REGULATING BY EXAMPLE

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ABSTRACT

Agency regulations are full of examples. Regulated parties and their advisors parse the examples to develop an understanding of the applicable law and to determine how to conduct their affairs. However, neither the legal nor theoretical literature contains any study of the nature of regulatory examples or how they should be interpreted. This lack of attention to regulatory examples reduces the clarity and quality of decisions regarding this pervasive regulatory tool. This Article fills this gap.

In this Article, we explore the nature of regulatory examples and set forth a theory for how to interpret regulatory examples. As we explain, some regulatory examples merely illustrate the law presented in the non-example portion of the regulations, while others implicitly communicate new legal content. Common law reasoning, or analogical reasoning, can uncover the law inherent in regulatory examples. Since regulatory examples are part of a broader regulatory and statutory scheme, the legal content of examples must also be reconciled with the rest of the scheme. We argue that the legal content of the regulatory examples should be treated as co-equal with the legal content of the non-example portion of the regulation. Our theory both empowers and constrains agencies, regulated parties and others in their efforts to discover and influence the meaning of regulatory examples, by placing regulatory examples in dialogue with the rest of the regulatory and statutory scheme.

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I. INTRODUCTION

A regulatory example[1] is a portion of a regulation that applies the law to hypothetical facts. Some examples are signaled in regulations with a heading announcing, "Examples."[2] Others are indicated by different signaling language, including "such as,"[3] "for example"[4] or "for instance."[5]

[1] Examples can be found in other sources of law as well. Legislative history may include examples. *See, e.g.*, Gas Plus L.L.C. v. U.S. Department of the Interior, 510 F.Supp.2d 18, 30 (D.D.C. 2007) (analyzing Senate Report description of financing transaction with default remedy that would produce an "encumbrance" on Indian land) (citing S. Rep. 106-20 (commenting on 25 U.S.C. §81)). Preambles to regulations may include examples. *See, e.g.*, American Federation of Labor and Congress of Indus. Orgs. V. Chao, 409 F.3d 377, 387 (D.C. Cir. 2005) (analyzing examples of circumvention of union reporting regulations given in a regulatory preamble, including "the use of joint training funds to host extravagant parties for trustees and to pay union officials supplementary salaries") (citing 67 Fed. Reg. at 79,283)*; see also* P&V Enterprises v. U.S. Army Corps of Engineers, 516 F.3d 1021 (D.C. Cir. 2008) (examples in notice of proposed rulemaking). Also, non-regulatory agency guidance may include examples. For instance, so-called "revenue rulings" are a form of guidance in which the IRS offers a stylized set of facts and then explains how it believes the law should apply. *See* https://www.irs.gov/uac/understanding-irs-guidance-a-brief-primer (last visited Jul. 20, 2016) (explaining that a revenue ruling is "the conclusion of the IRS on how the law is applied to a specific set of facts."). In this paper, we analyze examples that are found in final regulations themselves. This allows a cleaner analysis, as we avoid distractions like the question of whether an example deserves a similar level of deference from a court if it is located outside a final regulation. *Compare* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) *with* United States v. Mead Corp., 533 U.S. 218 (2001). However, our analysis here could be translated in to examples found outside final regulations, which face a more complex set of deference possibilities.

[2] *See, e.g.*, 45 C.F.R. § 148.170 (providing examples addressing standards for benefits for mothers and newborns); 40 C.F.R. § 1037.655 (providing examples of allowable and prohibited post-useful life vehicle modifications); 16 C.F.R. § 239.2 (providing examples of various types of disclosures in warranty or guarantee advertising).

[3] *See, e.g.*, 21 C.F.R. § 112.1 (providing examples of different types of covered produce); 32 C.F.R. § 203.11 (providing examples of activities ineligible for assistance under the Technical Assistance for Public Participation program); 7 C.F.R. § 520.5 (providing examples of actions for which an environmental assessment is not required).

[4] *See, e.g.*, 12 C.F.R. Pt. 1005, Supp. I (providing examples to elaborate various definitions relating to electronic fund transfers); 10 C.F.R. § 963.17 (providing examples of various characteristics and criteria

One regulatory example comes from a Treasury regulation regarding when a "fringe benefit" provided to an employee is taxable.[6] Pursuant to the governing statute, "de minimis" fringe benefits are excludable from gross income (and therefore not taxable).[7] The regulation that carries out this statutory provision first sets forth general provisions regarding when a benefit is "de minimis." The regulation begins by providing as follows:[8]

> The term "de minimis fringe" means any property or service (after taking into account the frequency with which similar fringes are provided …) so small as to make accounting for it unreasonable or administratively impracticable.[9]

This description of a "de minimis fringe" could be read as a conjunctive standard. It might mean that a fringe may be excluded if it meets three qualifying requirements: that it is "small," infrequent and involves "impracticable" accounting.[10] This description does not state any legal conclusion based on actual or hypothetical facts.

But regulatory examples later in the regulations do provide legal conclusions based on hypothetical facts. For instance, "occasional personal use of an employer's copying machine," is offered as an example of an excludable fringe benefit,[11] as well as "coffee, doughnuts and soft drinks."[12] These examples both help illustrate the contours of the non-example portion of the regulation and raise interpretive questions. For instance, what if expensive coffee is provided on demand only to the CEO of the company? Such a transfer is valuable, constant, and easy to attribute to one employee. Does the regulatory example mean to exclude the coffee from the CEO's income, or should it be understood as an illustration that is constrained by principles set forth elsewhere in the regulations? If the latter, then what principles constrain the interpretation? Must the provision of coffee meet all three of the listed criteria, as the non-example portion of the regulation initially seems to require? May it meet only one of them, such as difficulty of accountability, as some of the other regulatory examples seem to suggest?[13]

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that would be relevant to evaluate the postclosure suitability of a geologic repository); 40 C.F.R. § 1-65.695 (providing examples of various types of information that may be required from engine tests).

[5] *See, e.g.*, 29 C.F.R. § 780.310 (providing an example of a full-time farmworker not within the scope of the exemption); 5 C.F.R. § 412.202 (providing an example of critical career transitions, which require training); 42 C.F.R. § 432.55 (providing an example of costs of employing students on a temporary basis).

[6] 26 C.F.R. § 1.132-6.

[7] 26 U.S.C. § 132(a)(4).

[8] This language duplicates the statute. 26 U.S.C. § 132(e)(1)

[9] 26 C.F.R. § 1.132-6(a).

[10] *See infra* text accompanying notes 108-112.

[11] 26 C.F.R. § 1.132-6(e)(1).

[12] *Id.*

[13] If accounting impracticality is the key, perhaps coffee would be excluded only if supplied to a sufficiently large group of employees. The interpretation proceeding from accounting impracticality would be consistent with other examples, such as the example that excludes the value of "occasional cocktail

Despite the prevalence of examples like these (and accompanying interpretive questions), no scholarly account of regulatory examples exists. From a practical perspective, this gap is striking because both agencies and regulated parties pay close attention to regulatory examples, recognizing their importance to regulatory schemes. From a theoretical perspective, the gap is more understandable. Despite the fact that agency regulations have become a principal source of law, scholars have only begun to develop theories of regulatory interpretation. Existing theories of regulatory interpretation generally focus on background interpretive questions such as whether regulations should be read through a purposive or textualist lens. There has been little attention paid to different regulatory drafting practices, such as the choice to use a regulatory example. In addition, courts lack any clear interpretive framework for regulatory examples.

This Article fills this gap by supplying a theory of interpretation for regulatory examples. It considers only regulatory examples that are provided in final regulations that have emerged from a notice-and-comment rulemaking process. In other words, it only considers regulations that have the procedural pedigree to qualify as "force of law"[14] rules entitled to *Chevron* deference.[15]

As we explore, some regulatory examples merely illustrate legal content stated elsewhere in the regulations ("illustrative examples"). But other examples implicitly make declarations about the law by adding content to the non-example portion of the regulation ("declaratory examples"). When regulatory examples implicitly declare new legal content, we argue that analogical reasoning, of the type used in common law analysis, can be used to identify the principles inherent in examples.

However, our theory must also account for the fact that regulatory examples are situated within a broader statutory and regulatory scheme. As a result, as a second part in the interpretive process, the results of the analogical reasoning must be reconciled with the broader statutory and regulatory scheme. This second part in the process can be accomplished using different background interpretive approaches such as textualism or purposivism. The principles that emerge from this two-part interpretive process can then be applied to future sets of facts, in the way that principles drawn from judicial precedent can be applied to future cases.

Our theory anticipates that the broader statutory and regulatory scheme can change the meaning of the examples, and also that the regulatory examples can modify the interpretation of the broader statutory and regulatory scheme. In this regard, we argue that abstract statements of law in the non-example portion and the concrete legal conclusions stated in the examples have equal weight. As a result, each must be read so

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parties, group meals, or picnics" (all of which would presumably be provided to a group of employees, rather than just one). 26 C.F.R. § 1.132-6(e)(1).

[14] United States v. Mead, 533 U.S. 218, 226-27 (2001).

[15] Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc. 467 U.S. 837 (1984).

as to accommodate the other, just like other co-equal texts must be read through a process of mutual accommodation. A regulatory example therefore might modify the meaning of the non-example portion of the regulation such that the non-example portion must be read in a nonobvious fashion. Perhaps, for instance, the example that calls work coffee a "de minimis fringe" could result in the non-example portion of the regulations being interpreted as a disjunctive principle, rather than as a conjunctive provision.

This argument for applying analogical reasoning to regulatory examples and treating what comes out of this process as co-equal to the non-example portion of the regulation raises a number of potential questions and objections: How can we claim that regulatory examples should be read analogically when agencies have not indicated that they intended for regulatory examples to be interpreted this way? Should common law analogical reasoning apply to regulatory examples, which lack some of the procedural protections applicable to cases (such as the case or controversy requirement)? And does the analogical approach, which yields non-obvious and sometimes debatable interpretations, give agencies too much power to interpret their regulations, thereby weakening values such as notice to the public, which are inherent in the rule of law?

While these questions are important, we contend that they do not undermine our theory of interpretation. Our use of analogical reasoning does not rely on agency intent. Rather, we offer it as a canon, or default mode of interpretation, which applies in the absence of agency intent for regulatory examples to be read otherwise. Also, while regulatory examples do not meet the case or controversy requirement, the rulemaking process has other quality checks that make regulatory examples sound statements of how the law would apply to real facts. Finally, the fact that regulatory examples emerge from the same notice-and-comment process as other portions of the regulation supports the role or regulatory examples as a source of law that is co-equal with the non-example portion of the regulation. At bottom, by offering a comprehensive theory of interpretation of regulatory examples, we both empower and constrain regulated parties, agencies and others in their effort to discern and influence the meaning of regulatory examples.

Part II of this Article describes the importance of regulatory examples to agencies and regulated parties and the lack of any systematic theoretical or judicial framework for regulatory examples. Part III sets forth a theory of interpretation, offering analogical reasoning as a way to understand regulatory examples that implicitly add content to the law, and displaying how analogical reasoning should be reconciled with the broader regulatory and statutory scheme. Part IV addresses potential objections to our theory of interpretation. Part V briefly concludes.

II. REGULATORY EXAMPLES: THE GAP IN THEORY AND LAW

This part describes the gap in theory and law regarding regulatory examples. Examples pervade regulatory schemes, and both agencies and regulated parties look to examples as important sources of guidance. Yet the existing literature contains neither any theory of regulatory examples nor any interpretive tool designed to apply to

regulatory examples. Courts also lack any comprehensive framework. This results in a lack of certainty and transparency regarding the meaning of regulatory examples.

A. Agency and Regulated Party Treatment of Examples

Regulatory examples abound in agency regulations, and they matter to both agencies and regulated parties. Agencies use examples to help explain their regulations. Regulated parties (and their advisors) know that examples are important and spend significant resources evaluating regulatory examples. And regulated parties (and their advisors or interest groups) also seek to influence the drafting and interpretation of regulatory examples.

A set of proposed Treasury regulations addressing private equity management fee waivers[16] provides one illustration of how regulatory examples matter to agencies and regulated parties. These regulations[17] address whether fund managers may claim preferential capital gains treatment if they "waive" a right to management fees and instead accept a right to receive a return related to the fund's investment in portfolio companies.[18] The alternative to long-term capital gains taxation is taxation at higher, ordinary income rates, which typically apply to earned income.[19] The proposed regulations center on the "superfactor"[20] of "significant entrepreneurial risk,"[21] which is required to make an amount eligible for capital gains treatment.[22]

The proposed regulations provide a standard in the form of a list of facts and circumstances that "create a presumption that an arrangement lacks significant entrepreneurial risk" as well as a number of other factors that may weigh against the entrepreneurial risk factor.[23] But the bulk of the proposed regulations consists of six examples.[24] All of the examples reach a conclusion as to whether, based on the facts of the example,[25] there is significant entrepreneurial risk.[26] The preamble discusses in detail the thinking behind the conclusions reached in the examples,[27] and suggests

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[16] Gretchen Morgenson, *I.R.S. Targets Tax Dodge by Private Equity Firms*, N.Y. TIMES, B5 (Jul. 23, 2015).
[17] Prop. Treas. Reg. § 1.702-2, 80 Fed. Reg. 43,652 (proposed Jul. 23, 1015).
[18] *See* Gregg D. Polsky, *A Compendium of Private Equity Tax Games*, 146 TAX NOTES 615, 617-21 (Feb. 2, 2015) (describing fee waiver arrangements).
[19] *See* I.R.C. § 1.
[20] *See* Letter from Gregg D. Polsky to Internal Revenue Service, Nov. 16, 2015, at 5.
[21] Notice of Proposed Rulemaking, 80 Fed. Reg. 43652, 43654 (stating that the regulations follow the Congressional view that this factor is the most important).
[22] Prop. Treas. Reg. § 1.707-2(c).
[23] *Id.*
[24] Prop. Treas. Reg. § 1.707-2(d).
[25] Id.
[26] *Id.*
[27] The Treasury Department frankly acknowledged the importance of the regulatory examples. The preamble to the regulation explains that the examples "illustrate the application of these regulations to arrangements that contain certain facts and circumstances that the Treasury Department and IRS believe demonstrate the existence or absence of significant entrepreneurial risk." REG-115452-14, I.R.B. 2015-32 (Aug. 10, 2015).

circumstances in which the conclusion may have been different.[28] And the preamble requests suggestions from taxpayers and their advisors regarding particular real-world facts that may have altered the conclusions reached in the examples.[29]

The importance of the examples to the regulatory scheme was not lost on the tax bar. The New York State Bar Association ("NYSBA") Tax Section discussed the examples in depth in its report on the proposed regulations to the examples.[30] Various law firm "client updates" analyzed the examples.[31] According to one law firm, the "examples are critical to understanding the implications of the new rules."[32] Client alerts contrasted bad examples with good examples. For instance, they highlighted the difference between Example 3 and Example 5, both of which suggest common private equity firm facts.[33] Example 3 would require recharacterization as services income for a fee waiver in exchange for an interest in gain "during any 12-month accounting period in which the partnership has overall net gain" and where the service provider in effect controls the timing of gain recognition.[34] Example 5 would not require recharacterization of a fee waiver in exchange for an interest in partnership net income and gain over the life of the fund.[35]

The meaning of "significant entrepreneurial risk" in the regulations draws heavily on the examples. Indeed, some commentators argue that the examples lack facts tethered

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[28] *Id.*

[29] For instance, the preamble provides, "With respect to the fifth example, the Treasury Department and the IRS request suggestions regarding fee waiver requirements that sufficiently bind the waiving service provider and that are administrable by the partnership and its partners." *Id.*

[30] New York State Bar Association, Tax Section, Report on the Proposed Regulations on Disguised Payments for Services, Report No. 1330 (Nov. 13, 2015) [hereinafter NYSBA], *available at* https://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Reports_2015/Tax_Section_Report_1330.html.

