of female executives, managers and professionals say they have been sexually harassed on the job, and a similar proportion say they have witnessed it).

216. See, e.g., White, supra note 79 (“The core purpose of disclosure, of course, is to provide investors with the information they need to make informed investment and voting decisions. Such information makes it possible for investors to evaluate companies and have the confidence to invest and, as a result, allow our capital markets to flourish.”).

217. TSC Indus. v. Northway, Inc., 426 U.S. 438, 448 (1976); see also id. at 448 (“Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good.”).
ployees. Nevertheless, materiality is inherently “fact-specific,” and so companies will need to evaluate the individual costs they face from alleged or proven sexual misconduct.

1. Executive Misconduct

The concept of materiality should and does cover executive misconduct. Studies have shown that corporate officer misbehavior often has a significant effect on a corporation’s reputation and stock price. David Larcker and Bryan Tayan of the Rock Center for Corporate Governance at Stanford University, recently examined thirty-eight incidents of CEO misconduct and measured the resulting corporate consequences. A number of their findings illustrate why CEO misconduct is typically material to investor

218. See infra Section III.A.
219. See supra Section II.A.2.
220. The Wynn example illustrates how facts specific to each corporation impact the materiality analysis. The reports on Wynn’s alleged sexual misconduct by the Wall Street Journal were particularly impactful to Wynn Resorts’ reputation because of surrounding circumstances. Wynn was the CEO of Wynn Resorts and was highly identified with the company’s brand, given that he was its founder and that it shared his name. See Nina Munk, Steve Wynn’s Biggest Gamble, VANITY FAIR, (June, 2005), https://www.vanityfair.com/news/2005/06/steve-wynn-las-vegas-resort [https://perma.cc/UU3Z-3JAP]. Furthermore, the company was highly regulated by state and international gaming regulators, who had the ability to revoke the company’s gambling licenses if they determined that Wynn was “not ‘suitable’ as a casino operator.” Susan Pulliam, John Kamp, Chris Kirkham & Kate O’Keeffe, Misconduct Allegations Against Steve Wynn Put Big Casino Project at Risk, WALL ST. J. (Jan. 31, 2018, 7:51 PM), https://www.wsj.com/articles/massachusetts-review-of-wynn-allegations-holds-high-stakes-for-casino-1517400000 [https://perma.cc/6UYU-T344]. Indeed, some of these regulators began investigating the sexual misconduct allegations. Kirkham et al., supra note 19. These investigations put massive investments by Wynn Resorts at risk, including a billion-dollar casino investment in Massachusetts. Pulliam et al., supra note 220.


223. They identified thirty-eight incidents where a CEO’s behavior garnered a meaningful level of media coverage (defined as more than ten unique news references). 21% of these incidents involved a sexual affair or relations with a subordinate, contractor, or consultant and 16% involved CEOs engaging in objectionable personal behavior or using abusive language. David Larcker & Brian
decisions. For one thing, CEO misconduct is widely reported and has a long-lasting and significantly detrimental impact on a company. Moreover, CEO misconduct has a widespread effect on a company because it can stimulate additional fall-out and is often indicative of wider company culture. Finally, misbehaving CEOs tend to be recidivists and one incident of misconduct therefore suggests more misconduct will result in the future. Thus, it is no surprise that investors generally react negatively to news of executive misconduct.

Sexual misconduct allegations against corporate executives therefore raise real risks of material misstatements and resulting disclosure liability. Since executive misconduct is profoundly impactful, companies should immediately begin disclosure discussions as soon as proven or alleged executive misconduct is revealed.

Tayan, We Studied 38 Incidents of CEO Bad Behavior and Measured Their Consequences, HARV. BUS. REV., June 9, 2016. ERROR! HYPERLINK REFERENCE NOT VALID.


225. For example, news stories today continue to reference former American Apparel CEO Dov Charney’s odd behavior of walking around the company’s offices in his underwear, even though it was first reported over ten years ago. See Larcker & Tayan, supra note 223.

226. “Forty-five percent of companies in the sample experienced a significant unrelated governance issue following the event, such as an accounting restatement, unrelated lawsuit, shareholder action, or bankruptcy.” Id. Debra Katz, a lawyer specializing in sexual harassment explains, “If you have a company with an abuser on the top, they typically surround themselves with people like them, who engage in similar behavior. . . . It can put a set of enablers in place, who protect powerful people when they get challenged for misconduct, and who work to discredit and manage out women who come forward with allegations.” Farrow, supra note 13.

227. “21 percent of individuals in the sample were reported to have engaged in previous or subsequent questionable behavior, including allegations of sexual harassment, insider trading, and other infractions, felonies, or misdemeanors.” Larcker & Tayan, supra note 224.

228. Among the companies in the sample, share prices declined by a market-adjusted 3.1% (1.1% median) over the three-day trading period after the initial news story of CEO misconduct. Larcker & Tayan, supra note 223; see also Appendix B.

229. For example, securities class actions filed against Wynn Resorts and CBS Corporation argue that these companies materially mislead investors by failing to disclose sexual harassment allegations against their CEOs. See, e.g., CBS Complaint, supra note 18; Wynn Complaint, supra note 18.
2. Widespread Misconduct

In contrast to CEO misconduct, a different situation arises when only a few lower-level employees commit or are accused of sexual improprieties. Investors do not pay attention to every allegation of sexual misconduct against a public company’s employees. Isolated instances of sexual misconduct by low-level employees do not rise to the level of materiality.

On the other hand, allegations that a significant number of employees have committed sexual misconduct will often be material information to investors. For one thing, widespread corporate sexual misconduct can contribute to an executive’s firing even when the executive was not directly involved in the conduct. It...
can also result in negative media attention, which leads to public and private enforcement efforts. Widespread misconduct further has negative brand consequences, which will affect consumer decisions, while also harming the corporation in other ways. Pervasive misconduct can even lead to other lawsuits, which can result in a material amount of financial penalties. In sum, when a company uncovers increasing amounts of proven or alleged sexual misconduct, its disclosure discussions should be increasing as well.

B. Disclosure of Material Sexual Misconduct

As required by the 34 Act and subsequent regulations imposed by the SEC, public companies have affirmative duties to disclose certain information as it relates to material sexual misconduct. Outside of these affirmative duties, companies should remain mindful of the statements they make regarding sexual misconduct. Statements made prior to the detection of sexual misconduct will generally not lead to direct liability, but could potentially create a “duty to correct” or “update” under Rule 10b-5. Moreover, while Rule 10b-5 imposes no per se duty to reveal even material wrongdoing, it does impose a duty to not be misleading. Therefore, a company must decide between speaking truthfully or not at all in order to avoid securities liability following a material corporate sexual misconduct event.

1. Pre-Detection Statements

As long as they are careful, public companies need not fear disclosure liability due to statements made prior to sexual misconduct. Public companies may have a “duty to correct” disclosures (stating that corporate sexual harassment was a contributing factor in Uber CEO Travis Kalanick’s forced sabbatical and ultimately his firing).

234. See, e.g., id.
235. See supra Section II.B.
236. See, e.g., Sierra et al., supra note 20, at 187; Marzilli, supra note 151.
237. See Kim et al., supra note 136, at 21–22.
238. See, e.g., Flaherty, supra note 17.
239. Compare 17 C.F.R. § 229.103 (2019) (lawsuits can rise to a material level), with Signet Complaint, supra note 209, at 57–83 (attempting to claim that sexual misconduct lawsuits will result in a material financial penalty).
240. See infra Section III.B.
241. See id.
242. See infra notes 246–249 and accompanying text.
244. 17 C.F.R. § 240.10b-5(b) (2019).
that were materially false at the time they were made.\textsuperscript{246} And public companies may be subject to a “duty to update” in some—but not all—jurisdictions, which is triggered when a disclosure becomes materially false as a result of new developments.\textsuperscript{247} On the other hand, there will not be a direct finding of disclosure liability for pre-detection sexual misconduct statements because the scienter requirement\textsuperscript{248} of disclosure liability will not be satisfied.\textsuperscript{249}

Many corporate statements regarding sexual misconduct will naturally be made in the context of ethics programs. In that context, “It is well-established that general statements about reputation, integrity, and compliance with ethical norms are inactionable ‘puffery,’ meaning that they are ‘too general to cause a reasonable investor to rely upon them.’”\textsuperscript{250} Accordingly, recent court decisions, discussed below, indicate that actions and statements contradictory to a company’s ethics code will generally not trigger a duty to correct or update. However, public companies should be particularly vigilant in avoiding repeated ethical lapses, especially if the company has indicated that the conduct had ceased.

In \textit{Retail Wholesale & Department Store Union Local 338 Retirement Fund v. Hewlett-Packard Co. (Retail Wholesale),}\textsuperscript{251} for example, the

\begin{itemize}
\item \textsuperscript{247} See id. at 74–80.
\item \textsuperscript{248} The Supreme Court held, in \textit{Ernst & Ernst v. Hochfelder}, that a civil damage action under Rule 10b-5 requires a showing of scienter. 425 U.S. 185, 193 (1976). Four years later, the Supreme Court said that the SEC also had to prove scienter in its Rule 10b-5 cases, explaining that “the rationale of \textit{Hochfelder} ineluctably leads to the conclusion that scienter is an element of a violation of § 10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought.” \textit{Aaron v. SEC}, 446 U.S. 680, 691 (1980).
\item \textsuperscript{249} There are some commentators who believe that a lack of scienter precludes a duty to correct as well. \textit{J. Robert Brown, Jr., Regulation of Corporate Disclosure § 10.04[C]} (Allison Herren Lee ed., Wolters Kluwer 4th ed. Supp. 2019–1) (“There is no inherent reason why, under the federal securities laws, a statement must be corrected if false at the time issued. As long as the incorrect statement was made without scienter, no violations of the antifraud rules occurred. Thereafter, the statement is no different in practice from one that became false as a result of subsequent developments. The basis for requiring the correction of one but not the other remains obscure.”).
\item \textsuperscript{250} \textit{Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG}, 752 F.3d 173, 183 (2d Cir. 2014).
\item \textsuperscript{251} The facts of the case are as follows. In 2006, a whistleblower informed the government that HP had hired detectives to monitor phone records and email accounts of HP employees. 845 F.3d 1268, 1272 (9th Cir. 2017). Criminal charges were brought against the then-Chair and General Counsel of HP. \textit{Id.} Following the charges, HP took every opportunity it could to convince the public that it had improved its company code of ethics. \textit{Id.} And despite the scandal, the CEO of HP,
Ninth Circuit held that alleged inappropriate sexual behavior by a corporate executive need not be disclosed simply because it may have violated an “aspirational” company code of ethics. A plaintiff class had sued Hewlett Packard (HP), alleging: “(1) HP and [CEO] Hurd actively promoted the [company code of ethics (‘SBC’)] and stated that HP had zero tolerance for SBC violations; (2) Hurd’s SBC violations led to his resignation; and (3) Hurd’s resignation caused HP’s stock price to drop.” The Ninth Circuit upheld the district court’s dismissal of the complaint and found that HP’s touting of their ethics program was effectively immaterial “puffing,” because ethics codes are “inherently aspirational” and not capable of “objective verification.” Hurd’s sexual misconduct itself may very well have been material to investors since it predictably led to his resignation. But because § 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information, the court found that a duty to disclose was missing and Hurd’s failure to comply with a company’s ethics program did not trigger a corrective disclosure duty.

Retail Wholesale could have had a different outcome if HP had instead made unequivocal ethics statements. For example, if the company had said, “Hurd has not violated our code of conduct” but later found out he had, then a failure to make a corrective disclo-

Mark Hurd, remained highly respected. Id. (“HP, its stockholders, and Wall Street insiders viewed Hurd as one of HP’s most valuable assets, seeing his leadership as the 2006 scandal’s silver lining.”). This changed when HP’s Board of Directors received a letter from attorney Gloria Allred alleging that Hurd had, among other things, sexually harassed her client, Jodie Fisher. Id. The HP Board promptly launched an internal investigation, which found that Hurd falsified expense reports and lied about his relationship with Fisher. Id. at 1273. Hurd immediately resigned from his position at HP and the price of HP stock fell 10% in one day. Ashlee Vance, Boss’s Stumble May Also Trip Hewlett-Packard, N.Y. TIMES (Aug. 8, 2010), http://www.nytimes.com/2010/08/09/technology/09hp.html [https://perma.cc/S7N3-Z9BF] (reporting that “H.P.’s share price tumbled 10 percent on Friday as word of Mr. Hurd’s departure rippled through Wall Street”).

252. 845 F.3d 1268, 1278 (9th Cir. 2017).

253. Id. at 1275.

254. Id. at 1275–77 (“It simply cannot be that a reasonable investor’s decision would conceivably have been affected by HP’s compliance with SEC regulations requiring publication of ethics standards.”).


256. To the contrary, the court observed that “it appears that HP’s ethics and compliance policies worked. Hurd did not live up to HP’s standards; HP became aware of Hurd’s ostensible misconduct; HP quickly launched an investigation, confirming the misconduct; and Hurd resigned.” Retail Wholesale, 845 F.3d at 1277 n.3. Accordingly, Retail Wholesale suggests that public companies can implement and act on ethics programs without resulting disclosure liability.
sure would have been a material omission.\textsuperscript{257} The unequivocal statement distinction is also shown in \textit{In re Omnicare, Inc. Securities Litigation (Omnicare)}.\textsuperscript{258} In \textit{Omnicare}, the company received key information, namely audit results revealing “substantial fraud” and “billing irregularities,”\textsuperscript{259} but failed to correct previous unequivocal statements.\textsuperscript{260} While the \textit{Omnicare} court did not find scienter existed, they did find a “material omission.”\textsuperscript{261}

Public companies should also be particularly vigilant in avoiding repeated ethical lapses because courts in such scenarios may be more likely to find a material misstatement or omission.\textsuperscript{262} For example, the Ninth Circuit, in \textit{Retail Wholesale}, noted it “would likely be different if HP had continued the conduct that gave rise to [a] 2006 scandal while claiming that it had learned a valuable lesson in ethics.”\textsuperscript{263} In fact, the Sixth Circuit, in \textit{Omnicare}, found that the company in question had a recent history of non-compliance issues

\textsuperscript{257} There is an important difference between a company’s announcing rules forbidding conduct and its factual representation that no officer has engaged in such forbidden conduct. \textit{See In re PetroChina Co. Sec. Litig.}, 120 F. Supp. 3d 340, 360 (S.D.N.Y. 2015) (“Although the Company’s codes of ethics prohibit bribery and other forms of fraudulent conduct, they do not claim that PetroChina’s officers are abiding by them. Since the [complaint] does not challenge the actual existence of these rules, nor PetroChina’s description of them, Plaintiffs have not demonstrated that the Company’s statements were false or misleading.”).

\textsuperscript{258} \textit{In re Omnicare, Inc. Sec. Litig.}, 769 F.3d 455 (6th Cir. 2014).

\textsuperscript{259} \textit{Id.} at 479.

\textsuperscript{260} Omnicare’s material-compliance statements in its 10-K forms stated, “We believe that our billing practices materially comply with applicable state and federal requirements.” They also stated, “[W]e believe that we are in compliance in all material respects with federal, state and local laws.” \textit{Id.} at 477–78.

\textsuperscript{261} \textit{Id.} at 480–81.

\textsuperscript{262} \textit{See In re Petrobras Sec. Litig.}, 116 F. Supp. 3d 368, 380 (S.D.N.Y. 2015). In this case, the court held that a company’s statements about its “general integrity and ethical soundness” were not immaterial as a matter of law. \textit{Id.} at 380. The court said that although statements viewed in isolation, may be mere puffery, the defendant had repeatedly used the statements “in an effort to reassure the investing public about the Company’s integrity,” so as to cause “a reasonable investor [to] rely on them as reflective of the true state of affairs at the Company.” \textit{Id.} at 381. Therefore, “[w]hether a representation is ‘mere puffery’ depends, in part on the context in which it is made.” \textit{Id.}

\textsuperscript{263} Retail Wholesale, 845 F.3d at 1278. The court commented that the context of statements is only relevant to the materiality prong and not to the misrepresentation prong of disclosure liability. \textit{Id.} (citing to Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 43–47 (2011)). The court then ignored the context of the HP’s previous ethics scandal and determined that the statements were not material. However, the court seemed to imply that context would matter if the conduct had been more similar to that of the 2006 scandal. \textit{Id.}
and therefore the subsequent non-compliance was material infor-
mation to investors.264

As a general rule, then, public companies should avoid making
unequivocal statements related to ethics, including issues pertain-
ing to sexual misconduct. Further, companies should make an ex-
tra effort to avoid statements related to previous ethical lapses,
since these incidents could contribute to the statements’
materiality.

