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Regulating by Example

Susan C. Morse[†] & Leigh Osofsky[‡]

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, the theoretical literature contains no study of regulatory examples or of how they might be interpreted. Courts differ about whether examples serve as an independent source of law. There is uncertainty about the proper role of this frequently used regulatory tool.

In this Article, we argue that regulatory examples make law. Our claim is that, as a default rule, the legal content offered by regulatory examples is co-equal with, not subordinate to, the non-example portions of regulations. Treating examples as co-equal with other portions of the regulations empowers agencies to improve regulatory content through concrete communication, while also acknowledging regulated parties' natural inclination to treat such communications as law. We reject counterarguments that regulatory examples merit extra scrutiny, or less respect, that would relegate them to second-class status.

We also set forth a method for interpreting regulatory examples. We argue that they are best understood through analogical, or common law, reasoning, and we illustrate this approach. We show how analogical reasoning can be reconciled with the rest of the broader regulatory and statutory scheme using various interpretive approaches, such as textualism or purposivism. Our method places regulatory examples in dialogue with their broader regulatory and statutory schemes. It both empowers and constrains courts, agencies, and regulated parties in their efforts to understand the meaning of regulations.

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Introduction

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

1. See, e.g., 16 C.F.R. § 239.2 (2017) (providing examples of various types of disclosures in warranty or guarantee advertising); 40 C.F.R. § 1037.655 (2017) (providing examples of allowable and prohibited postuseful life vehicle modifications); 45 C.F.R. § 148.170 (2017) (providing examples addressing standards relating to benefits for mothers and newborns).

2. See, e.g., 7 C.F.R. § 520.5 (2017) (providing examples of actions for which an environmental assessment is not required); 21 C.F.R. § 112.1 (2017) (providing examples of different types of covered produce); 32 C.F.R. § 203.11 (2017) (providing examples of activities ineligible for assistance under the Technical Assistance for Public Participation program).

3. See, e.g., 10 C.F.R. § 963.17 (2017) (providing examples of characteristics and criteria relevant to evaluation of the postclosure suitability of a geologic repository); 12 C.F.R. pt. 1005, Supp. I (2017) (providing examples to clarify definitions of terms used in regulation pertaining to electronic fund transfers); 40 C.F.R. § 1065.695 (2017) (providing examples of various types of information that may be required from engine tests).

4. See, e.g., 5 C.F.R. § 412.202 (2017) (providing an example of critical career transitions, which require training); 29 C.F.R. § 780.310 (2017) (providing an example of a full-time

Consider a U.S. Department of Transportation example that addresses when an airline may refuse to board a sick passenger.⁵ The governing statute prohibits discrimination against a passenger “on the . . . grounds [that] the individual has a physical or mental impairment.”⁶ The regulation that carries out this statutory provision also acknowledges that the combination of contagious illness and air travel presents a public health risk. The regulation provides that an airline may not deny transportation unless the passenger’s condition poses a “direct threat,” which the airline must determine after considering “the significance of the consequences of a communicable disease and the degree to which it can be readily transmitted by casual contact.”⁷ This language leaves ample room for different understandings of the significance and transmissibility criteria.

Regulatory examples relating to diseases on airplanes narrow the field of interpretation. They state that neither a passenger with a common cold⁸ nor a passenger with AIDS⁹ presents a direct threat. The common cold is not serious enough, and AIDS is not sufficiently readily transmissible. In contrast, a passenger with SARS, a serious and contagious respiratory illness, “probably” poses a direct threat.¹⁰

What should we make of these regulatory examples? How do they relate to the non-example text? Do they have the power to modify the non-example text and serve as an independent source of law? Or are they subservient to it? To the extent that regulatory examples can create new legal content, how should meaning be drawn from them?

Despite the prevalence of examples across agency regulations, no systematic scholarly account or judicial framework addresses the meaning or interpretation of regulatory examples. From a practical perspective, this gap is striking because both agencies and regulated parties pay close attention to regulatory examples and recognize their importance to regulatory schemes. From

farmworker not within the scope of the exemption); 42 C.F.R. § 432.55 (2017) (providing an example of costs of employing students on a temporary basis).