[31] *See, e.g.*, Goodwin Proctor, New Proposed Treasury Regulations Focus on Management Fee Waivers, http://www.goodwinprocter.com/Publications/Newsletters/Client-Alert/2015/07_29-New-Proposed-Treasury-Regulations-Focus-on-Management-Fee-Waivers.aspx?article=1 (Jul. 29, 2015); Mayer Brown, Waiver Good-Bye, https://m.mayerbrown.com/files/Publication/c45ee6a3-dae0-4bab-8c8a-23f7c2253dc7/Presentation/PublicationAttachment/fedcb76c-a688-4b9a-ba09-4a7c5f5516d9/150806-UPDATE-Tax.pdf (Aug. 6, 2015); Sullivan & Cromwell, IRS Proposes Changes to the Taxation of Fee Waivers and Possibly Other Transactions in Which Partners Provide Services, https://www.sullcrom.com/irs-proposes-changes-to-the-taxation-of-fee-waivers-and-possibly-other-transactions-in-which-partners-provide-services (Jul. 24, 2015)

[32] Debevoise & Plimpton, Treasury Issues Proposed Regulations on Management Fee "Waiver" Mechanisms, http://www.debevoise.com/~/media/files/insights/publications/2015/07/07292015_management_fee_waiver_proposed.pdf (Jul. 29, 2015), at 4.

[33] Example 3 involves an "investment partnership that will acquire a portfolio of investment assets that are not readily tradable on an established securities market." Example 5 refers to the 2% management fee, 20% carry deal said to be the private equity industry standard. *See* Victor Fleischer, *Two and Twenty: Taxing Partnerships in Private Equity Funds*, 83 N.Y.U. L. REV. 1 (2008) (describing and analyzing "two and twenty" private equity compensation).

[34] Example 3 closely matches a "private equity game" carefully described by Gregg Polsky. *See* Polsky, *supra* note 18, at 617-21.

[35] The examples cite other factors, such as clawback obligations, in addition to contrasting net profit (in Example 5) and, in effect, gross profit (in Example 3). Prop. Treas. Reg. § 1.707-2(d).

to the factors listed under the "significant entrepreneurial risk" standard in the non-example portion of the regulations.[36] Because the examples are relatively salient and easy to understand, they help explain how the regulatory scheme works to nonexperts in the area. Law firms quickly embraced the examples to explain that Treasury meant to recharacterize some fee waiver agreements while reassuring clients that the regulations did not target "more common carried interests" used to compensate private equity fund managers.[37]

Advisors and regulated parties not only analyze regulatory examples. They also lobby for changes to the regulatory examples during the regulatory process. And after this lobbying opportunity closes, advisors and regulated parties seek to influence the interpretation of examples by the agency and in the market.

In the case of the management fee waiver regulation, the NYSBA report shows the thorough engagement of the tax bar with the regulatory examples. The report explored various presumed reasons for the facts offered and conclusions reached in the examples. It offered numerous edits, including factual changes and suggestions for new examples altogether.[38] The NYSBA's treatment of the examples amounts to a detailed negotiation regarding the contours of the regulation. For instance, with respect to Example 3, the NYSBA report asserts that a service provider's control over the timing of a gain recognition event is subject to constraints such as illiquidity and fiduciary duty. The NYSBA then suggests that perhaps the idea that the service provider controls the timing of gain recognition should be replaced with a requirement to reduce net gain by unrealized net loss.[39]

In the case of the fee waiver regulations, advocates who assumed the role of watchdogs for the public interest also expressed their views.[40] One law professor, for instance, requested an example (to the disadvantage of taxpayers) about "cashless" fee

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[36] These commentators contend that the examples take the proposed regulations in a direction that the rest of the regulation does not predict. *See* Bradley T. Borden et al., *Proposed Anti-Fee Waiver Regulations: A Blueprint for Waiving Fees?*, 57 TAX MG'T MEMO. 87, 100-02 (providing a chart listing the risk factors from the non-example portion of the regulations and arguing that the examples generally do not include information about the risk factors).

[37] Sullivan & Cromwell, IRS Proposes Changes to the Taxation of Fee Waivers and Possibly Other Transactions in Which Partners Provide Services, https://www.sullcrom.com/irs-proposes-changes-to-the-taxation-of-fee-waivers-and-possibly-other-transactions-in-which-partners-provide-services (Jul. 24, 2015).

[38] NYSBA, *supra* note 30.

[39] *Id.* at 39. The NYSBA does not explore the fact that the valuation of illiquid assets, which would give rise to a determination of unrealized net loss, is also within the control of the service provider. The service provider has an incentive to understate unrealized net loss for a number of nontax reasons, such as the incentive to show the best possible fund performance for reasons such as subsequent fundraising.

[40] Of course, as a result of collective action problems the negotiation over incremental changes to regulations often involves only (or mostly) the most closely interested regulated parties and the government. *See, e.g.*, Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. Pa. L. Rev. 815, 855 (2010) (outlining how an interest group might accomplish a regulatory goal incrementally and thus fragment public opposition); *see generally* Mancur Olson, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 144 (1965) (noting "political advantages of the small groups of large units").

waivers. His point is that the examples fail to sufficiently clarify that if a fee has already been earned, it cannot then be transformed into capital gain.[41] As the participation of such advocates reflects, the ultimate regulatory examples are sometimes influenced by a variety of differing views.

The negotiation over the content of regulatory examples does not end when the regulations are finalized. Indeed, the style of the comments reflects the long-term nature of the negotiation. The law professor's request for a cashless fee waiver example was presented as a "clarification" of the regulatory examples in light of the longstanding law of constructive receipt and related doctrines.[42] This approach leaves open the argument that even if a cashless fee waiver example does not make it into the regulations, the other regulatory examples should still be interpreted so as to foreclose capital gain treatment for cashless fee waivers. This framing illustrates that regulatory examples are pregnant with meaning. It prompts the question: How does one determine what they mean?

B. Gap in Theory

Notwithstanding the prevalence of examples throughout agency regulations, and their clear importance to regulated parties and agency officials, the legal literature contains no consideration of the meaning of regulatory examples. This gap creates interpretive problems under various administrative law doctrines and reduces the certainty and quality of decisions regarding regulatory examples.

The lack of any existing theory of regulatory examples is understandable. It is part of a broader neglect of regulatory interpretation.[43] Like courts, legal scholars have focused exhaustive attention on the deference due to regulations but paid very little systematic attention to how to determine the meaning of regulations.[44] This lack of attention to regulatory interpretation reflects a broader inattention to agencies' regulatory choices.[45]

To be sure, a number of scholars have opened the regulatory "black box"[46] by

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[41] *See* Letter from Gregg D. Polsky to Internal Revenue Service, Nov. 16, 2015, at 5.
[42] *Id.*
[43] Kevin Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012); Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 MICH. L. REV. FIRST IMPRESSIONS 61, 61 (2015) ("Despite the publication of thousands of law review articles and judicial opinions on the interpretation of the Constitution, statutes, contracts, and other legal texts, to date little attention has been paid to the theory or practice of regulatory interpretation.").
[44] Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 88-89 (2015) ("Despite the fact that regulations overwhelm statutes in number and scope, neither judges nor scholars have confronted regulations with the level of interpretive sophistication applied to constitutions, statutes, or contracts.").
[45] *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1003 (2015) (explaining that "agency statutory interpretation remains, to a large extent, a black box.").
[46] *Id.*

offering tentative thoughts on how agencies interpret statutes,[47] or examining why agencies make particular regulatory choices, such as voluntarily constraining their own discretion.[48] However, by and large, administrative law scholars have focused extensively on when courts should defer to agency pronouncements[49] without significant attention to why agencies have chosen to draft guidance in a particular way, or what such drafting decisions should mean to courts, regulated parties, and the agency officials who must apply such pronouncements in the future.

The lack of attention to the meaning of regulations is problematic. As Kevin Stack has argued, the focus on standards of deference puts the cart before the horse. In order to apply any number of administrative law doctrines, a court must first interpret what an agency regulation means.[50] For instance, under *Chevron*, a court should defer to a regulation if it is a permissible interpretation of the statute.[51] But one must know how to interpret the regulation in order to know whether the regulation is a permissible interpretation of the statute.[52] Also, under *Auer / Seminole Rock*, a court should defer to an agency's permissible interpretation of its own regulation.[53] But one must have some means of interpreting the regulation, to know its bounds, and therefore be able to decide whether the agency's own interpretation of it is permissible.[54]

Scholars who have begun to examine regulatory interpretation in depth have imported theories of statutory interpretation into the space of regulatory interpretation. The statutory interpretation debate features many theories, including those belonging to textualist,[55] purposivist, and intentionalist[56] schools of interpretation. Three principal

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[47] Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005); *see also* Walker, *supra* note 45 (offering an empirical study regarding the question).

[48] Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009).

[49] The deference question, and when courts should defer, is (among other places) at the heart of *Chevron* and the cases that have attempted to explain when *Chevron* applies. The judicial and scholarly examination of when *Chevron* should apply has been voluminous. *See, e.g.*, Kathryn A. Watts, *From Chevron to Massachusetts: Justice Steven's Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1028-29 (2010) (noting and citing to just a portion of the voluminous Chevron literature).

[50] Stack, *supra* note 43, at 365-75.

[51] Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc. 467 U.S. 837 (1984).

[52] Stack, *supra* note 43, at 368.

[53] Auer v. Robbins, 519 U.S. 452 (1997).

[54] Stack, *supra* note 43, at 371; *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000) (indicating that deference to agency interpretation only warranted when regulatory language is ambiguous). Stack also argues that under Accardi v. Shaughnessy, 347 U.S. 260 (1954), agencies are bound to their own regulations But, again, one must know how to interpret the regulation to know how, and to what extent, agencies should be bound. Stack, *supra* note 43, at 375-76.

[55] *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546 (1983) (arguing that a group of legislators do not form a common purpose when enacting legislation and that a focus on legislative history materials produces an incentive to manipulate those materials); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91, (explaining that textualists prioritize "semantic content" and arguing that this properly effects legislative compromises made necessary by Constitutional structure).

articles regarding regulatory interpretation have each advocated adopting one of three principal methods of statutory interpretation. Jennifer Nou has advocated adopting textualism, which emphasizes understanding the meaning of the words on the page in their semantic context.[57] Kevin Stack has set forth the case for purposivism, which seeks to effect the purpose of the law as written.[58] And Lars Noah has adopted intentionalism, which looks to the intent of the drafters.[59]

However, the statutory interpretation debate does not directly translate to the regulatory space.[60] Constitutional requirements, such as bicameralism and presentment, shape the enactment of statutes but not the promulgation of regulations.[61] There is a diverse and in some cases enormous body of possibly relevant regulatory source materials.[62] Empirical studies suggest that agency drafters have uneven levels of familiarity with common statutory interpretation tools.[63] The regulatory process also

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[56] Purposivism and internationalism are related schools. Purposivism seeks to effectuate the objective purpose of a statute. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1374-81 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947). Intentionalism focuses on the subjective intent of legislators. *See* Posner, R.; Merrill.

[57] Nou, *supra* note 44.

[58] Stack, *supra* note 43.

[59] Lars Noah, Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules, 51 Hastings L. J. 255, 281 (2000).

[60] *Compare, e.g.*, Stack, *supra* note 43, at 368-70 (emphasizing the differences between statutory and regulatory interpretation) *with* Frank C. Newman, *How Courts Interpret Regulations*, 35 Calif. L. Rev. 509 (1947) (acknowledging the importation of statutory interpretation concepts for purposes of constructing regulations).

[61] Some argue that determining agency intent is an easier or more certain exercise compared to discerning legislative intent. *See, e.g.*, Noah, *supra* note 59, at 281; Stack, *supra* note 43, at 380 (arguing that APA and other requirements "impose a uniquely high demand for rationality on agency action"). Others disagree. *See, e.g.*, Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1679 (describing the cacophony of interests that can influence agency action); Nou, *supra* note 44, at 82-83 (emphasizing the "fierce negotiations" and "bargains struck [at] pivotal points in the rule-drafting process"); s*ee also* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1154-55 (2014) (noting the importance of guidance outside the regulatory process, procedural mandates based on executive orders, division of responsibility among agencies and other factors that cause administrative practice to diverge from the process anticipated by the Administrative Procedure Act).

[62] *Compare* Stack, *supra* note 43, at 362-63 (arguing that regulatory interpretation should maintain a tight focus on official statements of basis and purpose, in particular in regulatory preambles) *with* Nou, *supra* note 44, at 85-86 (proposing a "hierarchy of sources" that proceeds from preamble to regulatory analyses to agency interpretation) *and* Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CINN. L. REV. 681, 710-16 (cataloguing "APA-mandated materials," "internal documents and memoranda," "unpublished documents" and "post-promulgation reconstruction" as possible sources of information regarding agency intent).

[63] *See* Walker, *supra* note 45, at 1025 (reporting, for example, that over 85% of agency rule drafters surveyed said they were familiar with the "ordinary meaning" and "whole act rule" interpretive canons); *see also* Abbe R. Gluck & Lisa Schultz Bressman, S*tatutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Abbe R. Gluck & Lisa Schultz Bressman, S*tatutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014) (both examining congressional knowledge of interpretive canons).

differs across different agencies and among different regulatory projects within the same agency. None of these issues has been fully explored by scholars in an attempt to develop a theory of regulatory interpretation.

Most importantly, for the purposes of this project, none of these background theories of regulatory interpretation carefully considers the common drafting practices that agencies use when writing guidance. In particular, none of the existing background theories offers an adequate way of understanding the meaning of regulatory examples.[64] This Article fills this gap.