2. Post-Detection Affirmative Duties to Disclose

Federal securities laws, and the rules265 and regulations266
promulgated thereunder, affirmatively require the disclosure of
certain information. Public companies have an ongoing obligation
to disclose information,267 but only in rare circumstances will a
company have a duty to disclose sexual misconduct. Additionally,
some corporate actions trigger an immediate duty to disclose mate-
rial information,268 including sexual misconduct that is material.

Item 103 of Regulation S-K, entitled “Legal proceedings,” is
particularly relevant to potential sexual misconduct disclosure lia-

264. In re Omnicare, 769 F.3d 455 at 478.
267. See, e.g., 17 C.F.R. § 229.103 (2019); 17 C.F.R. § 229.303 (2019). Hemel
and Lund argue that sexual misconduct may also trigger a duty to disclose under
Item 402, which requires public companies to publish details on compensation
paid to its CEO, CFO, and the three other most highly paid employees. See Hemel
& Lund, supra note 33, at 42; see also 17 C.F.R. § 229.402 (2019). They argue that
“if the company—in effect—allows its CEO to seek sexual pleasure through the
harassment of employees and then pays to clean up the resulting legal mess,” this
could arguably constitute a “perquisite” that must be disclosed under Item 402. Id.
at 53.
269. Many legal proceedings are typically publicly filed, which can simplify a
company’s disclosure decision. However, as the Signet Complaint reveals, sexual
misconduct litigation is often obscured by arbitration provisions, which could pot-
tentially tempt a company to hide the extent of the litigation from the public.
Signet Complaint, supra note 209, 82–83.
270. 17 C.F.R. § 229.103 (2019).
registrant and its subsidiaries on a consolidated basis.” Item 103 further requires companies to describe any legal proceedings “known to be contemplated by government authorities,” although it is doubtful that the term “legal proceedings” would pertain to many internal or government investigations of sexual misconduct. For example, in In re Lions Gate Entertainment Corp. Securities Litigation, the U.S. District Court for the Southern District of New York held that an SEC investigation, or even the receipt of a Wells Notice, is not per se material to investors and therefore need not always be disclosed. The court held that the mere “possibility of materiality” is not enough to support a securities fraud claim. In other words, the court found that while a public investigation may prompt the beginning of a disclosure conversation, companies need not disclose investigations under Item 103 until legal proceedings have begun. In essence, the affirmative disclosure duties imposed by Item 103 are actually rather limited.

Item 303 of Regulation S-K, entitled “Management’s discussion and analysis of financial condition and results of operations,” requires public companies to disclose “any known trends or uncertainties that have had or that the company reasonably expects will have a material favorable or unfavorable impact on net sales or rev-

271. 17 C.F.R. § 229.103(2) (2019). Because the materiality standard is often assessed relative to the size of a company, there are times it does not apply to large companies that fail to disclose information that would rise to the level of materiality at smaller companies, thereby leading to “materiality blindspots.” See George S. Georgiev, Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation, 64 UCLA L. Rev. 602, 633 (2017). For example, Twenty-First Century Fox’s sexual misconduct-related settlement payments, while large, were relatively small compared to the total size of the company. Compare Fountain & Folkenflik, supra note 156 (reporting that Gretchen Carlson’s settlement was for $20 million and experts said it was ambiguous whether the settlement payments were significant enough on a financial basis to warrant disclosure), with Press Release, The Walt Disney Co., The Walt Disney Company to Acquire Twenty-First Century Fox, Inc., After Spinoff of Certain Businesses, for $52.4 Billion in Stock (Dec. 14. 2017), https://thewaltdisneycompany.com/walt-disney-company-acquire-twenty-first-century-fox-inc-spinoff-certain-businesses-52-4-billion-stock-2/ [https://perma.cc/ECM3-4ZA8] (revealing that Twenty-First Century Fox was worth many multiples of $20 million).


273. 165 F. Supp. 3d 1, 12 (S.D.N.Y. 2016) (“[T]he defendants did not have a duty to disclose the SEC investigation and Wells Notices because the securities laws do not impose an obligation on a company to predict the outcome of investigations. There is no duty to disclose litigation that is not ‘substantially certain to occur.’”).

274. Id. at 14.
enues or income from continuing operations.” 275 The Supreme Court is currently considering whether there is a disclosure duty under Item 303 that is actionable under § 10(b) of the 34 Act. 276 If the court finds that there is, Item 303 may require companies to disclose information related to sexual misconduct in order to avoid disclosure liability. 277 For instance, the SEC issued Item 303 “cyberattack” guidance which states, “If it is reasonably likely that the attack will lead to reduced revenues, an increase in cybersecurity protection costs, including related to litigation, the registrant should discuss these possible outcomes, including the amount and duration of the expected costs, if material.” 278 By analogy, if a sexual misconduct allegation leads to a material amount of reduced revenues or increased compliance and litigation costs, a public company presumably should conduct Item 303 disclosure.

Additionally, as the Supreme Court emphasized in Chiarella v. United States, certain corporate actions trigger a duty to disclose material non-public information (MNPI). 279 Under insider trading doctrine, for example, companies and corporate insiders have a duty to disclose all material facts before buying or selling the company’s securities. 280 Furthermore, Regulation FD mandates that when public companies disclose MNPI, they do so to all investors at

---


277. In Indiana Public Retirement System v. SAIC, Inc., investors alleged that the corporation was aware of employee wrongdoing in connection with a city contract and the corporation’s potential liability to that city but still did not disclose it on the corporation’s 10-K. 818 F.3d 85, 85 (2d Cir. 2016). An analogous sexual misconduct scenario would arise if a company knows of sexual misconduct and its potential liability but fails to disclose it.

278. SEC, supra note 88.

279. 445 U.S. 222, 228 (1980) (“[O]ne who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.”) (internal citations omitted).

280. Id. (“Application of a duty to disclose prior to trading guarantees that corporate insiders, who have an obligation to place the shareholder’s welfare before their own, will not benefit personally through fraudulent use of material, nonpublic information.”); see also, United States v. O’Hagan, 521 U.S. 642, 651–53 (1997) (explaining the “classical” and “misappropriation” theory of insider trading liability).
the same time;\textsuperscript{281} if a company unintentionally discloses MNPI to only a few people, it must cure the problem by promptly disclosing that information to the rest of the public.\textsuperscript{282} In another example, public companies have certain disclosure obligations while they are undergoing a merger or acquisition.\textsuperscript{283} Therefore, to the extent that a company knows of material sexual misconduct, they must disclose it when there is a triggering event, such as insider trading or partial disclosure.

Furthermore, under § 10(b) and Rule 10b-5, public companies must not make any misleading statements concerning material sexual misconduct.\textsuperscript{284} Accordingly, companies must be complete when publicly discussing such issues. "Complete" does not necessarily mean disclosing all information related to the incident—for example, companies should avoid disclosing the names of victims or any facts that would make those victims easily identifiable.\textsuperscript{285} However, when a company makes a misleadingly incomplete disclosure regarding material sexual misconduct, they have a duty to disclose all information necessary to make that statement not misleading. Therefore, public companies can control their duty to disclose material sexual misconduct under Rule 10b-5, in part, by limiting their public statements.\textsuperscript{286} Even so, it may be unrealistic to expect that public companies will be able to remain silent about material sexual misconduct. As explained below, the longer a company holds onto a material fact without disclosure, the more it risks being accused of making a misleading statement.

Otherwise innocuous comments can trigger 10b-5 liability when a company holds onto information related to material misconduct. A recent case in the Southern District of New York, In re

\textsuperscript{281} 17 C.F.R. §§ 243.100-243.103 (2019).

\textsuperscript{282} Id.

\textsuperscript{283} See, e.g., Article 11 of Regulation S-X, 17 CFR § 210.11-01 (2014) (generally requiring the provision of pro forma financial information where a significant acquisition or disposition "has occurred or is probable"); Item 14 of Schedule 14A, 17 CFR § 240.14a-101 (requiring Article 11 pro forma financial information and extensive other information about certain extraordinary transactions if shareholder action is to be taken with respect to such a transaction).

\textsuperscript{284} See supra notes 25, 87–91, 116, 117 and accompanying text.

\textsuperscript{285} The EEOC found "reasonable cause" to believe that an employer violated Title VII when it revealed the name of a former employee with a pending sexual harassment claim against the company and characterized the claim as "meritless"; the Seventh Circuit agreed that the disclosure "constituted a material adverse employment action" because it "might be negatively viewed by future employers." Greengrass v. Int’l Monetary Sys., Ltd., 776 F.3d 481, 484 (7th Cir. 2015).

\textsuperscript{286} See analysis supra Section I.D.
VEON Ltd. Securities Litigation, is an apt example. VEON entered into a deferred prosecution agreement with the United States Department of Justice, pursuant to which the company pled guilty to Foreign Corrupt Practices Act violations. The company was also promptly sued for disclosure liability and found to have made material misstatements. For example, VEON credited its “sales and marketing efforts” for the growth of its operations in Uzbekistan without mentioning that it had also paid bribes to obtain business. Additionally, VEON’s disclosure about owners of telecommunications networks in Uzbekistan enjoying “equal protection guaranteed by law,” were found to be misleading since VEON had to pay bribes to operate in the country. Essentially, VEON’s statements, although initially appearing to be general business statements, gave rise to disclosure liability following the revelation of FCPA violations and 20/20 hindsight.

Thus, public companies should question whether they can hold onto material information, such as proven or alleged sexual misconduct, without making a material misstatement. For example, many public companies routinely make general statements in their SEC filings that they rely on their senior management to succeed. A court may very well find statements like these to be actionable misstatements when the company has failed to disclose proven or alleged sexual misconduct against an executive. In essence, complete and immediate disclosure is the only option that fully addresses the risk of sexual misconduct disclosure liability.

CONCLUSION

Sexual misconduct has a negative impact on multiple parties. Naturally, the victims of sexual misconduct are often emotionally and physically traumatized. Consequences to the accused stemming from such allegations range from reputational damage to incarceration. In the case of corporate officers or employees, sexual misconduct allegations can also have a materially negative impact on the companies with which the accused are affiliated, which in turn can

288. Id. at *1.
289. Id. at *8.
290. Id. at *6.
291. Id. at *7.
292. See, e.g., Wynn Las Vegas, LLC, Annual Report (Form 10-K) at I (Feb. 24, 2017) (“Our ability to maintain our competitive position is dependent to a large degree on the efforts, skills and reputation of Stephen A. Wynn.”).
293. See supra notes 173–175 and accompanying text.
cause economic harm to investors. In such circumstances, sexual misconduct raises a corporate concern of disclosure liability under federal securities laws.

In the wake of the #MeToo movement, public corporations face a particularly significant, but underestimated, risk of sexual misconduct disclosure liability. The victims of corporate sexual misconduct are more willing to publicly fight back in the #MeToo environment. Their allegations could have a material impact on companies by imposing a variety of costs including decreased productivity, reputational damage, and litigation expenses. Additionally, the increased number of allegations, publicized nature of the sexual misconduct, and an overall increase in securities disclosure cases makes it more likely that companies will face both public and private disclosure liability enforcement efforts.

The core purpose of securities disclosure is protecting investors. Companies therefore generally need only to focus on disclosing information that is material to investors to avoid liability. Material information pertaining to sexual misconduct includes incidents that implicate key executives or a significant number of employees, especially when they are combined with other investor-important factors. As the impact, frequency, and enforcement of corporate sexual misconduct allegations increase in the #MeToo world, however, its material importance to investors will grow as well.

Statements made prior to the detection of sexual misconduct will not lead to direct disclosure liability, but public corporations may have a duty to correct or update previously false material statements once any misconduct is detected. The materiality of those pre-detection statements will depend on their equivocality and whether they referenced an ongoing history of sexual misconduct. Therefore, after misconduct is detected, companies should examine their earlier public statements to determine if additional disclosure is required.

After a company detects material sexual misconduct, they must also comply with affirmative duties that require disclosure of information pertaining to that misconduct. Additionally, Rule 10b-5 requires that public companies must not make any untrue statements concerning material sexual misconduct. It further requires that companies must be complete when publicly discussing material sexual misconduct; a company that makes an incomplete disclosure has a duty to complete it. Since otherwise innocuous comments can trigger Rule 10b-5 liability when a company holds onto material in-
formation, immediate disclosure is the only option that fully addresses the risk of sexual misconduct disclosure liability.

By definition, sexual misconduct can cause profound harm to everyone associated with it. Companies should not add to this harm by attempting to deceive the investing public. Instead, companies should strongly consider fully, truthfully, and immediately disclosing material sexual misconduct to the investing public.
APPENDIX A: “PUBLIC” SEXUAL MISCONDUCT ALLEGATIONS

Temin’s #MeToo Index
Public Accusations of Sexual Misconduct

2019] SEXUAL MISCONDUCT & SECURITIES DISCLOSURE 135

APPENDIX B: SHARE-PRICE IMPACT OF ALLEGED SEXUAL MISCONDUCT295

<table>
<thead>
<tr>
<th>Despicable me 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Share-price change over two weeks, indexed to day before allegations=100</td>
</tr>
</tbody>
</table>

- **Fox:** Bill O'Reilly takes leave of absence
- **Wynn Resorts:** Steve Wynn resigns
- **Guess:** Paul Marciano resigns six months later
- **Nike:** Travis Edwards leaves company
- **CBS:** Les Moonves resigns over a month later
- **Barnes and Noble:** Demos Parneros is fired for unspecified reasons*

*Allegations confirmed over a month later

Source: Bloomberg

The Economist

136 NYU ANNUAL SURVEY OF AMERICAN LAW [Vol. 75:85
INTRODUCTION

Concern with regulatory agency (mis)use of guidance documents has ebbed and flowed over time.1 As of late, sustained criticism from each branch of the federal government has been the order of the day. With respect to the executive branch, at the 2017

Federalist Society's National Lawyers Convention in Washington, D.C., former Attorney General Jeff Sessions expressed concern that regulatory agencies were using guidance documents impermissibly. Sessions explained, “Too often, rather than going through the long, slow regulatory process provided in statute, agencies make new rules through guidance documents . . . . Guidance documents should be used to reasonably explain existing law – not to change it.” He continued, stating that he had “prohibited all Department of Justice (DOJ) components from issuing any guidance that purports to impose new obligations on any party outside the executive branch [and that the DOJ] will review and repeal existing guidance documents that violate this common sense principle.”

In Congress, a handful of senators have also taken up the guidance issue. In May of 2015, Senators Lamar Alexander and James Lankford sent a letter to the Department of Labor that laid out their concerns about the Agency’s use of guidance documents. The Senators first noted that guidance documents are exempt from notice-and-comment procedures “because they do not have the force of law,” and then stated their worry that “federal agencies are increasingly using guidance that appears to create new requirements without the benefit of notice-and-comment but with the expectation that the public comply.” In addition to the letter, the Senators held hearings in 2016 entitled “Examining the Use of Agency Regulatory Guidance” that looked into agencies’ use and abuse of guidance documents.

Although, as will be discussed below, the judiciary infrequently reviews use of guidance documents, it too has registered its disapproval of the ways in which agencies employ them. For example, in Appalachian Power Co. v. Environmental Protection Agency, the D.C. Circuit lamented:

The phenomenon we see in this case is familiar . . . . One guidance document may yield another and then another and

3. Id.
5. 208 F.3d 1015, 1020 (D.C. Cir. 2000).
so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

As will be discussed in Part II, administrative law scholars have largely reached conclusions similar to those above. Namely, that there are serious problems with agencies’—and the Food and Drugs Administration’s (FDA) in particular—uses of guidance documents.