5. 14 C.F.R. § 382.21 (2017).

6. 49 U.S.C. § 41705 (2012). 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.” Federal Aviation Act of 1958, 49 U.S.C. § 404(b) (repealed 1978). 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).

7. 14 C.F.R. § 382.21(a), (b)(2) (2017).

8. *Id.* § 382.21(b).

9. *Id.* AIDS is an acronym for Acquired Immune Deficiency Syndrome and is the final stage of the Human Immunodeficiency Virus infection. See *What are HIV and Aids?*, HIV.GOV, <http://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/what-are-hiv-and-aids> [<http://perma.cc/XDP8-HUMC>].

10. 14 C.F.R. § 382.21(b) (2017). SARS is an acronym for Severe Acute Respiratory Syndrome, and is a viral respiratory illness. See *SARS*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/sars> [<http://perma.cc/GL6L-KNEF>].

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 generally focus on background interpretive questions such as whether regulations should be read through a purposive or textualist lens. In contrast, there has been less attention paid to the interpretive questions presented by common regulatory drafting practices, such as the choice to use a regulatory example.¹¹ In the absence of such examination, courts, agencies, and regulated parties alike lack a coordinated understanding of the role that examples do, or should, play in regulatory schemes.

This Article fills this gap. We argue that, like the non-example portion of regulations, regulatory examples can serve as an independent source of law. We then supply a method of interpretation for regulatory examples. In so doing, we consider only regulatory examples that are provided in final regulations that have emerged from a notice-and-comment rulemaking process.¹² In other words, this Article only considers federal regulations that have the procedural pedigree to qualify as “force of law,”¹³ rules entitled to *Chevron* deference.¹⁴

We argue for a default rule that gives equal weight to general statements of law and specific examples contained in a federal regulation. Each must be read so 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 fashion that would not be the most natural reading, absent the regulatory example. Co-equal status empowers agencies to communicate while acknowledging the meaning regulated parties naturally take from regulatory examples. The co-equal approach also aligns with

11. A contemporaneous paper addresses examples in tax regulations. See Yariv Brauner, *Why Examples? Towards More Behaviorally-Intelligent Regulation* (Working Paper, July 24, 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008261 [<http://perma.cc/45D8-3QKR>].

12. Non-regulatory agency guidance also features 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 Internal Revenue Serv., *Understanding IRS Guidance: A Brief Primer*, U.S. DEP’T. TREASURY, <http://www.irs.gov/uac/understanding-irs-guidance-a-brief-primer> [<https://perma.cc/X6YQ-XQWB>] (explaining that a revenue ruling is “the conclusion of the IRS on how the law is applied to a specific set of facts”). Preambles to regulations may also include examples. See Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. U. L. REV. 1252, 1268-69 (2016) (discussing the use of examples in preambles); see also, e.g., *Am. Fed’n of Labor and Cong. 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. 79,280, 79,283 (Dec. 27, 2002)); *P&V Enters. v. U.S. Army Corps of Eng’rs*, 516 F.3d 1021 (D.C. Cir. 2008) (analyzing examples in notice of proposed rulemaking). Examples can also be found in other related sources of law as well, including legislative history. See, e.g., *Gas Plus, L.L.C. v. U.S. Dep’t of the Interior*, 510 F. Supp. 2d 18, 30 (D.D.C. 2007) (analyzing the Senate Report description of financing transaction that constitutes an “encumbrance” within the meaning of the statute) (citing S. Rep. No. 106-150 (1999)).

13. *United States v. Mead*, 533 U.S. 218, 226-27 (2001).

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

the application of administrative procedure requirements to all parts of final regulations.

A default rule that treats regulatory examples as an independent source of law both empowers and constrains agencies in their effort to communicate legal content. Treating examples as law empowers agencies to communicate law through concrete application, rather than being forced to communicate solely in the form of abstract statements. Treating examples as law also constrains agencies by matching examples' legal status with their influence on regulated parties. Recognizing examples' status as law thereby helps to coordinate agency and regulated parties' treatment of examples, and encourages agencies to adequately consider what the examples are communicating.