C. Examples in Courts

Case law also lacks a framework for determining the meaning of regulatory examples. Despite the prevalence and importance of regulatory examples, courts deal with examples in a somewhat haphazard fashion. Some courts ignore regulatory examples without explanation. At other times, judges take the view that case outcomes should turn on examples. Still others engage in more extensive analysis to extract legal principles from examples. Those courts that extract legal principles from regulatory examples use different approaches to do so. Some use a cabined approach that draws conclusions from the regulatory examples without placing them in the context of other regulatory examples or in the context of the regulation or statute more generally. In other cases, courts conduct a more holistic analysis that draws support from other parts of the regulation (including other regulatory examples) as well as the regulatory and statutory scheme. But no court has attempted to provide a comprehensive framework for how regulatory examples should be analyzed.

Some kinds of regulatory guidance that courts have labeled "examples" are different from the regulatory examples we consider here, because they do not apply law to hypothetical facts. For instance, based on our definition, listing a group of factors that is relevant to the application of a law is not an example. Factors may help illustrate what the agency means by honing in on relevant considerations, but they do not reach a conclusion as to how the agency thinks an issue would come out. Thus, a list of types of evidence that a mining company might bring forth to shift the burden of proof regarding damage causation is not a regulatory example.[65]

When a court does encounter a regulatory example that meets our definition -- meaning an example that reaches a legal conclusion based on hypothetical facts – it sometimes does not accord much weight to the example. Some courts have suggested

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[64] *See* Walker, *supra* note 43, at 71-72 (explaining that, while general theories for interpreting regulations deserve more attention, scholars should also "turn to perhaps more difficult questions about which other interpretive tools should be kept or discarded in the regulatory interpretation toolkit in light of how federal agencies actually draft rules in the modern administrative state.").

[65] *See* National Min. Ass'n v. Babbitt, 172 F.3d 906, 910 (1999) (citing 30 C.F.R. § 817.121(c)(4)(iv) (promulgated by the Secretary of the Interior)).

that regulatory examples are "illustrative" only, meaning that the examples lack independent legal content and "are not to be considered as dispositive of controversial issues . . . ."[66] For instance, in *Tennessee Children's Homes*, a child care center operated by the Tennessee Baptist Convention contended that it was exempt from reporting requirements because it was "exclusively religious." An example stated the result that a church-affiliated orphanage was not exclusively religious because the child-care operations would independently support a tax exemption. However, the the court found that, since the regulatory example was illustrative only, the non-example portion of the regulation left open a material question of fact that could be decided by the jury.[67]

Other courts have ignored regulatory examples entirely without explanation. For instance, in 2011, the Supreme Court in *Mayo*[68] upheld a decision that medical residents were employees for purposes of payroll tax liability. There is an on-point regulatory example which states that a "medical resident" regularly scheduled for more than 40 hours per week at "University V" is an employee for purposes of payroll tax liability."[69] The Court ignored the example in its analysis, focusing instead on the non-example text of the regulation. Other cases have also displayed a tendency to avoid relevant regulatory examples in favor of relying on the non-example portion of the regulatory text.[70]

If some judges ignore examples, other judges take the view that courts should defer to them. For instance, consider the dissent in *Waterman*, a 1999 Fourth Circuit case.[71] In *Waterman*, an enlisted member of the U.S. Navy became entitled to a separation payment of about $44,000 while he was serving in a combat zone. The question in the case was whether the amount was excludable from Waterman's income as combat pay.[72] The majority held that the amount was not "compensation received for active service" within the meaning of the statute.[73] The dissent argued that an example in the regulations was "controlling." The example provided that a reenlistment bonus earned while in a combat zone, but paid later, was excludable. The dissenting judge thought that the example ought to produce a result of exclusion for Waterman's separation payment.[74] There are

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[66] Tennessee Baptist Children's Homes, Inc. v. United States, 790 F.2d 534, 538-39 (6th Cir. 1986).

[67] *Id.* (citing Nico v. Commissioner, 565 F.2d 1234, 1238 (2d Cir. 1977) (addressing the use of itemized deductions versus standard deductions for nonresidents) ("We cannot agree with the unsupported proposition that non-pertinent illustrations render the text of a regulation internally inconsistent."); Solomon v. Commissioner, 67 T.C. 379, 386 (1976) (concluding that corporate reorganization examples in regulations do not limit statute), *aff'd sub nom* Katkin v. Commissioner, 570 F.2d 139 (6th Cir. 1978).

[68] Mayo Foundation v. United States, 562 U.S. 44 (2011).

[69] 26 C.F.R. § 31.3121(b)(1)-2(d)(3)(iii).

[70] *See, e.g.* Biovail Corp. v. FDA, 448 F. Supp. 2d 154, 162 (2006) (refusing to extract from examples any principle related to the proper degree of detail the FDA owed a drug applicant in a response); Am. College of Physicians v. U.S. (Ct. Clms. 1976) (citing to but then not discussing on point regulatory examples, instead focusing analysis on non-example portion of regulation).

[71] *See* Waterman v. Commissioner, 179 F.3d 123 (4th Cir. 1999).

[72] *See* I.R.C. § 112(a).

[73] *See* Waterman, 179 F.3d 127-28.

[74] *See* Waterman, 179 F.3d at 131, 135 (King, dissenting) (citing 26 C.F.R. 1.112-2(b)(5) Example 5) ("[T]he majority cannot convincingly distinguish Example 5 of the applicable regulation).

other instances of courts deferring to examples as well.[75]

Other courts have engaged in more extensive analysis to extract legal principles from regulatory examples. Some courts have used a cabined approach that draws conclusions from the regulatory examples without placing them in context. Others have used a more holistic approach that analyzes the example by considering the statute and other parts of the regulation, including other regulatory examples and non-example portions of the regulation.

The cabined approach is illustrated by *Lorillard*, a 2014 decision in the D.C. District Court. In *Lorillard*, the issue was whether there was conflict of interest for a consultant who worked for the Food and Drug Administration (FDA) on regulating dissolvable tobacco products.[76] The court held that a financial conflict arose because the consultant also advised companies who manufactured smoking cessation products, which directly competed with dissolvable tobacco.[77] The *Lorillard* court based its decision on an FDA regulatory example. This example found *no* disqualifying interest when an FDA consultant "does not own stock in, or hold any position, or have *any business relationship* with the company developing the drug." The Lorillard court took this conclusion and extrapolated from it in two ways. The Lorillard court first assumed that the existence of a business relationship with the company developing a drug would disqualify a consultant. The court then decided that the existence of a business relationship with the competitor of the company developing the drug would also disqualify a consultant.[78]

The *Lorillard* court drew broad principles from the regulatory example without analyzing how or why such principles should be drawn. In particular, the court extrapolated a ban on physicians with business interests in competitors from a regulatory example addressing business interests in the drug at issue, without exploring whether this was the right interpretation of the regulatory example. The court neglected the question of what the example meant as part of the regulatory scheme. For instance, other elements of the relevant law might reveal that the goal of the FDA's consultation process was to ensure that all viewpoints were zealously represented, in which case the presence of an

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[75] *See e.g.*, Estate of Timkin v. United States, 601 F.3d 431 (6th Cir. 2010) (holding that a constructive addition to a trust resulting from the lapse of a power of appointment was subject to the generation-skipping transfer tax). In *Timkin*, the court explicitly stated that it was applying *Chevron* deference, noted that "the Estate conceded at oral argument that Example 1 is part of the applicable regulation" and analogized the grantor in the case to the grantor in Example 1. *See id*. at 435, 438-39. *See also* Educational Assistance Found. for Descendants of Hungarian Immigrants in Performing Arts v. United States, 111 F. Supp. 3d 34, 40 (D.D.C. 2015) (holding that organization devoted to genealogy for one family was not a valid 501(c)(3) based on on-point regulatory example and citation to case on which regulatory example was apparently based); Chevron Corp. v. Commissioner, 104 T.C. 719 (1995) (allowing taxpayer to rely on method provided in example for allocating state taxes between foreign and domestic income);

[76] *See* Lorillard, Inc. v. Food & Drug Admin., 56 F. Supp. 3d 37 (D.D.C. 2014), *rev'd sub nom.*, R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 810 F.3d 827 (2016) (district court judgment vacated for lack of standing).

[77] *Id.*

[78] *Id.*

industry competitor in the review process would be viewed as a positive addition, not a disqualifying event.

A more holistic approach to identify legal principles in regulatory examples is illustrated by cases including *Washington Legal Foundation*. *Washington Legal Foundation* considered whether the Federal Advisory Committee Act (FACA) applied to an American Bar Association committee that advised the Department of Justice regarding nominees for federal judgeships.[79] Relevant regulations promulgated under FACA gave examples of groups not covered by the Act.[80]

In the course of deciding that FACA applied to the ABA committee at issue, the court first reviewed the legislative purpose of the statute, "to open to public scrutiny the manner in which government agencies obtain advice from private individuals and groups."[81] It cited four different examples of groups not covered by FACA under the regulatory example. It then drew out different principles from each example. For instance, the court reasoned that local groups who themselves initiated contact with the agency, and also primarily operational groups, were the sorts of groups who might be exempted.[82] The *Washington Legal Foundation* court concluded that none of the principles extracted from the regulations supported exempting the ABA committee from FACA.

The analytical approach the *Washington Legal Foundation* court took was more holistic than the approach adopted by the *Lorillard* court for two reasons. First, the *Washington Legal Foundation* court framed its analysis by considering the broader statutory and regulatory scheme, in this case as found in legislative purpose. Second, the *Washington Legal Foundation* court considered the regulatory examples as a body rather than focusing on only one.[83]

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[79] *See* Washington Legal Found. v. Dep't of Justice, 691 F. Supp. 483, 496 (D.D. C. 1988) (holding that FACA applied to ABA advisory committees by its terms, but that the application was unconstitutional due to the President's control over the process for nominating federal judges) (citing U.S. Const. Art. II § 2 cl. 2).

[80] 41 C.F.R. § 101-6.1004.

[81] Washington Legal Found., 691 F. Supp. at 490.

[82] *See id.* at 490 n.34 (citing examples of exemptions from FACA including "local civic group[s]", "meetings initiated by groups," and "primarily operational" rather than "advisory" groups).

[83] Other courts also take a holistic approach similar to the approach in *Washington Legal Foundation*. *See, e.g.*, Hilbert v. District of Columbia, 23 F.3d 429 (D.C. Cir. 1994). An example in the regulations provides that the salaried requirement is met when an employee is paid daily or on a shift basis, "if the employment arrangement includes a provision that the employee will receive not less than [an] amount specified … in any week in which the employee performs any work." 29 C.F.R. § 541.118(b) (apparently based on McReynolds v. Pocahontas Corp., 192 F.2d 301 (4th Cir. 1951)). The majority held that the correct principle was that, so long as there is a guaranteed amount payable per week, the employee is salaried, regardless of any additions, including those based on hour. Hilbert v. District of Columbia, 23 F.3d 429, 432 (D.C. Cir. 1994) ("If it is consistent with salaried status to calculate *deductions* from employee' pay on an hourly basis, it is just as consistent with salaried status to calculate *additions* to their pay on that basis.") (Williams, J.) (majority opinion). On the other hand, the *Hilbert* dissent concluded that the principle was conjunctive and confined to the facts of the example: the employee is salaried only if there is a guaranteed amount *and also* any additions to pay are based on daily, not hourly, increments. Hilbert v. District of

Washington Legal Foundation provides a glimpse of what could be possible if courts had a robust framework for analyzing regulatory examples. This case engages in some reasoning by analogy from the facts and conclusion of the examples, while also trying to appreciate how the regulatory examples fit within the broader regulatory and statutory scheme. But even though this case contains at least some strands of this analysis, neither it, nor any other case, attempts to articulate any framework for analyzing regulatory examples, or communicates in any systematic way how regulatory examples should be interpreted in connection with the non-example portion of the regulation or the broader regulatory and statutory scheme. As a result, courts are left to approach regulatory examples in an ad hoc fashion, which reduces the certainty and the quality of decisions about the meaning of regulations that include regulatory examples.

III. A THEORY OF EXAMPLES

In this Part, we provide a theory of regulatory examples. We explore how regulatory examples can either merely illustrate the non-example portion of the regulations or implicitly add content to the law. We set forth a theory of interpretation that can discern the content that examples add to the law. There are two parts of our theory, which can work in tandem or in dialogue with each other. The first part of our theory uses analogical, common-law reasoning to uncover the principles inherent in regulatory examples. In the second part, the results of the analogical reasoning must be reconciled with the broader regulatory and statutory scheme. In this second part reconciliation, the legal content of the examples and the non-example regulatory text are on equal footing.

A. The Nature of Examples

Why do agencies write regulatory examples?

A general answer is possible: agencies write regulatory examples because examples offer a way to express legal content without requiring the articulation of abstract rules.[84] Sometimes it is easier to express and receive information with a concrete hypothetical, rather than an abstract principle.[85]

Columbia, 23 F.3d 429, 439 (D.C. Cir. 1994) ("The essential distinction drawn by the DOL regulations is between payment on a salary basis (which presumably includes payment on a weekly or yearly basis) and payment on an hourly basis.") (Mikva, C.J.) (concurring in part and dissenting in part).

[84] The technique of communicating law with components that include general or abstract statements plus concrete hypotheticals is not unique to agency regulations. The same approach is used in Restatement summaries of common law. *See, e.g.*, ____ (using examples based on cases); _____ (using hypothetical examples). It is used in model laws. *See, e.g.*, UCC. It is also used by private organizations. *See, e.g.*, NFL rules, which are illustrated on a weekly basis in-season through the distribution of "good call" and "bad call" video clips to member teams.

[85] This is consistent with the idea of law as a problem of communication, and with the idea that regulations are "compressed policy instructions," written by regulators who leave to "subsequent actors" the task of "discerning the meaning of these communications." Mathew D. McCubbins & Daniel B. Rodriguez, *Deriving Interpretive Principles from a Theory of Communication and* Lawmaking, 76 BROOK. L. REV.

It is also possible to identify several different sources for the content of a regulatory example. An agency may have drafted the regulations in response to a particular transaction or situation that has come to its attention.[86] Examples may repeat legislative history[87] or case law.[88] Regulated parties – or public interest advocates -- may have requested certain examples that offer certainty or protection for a preferred or negotiated position.[89] Or examples may be sua sponte hypotheticals developed by the agency to help it think through the drafting of a regulation.[90]

Examples may explain the main and important target of the regulations, by giving the central case that prompted the rulemaking. They may be used to signal how the agency plans to allocate its enforcement resources.[91] Or they may operate on the boundaries, as safe harbors or "sure shipwrecks," allowing the agency to say how the law should apply in limited factual situations, without having to specify how the law applies in all circumstances.[92]

Sometimes regulatory examples only illustrate law that is clear from the non-example portion of the regulation. We call these "illustrative" examples. But sometimes they do more. Examples that we call "declaratory" add to the content of the non-example portion of the regulation. Below we show the difference between illustrative and declaratory regulatory examples with a Health and Human Services regulation that precludes a health insurer from restricting hospital stay benefits for a new mother or newborn to "less than— (i) 48 hours following a vaginal delivery[.]"[93]

979, 986 (2011). Like stories, examples are closer to the experience of a rule drafter and a rule interpreter than are abstract, logical rules. Examples may be more understandable and more persuasive because the person reading the example can draw upon his or her own experience to fill in and verify the story. *See* WILLIAM R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE AND ACTION (1987).