This Note, then, seeks to address the guidance problem. However, taking the approach advocated by Jill Family—that the “best approach to reforming agency use of guidance documents is an agency-by-agency approach”6—this Note focuses exclusively on the FDA’s use of guidance documents in the medical drug, device, and technology context.

In brief, this Note argues that while there are real problems with guidance documents as currently employed,7 seriously curtailing or ossifying guidance document issuance would be a grave mistake in light of the virtual revolution in science and technology confronting the FDA.8 Instead, the right formulation would acknowledge the critical role guidance documents play and will continue to play in the future, and balance the needs of regulated entities (e.g., clarity, speed, and agency accountability) with the needs of the FDA (e.g., speed, flexibility, and resource conservation).9

To that end, this Note offers a novel framework for the issuance and judicial review of FDA guidance documents consisting of two stages. At stage one, the FDA would issue a draft guidance document, including an explanation of its legal basis and a sunset provision. Upon issuance, concerned parties could then challenge the legal basis of the draft guidance in court, with the FDA’s analysis receiving Skidmore deference in judicial proceedings.10 After the propriety of the draft guidance is either unchallenged or affirmed, the FDA would then have until the end of the sunset provision to issue a final guidance or repeal the draft.

7. See infra Part I.
8. See infra Part III.
9. Id.
10. See infra Section IV.A.
At stage two, the FDA would issue a final guidance document. It would contain the guidance’s factual bases. Once promulgated, regulated entities could then challenge the final guidance in court under a modified *State Farm*\(^{11}\) arbitrary and capricious standard.\(^{12}\) Draft challenges would be filed in federal circuit courts and final guidance challenges would be lodged in federal district courts.\(^{13}\)

Altogether, this Note comprises five parts. Part I discusses the codification of the FDA’s guidance practices as well as the current state of play. Part II addresses scholarly approaches to the guidance problem as well as the shortcomings of those proposals. Part III seeks to reframe the debate concerning guidance documents and explain why guidance documents should be seen as valuable—perhaps necessary—tools of regulation at the FDA, and why, despite their prominence, guidance documents should not be subject to rule-like formality in issuance and review. Part IV lays out the two-stage process of guidance issuance and judicial review and explains the advantages of this proposed framework. Part V concludes.

### I. THE FDA’S RELATIONSHIP WITH GUIDANCE DOCUMENTS

The FDA has long used guidance documents or something similar to inform both regulated entities and Agency personnel.\(^{14}\) The nature of those informal guidance documents has changed over time depending on a variety of factors, including the needs of industry, the needs of the Agency, and the shifting views of various interested parties as to the propriety of the documents.\(^{15}\) In the last two decades, however, guidance documents have begun to play an unprecedented role in the Agency’s regulatory apparatus,\(^{16}\) effectively supplanting legislative rules and leading to considerable consternation. This Part discusses the codification of the FDA’s guidance practices, the current state of affairs, and the vocal concerns attendant to them.

---


\(^{12}\) See infra Section IV.B.

\(^{13}\) See infra Section IV.D.

\(^{14}\) See Lewis, *supra* note 1.

\(^{15}\) Id. at 509 (describing a recent ‘explosion of guidance at the FDA’); see also infra notes 31–32, 41.
A. The FDA and Guidance Documents: Codification

After playing a somewhat moderate role in the FDA’s regulatory scheme for many years, informal guidance [had become] FDA’s primary method of policymaking” by the mid-1990s. Numerically, that meant that the number of guidance documents issued by the FDA from the 1970s to the 1990s grew by leaps and bounds while the number of notice-and-comment rules decreased. Due to this pronounced shift, “cries that the [then-]required procedure was being subverted” and pressure from industry and the courts, the FDA began investigating how it could formalize the nature of and issuing process for guidance documents. After a series of public hearings, the FDA’s efforts culminated in the Agency adopting “Good Guidance Practices” (“GGP”) in 1997. GGP, which ultimately became law in the 2000 FDA Modernization Act (“FDAMA”), remains in force today.

Among other changes, GGP divided FDA guidance documents into two tiers and injected significant guidance documents

17. See Lewis, supra note 1, at 509–23 (discussing the FDA’s use of and rationale for employing a variety of informal guidance documents including “FIDs,” “TCs,” and “Formal Statements”).

18. Id. at 520.

19. Todd D. Rakoff, The Choice Between Formal and Informal Modes of Administrative Regulation, 52 ADMIN. L. REV. 159, 168 (2000) (noting that as compared to “the late 1970s or early 1980s . . . . the number of FDA regulations adopted each year [in the early to mid-90s through notice-and-comment procedures] declined by about fifty percent while . . . . the rate per year [of guidance documents issued was] about four hundred percent greater than the rate for the 1980s”).


21. See Lewis, supra note 1, at 520–23; see also Lars Noah, Governance by the Backdoor: Administrative Law(lessness?) at the FDA, 93 Neb. L. Rev. 89, 98 (2014) (“This policy [Good Guidance Practices] represented a response to complaints that the FDA inappropriately used guidance documents as if they constituted binding rules that regulated entities had to follow.”).

22. 21 C.F.R. § 10.115.

23. For more detailed histories of the development of GGP, see, e.g., Family, supra note 6, at 31–34; Lewis, supra note 1, at 509–23; Noah, supra note 21, at 90–110.

24. 21 U.S.C. § 371(h) et seq.

25. Noah, supra note 21, at 99 n.41.

26. Good Guidance Practices also includes the requirement that the FDA not include mandatory language in guidance documents, the mechanism by which interested parties can petition the FDA for review of guidance documents, and the reaffirmance that guidance is neither binding on the FDA nor on regulated parties. See generally 21 C.F.R. § 10.115.
with watered down notice-and-comment procedures. Level 1 guidance documents “[s]et forth initial interpretations of statutory or regulatory requirements; set forth changes in interpretation or policy that are of more than a minor nature; include complex scientific issues; or cover highly controversial issues.” Level 2 guidance documents are “guidance documents that set forth existing practices or minor changes in interpretation or policy” and “include all guidance documents that are not classified as Level 1.”

Commensurate with that division, Level 1 and Level 2 guidance documents demand different levels of procedural formality. Most notably, whereas Level 2 guidance documents can be acted on immediately after publication in the Federal Register, Level 1 guidance documents cannot be adopted until the public has had an opportunity to comment on them, though the FDA need not actually respond to those comments.

B. Current State of Play

Even after the formalization of guidance procedures, guidance documents remain the FDA’s primary means of policymaking. According to Lars Noah, the FDA continues to issue guidance documents much faster than it issues rules, and there may be nearly two thousand FDA guidance documents currently circulating. In fact, there is some indication that, notwithstanding whatever the implementation of GGP was intended to accomplish, it actually has

27. Professor Rakoff remarked around the time of Good Guidance codification that, in fact, the “new” guidance processes looked a lot like the original understanding of notice-and-comment rulemaking. Rakoff, supra note 19, at 169 (“It would not be far-fetched to rephrase these matters by saying the FDA now proposes to issue its important regulations mostly in accordance with the notice-and-comment rulemaking procedures set forth in the APA, as it was understood before 1970.”).


29. Id. at (c)(2).

30. Id. at (g)(1)(ii)(C).

31. See, e.g., Noah, supra note 21, at 90 (noting the FDA’s “shift from the promulgation of binding rules to the issuance of nonbinding guidance documents”).

32. Id. at 103 (“The latest version of [a sporadically published guidance document compendium] reveals almost two thousand guidance documents, in both draft and final form, and in recent years the FDA has produced more than a hundred new ones annually, easily outpacing the frequency of notice-and-comment rulemaking.”); see also id. at 103 n.68; Clyde Wayne Crews Jr., Mapping Washington’s Lawlessness: An Inventory of Regulatory Dark Matter, COMPETITIVE ENTERPRISE INSTITUTE, Mar. 2017, at 28 (“The Food and Drug Administration (FDA) acknowledges 1,819 pieces of final guidance as of this writing.”).

33. See Lewis, supra note 1, at 523 (“FDA’s aim in these reforms was to render all forms of informal guidance, including formal advisory opinions and guidelines,
stamped guidance documents with a level of “legitimacy” such that FDA personnel view them and notice-and-comment rules on relatively equal footing.\footnote{34}

Regardless of how widespread this belief is within the Agency, the reality in practice is that the guidance documents often do function like legislative rules\footnote{35} even though they are neither the result of adjudication nor the byproduct of formal or informal rulemaking.\footnote{36} Numerous commentators have sought to explain why this is. The crux of these various expositions is that the FDA, as the gatekeeper to the food and drug market, has extraordinary leverage over regulated entities.\footnote{37} In other words, the FDA’s pre-market ap-

\footnote{34. See \textit{Parrillo}, supra note 20, at 183 (discussing the perception that Good Guidance Practices “have heightened the FDA personnel’s sense of guidance’s legitimacy”). \textit{See also} Noah, supra note 21, at 97 (“Congress largely has endorsed and even encouraged [guidance documents’] development.”).}

\footnote{35. See, e.g., Rakoff, supra note 19, at 168 (“In short, guidance documents are meant to be statements of no legal consequence but immense practical consequence about virtually everything the agency regulates.”); Noah, supra note 21, at 104–05 (“[I]n spite of their explicitly ‘nonbinding’ character, draft or final guidance still often operate as de facto requirements.”); \textit{Parrillo}, supra note 20, at 4 (“The concern is that agencies in reality are not tentative or flexible when it comes to guidance but instead follow it as if it were a binding legislative rule, and regulated parties are under coercive pressure to do the same.”); Mark Seidenfeld, \textit{Substituting Substantive for Procedural Review of Guidance Documents}, 90 TEX. L. REV. 331, 343 (2011) (“Essentially, the policy [i.e., guidance] becomes practically binding in that it induces compliance even though it does not command independent force of law.”).}


\footnote{37. \textit{See}, e.g., Richard A. Epstein, \textit{The Role of Guidance in Modern Administrative Procedure: The Case for De Novo Review}, 8 J. LEGAL ANALYSIS 47, 70–71 (2016); \textit{Parrillo}, supra note 20, at 39 (“Given the nature of premarket approval, explained one food and drug industry attorney when discussing conformity to guidance, an applicant must anticipate how the FDA thinks; and it would be ‘foolish’ to proceed with an application without following the agency’s guidance.”); Noah, supra note 21, at 90 (“The FDA enjoys significant leverage over regulated entities, by virtue of its powers of enforcement and product licensing, and in both settings it can com-}
proval process imposes enormous costs—both monetarily and temporally—on regulated firms, and the cost-benefit analyses of those entities often lead them to comply.\textsuperscript{38}

These coercive effects are not, however, the only problems with the FDA’s current use of guidance documents. Additionally, guidance documents are largely unreviewable by courts, and the FDA not infrequently circumvents what limited procedural requirements GGP imposes. As to the former, commentators have noted that the judicial doctrines surrounding guidance documents—namely, inquiries into finality and ripeness—are deeply problematic and make “it difficult if not impossible to challenge agency action at any point prior to an enforcement action.”\textsuperscript{39} Thus, guidance documents not only bind parties, but also leave firms with limited opportunities to challenge them. As Todd Rakoff commented, so far as the FDA is concerned, guidance documents are “beyond the purview of the courts.”\textsuperscript{40}

As to the circumvention of GGP procedural requirements, the FDA has a tendency to leave guidance documents in draft form for

\textsuperscript{38} See, e.g., PARRILLO, supra note 20, at 64–65 (“The regulated party will compare the upside it sees in guidance-noncompliant behavior with the downside, which varies with four factors: (1) the probability of the agency detecting the regulated party’s guidance-noncompliant conduct and initiating enforcement to begin with, (2) the potential cost of the resulting enforcement proceeding irrespective of its outcome, (3) the probability that the proceeding will result in a finding that the party violated the relevant legislative rule or statute, and (4) the potential cost of sanctions attached to that finding.”); Michael S. Greve & Ashley C. Parrish, Administrative Law Without Congress, 22 GEO. MASON L. REV. 501, 532–33 (2015) (“[Draft guidance] documents do not bind the agency, but as a practical matter, they are binding on regulated firms . . . . The legal uncertainty created by the lack of regulations, combined with agency threats to seek massive penalties, produces an in terrorem effect sufficient to generate large settlements.”); David L. Franklin, Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut, 120 YALE L.J. 276, 311 & n.180 (2010).

\textsuperscript{39} Gwendolyn McKee, Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine, 60 ADMIN. L. REV. 371, 374 (2008); see also, e.g., Stephen Hylas, Final Agency Action in the Administrative Procedure Act, 92 N.Y.U. L. REV. 1644, 1644 (2017) (“[T]he second prong of [Bennett v. Spear] . . . . seems to effectively bar courts from reviewing nonlegislative rules before agencies have taken enforcement action.”); Stephen M. Johnson, Good Guidance, Good Grief, 72 MO. L. REV. 695, 712 (2007) (“[Due to uncertainty surrounding judicial challenges to guidances], businesses will be reluctant to make major changes to their activities that might conflict with the position taken by the agency in the rule, even though they may want to do so, and even though they believe that the rule is inconsistent with the law.”).

\textsuperscript{40} Rakoff, supra note 19, at 169.
years. This has several consequences. First, by leaving Level 1 draft guidance documents in draft form, the FDA effectively turns them into Level 2 documents, thereby violating the spirit, if not the letter, of GGP. Second, given finality and ripeness concerns, leaving the guidance documents in draft form renders judicial review even more unlikely to occur than when the guidance is finalized. Third, draft guidance documents lead to increased confusion for regulated entities and decreases their confidence and trust in the Agency. Fourth, despite all of the above, the FDA still manages to obtain compliance. As Professor Parrillo relayed in his Administrative Conference of the United States (“ACUS”) report, a trade agency official noted that it would be “folly” not to follow the FDA’s draft guidance in the context of the pre-market approval process.

While the FDA has taken notice of complaints about its use of draft guidances, there is little to no evidence that the Agency plans to adjust their use anytime soon. In fact, there appears to be a sense within certain parts of the Agency that draft guidances are sufficient. Professor Parrillo documented this tension in his ACUS report. He relays, for example, the thoughts of one former FDA official who said, “FDA personnel think draft guidance is ‘good enough’ . . . . [T]he draft gives regulated parties what they need to know about agency thinking and stops them from asking questions about what the agency wants, thus taking away the perceived need for more explanation from the agency.”

Taken together, there are very good reasons to be concerned with the FDA’s use of guidance documents as it currently stands. This is true whether viewed from a separation of powers standpoint, from a rule of law standpoint, or from a regulated entity or beneficiary standpoint. Simply put, a federal agency that can bind parties

---

41. Noah, supra note 21, at 104; Parrillo, supra note 20, at 179 (“FDA is not the only agency that has left guidance in ambiguous draft status for long periods.”); Greve & Parrish, supra note 38, at 532 (“In recent years, FDA has largely forswn regulation through notice-and-comment rulemaking procedures. Instead, it regulates through never-finalized ‘draft’ guidance documents.”).

42. Noah, supra note 21, at 104 (“Level 1 guidance often remain in draft form, which makes the procedures for their issuance (as drafts) essentially the same as those used for Level 2 guidance.”).

43. Parrillo, supra note 20, at 171–81 (discussing the confusion that arises out of indefinite draft guidance). See also Johnson, supra note 39, at 712 (describing the uncertainty that arises out of inconsistency in judicial review).

44. Parrillo, supra note 20, at 40. See also Noah, supra note 21, at 104–05. But see Parrillo, supra note 20, at 178–79 (relaying that some of his interviewees said whether to comply with draft guidance was context-specific).

45. See Parrillo, supra note 20, at 174–75.

46. Id. at 174.
without a single traditional safeguard—public input, agency response, judicial review—is a lawless one. It should thus come as little surprise that the FDA has been subject to substantial criticism from diverse actors.