In making the case that examples make law, we reject several counterarguments that would relegate examples to second-class status. Underlying these counterarguments is a sense that examples merit more scrutiny, or less respect, than the rest of a regulation. This is a proposition for which we do not find support. The counterarguments we address include those regarding structural subservience, the heterogeneity of examples, the potential for regulated parties or agencies to use regulatory examples to shift the balance of regulatory power, analogues to examples in other agency guidance that do not make law, and agency intent.

We also supply an interpretive method for regulatory examples. We argue that analogical reasoning, of the type used in common law analysis, should be used to understand what examples mean. Analogical reasoning identifies relevant similarities and differences across cases and articulates general principles that can be drawn from a body of case law. These principles can be applied to help determine outcomes for future fact patterns. Analogical reasoning can apply similarly to help understand the meaning of examples.

Our interpretive method must also account for the fact that regulatory examples are situated within a broader regulatory and statutory scheme. We show how regulatory examples can and must be reconciled with the rest of the law. This can be accomplished using existing approaches for statutory and regulatory interpretation, such as textualism or purposivism. In other words, our method of interpretation is consistent with, and extends the reach of, the current established theories of regulatory interpretation.

This Article proceeds as follows. Part I of this Article describes the importance of regulatory examples to regulated parties and agencies and the lack of any systematic theoretical or judicial framework for interpreting regulatory examples. Part II presents our core argument that examples make law. Part III offers analogical reasoning as a way to draw meaning from regulatory examples, and shows how regulatory examples can be reconciled with the broader regulatory and statutory scheme. The last Part briefly concludes.

I. Regulatory Examples: the Gap in Theory and Law

Federal regulations are full of examples.¹⁵ 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 a consistent interpretive framework and disagree about whether regulatory examples serve as an independent source of law. This theoretical gap reflects uncertainty regarding the proper role of this common regulatory tool.

A. Agency and Regulated Party Treatment of Examples

When agencies use examples, their effort to communicate the law is not limited to abstract or general language. Rather, examples say how the law works in a concrete and specific way, by applying abstract law to hypothetical facts. When an agency uses general statements of law in conjunction with the concrete hypotheticals found in examples, it follows a popular and proven method of communicating legal content.¹⁶ Restatements,¹⁷ model laws,¹⁸ and the rules of various self-regulating groups¹⁹ also use this abstract-plus-concrete format.

15. Some agencies use examples more frequently than others. To get a sense of this, we searched the federal register for the words “Example 2.” Our search for “Example 2” yielded 1150 rules promulgated between January 1, 1995, and June 15, 2017. Of these, 658 were issued by the Internal Revenue Service (and we assume cross-listed by the U.S. Treasury Department, *see* I.R.C. § 7805 (2012) (authorizing the Treasury Department to “prescribe all needful rules and regulations.”)). This suggests that about fifty-seven percent of rules that contain examples were tax regulations. Other federal agencies and executive departments that used “Example 2” in their rules included the Department of Health and Human Services (87), the Treasury Department (70) (excluding regulations cross-listed with IRS, i.e. tax regulations), the Department of Labor (38), the Department of Transportation (38), the Environmental Protection Agency (29), the Federal Communications Commission (23), the Department of Homeland Security (23), the Employee Benefits Security Administration (22), the Department of Commerce (21), the Department of Education (21), the Government Ethics Office (21), and the Department of the Interior (21). Another forty-six federal agencies used “Example 2” between three and eighteen times in rules during the search time period. Fifty-seven more federal agencies used “Example 2” once or twice. This produces rudimentary search data. For instance, searching for “Example 2” omits some instances of examples; although, it also avoids counting Preamble language such as “for example, (1).” The search also double counts rules filed by more than one agency. Nevertheless, it provides an idea of the scope of our topic. *See* FED. REG., <https://www.federalregister.gov/documents/search?conditions%5Bterm%5D=%22example+2%22&conditions%5Btype%5D%5B%5D=RULE> [<https://perma.cc/EM2D-RC5U>].