[86] For instance, the application of payroll tax liability to medical residents was an articulated policy goal when the regulations considered in the *Mayo* case were promulgated. [Cite brief.]

[87] For instance, many of the examples in the de minimis fringe benefit regulations are taken verbatim from the legislative history. *See* Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, H.R. 4170, 98th Cong., P.L. 98-369, 858-59 (noting that "coffee and doughnuts" as examples of de minimis fringes but noting also that "the frequency with which any such benefits are offered may make the exclusion unavailable for that benefit," and that "[b]y way of illustration, the exclusion is not available if sandwiches are provided free-of-charge to employees on a regular basis").

[88] For instance, the example considered in the *Hilbert* case was itself based on a decided case. *See supra* note 83.

[89] For instance, the dozens of regulatory examples that describe how the "universal capitalization" rules apply in income tax deal matter-of-factly with the concerns of one industry after another. *See* 26 C.F.R. § 263A. ___ (offering examples negotiated by airline industry, retail industry, and many others).

[90] [Add cite. Perhaps 469 material participation? Or GINA?]

[91] *See* Leigh Osofsky, *Concentrated Enforcement*, 16 Fla. Tax Rev. 325 (2014).

[92] Such examples often fit the description of "safe harbors" or "sure shipwrecks." *See, e.g.*, Susan Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. Davis L. Rev. 1385 (2016).

[93] 45 C.F.R. § 148.170 (a)(1). The regulation provides further that "[i]f delivery occurs in a hospital, the hospital length of stay for the mother or newborn child begins at the time of delivery." 45 C.F.R. § 148.170 (a)(2).

An illustrative example within this regulation illustrates the non-example portion of the regulation without adding any legal content. First it gives hypothetical facts: "A pregnant woman . . . goes into labor and is admitted to the hospital at 10 p.m. on June 11. She gives birth by vaginal delivery at 6 a.m. on June 12." Then it gives a legal conclusion: "[T]he 48–hour period described in paragraph (a)(1)(i) of this section ends at 6 a.m. on June 14."[94] This example is an illustrative example because it shows how the non-example portion of the regulation works without adding any legal content. Example 1 just illustrates a time passage calculation that was already fully specified in the non-example portion of the regulation.

In contrast, other examples within this regulation are declaratory. That is, they offer legal content that cannot be discerned from the non-example portion of the regulation. For instance, later in the same regulation, the non-example portion of the regulation states, "An issuer subject to the requirements of this section may not [p]rovide payments (including payments-in-kind) or rebates to a mother to encourage her to accept less than the minimum protections available under this section."[95] Under the facts of one example, "[i]n the event that a mother and her newborn are discharged earlier than 48 hours … the issuer provides for a follow-up visit by a nurse within 48 hours after the discharges to provide certain services that the mother and her newborn would otherwise receive in the hospital." The legal conclusion is that "coverage for the follow-up visit is not prohibited," "because the follow-up visit does not provide any services beyond what the mother and her newborn would receive in the hospital."[96]

This second example is declaratory. It adds to the meaning of the non-example portion of the regulation. It does so by considering the payment for a service that would only be made in the event of early discharge. The coverage it considers appears to fit the description of a payment (or "payment-in-kind") that would be made to encourage an early discharge. One can easily imagine the scene in which a provider "encourages" a new mother to accept early discharge from the hospital because the insurance company will cover an at-home visit from a nurse the next day. Yet Example 2 concludes that the at-home coverage is not a prohibited payment. In so doing, it changes the meanings of one or both of "payment" and "encourage" within the regulation. One might summarize the principle that can be drawn from the regulatory example as follows: *coverage of home services that would have been provided had the mother and newborn stayed in the hospital do not constitute prohibited payments or rebates, even if they encourage early discharge as a practical matter*. This implicit principle adds to the content of the law, by communicating legal content that is not already clear from the non-example portion of the regulation.

Examples need to be interpreted to the extent that they are declaratory. Or, to look at it from the opposite angle, if an example only illustrates the non-example portion of the regulation without adding anything to the content of the non-example portion of the regulation, the example provides no new content that needs to be interpreted. For

[94] 45 C.F.R. § 148.170 (a).
[95] 45 C.F.R. § 148.170 (b)(1).
[96] 45 C.F.R. § 148.170 (b) Example 2.

instance, recall that the Supreme Court in *Mayo* considered whether a medical resident's wages were subject to payroll tax liability, but did not analyze an on-point regulatory example involving a medical resident at "University V."[97] Perhaps the Court put the example on the sidelines in its analysis because the example was only illustrative; it did not add legal content to the rule that a student regularly scheduled to work 40 hours or more per week would be subject to payroll tax liability. In contrast, a declaratory example communicates new legal content that must be interpreted as part of the regulation. Our theory seeks to explain how to interpret such declaratory examples.

B. What is Analogical Reasoning?

When regulatory examples implicitly add content to the law, we argue that analogical common-law reasoning can uncover the principles inherent in regulatory examples. Analogical reasoning is the paradigmatic way that lawyers reason from case to case or, put another way, from one or more set of particular facts and results to another. One early commentator called this approach "reasoning by example."[98] It is typically described as involving a determination of similarity in relevant respects between existing cases and the case at hand, a determination of the revealed rule or principle and an application of the rule or principle to the case at hand.[99]

To illustrate analogical reasoning, assume a case in which a defendant failed to securely latch the cage of a dangerous tiger in the zoo, and injury to an adult resulted. The defendant in the tiger case was found negligent. Assume further a later case in which a defendant failed to securely latch the cage of a dangerous bear in the circus, and injury to a child resulted. If relevant similarities exist between the two cases, then one may conclude that the defendant in the second case is also negligent. In particular, if the relevant factual similarities between the two cases include the presence of a strong and dangerous animal and an unlatched cage, the result should also be negligence in the second case, because such facts are present in both cases. Facts that appear less relevant in reaching a negligence determination include the facts that one animal was a tiger and one a bear, that one location was a zoo and the other a circus, and that the injury in one case was to an adult and in the other case was to a child.

The logical underpinning for this process of analogical reasoning is subject to some debate. Many scholars argue that it is not deductive or inductive logic.[100] Some

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[97] Mayo Foundation v. United States, 562 U.S. 44 (2011). [NTD: fix fn numbering]

[98] Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501-02 (1947). The notion of reasoning by example, or from particular to particular, goes back to Aristotle. "Clearly then to argue by example is neither like reasoning from part to whole, nor like reasoning from whole to part, but rather reasoning from part to part, when both particulars are subordinate to the same term and one of them is known." ARISTOTLE, PRIOR ANALYTICS [69] (McKeon ed. 1941)

[99] Levi, *supra* note 98, at 501-02.

[100] *See, e.g.,* Scott Brewer, *Exemplary Reasoning: Semantics, Pragamatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 942-49 (1996). *But see* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1184-85 (1999) (explaining various views that

contend that it does not even require the conscious identification of a guiding principle,[101] but rather can be mediated by cognitive processes that are not necessarily articulated.[102] In the hard cases, where there are competing principles that might seem equally supported by the principles of similarity and relevance, some scholars have suggested that the results of analogical reasoning should accord with high-level moral principles[103] or reasoned policymaking.[104]

In its most self-conscious form, analogical reasoning includes both the articulation of possible principles from fact patterns, and also "test[ing] [of a principle] against other possibilities."[105] Articulating a principle and considering what conclusions it would yield for various hypothetical fact patterns allows the governing principle to be more carefully specified. To the extent that applying the principle would reach inappropriate outcomes on hypothetical facts, the principle can be modified, so that it reaches outcomes in a way that better accords with the underlying policy or meaning of law.

To illustrate, recall the caged dangerous animal examples. As illustrated above, one could determine that the tiger case and the bear case have relevant similarities, and that the bear case should therefore result in a negligence determination, without necessarily articulating the principle that motivates the result in the tiger case. However, articulating the principle that motivates the result in the tiger case can be helpful in honing the principle for application in future cases. Perhaps the governing principle in the tiger case is that *the failure to latch a dangerous animal's cage is negligent*. Applying this principle to the bear case should result in a negligence determination in the bear case as well.

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analogical reasoning may not be a distinct form of logical reasoning). Deductive logic relies on "if – then" type of reasoning, whereby if the premise is true, then the conclusion necessarily follows. Brewer, *supra,* at 947. Inductive logic relies on a large number of observations to conclude that if a specific set of facts occurs, a conclusion is likely to follow. Brewer, *supra*, at 944-45. In contrast, case law reasoning is a less logically formal process, which moves back and forth between the law and facts to determine what, if any, principles flow from the combination of law and facts.

[101] See, e.g., Dan Hunter, Reason is Too Large: Analogy and Precedent in Law, 50 EMORY L.J. 1197 (2001); F.M. Kamm, Theory and Analogy in Law, 29 ARIZ. ST. L.J. 405, 413-14 (1997); Frederick Schauer, Analogy in the Supreme Court: Lozman v. City of Riviera Beach, 2013 SUP. CT. REV. 405, at 409, 421.

[102] For some of the foundational cognitive science works regarding analogical reasoning, see, for example, M.L. Gick & Keith J. Holyoak, *Analogical Problem Solving*, 12 COGNITIVE PSYCHOL. 306 (1980); M.L. Gick & Keith J. Holyoak, *Schema Induction and Analogical Transfer*, 15 COGNITIVE PSYCHOL. 1 (1983). For a more recent model, see KEITH J. HOLYOAK & PAUL THAGARD, MENTAL LEAPS: ANALOGY IN CREATIVE THOUGHT 19-20 (1995).

[103] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE, 254-58 (1980).

[104] *See, e.g.*, Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 764, 770 (2006) (emphasizing that the "activity of deciding cases" involves "judicial reasoning based on policies expressed or implied in previous cases" and is not, in many cases, "untethered").

[105] Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 757 (1993); *see* Brewer, *supra* note 100, at 962 (defining analogical or exemplary reasoning as "a sequence of reasoning steps, involving a stage of abductive discovery, a stage of confirmation or disconfirmation, and a stage of application").

But imagining how this principle would apply to other, hypothetical cases allows for more precise honing of the principle. Imagine, for instance, that another case arises in which the defendant failed to latch the cage of a lion. In this case, the latch on the cage was just for show – it was never anticipated to keep the lion in the cage. Instead, there was a trench outside the lion's cage, which experts agree should have kept the lion from attacking humans. An outside company (not the defendant) failed to construct the trench properly, and the lion escaped and caused injury. Should the principle still be that failure to latch a dangerous animal's cage results in a negligence determination? Or, given these additional, hypothetical facts, should the preferred principle be something like *failure to latch a dangerous animal's cage is negligent when latching the cage was the mechanism meant to prevent the animal from causing damage*? Thinking through the hypothetical case suggests the latter formulation. As this example shows, the articulation of a principle that motivates the outcome in a case, as well as testing the principle in hypotheticals, can hone the principle that will apply to future cases.

Our use of analogical reasoning to understand the meaning of these examples draws on a discipline known and familiar to lawyers. It is not possible to set forth a formal, logical definition of similarity and relevance, or to formally articulate how a principle is derived from the application of law to a set of facts.[106] But despite the lack of formal, logical process, analogical reasoning is a familiar discipline within legal reasoning. It requires conclusions to be justified based on reasonable, even if not indisputable, claims of similarity and relevance and motivating principles.

Analogical reasoning has the capacity to evolve legal principles over time. As more facts about the world arise or become apparent (such as, for instance, the development of trenches designed to keep animals in), the governing principles will inevitably evolve. This is a strength of analogical reasoning. It allows the law to evolve as the world around it does, while still being constrained by the reasoning of past decisions.[107]

C. Application of Analogical Reasoning to Regulatory Examples

This Part IVC illustrates how analogical reasoning should apply to declaratory regulatory examples, which contain implicit legal content. This is the first part in our theory of interpretation. We present three regulatory examples: one dealing with fringe benefits, one dealing with diseases on airplanes, and one dealing with a health insurer's right to ask for genetic information. In Part III.D, we show the application of the second part of our interpretive theory, which reconciles the legal content of the examples with the rest of the regulatory and statutory scheme. These two parts are not intended to operate in a strict order. Rather, they represent two parts of the analysis that should be in dialogue with each other. In a given case, the interpreter might toggle back and forth between them in an effort to understand the meaning of the regulation.

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[106] *But see* Joshua C. Teitelbaum, *Analogical Legal Reasoning: Theory and Evidence*, 17 AM. L. & ECON. REV. 160-91 (2015) (for a recent attempt).

[107] *But see* Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 80-87 (1996) (arguing that this can entrench past mistakes).

1. Fringe benefits

When an employer provides an employee with perks, such as use of a company car or free coffee at work, having the perks treated as "de minimis fringe benefits" for tax purposes is favorable for the employee. This is because de minimis fringe benefits are excluded from income for tax purposes. The regulation that defines these benefits provides that "de minimis fringe" means "any property or service (after taking into account the frequency with which similar fringes are provided …) so small as to make accounting for it unreasonable or administratively impracticable."[108]

This language leaves questions unanswered. What qualifies as infrequent? Small? Unreasonable or impracticable to account for? Should the rule be read as a conjunctive test, such that a benefit qualifies as a de minimis fringe only if it is (1) infrequent, (2) small, and (3) unreasonable or impracticable to account for? Or will some subset of these characteristics suffice? Alternatively, do "small" and "infrequent" animate what is "unreasonable" or "impracticable" to account? If so, how, exactly, do they do so?

The regulation clarifies in part by providing examples of employment perks that do and do not qualify as fringe benefits. For instance, "occasional personal use of an employer's copying machine" is listed as a de minimis fringe, as are "coffee, doughnuts and soft drinks" and "occasional cocktail parties, group meals, or picnics for employees and their guests."[109] In contrast, "membership in a private country club or athletic facility" is not a de minimis fringe.[110]

The first part of our interpretive theory proposes that the regulatory examples should be read together in an analogical fashion. We suggest that relevant similarities and differences among the examples yield principles that add content to the rule stated in the non-example portion of the regulation. These principles can be tested against future or hypothetical fact situations to see if they reach reasonable conclusions.