II. ACADEMIC SOLUTIONS TO THE GUIDANCE DOCUMENT PROBLEM

Although public umbrage with guidance documents has grown increasingly pronounced in the last few years, scholars have been sounding the alarm for the better part of three decades. In 1992, Robert Anthony questioned whether “Interpretive Rules, Policy Statements, Guidance Manuals, and the Like” should bind the public. Since then, scholars have taken several different approaches to addressing the guidance problem. Those approaches can be grouped into three categories: (A) procedural changes, (B) non-governmental changes, and (C) doctrinal changes. This section elaborates on those approaches and explains why each is unsatisfactory.

A. Procedural Changes

The “procedural changes” category encompasses proposed changes to the procedures attendant to guidance document issuance. For example, a handful of scholars have suggested that guidance documents, or at least certain guidance documents, should be subject to procedures akin to those required of notice-and-comment rulemaking. In the same vein, but more modestly, another scholar has suggested that, among other alterations, agencies should provide some limited opportunity for public comment on guidance documents.

With respect to the former suggestion, turning guidance documents into legislative rules would deny the FDA the benefits of guidance documents—e.g., speed, flexibility, and resource conservation. Generally, even scholars who believe that coercive

48. See, e.g., Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 CORNELL L. REV. 397, 444–45 (2007) (discussing this possibility); see generally Anthony, supra note 47 (advocating for such a change expressly).
50. See, e.g., PARRILLO, supra note 20, at 7 (Guidance documents make “frontline agency decisionmakers more decisive and fast . . . . saving time and re-
guidance documents should be addressed still hold that guidance
documents can serve important functions as they currently exist.\footnote{51}{See, e.g., Anthony, supra note 47, 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.”). Cf. Franklin, supra note 38, at 306 (“By the same token,
however, there is good reason not to insist that all agency policymaking take place via
notice and comment . . . . To put matters simply, one of the benefits of nonlegis-
lative rulemaking, at least in contexts where notice and clarity are especially
important, is that it is not pure adjudication.”).}

As to the latter suggestion, while it addresses some of the problems
with guidance documents—\textit{i.e.}, that the public is often shut out—it
fails to confront the unreviewable nature of guidance documents.
Moreover, as exemplified by the FDA’s use of Level 1 guidance doc-
uments, simply adding a comment period alone is insufficient to
protect regulated entities and quickly runs into the problems associ-
ated with the first proposed solution.

Another scholar has suggested that agencies should explain
why they have chosen to proceed through, for example, guidance
document rather than legislative rule.\footnote{52}{See generally Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi.
L. Rev. 1383 (2004). As Mark Seidenfeld notes, Magill’s argument is “implicit.”
Seidenfeld, supra note 35, at 364 n.174.} As with the above, one ma-
ajor shortcoming of this proposal is that it does not address the reality
that most guidance documents do not receive judicial review by
virtue of going unchallenged. Furthermore, as Elizabeth Magill ac-
knowledges (even though she rejects the justifications for it being so),
discretionary agency choices surrounding which policymaking
form an agency will deploy are ordinarily unreviewable.\footnote{53}{See Magill, supra note 52, at 1385 (“An agency can choose among its available
policymaking tools and a court \textit{will not} require it to provide an explanation for
its choice.”); see also Stephen M. Johnson, In Defense of the Short Cut, 60 U. Kan. L.
826 (1985) (discussing that, although a narrow exception, certain agency decisions
are unreviewable because they are “committed to agency discretion by law”).}

Accordingly, even if courts were to review an agency’s choice, it is not clear
that such a review would present a meaningful check.
B. Non-Governmental Changes

The “non-governmental changes” category includes an amalgam of scholarly responses that look outside the procedural requirements for issuing guidance documents. For example, focusing on the downside of guidance documents to regulatory beneficiaries, Nina Mendelson has suggested that a more aggressive and formalized citizen petition process would rein in guidance document abuse.54 But, as Mark Seidenfeld notes, Professor Mendelson’s proposal has several issues: an agency’s obligation to respond would slow down guidance document issuance to the point of approximating notice-and-comment rulemaking;55 Professor Mendelson’s solution does not address courts’ disinclination to review the documents;56 and such a procedure appears already to exist but is virtually never used.57

Another approach under this header, offered by William Baude, suggests that regulated entities should be able to invoke a kind of qualified immunity. Thus, “[i]f presented with executive guidance that takes an aggressive or questionable interpretation of the [underlying] statute, the regulated entity would now be able to more confidently go on about its business, ignoring the agency’s position.”58

This approach is attractive, but regulated entities may nevertheless be concerned about the collateral consequences that come with being subject to an enforcement proceeding, even if they prevail.59 Similarly, given the cost-benefit analyses of regulated entities in the premarket approval process, even a good chance that their actions will be deemed “reasonable” may not be enough of an in-

54. Mendelson, supra note 48, at 438–44.
56. Id.
57. Id. at 370–72 (“In light of the clear language and the nondefinitive judicial treatment of the applicability of the right to petition for modification to guidance documents, the dearth of cases in which stakeholders attempted to petition for modification of such a document seems to reflect an assessment that such a strategy is unlikely to succeed in getting courts to hold the agency accountable for the guidance document, rather than a belief that the strategy was precluded by the APA.”).
59. PARRILLO, supra note 20, at 65 (relaying a drug manufacturer executive’s account of his company’s cost-benefit analysis, including “are we prepared to take a warning letter and defend ourselves” and “the ‘probability’ of enforcement ‘times’ the ‘damage’ to the business in the event of enforcement”).
centive for them to disregard the FDA’s pronouncements in light of the costs of being wrong. Lastly, while certain actors have robust qualified immunity, there are good reasons to believe that regulated entities would not have such substantial coverage. For example, both police officers and regulated entities of course should follow the law, but a doctrine protecting police officers may have clearer policy underpinnings than one protecting pharmaceutical companies.

C. Doctrinal Changes

Far and away, however, the third and largest category of proposed changes encompasses modifications to judicial review of guidance documents. As Mark Seidenfeld explained, “[s]cholarship on guidance documents has developed into a debate between those who bemoan judicial doctrines that enable agencies to issue them too easily and those who complain that courts have imposed arbitrary barriers to their use.”60 In particular, the debate has centered around how and whether courts should go about determining if an agency pronouncement is “legislative.”

As Seidenfeld noted, the two sides of the debate can largely be divided into two categories: the “ex ante legal effects” school and the “ex post monitoring” school.61 The ex ante school, spearheaded by Robert Anthony62 and endorsed by scholars such as David Franklin,63 believes that courts should look at whether “the [guidance] document was issued with the intent to bind or otherwise had binding legal effect.”64 Put another way, this inquiry seeks to determine whether an agency pronouncement is, in fact, a legislative rule as opposed to the nonlegislative rule it purports to be. If a court determines that the agency pronouncement is binding but was promulgated through means other than notice-and-comment or formal rulemaking, it will invalidate the pronouncement. This legislative/

60. Seidenfeld, supra note 35, at 332.

61. Id. at 346, 352.

62. Id. at 345. See also Anthony, supra note 47, at 1355 (containing a section titled, “The Key Tests: Intend to Bind or Binding Effect”); Robert A. Anthony, “Well, You Want the Permit, Don’t You?” Agency Efforts to Make Nonlegislative Documents Bind the Public, 44 ADMIN. L. REV. 31, 34 (1992); PARRILLO, supra note 20, at 7–9 (commenting on Anthony’s position).

63. See generally Franklin, supra note 38, at 276 (arguing that judges have been “wise” in not adopting the ex ante school’s “shortcut” and should stick with the current doctrine); see also David L. Franklin, Two Cheers for Procedural Review of Guidance Documents, 90 TEX. L. REV. 111 (2011) (defending his position).

64. Seidenfeld, supra note 35, at 346.
nonlegislative line of inquiry is, by and large, the doctrine as it exists today in federal courts. \footnote{See, e.g., Franklin, \textit{supra} note 38, at 294 (“[C]ourts continue to take the long road, attempting to draw distinctions between legislative and nonlegislative rules based on substantive criteria such as substantial impact, legal effect, and the agency’s intent to bind itself and others.”).}{65}

Despite, or perhaps because of its widespread adoption, the “ex ante legal effects” school has come under sustained criticism from scholars who claim it is deeply confused. In fact, one scholar broadly supportive of the current state of affairs even noted the doctrine suffers from “smog and muddle.”\footnote{See also id. at 278–79 (“[I]t is no wonder that courts have labeled the distinction between legislative and nonlegislative rules ‘tenuous,’ ‘baffling,’ and ‘enshrouded in considerable smog.’”).}{66} The criticism tracks several different lines but is succinctly captured by Professor Seidenfeld:

Because the binding-effect approach provides no demarcation of the kind of binding force required, the extent of binding force required, or how likely the agency must be to apply the statement with binding force for a court to conclude that the statement is a legislative rule, the resulting judicial decisions are inconsistent and seemingly ad hoc.\footnote{Seidenfeld, \textit{supra} note 35, at 349.}{67}

In addition, at least in the context of the FDA, it seems that arbitrariness is practically inevitable. Per Professor Parrillo, underlying FDA machinations are not what lead regulated entities to comply with guidance documents.\footnote{PARRILLO, \textit{supra} note 20, at 9 (“That regulated parties often (though not always) feel strong pressure to follow guidance is absolutely true, but the origins of this fact usually lie not in some plot hatched by the agency but instead in a series of structural features of modern regulation and of the legislation that establishes it, nearly all of which are vastly beyond the control of the agency officials who are issuing a guidance document.”); see also id. at 9–10 (laying out structural reasons for guidance compliance: (1) pre-approval; (2) “continuous monitoring and frequent evaluations by the agency”; (3) compliance officers and relationships, and; (4) cost-benefit analyses).}{68} Instead, guidance documents act as binding due to structural issues arising out of the FDA’s gatekeeping role and the immense cost of premarket approval.\footnote{Id. at 324. See also id. at 278–79 (“[I]t is no wonder that courts have labeled the distinction between legislative and nonlegislative rules ‘tenuous,’ ‘baffling,’ and ‘enshrouded in considerable smog.’”).}{69} Thus, there is a sense in which \textit{all} guidance documents will have coercive effects. This means, barring a structural overhaul of the FDA and its approval process, a judicial doctrine that examines the “bindingness” of a guidance document will necessarily be ad hoc unless it strikes down virtually all guidance documents. Altogether, there are substantial reasons to leave behind inquiries into a guidance docu-
ment’s degree of “bindingness.” This, then, is the movement championed by the ex post school.

The ex post school, which includes scholars such as William Funk70 and Jacob Gersen,71 believes that courts should stop seeking to determine whether or not an agency pronouncement is legislative. Instead, the ex post school “advocates that a rule adopted without notice-and-comment procedures should be deemed a policy statement or interpretive rule, and that courts should monitor the agency’s reliance on these rules to ensure that it does not use them as if they have independent legal force.”72 While this approach certainly streamlines review—it has been informally titled the “shortcut”73—it leaves a great deal to be desired. As scholars have repeatedly emphasized, the coercive nature of guidance documents often operates sub silentio. Therefore, potentially problematic guidance documents—whether because they are beyond the bounds of an agency’s statutory jurisdiction or because they are lacking in a factual basis—will not be reviewed despite the likely effects on regulated entities. In response to these shortcomings, Mark Seidenfeld74 and Richard Epstein75 have argued that direct substantive review of the guidance documents is the best way to deal with the problem posed by guidance documents, although the two disagree, at a minimum, about the appropriate standard of review. Seidenfeld advocates for an arbitrary and capricious standard, while Epstein claims that the review should be done de novo. Both arguments deserve a closer look.

Seidenfeld begins by suggesting that guidance documents should be able to receive substantive review upon issuance.76 He provides two persuasive reasons for direct review: first, “any official issuing a guidance document that takes effect without further agency action should first seriously consider its consequences”; and second, because “a stakeholder adversely affected by such a guidance document is entitled to an explanation for the official’s decision.”77 Because direct review may currently be hindered by finality

73. Franklin, supra note 38, at 289 n.65.
74. Seidenfeld, supra note 35.
75. Epstein, supra note 37.
76. Seidenfeld, supra note 35, at 373.
77. Id.
and ripeness doctrines, Seidenfeld suggests modifying these doctrines to reduce doctrinal barriers preventing review.\footnote{Seidenfeld, supra note 35, at 375–85. Seidenfeld is not the first to suggest this kind of change. See generally Epstein, supra note 37; Hylas, supra note 39; McKee, supra note 39.}

Seidenfeld then argues that this direct review should be governed by a modified arbitrary and capricious standard: “Reasoned decisionmaking of guidance documents could mandate that agencies explain actions in terms of factors that are relevant and alternatives that are plausible given the state of knowledge available to the agency when it acted.”\footnote{Seidenfeld, supra note 35, at 388.} Further, the explanation provided by the agency should not be limited simply to general knowledge. Rather, “the general state of knowledge should be that of one who is familiar with the underlying predicates for the policy or interpretation.”\footnote{Id.}

Seidenfeld argues that this model provides multiple benefits: it commands agencies to build reasonable factual records,\footnote{Id. at 390.} permits members of the public as well as regulated entities to challenge guidance documents without first having to comply,\footnote{Id. at 374.} and is relatively quick.\footnote{Id. at 393–94.} On the last point, Seidenfeld notes first that, as opposed to a formal production procedure, the agency retains “flexibility to develop the information it believes it needs to meet the standard of review by the means it chooses”; and second that, rather than respond to each public submission, the agency need only consider common, meritorious arguments on the issue.\footnote{Id. at 393.} As such, the model balances accountability with speed and flexibility.

Epstein tracks Seidenfeld’s stance insofar as both argue for direct substantive review. Epstein, however, believes that an arbitrary and capricious standard is too “timid.”\footnote{Id. at 68, 72.} Instead, Epstein argues that courts should employ de novo review of agency interpretive rules and statements of policy (e.g., guidance documents), where they present pure questions of law.\footnote{Id. at 65.} In so doing, Epstein points to a concurrence by Justice Scalia in Perez v. Mortgage Bankers Association in which the late Justice expressed deep reservations as to judicial deference to agency interpretive statements (i.e., one form of...
guidance document): “Interpretive rules that command deference do have the force of law.”

Both Epstein’s and Seidenfeld’s views have much merit. First, they address head-on the current state of guidance “unreviewability,” and ensure that most, if not all, guidance documents can be reviewed pre-enforcement. Second, they are fairly attuned to the time and resource constraints that agencies face as well as the benefits of guidance documents with respect to speed and flexibility. As noted above, Seidenfeld explains expressly how that is so, and Epstein notes the likelihood of a self-selection process: “A powerful selection process will be at work in this idealized system. Those guidances that pose no threat will not be challenged. Those that do will be challenged.”

Both, however, do have some shortcomings. For example, Stephen Johnson criticizes Seidenfeld’s version of guidance document reform on several bases. First, he criticizes Seidenfeld for treating nonlegislative rules too much like legislative rules. It may be, in the context of other agencies, that this criticism is stronger where there is a larger functional gap between legislative and nonlegislative rules. In the context of the FDA, however, and certainly under the proposal here, that is somewhat beside the point. Regulated entities and the FDA are, themselves, already treating nonlegislative rules like legislative rules. It makes sense, therefore, to treat them alike.

Second, Johnson criticizes direct substantive review because it will slow down the issuance process. This is so, Johnson says, because it will increase the amount of litigation and increase the costs of nonlegislative rules by demanding the FDA compile a factual record. As to the potential flood of litigation, while it is true that the FDA could be faced with more litigation, it is far from clear that it would be a “flood.” First, as Epstein notes, it is likely that regulated entities would only challenge a small subset of drug and device regulations given cost-benefit analyses attendant to the drug and device approval processes. It stands to reason, and is at least intimated by the trade agency official comment highlighted in Section I.B, that if a company believes the lawfulness of new requirement is a toss-up, it would err on the side of letting it be. This is so

87. Id. at 67 (quoting Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring)).
88. Id. at 49.
90. Id.
91. Id. at 535.
particularly if the consequence of being wrong is the denial or delay of FDA approval. Similarly, as noted in Section III.B, if, as indicated in interviews with Professor Parrillo, companies really want clarity, it would seem incongruous for them to then upset the apple cart through legal challenges unless the FDA’s change is particularly onerous. Second, the Agency would likely adapt its guidance documents—whether by incorporating input from regulated parties or by narrowing the scope of its guidances—in an effort to stave off precisely this potential problem. Third, the method of issuance and judicial review outlined below should limit the length of litigation by determining the propriety of the guidance from a legal standpoint in short order. Fourth, litigation is not necessarily bad even if it slows down the FDA to some degree. Given the current dynamic of binding guidance, regulated parties should have the opportunity to challenge the FDA when it goes too far.