16. Often, the non-example text may take the form of a standard, while the examples state what the result is on certain facts. In other words, regulatory examples often contribute to a “rulification of standards” process. *See* Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 806 (2005) (observing that incremental decisions tend to narrow and constrain the application of standards in future cases).

17. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 16 (AM. LAW INST. 1998) (providing general rule and nine “illustrations” on the topic of “increased harm due to product defect”).

18. Likewise, examples are used in the official comments regarding model laws. *See, e.g.*, U.C.C. § 9-336, Official Comment (MCKINNEY 2001) (providing examples to illustrate the application of the section).

19. *See, e.g.*, “Official Review” With Dean Blandino, NAT’L FOOTBALL LEAGUE, <http://www.nfl.com/videos/nfl-network-total-access/0ap3000000711171/NFL-Official-Review-with->

A set of regulations²⁰ addressing acquisitions of U.S. businesses by foreign owners illustrates how regulatory examples matter to agencies and regulated parties. These regulations implement a federal statute that directs the President to review the national security impact of foreign acquisitions of U.S. firms.²¹ A 2006 controversy over the management of U.S. seaports by a company controlled by the government of Dubai illustrates the issue that the statute and regulations are meant to address. Dubai Ports World agreed to assume leases and manage major ports, including ports in Baltimore, Miami, New Jersey, and New York.²² No member of the interagency committee that considered the deal objected, and so no in-depth review occurred. But a House committee voted to block the deal due to national security concerns.²³ Dubai Ports World agreed to back out of the transaction, and instead sold the business to a U.S. firm.²⁴

Legislation proposed after the Dubai Ports World controversy²⁵ amended the process for evaluating and blocking foreign control transactions for national security reasons.²⁶ It was enacted in 2007 as the Foreign Investment and National Security Act (FINSAs).²⁷ Among other changes, FINSAs made the review of all “covered transaction[s]” mandatory and defined a “covered transaction” as one that “could result in foreign control of any person engaged in interstate commerce in the United States.”²⁸

Dean-Blandino [<http://perma.cc/3NYT-MJH9>] (giving weekly review of close calls by NFL’s former Senior Vice President of Officiating).

20. 31 C.F.R. pt. 800 (2017) (implementing FINSAs).

21. See 50 U.S.C. § 2170(b)(1)(A) (2012) (directing the President, through a committee, to review “covered transactions”).

22. See David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), <http://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html> [<http://perma.cc/3U2S-3YLT>] (describing the Dubai Ports World transaction).

23. See Elisabeth Bumiller & Carl Hulse, *Panel Saw No Security Issue in Port Contract, Officials Say*, N.Y. TIMES (Feb. 23, 2006), <http://www.nytimes.com/2006/02/23/politics/panel-saw-no-security-issue-in-port-contract-officials-say.html> [<http://perma.cc/Y57V-L44S>] (reporting that a firm could experience a decision to investigate as negative).

24. See Heather Timmons, *Dubai Port Company Sells Its U.S. Holdings to A.I.G.*, N.Y. TIMES (Dec. 12, 2006), <http://www.nytimes.com/2006/12/12/business/worldbusiness/12ports.html> [<http://perma.cc/44ZL-GJHH>] (reporting the “final chapter in a politically charged deal”).

25. See EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 145-47 (2006) (explaining that the Dubai Ports World controversy prompted legislative action).

26. The prior law was known as the Exon-Florio Amendment. It was enacted as part of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021(a), 102 Stat. 1107, 1425 (1988) (codified as amended at 50 U.S.C. § 2170 (2012)). The Exon-Florio Amendment and related amendments gave the President the power to review and block foreign acquisitions on the strength of a finding of national security risk. FINSAs added the obligation to review “covered transactions” and added other procedural requirements in 2007. See Amy S. Josselyn, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose*, 21 GEO. MASON L. REV. 1347, 1351-53 (2014) (tracing the history of review process prior to passage of FINSAs).