To illustrate the analogical analysis, we examine three examples of perks that the regulations determine are fringe benefits: "occasional personal use of an employer's copying machine," "coffee, doughnuts and soft drinks," and "occasional cocktail parties, group meals, or picnics for employees and their guests."[111] What do these examples have in common that is different from the perk of "membership in a private country club or athletic facility"? One possible principle is that all of the perks that are listed as de minimis fringes are small in value, whereas membership in a country club or athletic facility is not. But this does not seem right. Attending an elaborate cocktail party or

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[108] 26 C.F.R. § 1.132-6(a). This language follows the statute. I.R.C. § 132(e)(1).

[109] 26 C.F.R. § 1.132-6(e)(1).

[110] 26 C.F.R. § 1.132-6(e)(2). (listing membership as a non-de minimis fringe "regardless of the frequency with which the employee uses the facility").

[111] 26 C.F.R. § 1.132-6(e)(1).

group meal can easily have significant value to an employee. Consider, for example, a law firm associate who receives a dinner invitation to the fanciest restaurant in town.

Perhaps the relevant similarity and difference should account for the fact that some de minimis fringes, like copying and coffee are small; others, like a lavish dinner, may not be small, but they only qualify as a de minimis fringe if they are infrequent. This suggests that the references to size and frequency in the non-example portion of the regulation should be read disjunctively. Perhaps the principle is that *a perk must be either small in value or infrequent to qualify as a de minimis fringe*. This squares with conclusions reached in the examples: the small perks (use of a copying machine, and coffee, doughnuts, and soft drinks) are de minimis, whether or not occasional, whereas the perks of possibly bigger value (cocktail parties, group meals, picnics, and country club or athletic membership) are de minimis only if they are an occasional perk. Unlike the cocktail parties, group meals, and picnics, which the regulations say are "occasional," the country club and athletic membership presumably offer frequent, rather than occasional, access.

However, testing this potential principle against hypothetical facts yields some difficulties. The principle that *a perk must be either small in value or infrequent to qualify as a de minimis fringe* suggests that perks that are large in value can be de minimis as long as they are occasional. Imagine, for instance, that an employer provides a lavish, private wedding cocktail party for two employees on the occasion of their marriage. Would such an event be a de minimis fringe? The answer has to be no. Such a perk would be very valuable and easy to account for. Treating it as a de minimis fringe would render too much of the non-example portion of the regulation (the portion focused on smallness and difficulty of accounting) superfluous. In other words, a principle which *could* explain the legal outcomes of the examples given, nonetheless does not reach reasonable conclusions on hypothetical facts. As a result, it must be discarded.

In contrast, a principle that not only explains the legal conclusions reached for all of the examples, but also produces reasonable results on hypothetical facts is: *perks that are impracticable to account for are de minimis fringe benefits, whether the accounting impracticability arises from the small size of the perk or from its infrequency.* This principle explains all of the legal outcomes of the examples given. The perks that are quite small in value, like use of a copy machine, or coffee, doughnuts, and soft drinks, are de minimis whether or not occasional. Perks that are potentially larger in value, like the cocktail parties, group meals, and picnics, are de minimis only if additional criteria are met (namely, that they are being provided in an occasional fashion that makes them difficult to account for). Bigger perks, such as the private club or athletic facility membership, that are not being provided in an occasional fashion, are not de minimis. Moreover, in terms of hypothetical fact patterns, if an employer were to provide a sufficiently big perk that was infrequent but yet still easy to account for, such as a lavish wedding cocktail party for two employees, the perk would not be a de minimis fringe under this principle. The fact that this principle reaches this reasonable result on hypothetical facts helps affirm the principle.

This principle may not be the only plausible principle that could be drawn from the regulatory examples.[112] Analogical reasoning inherently lends itself to a variety of potential interpretations even while it provides a disciplined process to make arguments about what principles govern, given the conclusions reached on various facts. The point is not that one analogical interpretation is necessarily correct. Rather, the point here is to illustrate how regulatory examples add content to the non-example portion of the regulations in a similar fashion as cases add content to the law. The analogical reasoning that applies to case law should also guide reasonable arguments about regulatory examples' legal content.

2. Celiac disease

As a second illustration of how analogical reasoning can reveal the legal content of examples, consider, a regulation under the Genetic Information Nondiscrimination Act of 2008, or GINA.[113] This law balances patient interests in privacy and freedom from discrimination against insurers' interests in receiving the information they need to process health insurance claims. The non-example portion of the GINA regulations provides that "[a health insurer] is permitted to request only the minimum amount of genetic information necessary to determine medical appropriateness [of a claimed benefit]."[114] Then, the regulations illustrate the application of these standards through extensive regulatory examples.

The first example describes an insured individual, with "dependent coverage", who has a policy that covers genetic testing for celiac disease "for individuals who have family members with this condition." "After [the individual's] son is diagnosed with celiac disease," the individual undergoes a test for celiac disease.[115] The regulatory example concludes that the insurer may not request the results of the insured individual's own genetic test for celiac disease because that would exceed the minimum amount of information necessary to determine medical appropriateness.[116]

There is some uncertainty in this example about which of the listed facts is relevant and, therefore, what the governing principle is. The example might support the principle that *the results of a genetic test may never be required to support payment for*

[112] For instance, another possibility is simply that all of the regulatory examples that are given of de minimis fringes are "small," in value, such that the regulations are simply elaborating on what counts as "small" in value, with occasional cocktail parties, group meals, and picnics counting as "small" as long as they are not worth too much.

[113] Pub. L. No. 110-233, 122 Stat. 881 (2008). There are a number of different regulations in different portions of the code of federal regulations implementing the act. *See* 74 FR 51664-01 (Oct. 7, 2009) (preamble describing implementation by the Department of Treasury, Department of Labor, and Department of Health and Human Services). The regulations referred to in this discussion are those that were implemented by the Department of Health and Human Services, which apply to health insurers in the individual market. *See id.*

[114] 45 C.F.R. § 148.180(f)(1)(iii).

[115] 45 C.F.R. § 148.180(g), Example 1(i).

[116] 45 C.F.R. § 148.180(g), Example 1(ii).

the test itself. The reasoning behind this principle could be that ex post test results are by definition not available before the test, which is the proper time for determining medical appropriateness.

However, other facts from the example may be relevant in reaching the example's conclusion, and, if relevant, these facts would suggest a different principle. In particular, the example included the following facts: a family member's diagnosis was a prerequisite for the test, the insured individual had dependent care coverage, and the insured individual's son had been diagnosed with celiac disease.[117] Might these facts be relevant to the example's conclusion that the insurance company could not ask about the insured individual's own celiac disease test result? Perhaps the example means to include the assumption that the insured's son is a dependent covered on the same policy, and that the insurance company has been presented with test results, claims for medical treatment, or other evidence of the son's celiac disease. Why would the example mention "dependent coverage" if this fact was not relevant to the conclusions reached?[118] This view of the facts supports a different principle: *When known family history has already satisfied a contract prerequisite for a genetic test, no further information may be required as a condition for payment.*

Considering this example in light of other examples under the Genetic Information Nondisclosure Act regulations helps to hone the governing principles further.

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[117] 45 C.F.R. § 148.180(g), Example 1(i) (discussion tamoxifen prescription and gene variation involving production of CYPZD6 enzyme).

[118] The Department of Health and Human Services regulations implement the Genetic Information Nondiscrimination Act, which itself states the standard that an issuer may only request the "minimum necessary" information. 122 Stat. 893-94 (May 21, 2008). The same statute resulted in implementing regulations issued by the Department of the Treasury and the Department of Labor. 74 FR 51664-01 (Oct. 7, 2009). In the Department of Health and Human Services context, there are implementing regulations that apply to group health care and to the individual insurance market. *Id.* Interestingly, while the most relevant example to the analysis, Example 1, appears in almost identical form in all of these contexts, the mention of the insured individual having dependent care coverage – which bolsters the case that the insurance company knows about the dependent's diagnosis and thus possesses evidence of family history -- only appears in the Department of Health and Human Services regulation that applies to the individual insurance market. *Compare* 45 C.F.R. § 148.180(g), Example 1 *with* 26 C.F.R. § 54.9802-3T(e), Example 1 *and* 29 C.F.R. § 2590.702-1(e), Example 1 *and* 45 C.F.R. § 146.122(e), Example 1. In fact, the Department of Health and Human Services regulations contain the fact about the dependent care coverage in the regulatory example in the individual insurance context, but not in the otherwise identical regulatory example contained in the group insurance context. Compare 45 C.F.R. § 148.180(g), Example 1 *with* 45 C.F.R. § 146.122(e), Example 1. This slight change in an otherwise identical example leads to the question: does it matter that the fact regarding dependent care coverage appears in the regulatory example in the individual insurance market context but not in the group insurance market context?

Turning to the statute reveals that it is unlikely that the presence of the fact in one context and absence in another was intentional, or supposed to change the import of the examples in the difference contexts. The statutory provisions allowing an insurer to request the minimum amount of genetic information necessary to determine whether a procedure or test is medically appropriate are, in relevant part, the same in the group and individual insurance contexts. *Compare* Pub. L. No. 110-233, § 2753(d)(3) *with* § 101(c)(3). As a result, and absent any other indication of a reason for the difference, the best interpretation of the slight difference in the examples in these two contexts is simple inadvertence, or an assumption that the group insurance policy at issue extends to dependents because group insurance plans are required to offer dependent coverage.

In Example 3 of the same regulation, for instance, an insured individual is being treated for breast cancer.[119] The latest scientific evidence shows that the treatment is not effective in up to 7% of patients with a particular gene variation.[120] Example 3 concludes that the insurer may condition future payments for the treatment on the insured individual undergoing a genetic test to make sure the insured individual does not have that genetic variation.[121] Example 3 does not explore other possibilities, such as providing the treatment to the insured individual and stopping it if it proves ineffective, or having the insured individual provide genetic information from a family member that would show the insured individual does not have the gene variation.[122]

Example 3's conclusion that the insurer may ask for the genetic test, without considering these other possibilities, suggests as a principle that *when other information has not satisfied a contract prerequisite for treatment, a genetic test may be required to satisfy the prerequisite, even if obtaining the other information would be less violative of privacy rights*. Example 3 has its own ambiguities, however. For instance, it is possible that, in Example 3, family history cannot provide persuasive evidence of whether the individual has the particular genetic variation at issue, in which case Example 3 would more comfortably support the principle that *when other information cannot satisfy a contract prerequisite for treatment, a genetic test may be required to satisfy the prerequisite*.

Which of these principles should govern is important to determining the outcomes on future sets of facts. Consider the interpretation of these examples posted on the website of the Huntington Disease Society of America ("HDSA"). On its website, the HDSA translates the regulations' celiac disease example (Example 1, above) into the context of Huntington's disease. The HDSA paints a scenario very similar to the regulatory examples. It poses an example of Sam, whose father was diagnosed with Huntington's Disease.[123] Sam gets a test for Huntington's Disease.[124] The HDSA concludes that that if the insurance company requests the results of Sam's Huntington's Disease test, the insurer "may have violated GINA because [Sam's] insurance covers the genetic test for individuals who have family members with Huntington's Disease, thus it is not necessary for his insurance to learn the results [of Sam's own test]."[125]

Does the HDSA get this conclusion right, based on the regulatory examples? Answering this question depends on what the right principles from the regulatory examples are. Taking Example 1 first, the broadest, potential principle from Example 1,

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[119] 45 C.F.R. § 148.180(g), Example 3(i).
[120] *Id.*
[121] 45 C.F.R. § 148.180(g), Example 3(ii).
[122] 45 C.F.R. § 148.180(g), Example 3(i).
[123] Huntington's Disease Society of America, The Genetic Information Nondiscrimination Act, http://hdsa.org/living-with-hd/gina/ (last visited Apr. 27, 2016).
[124] Id.
[125] Id.

which is that *the results of a genetic test may never be required to support payment for the test itself*, would clearly support the results suggested by the HDSA.

On the other hand, the HDSA statement conflicts with the narrower potential principle from Example 1, that *when known family history has already satisfied a contract prerequisite for a genetic test, no further information may be required as a condition for payment*. In particular, unlike in Example 1, the HDSA hypothetical example does not specify that Sam has "dependent coverage."[126] Moreover, since it is the insured's father in the HDSA hypothetical example who has the diagnosed disease, rather than his son (as in the regulatory examples), it is less likely in the HDSA hypothetical example that the insurance company determining medical appropriateness already possesses information about the family member's diagnosis.[127] This factual difference may mean that, in the HDSA hypothetical example, the insurance company may not already have known family history that satisfies a contract prerequisite for a genetic test. As a result, if the narrower principle from Example 1 governs, then the insurance company may be able to ask for further information as a condition for payment including, potentially, Sam's own test results (which, if positive, could provide the evidence of family history of the disease).[128]

The broader point is that determining the meaning of the examples in the GINA regulations is no simple matter. What is clear is that simply taking some of the facts from Example 1 and placing them in a new context does not assure that the conclusion from Example 1 will follow in the new context. What matters in analogical reasoning is that the *relevant* facts are similar, such that the principle that motivated the conclusion in the first set of facts motivates the same conclusion on the second set of facts. Determining what the relevant facts and motivating principles are is not always straightforward. But, even in tough cases such as these, using the analogical reasoning tools of relevance,

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[126] *Id.*

[127] *Compare id. with* 45 C.F.R. § 148.180(g), Example 1(i).

[128] Applying the principles from Example 3 also leaves some ambiguity in the Huntington's disease case. One potential principle from Example 3 was that *when other information* has not *satisfied a contract prerequisite for treatment, a genetic test may be required to satisfy the prerequisite, even if obtaining the other information would be less violative of privacy rights*. If the insurance company in the HDSA hypothetical example has not received information about Sam's family history that would satisfy the contract prerequisite, then, based on this principle, Sam's insurance company may be able to request the results of Sam's own genetic test as a condition for paying for the test. On the other hand, an alternative potential principle from Example 3 was that *when other information* cannot *satisfy a contract prerequisite for treatment, a genetic test may be required to satisfy the prerequisite*. If other information is available that may satisfy the contract prerequisite in the HDSA hypothetical example (such as, for example, proof of Sam's father's Huntington's Disease diagnosis), then the insurance company should not be able to ask for Sam's own test results to establish family history of Huntington's Disease. But if neither that information, nor other evidence of family history, is available, then perhaps the insurance company could ask for Sam's own genetic test results after all.

similarity, and governing principles is key to making disciplined arguments about the meaning of regulatory examples.[129]

3. Diseases on planes

As a third illustration, take Department of Transportation regulation addressing when airlines may refuse to carry a passenger because the passenger is ill.[130] This regulation seeks to balance two competing interests: the interest of passengers in equal and fair access to public carriers, and the public health interest in limiting the transmission of communicable disease. The non-example portion of the regulation states that an airline may not deny transportation unless the passenger's condition poses a "direct threat,"[131] and that the airline must "consider the significance of the consequences of a communicable disease and the degree to which it can be readily transmitted by casual contact . . . ."[132]

The nonexample portion of the regulation leaves some open questions. What does it mean to "consider the significance of the consequences of the disease and the degree to which it can be readily transmitted by casual contact . . ."?[133] Is this a disjunctive or conjunctive standard? Do both the severity of the disease factor and the readily transmissible factor have to be present to reach a direct threat conclusion? Is the presence of both factors sufficient for a carrier to be able to exclude a passenger?