As to the second criticism that substantive review will slow down the process too much, while it may be the case that the Agency will need a greater factual record than it has now, that record is not so great and the procedural hurdles are not so high that its development will unduly delay the FDA. More particularly, by eliminating any specific method by which the FDA compiles its factual record, allowing the proposed draft guidance to be issued without factual or procedural hurdles on the front end, and limiting the nature of the factual record to relevant debates and other more general questions, the framework proposed here should limit the resources and time required for the FDA to compile its record.

More, however, could be said by Seidenfeld and Epstein in defense of guidance documents, and more attention could be paid to agencies’ rationales for employing them. Additionally, neither addresses the problems attendant to draft guidance documents. Even if the judicial doctrines were augmented such that final draft guidance documents were “final” and “ripe,” the question of what to do with draft guidance documents still would remain. In view of these shortcomings, this Note develops a framework in Part IV for issuance and judicial review of guidance documents, building on Seidenfeld’s and Epstein’s works. This framework addresses draft guidance issuance, ensures reviewability, and yet is sensitive to the benefits that flow from guidance documents to both the FDA and regulated entities.

Before turning to the framework in Part IV, however, Part III reframes the debate around guidance documents at the FDA. It argues that guidance documents not only serve a useful role as is, but
also that the challenges facing the FDA mean that guidance documents’ role will continue to grow in importance going forward.

III. REFRAMING THE DEBATE AROUND GUIDANCE DOCUMENTS AT THE FDA

Despite the issues bound up in the FDA’s current use of guidance documents, any effort seriously to curtail their issuance would be a mistake. The FDA’s traditional regulatory regime is now being foundationally challenged by technological and scientific advances. Depriving the FDA of the ability to act quickly and flexibly in response to those challenges would do much more harm than good to both regulated entities and regulatory beneficiaries (i.e., patients and doctors). While I am not alone in believing that guidance documents are useful,92 the following section is a more full-throated defense of the potential benefits of guidance documents given challenges now facing the FDA.

To that end, this section discusses the fact that the FDA now confronts a virtual technological and scientific revolution and that, absent a complete overhaul of the FDA, guidance documents may be the only way for the FDA to regulate successfully in face of these profound shifts in science and medicine.

A. Technological Innovation

The FDA is, admittedly, facing a number of challenges to its traditional regulatory regime.93 Several of these challenges come in

---

92. See sources cited supra note 50.
93. See, e.g., Press Release, Scott Gottlieb, Comm’r, Food & Drug Admin. (Jan. 9, 2018), https://www.fda.gov/news-events/fda-voices-perspectives-fda-experts/reflections-landmark-year-medical-product-innovation-and-public-health-advances-and-looking-ahead [https://perma.cc/V8BG-5J9R] (“These new advances also present new challenges. At FDA, we’re being confronted with the need to regulate highly novel areas of science like gene therapy, targeted medicine, cell-based regenerative medicine, and digital health; where our traditional approaches to product regulation may not be as well suited. To meet these new challenges, we’re taking a fresh look at how we can adapt our customary approaches to regulation. We need to make sure that we’re allowing beneficial new technologies to advance, while continuing to protect consumers as part of our product review processes.”); Press Release, Scott Gottlieb, Comm’r, Food & Drug Admin. (Dec. 7, 2017), https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm587890.htm [https://perma.cc/JE4V-BH3P] (“We’re finding that in some parts of our regulatory portfolio, our traditional approach to overseeing certain health care products does not easily fit the types of innovations that are being developed. In these cases, we must adapt and evolve our policies to make sure we continue to provide a gold standard for oversight, while enabling advancement of beneficial
the form of new medical technologies and targeted, “individualized” medicines. Although it is beyond the scope of this Note to explore fully the nature of the current “disruption” in the medical field, three examples serve to demonstrate this larger trend. These examples also serve to demonstrate the utility of guidance documents: guidance documents can address pressing needs in relatively short order, permitting products to get to market significantly faster and with a more tailored regulatory regime than would be possible under a rulemaking-only strategy.

First, an example from the medical device realm: Next Generation Sequencing (“NGS”), a kind of cutting-edge genetic test, poses unique challenges to the FDA’s regulatory model. Barbara Evans, among others, has sought to bring attention to precisely this problem for several years. In a 2015 New England Journal of Medicine article, Evans argued that the FDA’s present regulatory model is ill-equipped to regulate NGS because the current device regulations “simply do not add up to a comprehensive, modern framework to support continuous learning and nimble response.”

Second, an example from the pharmaceutical realm: targeted cancer therapies. Ordinarily, getting a drug to market takes years and costs millions of dollars. For all-purpose (i.e., non-targeted) innovations and greater consumer access to technologies that can improve their health.”); Margaret A. Hamburg, FDA’s Program Alignment Addresses New Regulatory Challenges, ORTHO SPINE NEWS (Oct. 9, 2014), http://www.orthospinenews.com/2014/10/09/fdas-program-alignment-addresses-new-regulatory-challenges/ [https://perma.cc/32XR-UFJ8] (“Over the last year, a group of senior FDA leaders, under my direction, were tasked to develop plans to modify FDA’s functions and processes in order to address new regulatory challenges. Among these challenges are . . . . the ongoing trend of rapid scientific innovation and increased biomedical discovery.”); Bob Roehr, FDA Faces Regulatory Challenges with New Approaches to Medicine, 348 BRITISH MED. J. at 1 (2014), http://www.bmj.com/content/bmj/348/bmj.g1530.full.pdf [https://perma.cc/6HFQ-N4VQ] (“The [FDA] faces unprecedented regulatory challenges not just with new products but with entirely new fields of activity that are likely to transform medicine in the decades to come.”).


95. Rebecca S. Eisenberg, Patents and Regulatory Exclusivity, in THE OXFORD HANDBOOK OF THE ECONOMICS OF THE BIOPHARMACEUTICAL INDUSTRY 167, 169 (Patricia M. Danzon & Sean Nicholson eds., 2012) (“The FDA estimates that it takes on average 8 1/2 years to study and test a new drug before the FDA can approve it for sale to the public; industry estimates are even higher, ranging from 10 to 15 years.”) (citations omitted).

drugs, even if not the perfect solution, the FDA’s traditional regulatory framework has worked reasonably well. Targeted cancer therapies, however, pose a serious challenge to that route. In short, targeted cancer therapies are designed around an individual’s specific tumor and may be rendered useless if compelled to undergo a years-long approval process.97

Third, an example from the medical technology realm: Artificial Intelligence. As Jane Bambauer notes, “[p]redicting the future is a surefire way to embarrass oneself. But it is a relatively safe bet that Artificial Intelligence (“AI”) will transform the practice of healthcare . . . . [because] healthcare is already being transformed by AI.”98 However, as Professor Bambauer continues, it is far from clear that the FDA is prepared for this transformation.99 Increasingly, medical devices are looking like “knowledge devices.”100 That is, unlike traditional medical devices that mostly take measurements, medical devices are increasingly “analyze[ing] data (either preexisting or newly measured) and interpret[ing] the data to form opinions.”101 Despite this shift, the FDA is using the regulatory requirements associated with measurement devices and applying them to devices that do not fit that model—“the FDA is using the wrong baseline.”102

B. Consequences of Changing Technology

These promising developments portend a healthier future. However, the degree of their success (e.g., their safety, the speed

the average costs of developing a new drug to the point of new drug approval (‘NDA’) at approximately $800 million, after adjusting historical costs to present value to account for the time value of money.”).

97. Press Release, Scott Gottlieb, Comm’r, Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on new FDA efforts to support more efficient development of targeted therapies (Dec. 15, 2017), https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm589248.htm [https://perma.cc/628S-YRL7] (“In recent years, the medical community has experienced a shift in the way health care is practiced. Rather than focusing solely on how to treat an overall disease type, medical innovators are now exploring how to tailor treatments that target unique characteristics of an individual’s disease, such as the genetic profile of a person’s tumor . . . . By providing clear guidance on the regulatory and scientific frameworks for product developers, safe and effective targeted treatments can be identified with scientifically valid tests and ultimately, made available to patients faster.”).


99. Id. at 384.

100. Id. at 386.

101. Id.

102. Id. at 389.
with which they get on the market, their cost) depends, in no small measure, on the FDA’s ability to regulate them well. As noted in the opening paragraph of Section III.A, commentators and FDA officials alike have suggested that the FDA’s regulatory regime is not well suited to address these developments as currently constituted.\textsuperscript{103}

The FDA should be commended for admitting the insufficiency of its regulatory regime and encouraged to alter its regulations accordingly. Unfortunately, forcing the FDA to proceed exclusively through traditional regulatory tools might well stifle the FDA’s initiative. If the FDA were to proceed using only traditional tools of regulation—notice-and-comment procedures, for example—the likelihood that the FDA could adapt to these new challenges in any sort of quick timeframe is minimal.\textsuperscript{104} Many commentators have noted rule creation “ossification,” elaborating that promulgating a notice-and-comment rule can take years to accomplish if it is accomplished at all.\textsuperscript{105} Rather than force the FDA to double down on its current regulations or work through notice-and-comment procedures (thereby potentially leaving the new drugs and devices unregulated, poorly regulated, or off-market) or adjudication (leaving open the possibility of considerable inconsistency) the FDA should have tools at its disposal to quickly get a regulatory handle on these drugs and devices.

Additionally, Professor Eisenberg and others have written about the important role that the FDA plays in medical innova-

\textsuperscript{103.} See sources cited \textit{supra} note 50; see also \textit{Food & Drug Admin. Subcomm. on Sci. & Tech., FDA Sci. & Mission at Risk} 24 (2007) (“The FDA must develop a program to manage ‘new science’ that will provide a standardized approach to enable the FDA to address all emerging sciences and technologies.”).

\textsuperscript{104.} According to a 2009 Government Accountability Office Report, it may take 3.5 to 4 years for the FDA to complete a “straightforward rulemaking,” \textit{U.S. Gov’t Accountability Office, GAO-09-205, Fed. Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews} 17 (2009), \url{https://www.gao.gov/assets/290/288538.pdf}. Further, FDA personnel noted that speed and resource conversation played a major role in their choice to proceed by guidance. See \textit{Parrillo, supra} note 20, at 7, 31 n.58 (discussing the value of guidances in conserving resources relative to rules and the fact that guidance could be produced quickly).

\textsuperscript{105.} See, \textit{e.g.}, \textit{Parrillo, supra} note 20, at 147 (“[A]n FDA Office of Chief Counsel official [said], whereas legislative rulemaking was criticized for being ‘ossified,’ it was possible to issue guidance ‘pretty quickly.’”); Thomas O. McGarity, \textit{Some Thoughts on “Deossifying” the Rulemaking Process}, \textit{41 Duke L.J.} 1385, 1385 (1992) (“During the last fifteen years the rulemaking process has become increasingly rigid and burdensome.”).
Eisenberg, for example, has written that the FDA can foster innovation through mandating the production of high-quality information. It may well be the case, however, that the FDA cannot perform such a function successfully unless it adapts to rapidly changing technologies and scientific discoveries. Shoehorning novel devices and drugs into old regulatory frameworks is an ominous recipe incongruent with fostering innovation.

Guidance documents can fill this regulatory void. In fact, the FDA’s continued and extensive use of guidance documents should be viewed as sensible and welcome from a practical perspective. And indeed, at least some regulated entities (and Congress) appear to desire guidance documents. A congressional staffer, in interviews conducted by Professor Parrillo, stated that “even those who argued that FDA improperly over-used guidance on some subjects simultaneously wanted the agency to issue more guidance faster on other subjects.” And again, an FDA Office of Policy official...
“acknowledge[d] that FDA does not provide as much guidance as industry would like.”

One reason for this desire is that the FDA, despite having a substantial compass, is a relatively resource-constrained agency. Thus, given the disparities in resources required to make one as compared to the other, guidance documents permit the FDA to accomplish its mandate in a way that rulemaking alone would not. A second and related reason is the speed with which guidance documents can be issued and the increased likelihood that they will be tailored to current science. “[A]n executive at a drug manufacturer said he could see the argument ‘in the abstract’ for why legislative rulemaking was better, but . . . said . . . that he preferred to know what FDA was thinking ‘rather than wait twenty years’ for a legislative rulemaking to finish.” Officials from the FDA acknowledged as much as well. For example, Janet Woodcock, the current Director of the Center for Drug Evaluation and Research, noted that “guidance can be provided closer to ‘real time’ than can rulemaking, which takes a long time; by the time you complete a rulemaking, ‘the science may have changed.’”

Another reason is the industry’s overarching desire for consistency and a clear path forward. After conducting an interview with Coleen Klasmeier, the current head of Sidley Austin’s FDA practice and a former FDA Office of Chief Counsel attorney, Professor Parrillo relayed Klasmeier’s sense of industry’s view, noting: “[I]t was

112. Id. at 36 & n.78.
113. See, e.g., Lars Noah, The Little Agency that Could (Act with Indifference to Constitutional and Statutory Strictures), 93 CORNELL L. REV. 901, 924 (2008) (commenting that the FDA has, historically, struggled “to protect the public health with its limited statutory powers and often inadequate resources”); Lewis, supra note 1, at 538 (“[T]he FDA operates under severe resource constraints.”); Parrillo, supra note 20, at 12 & n.19 (quoting an interviewee who describes the agency as “resource-constrained”).
114. See, e.g., Parrillo, supra note 20, at 31 & n.59 (congressional staffer noting “FDA personnel say that legislative rulemaking is cumbersome and they will do guidance if they can”); Lewis, supra note 1, at 538 & n.268 (“[M]any FDA officials have therefore agreed that using guidance instead confers massive cost advantages to the agency.”); Franklin, supra note 38, at 304 & n.150 (“[N] onlegislative rules avoid opportunity costs by freeing up agencies to redirect resources—resources that would otherwise be expended in the cumbersome process of notice-and-comment rulemaking—toward potentially more important priorities.”); Seidenfeld, supra note 35, at 368 (“Given the limited resources available to agencies, I suspect that many would instruct their staff members to avoid issuing guidance documents unless the agency deemed the guidance to be absolutely necessary.”).
115. Parrillo, supra note 20, at 33.
116. Id. at 31 & n.58; see also id. at 95 (discussing the need to keep up with scientific change).
'far more common' for the complaint of industry to be that an FDA reviewer was not following guidance than that the reviewer was following it too closely. Industry . . . just wants ‘certainty’ and a ‘level playing field.’" Additionally, Parrillo relayed that a former senior FDA official "observed that, although some guidance had to be flexible because science is changing, ‘flexibility’ is not a ‘primary interest’ for pharmaceutical companies; instead they ‘want certainty’—‘tell me what to do, and I’ll do it.’"

Altogether, guidance documents could be viewed as occupying a sweet spot where the needs of the FDA and the interests of firms and regulatory beneficiaries (i.e., patients and doctors) converge. At a minimum, if not a sweet spot, guidance documents could, in the absence of an expedited rulemaking process, be viewed as the best among least-best options. They permit the FDA to act quickly and creatively while allowing the Agency to tailor its regulations to promote safety and innovation. Furthermore, guidance documents work prospectively, and so they should not interfere with the settled interests of parties whose devices do not fit clearly within current regulatory guidelines. Rather, guidance documents will promote stability by offering the FDA’s thoughts on how to proceed with novel drugs and devices, encourage speed by allowing the FDA to address new issues quickly, and ensure safety both by permitting tailored regulations and by ensuring worthwhile devices reach the market expeditiously.