Three regulatory examples, read together, help supply much, though not all, of the governing principle. The first example reads, "The common cold is readily transmissible in an aircraft cabin environment but does not have severe health consequences. Someone with a cold would not pose a direct threat."[134] This example yields the principle that *a disease that does not have severe health consequences does not pose a direct threat, even if it is readily transmissible*.

The second example reads, "AIDS[135] has very severe health consequences but is not readily transmissible in an aircraft cabin environment. Someone would not pose a direct threat because he or she is HIV–positive or has AIDS."[136] This example similarly relies on analogical reasoning to yield the principle that *a disease that is not readily transmissible does not pose a direct threat, even if it has severe health consequences*.

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[129] *Cf.* Emily Sherwin, *supra* note 100, ("Of course a practice such as analogical reasoning is quite different from a rule: just how judges are to draw comparisons among cases is not something that can be captured in canonical form. Nevertheless, a practice of analogical reasoning, ingrained by training and tradition, can work indirectly--in the manner of a rule--to improve the quality of judicial decisionmaking.").

[130] 14 C.F.R. § 382.21.

[131] 14 C.F.R. § 382.21 (a).

[132] 14 C.F.R. § 382.21(b)(2).

[133] 14 C.F.R. § 382.21(b)(2).

[134] 14 C.F.R. § 382.21(b).

[135] AIDS is an acronym for Acquired Immune Deficiency Syndrome, and is the final stage of Human Immunodeficiency Virus infection. www.aids.gov (last visited July 22, 2016).

[136] 14 C.F.R. § 382.21(b).

Examples 1 and 2, taken together, clarify that the nonexample portion of the regulation should be read as a conjunctive test: only a disease that is both readily transmissible and has severe health consequences can pose a direct threat.

The third example clarifies further. It reads, "SARS[137] may be readily transmissible in an aircraft cabin environment and has severe health consequences. Someone with SARS probably poses a direct threat."[138] Since Example 3 appears to include both conditions but concludes that the passenger only "probably" poses a direct threat, it suggests that having both conditions is not necessarily sufficient to pose a direct threat. As with the other examples, a principle can be drawn from the example through a process of analogical reasoning. Taken with Examples 1 and 2, Example 3 appears to yield the principle that *the presence of both conditions is necessary, but not necessarily sufficient, to establish a direct threat.*

However, this principle raises an additional question: when, if ever, is the presence of the two conditions sufficient to establish a direct threat? A closer reading of the text of the three examples suggests that the answer could turn on transmissibility. The common cold example and the AIDS example refer to a disease that "*is* readily transmissible"[139] or "*is not* readily transmissible,"[140] respectively. But Example 3 reads as follows: "SARS *may be* readily transmissible in an aircraft cabin environment and has severe health consequences. Someone with SARS probably poses a direct threat."[141] Are the slight language differences (namely, the use of "*is*" or "*is not*" readily transmissible in the first two examples, but only "*may be*" readily transmissible" in Example 3) significant? Might Example 3's "probably" conclusion only proceed from a situation in which a serious disease *might* be readily transmissible, rather than a situation in which both conditions are clearly met?[142]

Example 3 is a frustrating example, because it does not give a practical answer. It does not say whether or not an airline can limit the access of a person known to have SARS. Applying the second stage of our analysis clarifies the meaning of Example 3. We offer this second analytical phase below, in Part III.D.

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[137] SARS is an acronym for Severe Acute Respiratory Syndrome, and is a viral respiratory illness. www.cdc.gov/sars (last visited July 22, 2016).

[138] 14 C.F.R. § 382.21(b).

[139] 14 C.F.R. 382.21(b) (emphasis added).

[140] *Id.*

[141] *Id.*

[142] Note that "may be," as used in Example 3, could have one of two different definitions. First, "may be" could indicate "has the ability to be" which would mean that, in Example 3, the disease has the ability to be readily transmissible, or in other words, "is" readily transmissible. The use of the language "may be" to mean "is" would sit uncomfortably with the rest of the regulatory examples, since the other examples demonstrate that the regulation writers can certainly use "is" to indicate definite, ready transmissibility (for the common cold) and definite seriousness (for AIDS and SARS). Alternatively, "may be" can indicate possibility or probability (as in "you *may* be right"). http://www.merriam-webster.com/dictionary/may (last visited July 19, 2016). In this reading, "may be readily transmissible" means "is possibly readily transmissible" (without clarity regarding whether it is). Under the latter reading, the disease *is* severe but is only possibly (rather than definitively) readily transmissible.

D. Reconciling Analogical Reasoning with Regulatory and Statutory Scheme

While, as illustrated above, regulatory examples call for the type of analogical reasoning found in the common law, regulatory examples are also different than purely common law cases because they are set in regulations, which themselves are set within a broader statutory scheme. As a result, interpretation of regulatory examples must reconcile the analogical reasoning fleshed out above with the broader regulatory and statutory scheme. This second part in our interpretive theory is consistent with the widely-held view that text must be understood in context.[143] We mean for these two parts of our theory to work in tandem, rather than assigning a strict order to them.

In the hierarchy of sources of law, the statute governs, if there is a conflict between the statute and regulations. Moreover, even if the statute does not clearly address an issue, the statute nonetheless informs regulatory interpretation.[144] Within the regulation, we argue that neither the non-example portion of the regulation nor the examples are a more important source of legal content. Instead, we argue they are co-equal sources of law, and that each should inform the meaning of the other. As a result, the interpretation of each of the non-example text and the examples must be stretched so as to accommodate the other, much like courts stretch the interpretation of treaties and statutes so as to accommodate the other.[145]

This means that the non-example text must be read in such a way as to accommodate the legal content of the regulatory example. For instance, perhaps the most comfortable way to read the non-example portion of the fringe benefit regulations is as a conjunctive test that defines de minimis fringe benefits as (1) infrequent, (2) small, and (3) unreasonable or impracticable to account for. But since there is an example that says that work coffee, which is generally provided constantly, is a de minimis fringe, our theory insists that the interpretation of the non-example portion of the regulations must be revisited so as to accommodate the coffee example. As a result, even if it is most comfortable to read the non-example portion of the fringe benefit regulations as a conjunctive test, the examples require a disjunctive interpretation.

On the flip side, the examples must also be read in a way so as to accommodate the non-example portion of the regulation. For instance, the coffee example, by itself, could theoretically be read to apply to all work coffee including, for instance, a private barista shop set up in a CEO's office. However, this reading would not accommodate the non-example portion of the regulation's statement that an item must be so small or infrequent as to make accounting for it unreasonable or impractical. As a result, the example cannot be read to apply to a private barista shop in the CEO's office, or to any other application

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[143] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78-91 (2006); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 35 (2006) (both emphasizing that textualists, like purposivists, agree that text must be understood in context).

[144] [Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).]

[145] *See, e.g.*, Carlos Manuel Vasquez, *Treaties as Law of the Land: the Supremacy Clause and Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

of the example that would not accommodate the non-example text. Since each the non-example text and the examples have the ability to stretch the interpreted meaning of the other, they act as co-equal sources of law, with independent communicative power.

In terms of how to interpret the rest of the regulatory and statutory scheme so as to integrate it with the regulatory examples, a variety of background interpretive approaches can be used. Our theory thereby marries a new interpretive tool for understanding regulatory examples with a variety of background interpretive approaches for understanding statutory and regulatory schemes, such as purposivism, textualism, and others. In some cases, the background approach can affect the ultimate regulatory interpretation. For instance, while it is a widely accepted interpretive practice to read text in context,[146] background interpretive approaches differ in terms of what context matters. Purposivists tend to emphasize the policy context for a regulation, and may tend to look to statements of regulatory purpose, such as those found in regulatory history, for evidence of such context. Textualists tend to emphasize semantic context, and may focus on textual clues, such as related provisions, to supply evidence of words' meaning.[147] Other interpretive approaches may blend these different emphases.[148]

To illustrate how to reconcile interpretations that flow from analogical reasoning and the broader regulatory and statutory context, we use the Department of Transportation's example that states that SARS on airplanes "probably" poses a direct threat.[149] This regulation is part of a law that seeks to balance two competing interests: the interest of passengers in equal and fair access to public carriers, and the public health interest in limiting the transmission of communicable disease. We applied analogical reasoning to this example and related examples above in Part III.C and arrived at the principle that *the presence of both a severe disease and ready transmissibility in an airplane environment is necessary, but not necessarily sufficient, to establish a direct threat.* This analogical reasoning left open the question of whether, even if both conditions are present, the regulations call for an individualized determination of direct threat, or whether they establish a general rule that, if both conditions are present, a direct threat exists. We now consider this question in light of the broader regulatory and statutory context.

In accordance with the hierarchy of legal sources, the analysis would look to the statute as potentially controlling authority. However, in this particular case, the statute does not shed much light on the issues left open by the analogical reasoning of the regulatory examples. The source statute for this regulation states, in part, that "an air carrier … may not discriminate against an otherwise qualified individual on the …

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[146] *Id.*

[147] Manning, *supra* note 143, at 91; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 407-08 (1942).

[148] *See, e.g.,* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (for a foundational description of a practical approach to interpretation in the statutory context).

[149] 14 C.F.R. § 382.21(b).

grounds [that] the individual has a physical or mental impairment."[150] The instruction in the statute is to avoid "discrimination" against an "individual," and the statute's language and vision for including people with disabilities follow that of other antidiscrimination statutes, such as in the public accommodation and employment context.[151] One might think that the anti-discrimination roots of the statutory provision might point in favor of individualized assessments, to ensure that no individual is unnecessarily excluded from air travel. However, it is also possible for anti-discrimination objectives to be achieved by the application of a general or definitive rule, to minimize the chance that an airline employee, for example, will inappropriately discriminate. In addition, by allowing for exclusion of passengers with communicable diseases that pose a "direct threat," the regulation is carving out exceptions to the general, anti-discrimination dictate of the statute. The statute provides little guidance regarding how individualized or general this regulatory exception should be.

The non-example portion of the regulation, as well as the broader regulatory scheme, seems to contemplate an individualized approach to determining whether passengers pose a direct threat. For instance, while the non-example portion of the regulation acknowledges the relevance of the seriousness and communicability of a disease,[152] it also mentions many other factors that should be taken into account. As one example, the regulation cross references another passenger disability regulation that calls for an "individualized" cost-benefit analysis, including the factors of risk, "potential harm … to others" and the availability of risk mitigation steps.[153] Another part of the non-example portion of the regulation also states that, even if a passenger poses a direct threat, if the passenger has a medical certificate describing measures designed to prevent transmission of the disease, the passenger may be able to fly, again suggesting an individualized approach, at least in terms of exclusion, if not in terms of direct threat.[154] The broader cross-referenced regulation also requires the "select[ion]" of "the least restrictive response."[155] Indeed, this cross-referenced regulation then cross-references a definition of "direct threat" from another portion of the regulations, which is a "significant risk to the

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[150] 49 U.S.C. § 41705 (enacted 1986). A predecessor statute provided that air carriers must not "subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." § 404(b) of the Federal Aviation Act of 1958. The predecessor statute was repealed in connection with airline deregulation in 1978 and replaced with § 41705 in 1986. *See* James S. Strawinski, *Where is the ACAA Today? Tracing the Law Developing from the Carrier Access Act of 1986*, 68 J. AIR L. & COM. 385, 385-87 (2003) (describing the history of the predecessor statute and its repeal).

[151] *See* Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449, 451 (2015) (explaining how the source statute exists as part of a group of federal statutes designed to carry out the vision of the rights of disabled individuals to "live in the world").

[152] 14 C.F.R. § 382.21(b) (emphasis added).

[153] 14 C.F.R. § 382.19(c)(1)-(2).

[154] The regulation reads: (c) If a passenger with a communicable disease meeting the direct threat criteria of this section gives you a medical certificate . . . describing measures for preventing transmission of the disease during the normal course of the flight, you *must* provide transportation to the passenger, unless you are unable to carry out the measures. 14 C.F.R. § 382.21(c). The doctor's note may include "measures" that should be followed "for preventing the disease during the normal course of flight," in which case the airline may refuse transportation if it is "unable to carry out the measures."

[155] *Id.*

health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services,"[156] clearly an individualized type of approach.

On the other hand, the regulatory history, as found in the Preamble to the current version of the regulation, suggests that more general and less individualized determinations, can be made. The Preamble explains that the current rule was meant to depart from the overwhelming emphasis placed on individual assessment in a prior version of the rule. The earlier regulation listed a number of factors to consider in the determination of whether a passenger presented a direct threat, without any clear demarcation of relative importance or how they should be employed to make a determination.[157] According to the Preamble, the revisions to the current regulations responded to requests for "greater guidance" regarding the rules.[158] The Preamble suggests that the current version was intended to provide greater certainty and less discretion.[159]

The Preamble also makes specific statements that suggest a general, or categorical, rule approach. The Preamble states that in the context of communicable diseases,

> To be a direct threat, a condition must be both able to be readily transmitted by casual contact in the course of a flight AND have severe health consequences (e.g., SARS, active tuberculosis). If a condition is readily transmissible but does not typically have severe health consequences (e.g., the common cold), or has severe health consequences but is not readily transmitted by casual conduct in the course of a flight (e.g., HIV), its presence would not create a direct threat. Carriers may also rely on directives issued by public health authorities (e.g., in the context of a future flu pandemic).[160]

At another place in the Preamble, the Preamble similarly explains, "Under this provision, carriers would have the ability to impose travel restrictions and/or require a medical certificate if a passenger presented with a communicable disease that was both readily transmitted in the course of a flight and which had serious health consequences (e.g., SARS, but not AIDS or a cold)."[161] Together, these portions of the Preamble confirm the conjunctive nature of the test illustrated by the regulatory examples, and seem to clearly

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[156] 14 C.F.R. § 318.3.

[157] The prior version of the regulation stated, "In determining whether an individual poses a direct threat to the health or safety of others, a carrier must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; that the potential harm to the health and safety of others will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk." 14 C.F.R. § 382.51 (prior to May 13, 2008).

[158] 73 FR 27614-01, at 27624 (May 13, 2008).

[159] *Id.*

[160] *Id.*

[161] *Id.* at 27648.

indicate that a severe and readily transmissible disease poses a direct threat as a categorical or general rule. The direct reference to SARS reveals that the regulation's drafters considered SARS just such a disease, and would permit airlines to implement general measures targeted at passengers with SARS.

So, how should the different pieces of the puzzle be reconciled, or stitched together, to come up with an interpretation of the regulation? The regulatory examples leave some ambiguity as to whether a disease that is severe and readily transmissible definitely results in a direct threat determination or requires an individualized assessment.[162] The broader regulatory scheme seems to suggest that the presence of these two conditions should just be part of a broader, individualized assessment.[163] In contrast, the Preamble supports a general rule approach.[164]

We believe the best reading of all of the sources of information, together, is that the current version of the regulation does move away from a completely individualized approach toward a general rule approach.[165] The non-example portion of the direct threat regulation is much more specific about which factors *must* be considered in making a direct threat determination than prior versions of the regulation, with severity and ease of transmissibility chief among the factors.[166] The Preamble also supports the notion that the current version of the regulation is meant to be more definitive than the old approach.[167] However, notwithstanding some Preamble suggestions to the contrary, the current version of the regulation does not go so far as to adopt a completely definitive approach, whereby the existence of the two conditions establishes a direct threat as a general rule. Rather, by continuing to situate the determination of a direct threat in a broader framework of still somewhat individualized considerations,[168] the current version of the communicable disease regulation maintains some role for individualized assessments. Therefore, a good interpretation of the regulation, which combines analogical reasoning of the regulatory examples and the background statutory and regulatory context, is that *the presence of the two conditions (severity and being readily transmissible) is necessary, and generally will be sufficient, in making a direct threat*

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[162] *See supra* text accompanying notes 139-142.

[163] *See supra* text accompanying notes 152-156.

[164] *See supra* text accompanying notes 157-161.

[165] The middle-ground approach that we use in this analysis subscribes to a "practical" school of interpretation that privileges enacted text but also assesses the meaning of a given provision based on evidence from a number of reliable sources, based on their relative importance and reliability in a given context. *See* Eskridge & Frickey, *supra* note 148.

[166] *See infra* text accompanying notes 157-158.

[167] *See infra* text accompanying notes 157-161. Indeed, the cross-referenced passenger disability provision actually uses language almost identical to the old version of the communicable disease regulation. *Compare* 14 C.F.R. § 382.19 *with* 14 C.F.R. § 382.51 (prior to May 13, 2008). In discussing the passenger disability provision (which remains current), the Preamble to the current version of the regulations explains that carriers must make an "individualized assessent." 73 FR 27614-01 (May 13, 2008). Clearly, the current version of the regulations meant to maintain a more individualized approach in the general passenger disability context than in the communicable disease context.

[168] *See infra* text accompanying notes 152-154.

determination, but a potential role for individualized determination remains based on the other factors set forth in the regulation.

Note that the conclusion may come out somewhat differently depending on the background interpretive approach used to read the broader statutory and regulatory context. For instance, while both recent purposivist and textualist accounts of regulatory interpretation have acknowledged that the Preamble can play an important role in regulatory interpretation,[169] the background interpretive approach nevertheless may affect how information from the Preamble is used, both here and more generally.

A strong purposivist, for instance, may be more inclined to find an interpretation that does justice to the Preamble's indication that the current version of the regulation was supposed to provide greater clarity, and that, according to the Preamble, SARS categorically poses a direct threat.[170] Such an approach may accordingly read Example 3's "probably" conclusion to cover only situations in which there was *possibly* transmissibility, with the implication that so long as SARS is definitely transmissible in an airplane environment, it poses a direct threat.

A strong textualist, on the other hand, may be less inclined to look to provisions of general purpose in the Preamble, particularly when the Preamble conflicts with the text of the actual regulation.[171] Since the actual regulation situates the examples within a regulatory framework that still calls for an individualized approach, a strong textualist may be more inclined to favor an individualized interpretation. She may be more inclined to dismiss the idea that SARS categorically poses a direct threat.

The point here is not to advocate for one or another background approach to regulatory interpretation, such as purposivism or textualism. Rather the goal is to illustrate how how analogical reasoning is essential to understand the legal content communicated through regulatory examples. Applying analogical reasoning to the regulatory examples in this case, for instance, lays bare an unresolved legal issue (whether both conditions are sufficient to establish a direct threat) and reveals, at the least, that the current regulations offer a more general rules approach than prior, more individualized regulations. By ferreting out legal content in this and other regulatory

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[169] Compare*, e.g.*, Nou, *supra* note 44, *with* Stack, *supra* note 43 (each relying heavily on preambles for interperetation, albeit in a case for textualist interpretation and purposive interpretation, respectively). The use of Preamble material is not without controversy. *See, e.g.*, Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 228 (2007) (arguing that agency preamble statements about preemption of state law produce an effect of "'backdoor federalization'") (citing and quoting Samuel Issacharoff & Catherine M. Sharkey, Backdoor Federalization, 53 UCLA L. REV.1353 (2006)).

[170] *See* Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669, 684-85 (2015) (explaining that the two privileged sources under a purposivist method of regulatory interpretation are the text of the regulation and the explanation of the regulation in the preamble).

[171] *See, e.g.*, Nou, *supra* note 44, at 120 ("By contrast to Stack's purposivist approach,regulatory textualism rejects reliance on the broad statements of purpose often found in preambles in favor of the more specific explanatory provisions.")

examples, analogical reasoning allows the guidance from regulatory examples to be pieced together with other statutory and regulatory materials to develop a fuller regulatory interpretation. The theory we offer thereby both dovetails with, and extends the reach of, different existing background approaches to regulatory interpretation.

IV. RESPONDING TO OBJECTIONS

In this Part, we respond to objections to the theory of interpretation we offer. We consider three objections: uncertainty about agency intent, a lack of case law safeguards, and the view that both regulatory examples and analogical interpretation of them confer too much power on agencies.

A. What Does the Agency Intend?

Under our theory of interpretation, reading regulatory examples carefully in an analogical fashion reveals legal principles embedded in the examples.[172] Some might object that we have not shown that agencies intend to communicate principles through regulatory examples. If surveyed, some regulatory drafters might say that when they wrote the examples they simply were communicating the situations that came to their minds when drafting the regulations. As a result, agency drafters might not characterize the regulatory examples as sources of new law that shape the understanding of the non-example text. Some might also argue that the way that examples are presented in regulations suggests they should be subordinate to the non-example portion of the text. For instance, the examples are usually provided after a more general statement in the regulations. The very use of the prefacing word, "Example" might be thought to suggest that the drafters consider the examples to be merely illustrative, or subordinate.[173]

The school of interpretation known as intentionalism might support this argument that we must look to agency intent to decide what to make of regulatory examples.[174] Intentionalism looks to the drafters' intent to determine the meaning of a provision.[175] Scholars and courts that have supported intentionalism have argued that intentionalism is

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[172] Although, as indicated previously, some regulatory examples may merely illustrate the non-example portion of the law without adding any new legal content. *See supra* text accompanying notes 93-96.

[173] *Compare* interpretive principle for introductory material in statute. [Stack]

[174] Intentionalism itself has been chipped away at by a number of critiques over the years. Legal realism and public choice theory have argued that finding credible evidence of intent is exceedingly difficult and that the draft of enacted law often reflects innumerable motives and compromises. For a canonical critique of the intentionalist approach, see, for example, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). *But see* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255 (2000) (arguing for an intentionalist view of agency regulations). The statutory interpretation method of purposivism was developed largely in response to some of these perceived defects of intentionalism. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332-33 (1990).

[175] William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325-32 (1990).

essential to protect the power of the lawmaker to say what the law is.[176] If the legislature (or, in the administrative context, the regulator) is the lawmaking body, then courts must be bound by the intent of the legislature in interpreting the law.[177] As applied to regulatory examples, if the agency did not intend for regulatory examples to be interpreted analogically to communicate legal principles, then using analogical reasoning to interpret regulatory examples this way may violate the agency's prerogative.

We cannot claim, in response, that agencies generally intend for regulatory examples to be read in accordance with the analogical approach we set forth in Part III. It is very likely that many agency drafters simply have not thought about it.[178] Yet the determination of legal principles from a series of concrete results does not require that the decision maker in each particular case was aware of the legal principles.[179] Our argument is that analogical reasoning (plus reconciliation with the rest of the regulatory and statutory scheme) offers the best means of making sense of regulatory examples, in the absence of evidence that the drafters intended for them to be read differently.

Our theory can be thought of as a canon of interpretation, or a set of default conventions that can be used to make sense of particular drafting choices or answer certain interpretive questions.[180] A large literature considers interpretive canons.[181] They

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[176] *See, e.g.*, Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 13 (1988) (exploring relationship between intentionalism and legislative supremacy).

[177] Id.

[178] *Cf.* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 69 Stan. L. Rev. 999 (2015).

[179] Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 967-68 (discussing, in the context of case law analysis, how analogical reasoning yields a result in which "the nature of the legal provision . . . is not known before the analogical process takes place").

[180] *See, e.g.*, Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L. J. 341, 343 (2010) ("Canons serve as rules of thumb or presumptions that help extract substantive meaning from, among other things, the language, context, structure, and subject matter of a statute."). Some examples of canons of interpretation include the *expressio unius* maxim (in which the inclusion of one term implies the exclusion of others), *see, e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 451-52 (2002); and the rule of lenity (in which criminal statutes are construed in favor of the defendant), *see, e.g.*, Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420 (2006).

[181] Some commentators emphasize a communication theory grounding for interpretive canons. *See, e.g.*, Matthew D. McCubbins & Daniel B. Rodriguez, *Deriving Interpretive Principles From a Theory of Communication and Lawmaking*, 76 BROOK. L. REV. 979, 980 (2011) ("[W]e assume here that statutes are constitutionally pedigreed commands and that the objective of interpreting a statute is to recover its meaning using a theory of both communication and lawmaking."). Others point to the importance of considering the institutional competence of the court or other interpretive actor. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Interpretations and Institutions*, 101 Mich. L. Rev. 885, 900-01 (2003) (describing the purpose-based statutory interpretation approach suggested by Henry Hart and Albert Sacks and arguing that the success of such an approach is subject to the capacity of a court to perform the suggested analysis); *see also* Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 Mich. L. Rev. 952, 952 (2003) (agreeing that institutional context is important). Congress, for instance – can legislate and create a record in a fashion that is tailored to applicable canons of interpretation. *See, e.g.*, Thomas M. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 578-81 (2002) (making coordination argument for proposed deference canon); *see also* Ellen P. Aprill, *The Interpretive Voice*, 38 LOYOLA L. REV. 2081, 2084 (2005) (arguing

are controversial;[182] Karl Llewellyn famously showed that, for every canon, there is an offsetting counter-canon, and that this inherent malleability undermines claims of predictability and coordination.[183] But despite some of the asserted problems with canons, interpreters still require tools to understand the meaning of legal material, and canons can supply such tools when meaning is not otherwise clear. Our theory is a default rule, as agencies could avoid the approach we suggest by using a different drafting approach, or promulgating a different rule of interpretation for regulatory examples. Our theory also plays to the strengths of legal interpreters, since analogical reasoning is a fundamental legal skill, universally taught and practiced.

Our theory has the further advantage that it is consistent with a plausible account of agency intent. It is plausible to conclude that agencies are trying to communicate in their regulations using two verbal strategies. The non-example portion of the regulation uses an abstract strategy, while the examples use a concrete communication strategy. We see no reason to provide a preference for the abstract over the concrete (or vice versa).

Nor do we have reason to believe that the agency process is designed to produce first a rule, which is the controlling source of law, and then the examples as an afterthought. Factual situations often provide the push for regulatory guidance. Perhaps the examples are, in many cases, the motivating source of law, and the non-example text is the afterthought. In this case, agency drafters may be offering the non-example text as a way to try to communicate in an abstract way what they felt they actually could understand or communicate better in the first instance through an example. In any case, both the examples and the non-example portion of the regulation go through the same notice-and-comment procedure that provides the force of law rationale for *Chevron* deference. We see no reason to preference one over the other as a source of law.

B. Lack of Case Law Safeguards

Another objection to our theory is that examples lack case law safeguards. We import analogical reasoning from the case law context, since it is the method that

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that expanded judicial review of agency decisions "puts additional pressure on administrative agencies to imitate the judicial interpretive voice").

[182] *See, e.g.*, CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 147-57 (1990); Eskridge & Frickey, *Foreword: Law as Equilibrium*, *supra* note __, at 66-67.

[183] Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395, 401-06 (1950). Others have shown how canons are often used to make text seem clear, and unambiguously in accord with a court's interpretation, even if the analysis is not that simple. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 67, 93-94 (2005). Canons might, for instance, promote a textualist mode of interpretation over an interpretation that looks to legislative purpose, while masking this deliberate interpretive choice behind a seemingly neutral canon. *See, e.g.*, *id.*; Louis Fisher, *Statutory Construction: Keeping a Respectful Eye on Congress*, 53 SMU L. REV. 49, 49 (2000); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873-75 (1930); Stephen F. Ross, Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?, 45 VAND. L. REV. 561, 562 (1992) ("[C]anons have . . . been abused as part of the judiciary's systematic attempt to frustrate legislative policy preferences.").

typically applies to the interpretation of judicial decisions in litigated cases.[184] But judicial decisions have a particular way of making law, which includes case law safeguards designed to ensure good law. Requirements such as the "case or controversy"[185] prerequisite ensure that cases are based on actual facts,[186] that they emerge from an adversarial process,[187] and that they result in a judge's decision on the consequences that will be imposed as a remedy. Some may argue that the lack of case law safeguards undermines the quality of the legal content of regulatory examples, and this suggests in turn that applying analogical reasoning to regulatory examples could result in bad law.[188]

Underlying this objection is the belief that case or controversy features such as actual facts, an adversarial process, and actual consequences help ensure that the judge deciding a case makes a good decision.[189] The presence of actual facts and consequences means that the parties involved have something real at stake, motivating them to make arguments on both sides.[190] Adjudication through an adversarial process means that the parties on both sides can make vigorous, opposing arguments.[191] The fact that the judge must specify and enforce a remedy means that she must take responsibility for, and presumably think through, the hard practical consequences of her decision.[192] All of these features mean that the outcome of a case is more likely to reflect a careful

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[184] *See, e.g.*, Cass Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 741 (1993) (noting that analogical reasoning "dominates the first year of law school" and that "it is a characteristic part of brief-writing and opinion-writing as well").

[185] U.S. Const. Art. III.

[186] *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, __ U.S. __ (1982) (explaining that the requirement of actual facts "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

[187] *See* Baker v. Carr, 369 U.S. 186, 204 (1962) (explaining the importance of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depend for illumination of difficult...questions").

[188] *Cf.* Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 80-86 (1996) (examining the phenomonen of entrenching prior mistakes through the common law reasoning process).