Accepting guidance documents will mean accepting that regulated firms might treat these documents as binding, regardless of whether the FDA intends them to be so. Given Professor Parrillo’s extensive research, however, that reality may not be as bad as it sounds. To an extent, his investigation suggests that regulated entities care less about the method by which they are told to act and more that they can be sure they will, in short order, be given a clear, reliable path that is more or less equally applied. In a sense then, severely curtailing guidance documents without some com-

117. Id. at 95.
118. Id. See also Erica Seiguer & John J. Smith, Perception and Process at the Food and Drug Administration: Obligations and Trade-Offs in Rules and Guidances, 60 Food & Drug L.J. 17, 29 (2005) (“In the majority of cases, guidances are treated the same way as rules (that is, industry follows them as if they were legally binding) because industry desires consistency.”).
119. See sources cited supra note 50 (describing the value of guidance).
120. See supra pp. 27–28; see also Seiguer & Smith, supra note 118, at 29–30 (quoting an “industry representative” who said the industry does not care whether the FDA’s pronouncements come as a guidance or as a regulation, so long as it can rely on them).
mensurate change in the FDA’s regulatory structure is tantamount to cutting off the nose to spite the face. At a time when the FDA is facing daunting technological and scientific changes and demands to get products to market cheaper and faster persist, forcing the FDA to go through years-long notice-and-comment rulemaking would render its role largely impossible while, it seems, simultaneously doing exactly the opposite of what regulated entities desire.

This is not to say the entire current state of affairs is acceptable. It is not, and there are many instances in which regulated entities object to regulations both in substance and in form. But it is to say that any reform to guidance documents must be sensitive to the important role they currently play, and must continue to play if the FDA is to accomplish its broad mandate with a level of reasonable success.

As will be explained below, however, reforming the issuance and judicial review of guidance documents should alleviate some concerns with respect to “bindingness” and uncertainty. Not by making them less coercive per se, but by ensuring that regulated entities can judicially challenge documents that impose greater costs than benefits, are beyond the permissible scope of the authorizing statute or rule, and/or lack a sufficient factual basis.

---

121. To put a finer point on it, in the 21st Century Cures Act, Pub. L. No. 114-225 (2016), Congress tasked the FDA with reassessing its regulatory model with respect to technologies and innovation. See, Press Release, Scott Gottlieb, Comm’r., Food & Drug Admin, How FDA Plans to Help Consumers Capitalize on Advances in Science (July 7, 2017), https://www.fda.gov/news-events/fda-voices-perspectives-fda-experts/how-fda-plans-help-consumers-capitalize-advances-science [https://perma.cc/26GT-FE69] (“‘Cures’ provides FDA with tools aimed at modernizing our regulatory programs.”). Part of that reassessment led the FDA to believe it needs to take more tailored approaches to regulating drugs and devices. In a conference on the FDA’s PreCert Program, discussed briefly in Section IV.A infra, the director of Center for Devices and Radiological Health, Jeffrey Shuren, explained, pursuant to the Cures Act, the idea of “flexible regulatory paradigms.” Jeffrey Shuren, Director, Ctr. for Devices and Radiological Health, Remarks at the Fostering Digital Health Innovation: Developing the Software Precertification Program Public Workshop 18 (Jan. 30, 2018), https://www.fda.gov/downloads/MedicalDevices/NewsEvents/WorkshopsConferences/UCM600093.pdf [https://perma.cc/FP2R-9EUD]. He elaborated, “The idea is rather than take technologies and put them down in cookie cutter pathways, design the regulatory paradigm around the technology. What are its unique evidence generation needs, patient access needs, innovation cycles?” Id. Without guidance documents leading the way, it is hard to see how the FDA will accomplish this task. Thus, a Congress that seeks seriously to curtail the use of guidance documents both giveth (the mandate) and taketh (the tools to effectuate it). While such a situation may make for good political optics, it does nothing to advance the interests of the FDA, regulated entities, or regulatory beneficiaries.
IV. FRAMEWORK FOR ISSUANCE AND JUDICIAL REVIEW

Under my proposal, guidance document issuance and review would occur in two stages. First, draft guidance documents would lay out the FDA’s guidance and the legal basis for it. That legal basis would be subject to immediate judicial review, with the Agency’s interpretation accorded Skidmore\(^\text{122}\) deference. Second, after a set period of time, the draft would either be repealed or replaced by a final guidance. The final guidance would also be subject to judicial review but only as to its factual basis, since its legal review would have been either foregone or completed at stage one. At this second stage, a modified State Farm\(^\text{123}\) arbitrary and capricious standard of review would apply. Consequently, the final guidance would need to contain a factual basis, the breadth and depth of which would allow it to withstand this modified arbitrary and capricious standard of review.

The bifurcated process can be viewed analogically through a Chevron lens. Without wading too deeply into how many steps are involved in a Chevron analysis, I will borrow loosely from Professor Catherine Sharkey’s recent proposal that infuses the currently murky Chevron Two-Step framework with a State Farm arbitrary and capricious review at Step Two.\(^\text{124}\) As a general matter, this means that courts should scrutinize the legal basis for the Agency’s action at Step One,\(^\text{125}\) and scrutinize the factual foundation for the administrative action at Step Two under a State Farm standard of review.\(^\text{126}\)

122. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that agency interpretations should be afforded the weight they deserve given “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade”).
125. While the focus of her paper is not on Step One, Professor Sharkey does appear to suggest that an agency’s legal interpretation should be accorded Skidmore deference at Step One. See id. at 2375 n.72 (“[A] purely legal statutory analysis should not suffice where such an analysis inevitably hinges on policy choices dependent upon facts which the agency should have to justify. Alternatively, an agency’s legal interpretations should be subject to Skidmore deference (at Chevron Step One), not mandatory deference at Step Two.”). In any event, that is the standard I adopt here.
126. Id. at 2384 (“[C]ourts at Step Two should demand the relevant agencies’ policy-relevant analyses and not instead be lulled into accepting agencies’ legal in-
The process of review suggested here is a bit unusual procedurally. Specifically, the first stage of judicial review would be tantamount to a motion to dismiss, and the second stage of judicial review would deal with the “facts” underpinning the guidance. Despite the unusual format, I believe bifurcating court procedures and guidance documents as described is a sensible means of increasing guidance document legitimacy without unduly hampering the FDA’s incentives to issue them. The overall structure and the benefits that flow from it are explained in the following sections.

A. Draft Issuance and Review

1. Draft Content and Standard of Review

As noted above, draft guidance documents often remain in draft form for years. Indeed, some are never converted into final guidances at all but nevertheless lead regulated entities to comply. This state of affairs leads to uncertainty among regulated entities and even more limited opportunities for review by courts. My proposal seeks to give draft guidance documents a different role from that which they currently occupy, one that would make them meaningfully distinct from final guidance documents and ensure that draft guidances are either finalized or repealed.

In practice, this would mean that, rather than act as an early run of final guidance documents, draft guidances would pronounce only the meaning of certain text, new factors the Agency will consider, or other novel policy positions and the legal bases for those pronouncements. Thus, at Chevron Step One, i.e., the draft guidance stage, the reviewing court will decide “whether the [A]gency’s construction is permissible as a matter of statutory interpretation,”128 in light of the “[A]gencies’ legal interpretations on the basis of statutory text, legislative history, and canons of statutory interpretation.”129

Even though draft guidances would only address the legal bases for the new pronouncements, I am not convinced, unlike Professor Epstein, that they should be reviewed de novo. While it is true that guidance documents can present pure questions of law, “[a]s Chevron itself illustrates, the resolution of ambiguity in a statutory interpretations on the basis of statutory text, legislative history, and canons of statutory interpretation (which might guide courts at Step One).”.

127. See supra notes 41–46 and accompanying text.
129. Sharkey, supra note 124, at 2384.
ternary text is often more a question of policy than of law.” Agencies should, therefore, have some policy space within which to operate when they are interpreting ambiguous statutes or their own rules and regulations. Peter Strauss has made an argument along these lines. He explains that, in his view, *Chevron* gives rise to “space” in which “an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints;” and *Skidmore* gives rise to “weight” which “addresses the possibility that an agency’s view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority.”

With respect to draft guidance review, under my framework this means that “Step One defines boundaries for the realm of ‘reasonable’ agency interpretations,” where the court should accord the FDA’s legal interpretation *Skidmore* deference and defer to it if the court finds the statute, rule, or regulation can bear the Agency’s interpretation under the *Skidmore* standard. Further, as intimated, the analysis would cover the Agency’s own rules and regulations in addition to statutes, thereby eliminating the extreme deference that otherwise might be accorded to the Agency’s interpretations under *Auer* or *Seminole Rock* deference. Once the court has determined that the FDA’s legal analysis supports its draft guidance document as a legal matter, the FDA could proceed to the final guidance stage.

Because the review of draft guidance documents would turn only on questions of statutory interpretation, the first step of judicial review should be relatively straightforward. For the same reason, regulated entities should not need much time to challenge them. Therefore, after the issuance of a draft guidance document,

---

132. Sharkey, supra note 124, at 2387 (summarizing in part Kenneth A. Bamberger & Peter L. Strauss, Chevron’s Two Steps, 95 Va. L. Rev. 611 (2009)).
133. Skidmore, supra note 122, at 140.
134. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945) (“Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt . . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”); Auer v. Robbins, 519 U.S. 452, 461 (1997) (“Because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’”) (internal quotations omitted). See also Chase Bank USA, N.A. v. McCoy, 562 U.S. 195 (2011).
all parties objecting to its legal basis would have two months from the date of issuance to challenge the document. Such a limitation is not unheard of. The EPA often limits the timeframe for challenging its legislative rules, with some cutoffs running as short as forty-five days. So too does the FDA, on occasion. Given the commonality of potential objections, reviewing courts would also have the ability to consolidate legal challenges at their discretion.

2. Standing

In order for this direct substantive review of draft guidance to occur, however, guidance documents would need to be “final” and “ripe.” I address each issue in turn.

The judiciary’s concern with finality of agency action is eminently sensible and—not to mention—statutorily mandated. This sensibility holds true whether viewed from a conservation of resources, separation of powers, or Article III justiciability standpoint. In the FDA context, however, there are good reasons to believe that the reality on the ground does not align with the usual concerns. There are three reasons for this: guidance documents are already treated as final, guidance issuance is centralized to the FDA, and guidance challenges should not be too numerous.

First, as previously noted, both the FDA and regulated entities are already treating guidance documents as final regardless of whether they technically are – with good reason, too. They often

135. As with the six-month limit below, the timing could be changed. Perhaps more significant guidance documents would have longer timeframes and less consequential ones would have shorter ones. Nevertheless, two months to file what is effectively a motion to dismiss seems sufficient.

136. See Johnson, supra note 39, at 712 n.84 (citing environmental laws imposing time restrictions on challenges to rules issued under them).

137. See, e.g., The United States Federal Food, Drug, and Cosmetic Act § 912(a)(1)(A–B), 21 U.S.C. § 387l (limiting the filing date for petitions for judicial review of regulations “establishing, amending, or revoking a tobacco product standard; or . . . a denial of an application under section [910(c)]” to thirty days after regulation issuance or application denial).

138. Cf. Fed. R. App. P. 3(b)(2) (“When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.”).

139. Administrative Procedure Act of 1946 § 704, 5 U.S.C. § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).

140. See, e.g., Seidenfeld, supra note 35, at 376 (“The foundation for [one prong of the finality test] is avoidance of judicial interference with agency decision making until the agency has completed its own resolution.”).

141. See supra Section I.B.
remain on the “books” for years and affect party behavior notwithstanding any tentative and noncommittal language. As a practical matter, then, if the relevant parties are treating them as final, the judiciary ought to as well. The FDA should not be able to skirt judicial review by portraying an air of uncertainty incommensurate with reality.

Furthermore, as explained in Section IV.E, guidance documents would be further legitimized and stabilized under my proposal. For the same reasons, then, courts should treat them as final under my proposal as well. That is not to say that guidances will not change. They will. But so will rules, and courts ought not to elide

142. My review of withdrawn guidances listed on the FDA’s website reveals the following. Since 1977, listed guidance documents pertaining to drugs have been withdrawn, on average, 11.34 years after issuance (standard deviation of 6.5, N=105) with the longest guidance lasting just shy of twenty-seven years and the shortest guidance lasting just shy of six months. Since 2000, i.e., year of GGP’s codification, the listed guidance documents were withdrawn, on average, just shy of 7.5 years after issuance (standard deviation of 4.36, N=55), with the longest lasting just shy of fifteen years and the shortest lasting just shy of six months (the same guidance as above). Since 1977 listed guidances pertaining to devices are withdrawn, on average, 15.9 years after issuance (standard deviation of 8.88, N=117) with the longest lasting just shy of forty years and the shortest lasting a little more than four months. Since 2000, the listed guidance documents were withdrawn, on average, just shy of eight years after issuance (standard deviation of 4.40, N=52), with the longest lasting about 17.5 years, and the shortest lasting a little more than four months (the same guidance as above). I note that there is something of a discernable trend towards guidances being withdrawn more quickly in the last three years than in years prior. It remains to be seen whether that will continue. Underlying drug data available at: FOOD & DRUG ADMIN., WITHDRAWN GUIDANCES (DRUGS), https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm528107.htm [https://perma.cc/M7RT-3AYB]. Underlying device data available at: FOOD & DRUG ADMIN., WITHDRAWN GUIDANCE, https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/ucm425025.htm [https://perma.cc/3Q45-D7NR].

143. Cf. McKee, supra note 39, at 384 (“Even if a court found the document to [meet the first prong of the finality test], it would not likely qualify . . . [under the] second prong of the overly complex finality requirements of Bennett. This is at least partially because the FDA inserted two disclaimers stating the document is not legally binding, and used nonmandatory terms like ‘should’ instead of ‘must’ when describing suggestions for producers. This seemingly tentative language does not disguise reality; the FDA produced the guidance because it expects that producers will follow its suggestions.”).

144. See, e.g., Noah, supra note 113, at 907 n.34 (listing two cases in which the FDA argued its guidances were not final). See also, e.g., BBK Tobacco & Foods, LLP v. U.S. Food & Drug Admin., 672 F. Supp. 2d 969 (D. Ariz. 2009) (finding the FDA’s guidance was not final); Mallinckrodt Inc. v. United States Food & Drug Admin., No. CV DKC 14-3607, 2015 WL 13091366, at *10 (D. Md. July 29, 2015) (same).
deliberate change and incompleteness. The fact that the agency may change a document does not mean that one currently “in force,” as it were, is not final agency action with respect to that document.

Second, guidances are centralized at the FDA. Thus, unlike another agency where field officers and the like might issue them or where they are more readily subject to change, an FDA guidance document is far from a perfunctory piece of work. This would be truer still under my proposal where they function as quasi-rules. Third, as elaborated in Section IV.E.i, guidance document challenges should not be too numerous. Thus, concerns stemming from conservation of judicial resources should be mitigated as well.

Because, however, this proposal speaks only to the FDA and courts must deal with guidances from all agencies, I believe the FDA should make explicit that guidances issued pursuant to the proposed framework at both the draft and the final guidance stage are “final” for the purposes of judicial review. Such a statement would streamline review of FDA guidance documents without affecting those of other agencies, and it would have the added benefit of saving all parties from having to brief the issue continuously.

---

145. FDA guidances contain language noting that the document represents the “Agency’s thinking on a particular subject” (emphasis added); see also 21 U.S.C. § 371(h) et seq.

146. Concerns related to finality—indeed many concerns related to the reviewability of guidance documents—might well be addressed if regulated entities could bring constitutional separation of powers challenges. Cf. Kent H. Barnett, Standing for (and up to) Separation of Powers, 91 INDIANA L.J., 665, 670 (2016) (arguing that regulated entities should be able to bring separation of powers challenges and that “[structural] challenges rest comfortably with existing standing and cause-of-action doctrine,” as they are analogous to “ubiquitous procedural challenges,” “fall comfortably within structural safeguards’ ‘zone of interests,’” and “neither founding history nor historical practice is to the contrary”); see also id. at 694–710. In the guidance context, such a challenge would have the advantage of removing certain statutory standing barriers that currently limit (or eliminate) guidance challenges—“finality” under the APA in particular—by transforming standing issues into merits questions. For example, constitutional standing ordinarily requires an injury-in-fact, a showing that the government’s wrong caused the injury, and a demonstration that the harm can be remedied by a court. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). For guidance documents, these elements could be shown through allegations that, by promulgating a rule ultra vires which is de facto binding, the FDA violated separation of powers principles and that violation, coupled with the plaintiff’s cost of compliance and inability otherwise to seek redress, makes out a constitutional violation, causation, and injury-in-fact. Alternatively, this could possibly be accomplished by curtailing judicial review [cf. Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199, 1213–25 (2015) (Thomas, J., concurring) (arguing that giving deference to agency interpretations of regulations usurps the judiciary’s constitutional role and violates separation of powers principles)]. Thus,
As it stands now, however, an FDA pronouncement stating that a guidance document is final would likely be insufficient to render it so. Under *Bennett v. Spear*, agency action is “final” if it is the “‘consummation’ of the agency’s decisionmaking process” and “one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” Thus, while the Agency’s statement of finality might well satisfy prong one, such a statement might not suffice at prong two, and both conditions must be met. Without wading too deeply into which of the two is preferable, several scholars have argued that the second *Bennett* prong should be altered or eliminated. I agree. With the doctrine altered such that prong one is the primary (or only) inquiry, a statement by the FDA that its draft and final guidances are final for the purposes of judicial review should suffice to make most if not all FDA guidances reviewable, while leaving other agencies sufficient play in the joints.

With respect to ripeness, Seidenfeld adopts the current distinction between rules that “directly address regulated entities’ conduct, which almost always are ripe,” and those that “have only secondary effects on conduct, which are not.” This seems like a reasonable limiting principle. Additionally, as a general matter, Seidenfeld states that “challenges to nonlegislative rules that specify how the agency views a matter of policy or interpretation generally should be ripe.” Further, Seidenfeld suggests that hardship sufficient to challenge a guidance document can stem from guidances that are pragmatically binding, and that courts should not block guidances from arbitrary and capricious review due to uncertainty in how they will be applied. These appear to be sensible alterations rather than have APA “finality” be a question of justiciability, it becomes part-and-parcel of causation. Put another way, the injured party and the FDA would likely argue about whether, *inter alia*, the regulated entity actually had to comply. Whether the guidance was binding and final would seem to be central to that argument as a matter of proof, but it would have limited bearing at the pleading stage – certainly as compared to the current state of affairs. It is beyond the scope of this paper to explore this avenue further, but it appears to be an alternative worthy of further investigation.


148. *Id.* (citing *Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

149. *See*, e.g., *Hylas*, supra note 39 *passim*.


152. *Id.*

153. *Id.* at 383.
tions in the doctrine, geared towards increasing review, a goal this paper shares.

3. Sunset Provision and Response Obligation

To keep draft documents from remaining in force, so to speak, without being finalized or reviewed, all draft guidance documents also would have to be issued with sunset provisions. To wit, the Agency would have something like six months from the end of litigation challenging the draft guidance, or six months after the two-month window for challenges closes, within which it must either repeal the draft guidance or replace it with a final guidance. While six months is not the only possible timeline, some impetus to usher the process along must exist.154

Finally, during the draft period, the FDA may solicit feedback on the new regulation, but it is under no obligation to do so and need not respond to the feedback it receives. The primary reason for this is speed. A comment period with an obligation to respond would unduly hamper the speed at which the FDA can regulate and would effectively transform guidance documents into notice-and-comment rules. Additionally, because regulated parties can challenge the guidance document immediately, presumably any legal concern that might otherwise have been submitted as a comment could instead be brought as a legal challenge at stage one. Also, if, for example, a comment suggests that the FDA ought to consider a particular important factual issue and the Agency fails to do so, the concerned party, as will be explained below, can bring a suit at the final guidance stage arguing the FDA’s action was arbitrary and capricious.

I understand that the lack of a mandated comment period or obligation to respond could be fertile ground for objecting to these proposed draft guidance changes. In light of that, I offer the following four responses. First, as Seidenfeld explained, one issue with a lack of input is that it blocks regulated entities who are not party to informal channels of communication from participating and instead favors “repeat players.”155 The drug and device industry, however, is largely comprised of “repeat players,”156 for whom a

154. Professor Mendelson also suggested six months to respond to petitions related to guidance documents. See Mendelson, supra note 48, at 439.


156. See Rakoff, supra note 19, at 169–70 ("In this highly regulated industry, in which all the players—including the agency, the drug companies, and even the representatives of consumers—are repeat players, it may well be that ‘the force of law,’ in the strict sense of enforceability in court, is of little value compared to the
strong relationship with the FDA is nearly paramount. Additionally, the comment process already is “dominated by insiders.” Further still, some commentators have noted that agencies have more or less already set the policy in stone by the time the comment period is open. Taken together, removing a comment period may not be as problematic in reality as it seems at first blush. Smaller entities often do not comment to begin with, and as an industry composed largely of familiar faces and prone to “revolving doors,” informal communications may occur in both directions in any event.

Second, as elaborated by Seidenfeld himself, immediate review of guidance documents under a modified form of arbitrary and capricious review “holds the potential for encouraging agencies to consult with stakeholders who are not repeat players or politically powerful groups when developing guidance, as well as to seriously consider the impacts of such guidance on these stakeholders.” Indeed, the FDA has reasons to want to avoid litigation: limited resources, legitimacy concerns, and so forth. Likewise, by working with regulated entities, the FDA can, in a sense, outsource its labor by having the firms provide some of the factual resources on which the FDA can build its guidance.

Third, in Fixing Innovation Policy: A Structural Perspective, Professors Rai and Benjamin closely examined the value of the comment process in the context of innovation. After reviewing three FCC rulemakings that focused on innovation and garnered significant public attention, Rai and Benjamin concluded that “the results of the available theoretical and empirical work, including [their] own, strongly suggest that an APA-style comment process is not essential, "force of law" in the practical sense as dictated by existing relationships.”
or even particularly helpful, for purposes of improving innovation regulation.\textsuperscript{161} To the extent Professors Rai and Benjamin’s findings can be extrapolated to comments on other agencies’ pronouncements, or at least to those of the FDA, the loss of commenting might not be quite so problematic, at least not as it pertains to the FDA’s role in fostering innovation through regulation.

Fourth, although it does not appear that the FDA is currently using the procedure widely, the FDA has sought on a few recent occasions to employ pilot programs when testing new methods of regulation. A more expansive use of pilot programs may be a way for the FDA to obtain meaningful input from regulated entities in the absence of a comment period. Take, for example, the PreCert program for medical software developers. The FDA explained:

Digital health technology has become a new health care revolution . . . . At the FDA, we recognize this revolution and are reimagining our oversight of digital health technology to help provide patients with timely access to high-quality, safe, and effective digital health products . . . . FDA’s traditional approach to moderate and higher-risk, hardware-based medical devices is not well suited for the faster and iterative design, development, and validation used for software products.\textsuperscript{162}

To that end, the FDA developed a program that ultimately allowed nine creators of medical digital health technology to participate in a program to help, \textit{inter alia}, “[e]nable a modern and tailored approach that allows software iterations and changes to occur in a timely fashion.”\textsuperscript{163} This sort of cooperative framework, then, could be a promising method to develop quick and relevant regulation without the cost and time burdens associated with comment periods and response obligations.

Finally, it should be noted that these challenges might look different for the two categories of pronouncements that comprise guidance documents.\textsuperscript{164} Interpretive statements, as Professor Epstein

\begin{footnotesize}
\begin{enumerate}
\item[161.] Benjamin & Rai, \textit{supra} note 158, at 75.
\item[164.] See sources cited \textit{supra} note 36.
\end{enumerate}
\end{footnotesize}
noted, are often primed for legal analysis as they tend to be traditional questions of statutory construction. Policy statements may present less clear-cut questions of statutory interpretation; however, "in most cases, their precatory language does not hide how the agency intends for the rule [flowing from the policy statement] to operate." Nevertheless, to the extent policy statements do not present clean statutory interpretation questions, they will be swept up and challengeable at the final guidance stage.

B. Final Guidance Issuance and Review

After the draft guidance time period has elapsed, the FDA will then have to replace it with a final guidance document. The final guidance, unlike the draft, must present the factual and/or policy bases for the new regulation.

To continue the *Chevron* analogy as relayed by Professor Sharkey, this stage of review would be akin to *Chevron* Step Two. At *Chevron* Step Two, i.e., the final guidance stage, the court will employ arbitrary and capricious review. Here, however, the arbitrary and capricious review will follow Seidenfeld’s model. Put succinctly, "[r]asoned decisionmaking of guidance documents [would] mandate that agencies explain actions in terms of factors that are relevant and alternatives that are plausible given the state of knowledge available to the agency when it acted," in view of the knowledge of an individual or company well-versed in the field.

As Professor Seidenfeld noted, perhaps the major difficulty presented by direct substantive review is how to define the record. On the one hand, if the FDA is permitted to present a severely limited factual record, then the door is open to arbitrary and capricious acts. Similarly, the FDA would be permitted to issue regulations untethered from the actual dangers presented by the drug or device and potentially bog down the approval process. If, on the other hand, the FDA is required to present a fully-fledged factual record akin to what it would have to produce when issuing a rule, two of the major advantages of proceeding through guidance—speed and resource conservation—would be sacrificed.

---

165. Epstein, *supra* note 37, at 65 ("We are not dealing with how to make general standards more concrete on questions as, for example, how to measure the presence and severity of black lung disease, which cannot be regarded as pure questions of law.").


Seidenfeld's response, and the review standard I adopt here, is that a modified *State Farm* 169 arbitrary and capricious review can, nevertheless, address a less-than-full record adequately. Essentially, knowing that the final guidance review standard would require the FDA “to acknowledge well-recognized debates in the relevant field about issues of fact and prediction, and explain the substance of interpretations or polices announced in guidance documents in light of its resolution of those issues,” the FDA would have a reasonable sense of the parameters of the factual record it would have to build before issuing final guidance 170—a record considerably more than none at all, but far less than that required of a rule.

Regulated entities that believe the factual record does not support the Agency's guidance can raise claims of arbitrary and capricious rulemaking and would be able to appeal as is usual. They would, however, be precluded from bringing legal challenges based on statutory interpretation concerns. That window closes after the disposition of the draft guidance.

Finally, the Agency can either repeal or augment a final guidance by restarting this process from the draft stage. As the Supreme Court explained in *Perez*, notice-and-comment rulemaking is not required under the APA to repeal an interpretive statement. 171 However, under this framework, in the interest of party reliance, if the Agency decides to augment a final guidance, it would have to leave the old one in place until the new guidance becomes final. Thus, while the FDA would not need to justify the repeal *per se*, it would open itself to claims of arbitrariness and capriciousness if the subsequent guidance’s factual record insufficiently accounts for the Agency’s change in position.

169. *State Farm* review was first developed in the case *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under *State Farm*, “[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Although there are debates around what, precisely, *State Farm* requires of courts, the general crux of the doctrine is that courts must dig into the factual record offered by the agency, as well as Congress’s instructions, and determine whether the agency has acted reasonably.


C. Summary of the Proposed Process

To summarize, the process of issuance and review offered here occurs in two stages. At stage one, the FDA issues a draft guidance that contains the legal bases for the guidance and a sunset provision. Prior to the draft issuance, the Agency may solicit comments, but is under no obligation to do so or to respond to submitted comments. After the draft is promulgated, challenging parties will have a set, short period of time during which they can bring legal challenges to the draft guidance. As explained in the following subsection, these proceedings will be filed in courts of appeals. In those proceedings, the FDA’s legal analysis will be accorded *Skidmore* deference. If the draft guidance is ultimately struck down, the Agency must start anew. If the draft guidance is upheld, then the FDA has the sunset provision’s duration to either finalize or repeal the draft.

At the final guidance stage, the FDA would issue the same guidance, but with the factual basis for it included. Having already dealt with the legal basis of the guidance, parties can now challenge its factual basis under a modified version of *State Farm* arbitrary and capricious review. As will be explained below, these challenges will be filed in district courts. If the guidance is upheld, it remains in force. If it is struck down, the final guidance will be returned to draft form, and the Agency will have one more opportunity to finalize or otherwise repeal the document.

D. Reviewing Courts

A few notes with respect to reviewing courts are in order. To that end, this subsection addresses two questions: in what judicial fora should draft and final guidance challenges be filed, and why should they be filed in those fora?

Stage one challenges should be filed in circuit courts. Although direct-to-circuit review ordinarily follows a full course of administrative proceedings, immediate circuit review is appropriate here as well because expeditious resolution is essential, stage one challenges present pure question of law, and direct review by circuit courts would eliminate completely the delay inherent in proceedings at the district court level. Therefore, I propose that the Food, Drug, and Cosmetic Act (“FDCA”) be amended to require that petitions for review of draft guidances be filed in the U.S. Court of Appeals for the District of Columbia or in the circuit in which the petitioner resides or has its principal place of business. Currently, section 912 of the FDCA provides for petitions to circuit courts con-
cerning FDA tobacco-related rulings and regulations, so this would not be an entirely unusual development.\footnote{172}

Because final guidance suits would occur without prior agency proceedings (\textit{e.g.}, no exhaustion), it makes sense for an inquiry heavily reliant on facts to be developed in district courts before proceeding to courts of appeals. This would permit full factual development and a closed record for subsequent review. Therefore, I also propose, for purposes of clarity, that the FDCA be amended to provide that petitions for review of final guidances be filed in the U.S. District Courts for the District of Columbia or in the federal district court that encompasses petitioner’s residence or principal place of business.

As to the location of review, there are good reasons for all FDA guidance challenges to be lodged in the D.C. Circuit and District Courts. At stage one, it would help to ensure uniformity in FDA regulations—one circuit, no splits. At stage two, coordinating all proceedings in one district court would avoid the delay resultant from transfer motions under 28 U.S.C. §1404(a) or multidistrict proceedings under 28 U.S.C. §1407. Further, many, if not most, challenges to federal agency actions are currently brought in the Washington, D.C. federal courts, and regulated entities challenging federal agency action presumably have legal or other advisers who are either based in Washington or regularly appear in administrative matters there. Additionally, for the process to work well at stage two, reviewing courts would need to move swiftly while still meeting their obligation to dig deeply into the factual record. Because of their semi-specialized nature in administrative matters, the D.C. courts may best promote the twin goals of speed and meaningful factual review.\footnote{173}

\footnote{172. 21 U.S.C. § 387l (“[A]ny person adversely affected by such regulation or denial may file a petition for judicial review of such regulation or denial with the United States Court of Appeals for the District of Columbia or for the circuit in which such person resides or has their principal place of business.”).}

\footnote{173. With respect to speed, Judge Ginsburg noted in 2011 that, “[I]ooking back over these last twenty-five years, from a statistical point of view . . . . [t]he D.C. Circuit has fewer administrative law cases and yet a larger share than ever of all the administrative law cases in the federal courts of appeals.” Douglas H. Ginsburg, \textit{Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter}, 10 \textit{Geo. J.L. & Pub. Pol’y} 1 (2012); \textit{see also id. at 2 (“The number of cases filed in the D.C. Circuit has declined more or less continuously over the last twenty-five years. More surprising, the number of administrative law cases filed in our court also has declined over that period, again consistently, and the percentage of administrative law cases on our docket is lower now than it has been in all but two of the last twenty-five years.”). In view of this change, there is some reason to believe the Circuit can handle the increased workload that would come with}
Nevertheless, lodging all challenges in one circuit—as opposed to several—would give up more than would be gained. First, stage one challenges would present questions of statutory interpretation only. Notwithstanding the advantages the D.C. Circuit may have with respect to administrative matters generally, it has no such advantage when it comes to statutory interpretation. Second, with respect to stage two, while it is true that the D.C. courts see more administrative challenges than other jurisdictions, there is little reason to believe that the D.C. courts are uniquely well-versed in drug-and device-related matters as compared to other circuits. Third, as with other legal matters, advantages adhere to having multiple courts weigh in on legally complex and economically weighty questions. Under this model, presumably, it would only—or at least largely—be difficult questions that entities find cost-effective to challenge.