[189] Proposals to expand justiciability requirements such as standing, for example to provide a serviceable method for adjudicating the diffuse common interests affected by public regulation, would modify some of these requirements, but would not abandon the idea of promoting a vigorous adversarial process. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 Yale L. J. 221, 255-64 (discussing standing under the Administrative Procedure Act and arguing for expanded standing based on whether the statute intended to "confer on plaintiff the right to enforce").

[190] *See, e.g.*, Robert J. Kutak, *The Adversary System and the Practice of Law in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban, ed., 1983) 172, 177 ("Discerning the truth is so important the the adversarial adjudicatory process that elaborate mechanisms [such as "cross-examination and the distribution of burdens of proof"] have been developed to permit an adversary to elicit information and discover sources of information from an opposing party.")..

[191] *See, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 383 (1978) ("An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.").

[192] *See* Charles A. Wright et al., 13B Fed. Prac. & Proc. Juris. § 3533.1 (3d ed. Updated April 2016) (noting the concern of justiciability doctrines such as standing, ripeness and mootness "that courts may be more prone to improvident decisions when nothing immediate seems to be at stake").

consideration of how the law should apply to the facts presented.

Regulatory examples involve neither cases nor controversies, as those terms are understood in the context of litigation. They are based on hypothetical facts, rather than actual facts. They are written by an agency in a drafting process that is not adversarial. And they do not enforce a concrete remedy in any particular case. Might these differences between cases and regulations undermine the case for using analogical reasoning to understand regulatory examples? We do not think so. Although regulatory examples are not based on actual facts, do not have an adversarial process, and do not result in actual consequences to the same degree as cases, regulatory examples have enough of a relationship with each of these characteristics to support their treatment as valid legal conclusions and thus to support use of analogical reasoning to discern legal conclusions.

While the connection between actual facts and a regulatory example is more general than that of a litigated case, a regulatory example's relationship with facts is still sufficient to say that the regulatory example arises out of facts from the world.[193] Regulatory examples often articulate stylized summaries of a typical case that prompted the example (as well as perhaps also the broader regulation) rather than the exact particulars of one person's situation. The greater generality in the case of a regulatory example does not make the facts less true or relevant. In many cases, the generality of a regulatory example's facts means that they represent the experience of more regulated persons. For instance, when a regulatory example describes a hypothetical patient's effort to provide the minimum information necessary to obtain payment for a genetic test, it tries to convey the situation of many patients who seek insurance coverage for similar tests.[194]

Similarly, while regulatory examples do not directly impose a consequence on a specific party, they do have real world consequences that give the agency motivation to adequately consider the impact of the examples. When a regulatory example states, for instance, that certain information may not be required as a prerequisite to payment for a genetic test, there is no specific person that receives a judgment requiring an insurance company to pay for her test. In that sense, there is no concrete result. But the regulation amounts to the agency's commitment that, when the case does come up, the articulated result will follow.[195] In this sense, the regulatory example has a result, in an even more widespread fashion than a case, even though the result will apply prospectively (usually) and to persons not yet identified.

Moreover, although regulations are not subject to an adversarial process, they are subject to a public process that can help ensure that the regulatory examples are well considered. The notice and comment requirement of the Administrative Procedure Act

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[193] *See supra* Part IV.A (listing and illustrating possible sources for regulatory examples).

[194] *See supra* text accompanying notes 113-129 (discussing GINA examples).

[195] Of course, the prediction is subject to the agency's ability to interpret the meaning of the regulation. But the agency places meaningful limits on the interpretive space, for itself and others, when it writes the regulatory example.

requires that regulated parties and other members of the public have the opportunity to comment on regulations, including regulatory examples, and agencies must respond with reasoned explanations.[196] This process offers regulated parties and the public the opportunity to provide input that can inform regulatory examples, much as the adversarial process can inform case decisions.

The degree to which notice and comment results in input from the public varies widely. At one extreme are instances where the notice and comment process involves the statement and defense of strong adversarial positions.[197] At the other extreme are situations where the agency claims that final regulations are exempt from the notice and comment process,[198] or situations where no one is interested enough to provide any input. The variation in notice-and-comment practice means that sometimes regulations are contested, and sometimes they are not. Without adequate contest, regulatory examples could be missing crucial input.

In this regard, however, a regulation's notice and comment process is not necessarily more deficient than the adversarial process. For a variety of reasons, the adversarial process does not always ensure a full and fair airing of opposing views.[199] And yet, these known deficiencies of the adversarial process do not invalidate analogical reasoning in the case law context in general.

Likewise, the existence of adversarial proceedings in the promulgation of a particular regulatory example should not be a prerequisite to the application of analogical reasoning. The point of an open notice-and-comment process for our purpose is that it offers opportunity for input as a check on an agency's ability to write misguided regulatory examples. This opportunity, along with other checks on agency power,[200] help legitimize and justify regulations generally (or, if they do not, that is a far-reaching issue that threatens the legitimacy of much more than regulatory examples).[201] While regulatory examples do not have the traditional case or controversy hallmarks, their motivation by real facts and attendant real consequences, combined with notice and comment and other checks on agency power, proves a sufficient quality check to justify the application of analogical reasoning.

As a separate matter, the case or controversy requirement also protects

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[196] *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) (invalidating an agency "explanation [that ran] counter to the evidence before it")..

[197] *See* Jody Freeman, *Collaborative Governance in the Regulatory State*, 45 UCLA L. Rev. 1, 11-12 (1997) (arguing that notice and comment encourages regulated parties to "posture in anticipation of litigation").

[198] *See* Kristin Hickman, Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*,* 82 Notre Dame L. Rev. 1728, 1749-53 (2007) (providing data regarding Treasury compliance with administrative rulemaking procedures).

[199] [Add cites re: unevenness, sometime ineffectiveness of adversarial system.]

[200] For example, judicial review. *See* Pierce et al.

[201] See, e.g., Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452 (1989).

fundamental separation of powers principles in the context of court cases, but these separation of powers concerns do not arise in the context of regulatory examples. Justiciability requirements such as standing prevent courts from engaging in the legislative task of making general statements of law disconnected from a particular controversy.[202] But agencies' rule-making, including their offering of regulatory examples, operates within a legislative mandate. Examples do not consider a particular case or enforce a specific remedy for any person, let alone on a retroactive basis. The examples are not adjudications, even though analogical reasoning provides the right tool to understand their meaning.

C. Too Much Agency Power

Some may argue that both regulatory examples and analogical interpretation of them confer too much power on agencies. As we have shown throughout this Article, regulatory examples allow agencies to convey legal content concretely, by saying how they believe the law applies to facts.[203] The availability of concrete hypotheticals as a lawmaking tool presumably expands the agency's ability to communicate effectively. But some may worry that the concrete regulatory examples may not be as well thought through as other, more abstract portions of the regulation. Or some may view regulatory examples as a way to sneak in rules that would be more likely to yield public protest, or at least scrutiny, if they were stated in a more forthright fashion. If either of these possibilities is true, it may seem more suitable for the examples to be issued in less formal guidance documents (such as manuals, opinion letters, or the like)[204]. This would be animated by a concern that, if examples are issued in notice and comment regulations, they would be entitled to *Chevron* deference, giving the examples too much weight.[205]

There may also be a concern that our theory of interpretation increases an agency's discretion. Analogical reasoning is flexible and can lend itself to a variety of interpretations,[206] because analogical reasoning is subject to judgments about similarity

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[202] *See, e.g.*, Spokeo v. Robins, 136 S. Ct. 1540 (2016) (explaining that standing is a Constitutional doctrine "developed … to ensure that federal courts do not exceed their authority as it has been traditionally understood" and to "confin[e] the federal courts to a properly judicial role").

[203] There is a strand of administrative law that considers the choice administrative agencies have between adjudication and rulemaking. Under *Chenery II*, an agency has the discretion to choose its method, but *Chenery II* is a controversial doctrine. The dilemma posed by *Chenery II* is not implicated by regulatory examples as a general matter. This is because regulatory examples are not adjudicative, even though they use concrete explanations. They do not assign consequences to particular persons on a retroactive basis. *See, e.g.*, Nielsen.

[204] For discussion of some of the many forms of informal guidance that agencies use, see, for example, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Policymaking*, 92 CORNELL L. REV. 397 (2007); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992); Todd D. Rakoff, The Choice Between Formal and Informal Modes of Adminisrtative Regulation, 52 Admin. L. Rev. 159 (2000).

[205] United States v. Mead, 533 U.S. 218, 226-27 (2001) (holding that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority").

[206] Brewer, *supra* note 101, at 985-89 (discussing analogical reasoning and rule of law).

and difference. The *Auer / Seminole Rock* [207] administrative law doctrine gives deference to agencies' interpretations of their own regulations unless the agency's interpretation is "plainly erroneous or inconsistent with the regulation."[208] An agency's later interpretation of a regulatory example could receive *Auer* deference. Might this make regulatory examples a problematically powerful tool in agencies' hands? Might regulatory examples enable agencies to put in place particularly unclear guidance in regulations, which the agency can then later claim implicitly sets forth rules that the public may not have anticipated? Some have argued that such lack of notice and consolidation of rulemaking and interpretive power in the hands of agencies threatens the rule of law.[209]

Taking these concerns in turn, it is not clear that the concerns regarding agency inattention to regulatory examples is merited, or that any such concerns would be resolved by having examples instead included in less formal guidance. We are aware of no evidence suggesting that agencies give any less thought to regulatory examples than to any other parts of a regulation, or that regulated parties or the public are any less focused on them. Indeed, as illustrated previously, regulated parties and their advisors often pay careful attention to regulatory examples.[210] Nor is it clear that examples in less formal guidance offer agencies less deference under current law, including under application of *Chevron*[211] and *Auer*.[212]

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[207] Auer v. Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (internal quotation marks and citations omitted). For just a sample of the extensive discussion of this doctrine, see, for example, Scott H. Angstreich, *Shoring Up Chevron*, 34 U.C. Davis L. Rev. 49 (2000); Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787 (2014); Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669 (2015).

[208] Auer v. Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (internal quotation marks and citations omitted). *But see* Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813 (2015) (casting doubt on the power that *Auer / Seminole Rock* has as a "super deference" regime).

[209] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 659-60 (1996) (discussing deference to agencies and rule of law); Scalia (expressing concern about *Auer*). *But see* Sunstein & Vermeule, *The Unbearable Rightness of Auer*, forthcoming U. Chi. L. Rev. (arguing inter alia that no empirical or anecdotal evidence exists that agencies take advantage of *Auer* in the way suggested by Manning and Scalia).

[210] *Supra* __.

[211] If the agency offers the same forecasts of how the law will apply to facts in other, less formal forms of guidance (such as manuals, opinion letters, or the like), a court could provide the exact same *Chevron* deference to such guidance. When *Chevron* deference applies is a perenially difficult question, and whether it would fail to apply to examples issued in less formal guidance is not entirely clear. *Mead* itself made clear that notice and comment procedures may not be a prerequisite to *Chevron* deference. United States v. Mead, 533 U.S. 218, 230-31 (2001). For only a small fraction of the scholarship regarding when *Chevron* deference applies after *Mead*, see for example, Lisa Schultz Bressman, *How Mead Has Muddled Judcial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719 (2002); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

[212] Alternatively, if an agency offers such examples in less formal guidance, an agency may be able to argue that the examples are now the agency's interpretation of its own regulations, in which case the agency is arguably entitled to *Auer* deference. Deference under *Auer* would theoretically be stronger, or

With respect to the concern that our use of analogical reasoning in particular expands agency discretion to provide post hoc, nonobvious interpretations of regulatory examples, we reply that our theory also narrows agency discretion.[213] It does this by providing a framework that sets the parameters for interpretations of regulatory examples. For instance, with the regulatory examples regarding diseases on planes, analogical reasoning makes clear that both severity and ease of transmissibility must be present in order to exclude a passenger from a plane, and offers a narrow set of arguments regarding whether both conditions are sufficient to exclude a passenger from a plane.[214]

Ours is a theory of regulatory interpretation that helps delineate the interpretive parameters of agency regulations under *Auer*.[215] It blocks agencies from later interpreting the non-example portion of a regulation in a way that is inconsistent with the examples. But it also insists that regulated parties and courts interpret regulations in a way that respects the agency's communication of legal content in both the examples and in the non-example portion of the regulation. In short, our theory provides a means of bringing examples into the conversation of regulatory interpretation, so that they are in dialogue with the rest of the regulatory and statutory scheme, as well as background approaches to regulatory interpretation. It makes sense of a type of guidance that pervades regulatory schemes, but lacks any systematic interpretive theory.

V. CONCLUSION

Scholars have done important work that proposes how background theories of interpretation should apply to regulations. Theories of regulatory interpretation should

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practically likely at least as strong, as deference under *Chevron.* The formal statement of the two tests suggests that *Auer / Seminole Rock* deference is stronger than *Chevron* deference. *Compare* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013) (quoting Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011)) (explaining that, with *Auer / Seminole Rock* deference, "[w]hen an agency interprets its own regulation, the Court, as a general rule, defers to it 'unless that interpretation is "plainly erroneous or inconsistent with the regulation"') *with* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). However, recent scholarship has suggested that, in practice, *Auer / Seminole Rock* deference may not actually be much more deferential than *Chevron* deference. *See* Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813 (2015). For less recent assessments of comparative deference regimes, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1142 & tbl.15 (2008) and Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 519 (2011).

[213] The increased transparency and certainty regarding the meaning of examples might encourage or discourage agencies from including examples in their regulations, based in part on the comparison between the effects of our theory and the underlying assumptions previously held.

[214] *Supra* __.

[215] *See, e.g.*, Kristin Hickman, *Contemplating a Weaker Auer Standard*, Yale J. on Reg: Notice and Comment (Sept. 23, 2016) http://yalejreg.com/nc/contemplating-a-weaker-auer-standard-by-kristin-e-hickman; Stack, The Interpretive Dimension of Seminole Rock, supra note __; Stack, Interpreting Regulations, supra note __, at 371-74.

also consider common regulatory drafting practices. Regulatory examples are a good place to start in thinking about such practices. They pervade many agency regulations and are an influential regulatory tool. And yet, background theories of regulatory interpretation have little, if anything, to say about the nature of regulatory examples or how to interpret them.

This Article supplies an interpretive theory of regulatory examples. Our theory places regulatory examples and non-example text on equal footing. When regulatory examples add content to the law, they are best interpreted through analogical, case-law like reasoning. The guidance from analogical reasoning should also be reconciled with the broader regulatory and statutory scheme.

We offer an interpretive approach that does not turn on agency intent. It demands only the prerequisite that the agency, in stating the result to a concrete hypothetical, has offered legal content in a final regulation, after a notice-and-comment process. Our theory provides a way to understand the legal content communicated through this drafting style, whether the interpreters are agencies, regulated parties, or others. The theory increases the transparency and certainty of the law offered by regulatory examples.