This is not to say there are no issues attendant to having challenges spread out. Most notably, the diversity may well lead to splits among circuits on certain guidance documents. This likelihood is further heightened by the fact that Skidmore rather than Chevron would be applied at stage one and that State Farm would be applied at stage two.174 If, however, the scheme were to work as it is outlined here, such splits may be welcome developments. In other words, if regulated entities primarily challenge particularly cost- and/or time-burdensome regulations and/or ones involving difficult questions of statutory interpretation, circuit splits may encourage further scrutiny either by the Agency, other circuit courts, Congress, or the Supreme Court.

direct substantive review of FDA guidance documents. As to expertise, see id. at 3 ("In consequence, the D.C. Circuit has become a relatively specialized court in the area of administrative law."); John M. Golden, The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts, 78 GEO. WASH. L. REV. 553, 554–55 (2010); Eric M. Fraser et al, The Jurisdiction of the D.C. Circuit, 25 CORNELL J.L. & PUB. POL’Y 131, 146 ("It is reasonable to believe that the [D.C.] Circuit has a particular expertise in administrative law simply because of the nature of its docket over the last few decades.").

174. One advantage of Chevron is that it fosters national uniformity in administrative law. See, e.g., Peter L. Strauss, One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action, 87 COLUM. L. REV. 1093, 1121 (1987) ("By removing the responsibility for precision from the courts of appeals, the Chevron rule subdues this diversity, and thus enhances the probability of uniform national administration of the laws."). Lack of uniformity is not unprecedented, however. See, e.g., Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 YALE L.J. 679 (1989) (discussing how agencies ought to handle circuit splits).
The method of issuance and review advocated here has several advantages that this section will address. Before turning to them, however, Stephen Johnson’s critique of direct substantive review merits brief response.

1. Advantages of the Proposed Framework

The proposed framework offered here has at least five advantages, each of which this section discusses. First, it preserves FDA resources. If the ultimate determination will turn on the fact that the regulation is without legal basis, it seems unwise to compel the Agency to expend resources to formalize the record beforehand. Although it could be argued that the FDA should not produce guidances prior to solidifying a formal factual record, the current state of guidance documents suggests otherwise. As is, the FDA puts forth detailed pronouncements without compiling a formal record in at least some instances. Further, as Mark Seidenfeld notes, resource and time savings adhere in the FDA’s having no formal method by which it must compile a formal record as well as the FDA’s having no formal obligation to respond to input by regulated firms.175

The preservation of resources is a critically important aspect of this proposal. As noted above, one of the main reasons the FDA employs guidances is that it simply lacks the resources both to proceed by more formal means and to address the many issues within its ambit.176 To the extent having the FDA act quickly and cover the wide range of drugs, devices, and food within its charge is important, resource preservation is essential.

Second, this proposed change to guidance documents would increase the legitimacy of these pronouncements. Regulated entities would know that they can challenge guidance documents they believe to be beyond the FDA’s purview and would be assured that the FDA is not proceeding through guidance solely to evade judicial review. Additionally, as Justice Scalia noted in Perez, agency interpretations of nonlegislative rules that are afforded deference function as de facto rules.177 While it may not be possible to completely rid guidance documents of their coercive effects given the structure of the FDA, its approval process, and the desires of regulated entities, judicial scrutiny commensurate with the force of

175. Seidenfeld, supra note 35, at 393.
176. PARRILLO, supra note 20.
guidances would provide regulated entities with a valuable counterweight. Further, by previewing the proposed guidance, the FDA would give interested parties the opportunity to submit additional facts to the Agency. Thus, although the Agency would not have an obligation to respond, if an interested party submits something that speaks to an issue that would be arbitrary and capricious to ignore, the FDA would have to incorporate it and adapt its guidance to it.

Relatedly, as Professor Sharkey noted, judicial review for “reasoned decision making” at Step Two (the final stage here) has certain benefits that touch on the legitimacy of agency action. In particular, meaningful factual review ensures the agency’s expertise is properly brought to bear. It mandates that, after the agency’s guidance is deemed plausible from a legal standpoint, the agency put forth a factual basis for the policy-laden judgment demonstrating the reasonableness of its choice. In this way, then, regulated entities would be assured that the Agency’s policy choice is grounded in the facts before it.

Third, proceeding this way would enhance guidance documents’ stability. As stated above, draft guidances and ad hoc judicial review leave regulated entities with great uncertainty. In the face of this uncertainty, regulated entities often believe their best option is to comply. Compliance does not, however, alleviate the uncertainty, given that the FDA can change the drafts on a whim and treat the pronouncements flexibly or inflexibly at their discretion. This sort of uncertainty helps neither regulatory beneficiaries nor regulated firms. Regulated firms have said as much, noting they would rather have clarity than flexibility. The two-part issuance and review process advocated here would alleviate those concerns. The FDA would no longer be permitted to leave guidances in draft form, and regulated entities will know they can have their day in

178. Sharkey, supra note 124, at 2395–96 (“The implications of adopting the Chevron-State Farm model go beyond the outcomes of particular disputes . . . . It highlights a functional comparative expertise rationale for agency deference . . . . The incorporation model tips the balance further to make clear that ‘we defer to an agency’s statutory interpretations not only because Congress has delegated lawmaking authority to the agency, but also because that agency has the expertise to produce a reasoned decision.’”) (internal citations omitted).

179. Id.

180. Id. at 2438 (“[T]he Chevron-State Farm model will ensure that agency expertise is at the center of the discussion and will produce more effective regulatory decisions.”).

181. See sources cited supra notes 38–39, 43.

182. See supra pp. 27–28.
court if they so choose. And, if they do not choose to do so, the regulated entities would know they have a clear path forward.

Fourth, the framework would ensure that the FDA could act with the speed required by technological and scientific change. As elaborated above, the FDA is confronting a tide of scientific and technological innovation that its traditional regulatory regime is ill-equipped to handle. This is true both at the specific level (i.e., the literal regulations) and at the structural level (e.g., the incongruence between four-year-long rulemaking and rapidly changing science and technology). As is, the FDA is employing guidance documents to tackle these challenges. The FDA should continue to have a tool at its disposal to address these innovations in a timely and targeted manner. By eliminating a comment period and limiting the breadth of the factual record that the FDA must complete at the final guidance stage, the method of issuance and judicial review offered here would allow guidance documents to continue being that tool, but within sensible limits.

Fifth, the review advocated here may well preserve the FDA’s ability to employ guidance documents as a general matter. As noted earlier, guidance documents have caught the attention of Congress and the current Administration. Given the FDA’s relationship with guidance documents, it is not hard to imagine the Agency’s becoming a focal point of the two branches’ ire. These reforms, however, could preserve some space within which the FDA could operate since it then could be held accountable.

2. Example – Laboratory Developed Tests

The FDA and industry’s battle over laboratory developed tests (“LDTs”) is instructive as to the value of this system. For years, the FDA exercised “enforcement discretion” with respect to LDTs, a subset of in vitro diagnostic tests. In a series of guidance documents responding to major developments in the LDT arena (genetic tests being one likely recent catalyst), however, the FDA

183. See supra Part II.
184. See supra Introduction.
186. See, e.g., Weiss, supra note 185, at 21–22; see also Javitt, supra note 185 (“Since the late 1990s, the FDA has grappled with LDT regulation in fits and starts,
revealed that it intended largely to discontinue such discretion.\textsuperscript{187} Instead, it would phase in LDT regulations over several years.\textsuperscript{188} Industry was, and continues to be, displeased with this development as it threatens a major and potentially expensive overhaul.\textsuperscript{189} The FDA, although apparently sensitive to these concerns (e.g., it delayed finalizing the guidances),\textsuperscript{190} has forged ahead with its efforts to regulate LDTs nevertheless.\textsuperscript{191} Indeed, as noted, a lack of finalization does not necessarily mean a lack of impact. Consequently, regulated firms have expended substantial sums in protest\textsuperscript{192} while the FDA has “expanded its reach over LDTs well beyond where it was 25 years ago.”\textsuperscript{193}


\textsuperscript{188.} Id. at 5 (“Specifically, this document describes FDA’s priorities for enforcing premarket and postmarket requirements for LDTs as well as the process by which FDA intends to phase in enforcement of FDA regulatory requirements for LDTs over time.”).

\textsuperscript{189.} See, e.g., Paul D. Clement & Laurence H. Tribe, Laboratory Testing Services, As The Practice Of Medicine, Cannot Be Regulated As Medical Devices 1 (2015).

\textsuperscript{190.} Food & Drug Admin., Discussion Paper on Laboratory Developed Tests (LDTs) (Jan. 13, 2017), https://www.fda.gov/downloads/MedicalDevices/ProductsandMedicalProcedures/InVitroDiagnostics/LaboratoryDevelopedTests/UCM536965.pdf [https://perma.cc/9HZ2-8ME3], at 1 (“The Food and Drug Administration (FDA) recently announced that we would not issue a final guidance on the oversight of laboratory developed tests (LDTs) at the request of various stakeholders to allow for further public discussion on an appropriate oversight approach, and to give our congressional authorizing committees the opportunity to develop a legislative solution.”).

\textsuperscript{191.} Id. The Discussion Paper offers the FDA’s current thoughts and solicits additional feedback, but does not state that the FDA intends to discontinue its quest to regulate LDTs.

\textsuperscript{192.} Javitt, supra note 185 (“In short, the FDA has proposed much but implemented relatively little in terms of LDT regulation. At the same time, the specter of regulation, and the numerous public meetings, draft guidance documents and agency pronouncements have resulted in the expenditure of significant stakeholder resources to either stave off or encourage (depending on the stakeholder’s point of view) definitive FDA action.”).

\textsuperscript{193.} Gibbs, supra note 185 (“While FDA maintains it has the power to regulate LDTs, it does not have a policy to exercise that authority, and so nothing has changed. And yet, viewed from a different perspective, FDA’s role in regulating LDTs has shifted profoundly. Even in the absence of a formal, overarching policy, FDA has expanded its reach over LDTs well beyond where it was 25 years ago.”).
The turf battle is far from over. Most recently, a diverse group of interested parties—including the American Clinical Laboratory Association ("ACLA")—expressed their support for the Diagnostic Accuracy and Improvement Act ("DAIA") and urged Congress to act on it. Among other things, the DAIA would combine in vitro diagnostic devices ("IVDs") and LDTs into a single “in vitro clinical test ("IVCT") category." In other words, LDTs and IVDs would be brought under the same general, relatively relaxed, regulatory structure. Notwithstanding the bipartisan sponsorship of the bill, industry support, and stakeholder input, the FDA’s response has been anything but supportive. According to “some policy experts . . . . what the FDA had submitted to legislators was an entirely new bill.”

Writing in 2015 for the ACLA, Paul Clement and Laurence Tribe sought to lay out the case against the FDA’s assertion of jurisdiction. Among other arguments, Tribe and Clement posited that the FDA lacks jurisdiction over laboratory-developed testing services and that, even if it does have jurisdiction, it cannot now claim it through guidance documents. Tribe and Clement’s arguments have not, however, been tested in court, and regulated entities continue to spend and adjust accordingly. That would not be the case, however, under the framework advocated for here. Once the FDA produced a draft guidance announcing the legal basis for its decision to regulate LDTs, challenges would be able to be filed right away. Beyond industry’s ability to push back, several other benefits adhere to a direct challenge. Immediate review would allow regu-
lated entities to save time and resources. Rather than spending time and effort adjusting to or preemptively combatting the pronouncements (with as of yet undetermined success) over several years, they could challenge them directly—both as to law and to fact—and arrive at a relatively expeditious conclusion. The same goes for the FDA. The Agency would get a quicker, more certain result with undoubtedly less time and fewer resources expended. Indeed, the Agency would not have to put forth the factual basis for its change until after the legal challenges to draft guidances conclude. Also, because Tribe and Clement’s arguments do not lead to easy resolution, and LDT regulation is seriously consequential, parties could benefit from having several circuits weigh in. In addition to the usual benefits of multiple judicial decisions, potential circuit splits could spur congressional action or Supreme Court review. Finally, to the extent these battles frustrate industry and plausibly harm consumers, less ill will would be directed toward the FDA.

CONCLUSION

This Note recognizes that guidance documents, as currently employed, have deep flaws. Under any theory of the regulatory state, an agency that can act without any traditional safeguards—public input, an obligation to respond, judicial scrutiny—is antithetical to democracy. At the same time, this Note argues that guidance documents, though problematic as currently employed, are promising tools of regulation going forward if properly reformed. Guidance documents, unlike notice-and-comment rules, can be issued quickly, narrowly tailored, and made reasonably flexible. As such, they can be responsive to technological and scientific change. Given the challenges the FDA admits it is currently facing and those it predicts it will face in the future, curtailing guidance document use at this moment would render the FDA’s job virtually impossible. At a minimum, it would undermine the Agency’s ability to get products to market quickly and to tailor its regulations to new drugs and devices. Although perhaps politically nice, guidance document curtailment and ossification would, on balance, do more harm than good. Patients want drugs and devices that can save their lives; regulated entities want clarity and a path to market their product quickly; and the FDA has an obligation both to protect individuals and to enhance their well-being by allowing novel drugs and devices to reach them.

Given the critiques of guidance document use as well as the benefits of guidance documents, this Note proposes reforms to the issuance and review of guidance documents that re-introduces cer-
tain checks without unduly sacrificing guidance documents’ valuable functions. This Note does not ignore the fact that guidance documents will continue to have coercive effects even under the reforms it proposes. This paper suggests, however, that such coercive effects are partly inevitable, not altogether bad, and that regulated entities, realizing a complete overhaul of the FDA is not on the table, appear to be amenable to that reality. Additionally, the alternative of reviewing guidance documents for their degree of “bindingness” is fraught with uncertainty and has failed sufficiently to address the issues arising out of guidance documents as they currently stand.

From a realistic standpoint, then, by balancing the costs and benefits to interested parties, this Note provides a middle ground through which the most extreme guidance documents—those whose costs greatly outweigh their benefits to regulated entities and those whose stability from a legal and factual standpoint are most dubious—can be reviewed, while preserving those guidance documents that are useful to all parties. Altogether, this Note argues that such a balance of incentives best serves public and private interests without upsetting too much of the administrative state as it currently exists.

I close, then, approximately where I began. Though the framework and alterations for which I advocate could serve as a template for other agencies’ reform, this Note focuses only the FDA’s use of guidance documents in the drug and device context. As noted in the Introduction, however, the guidance issue extends to the entire administrative state. In her paper discussing reforms to agency use of guidance documents in the immigration context, Professor Family advocated for an agency-by-agency approach to guidance reform. Family noted that guidances have several general advantages and disadvantages, but that each agency’s employment of them is idiosyncratic such that lasting success depends on tailored reform. I echo that sentiment.

Thus, as a final thought, I believe other agency-specific investigations would be valuable. There is a wealth of scholarship addressing the propriety of guidance documents in general, and Professor Parrillo’s research for ACUS and his conclusions stemming from

201. Family, supra note 6, at 9, 27–31.
202. See, e.g., id. at 28 (“Agency initiative is also important because a ground-up process holds the promise of tailoring Good Guidance Practices to each agency. Not every agency uses guidance documents in the same way, and problems with agency use of guidance documents do not manifest uniformly. Additionally, the composition and characteristics of agency stakeholders differ across agencies.”).
that research are exceedingly valuable resources to aid in more tailored approaches. Scholars, therefore, have a solid foundation on which to build, and build they should. The administrative state, regulated entities, and regulatory beneficiaries would all be the better for it.
NYU ANNUAL SURVEY OF AMERICAN LAW [Vol. 75:137