27. Foreign Investment and National Security Act of 2007, Pub. Law No. 110-49, 121 Stat. 246 (2007) (codified in scattered sections of 50 U.S.C.).

28. 50 U.S.C. § 2170(a)(3) (defining covered transaction); *Id.* § 2170(b)(1)(A) (mandating review).

The meaning of the word “control” is a key definitional issue under FINSA. The statute explicitly leaves the definition of control to regulations,²⁹ and the regulations in turn largely leave the definition to examples. The description of control in the non-example regulatory text is vague. “Control” means the “power, direct or indirect . . . to determine, direct, or decide important matters affecting an entity”³⁰ Other non-example text also offers a nonspecific treatment of the idea of control. A joint venture can be a “covered transaction” if “a foreign person could control that U.S. business” through the joint venture.³¹

The non-example text does not give an answer to key questions about the definition of control. But the examples do. For instance, the non-example text does not say whether a 50/50 joint venture is under the “control” of a fifty percent foreign partner. As the preamble explains, though, an example in proposed regulations concluded that a foreign firm has control within the meaning of FINSA in a 50/50 joint venture. A commenter raised an obvious question, and “suggested that [a 50/50 joint venture] should not be a covered transaction because the power that the foreign person has over the U.S. business is not greater than the other party’s.”³² But, as the preamble explains, the final rule contained the 50/50 example, unchanged. The example reveals that veto power is enough to support “control” for purposes of FINSA.

The same regulations include other examples that clarify the definition of control. In one example, “Corporation A” is owned fifty percent by a U.S. investor and fifty percent by “five unrelated foreign investors” who “have an informal arrangement to act in concert”; the example concludes that “as a result, the foreign investors control Corporation A.”³³ As with the 50/50 joint venture example, the notice-and-comment process included discussion and negotiation over the example’s content. The preamble explains that a commenter asked whether such an informal arrangement would include a voting trust.³⁴ A voting trust would be covered in many circumstances, explains the preamble. The decision to keep the language unchanged in the final regulation’s example appears intended to avoid the impression that a voting trust was required to conclude that foreign persons had informally agreed to act in concert.³⁵

29. *Id.* § 2170(a)(2) (“The term ‘control’ has the meaning given to such term in regulations which the [Committee on Foreign Investment in the United States] shall prescribe.”). The Committee on Foreign Investment in the United States, or CFIUS, is an interagency committee including representatives of nine agencies and chaired by the Secretary of the Treasury. *See id.* § 2170(f).

30. 31 C.F.R. § 800.204(a) (2017).

31. *Id.* § 800.301(d).

32. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702, 70,709 (Nov. 21, 2008).

33. 31 C.F.R. § 800.204 Ex. 1 (2017). Example 2 presents the counterexample, where the unrelated foreign investors do not act in concert and there is no foreign control. *Id.* § 800.204 Ex. 2.

34. *Id.* at Preamble.

35. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702, 70,707 (Nov. 21, 2008) (emphasizing an example that finds control in the absence of a “formal agreement”).

The preamble also records requests for more examples that arose during notice and comment. For instance, one additional example addresses incremental acquisitions.³⁶ Two others give guidance on “private equity” fact patterns.³⁷ The content of these and other examples is specifically highlighted in law firm client alerts describing the changes in law brought about by the new FINSA regulations. For instance, one law firm explained that the important factor identified in the private equity examples is whether the general partner solely controls major actions, such as investment decisions and board representation selection.³⁸

As the client alerts and the notice and comment attention to the examples show, agencies and regulated parties pay careful attention to regulatory examples. They negotiate over the inclusion and content of regulatory examples, they parse their meaning, and they stake out claims regarding their effect. As a practical matter, regulatory examples are clearly an influential aspect of a regulatory scheme. But it is less clear what their role *should* be. Should an agency make law through regulatory examples? Or is there something wrong with the agency doing so? Should regulated parties and agencies be able to use regulatory examples as support for a particular regulatory interpretation? Do examples serve as an independent source of law, or should the law be limited to the non-regulatory text? If regulatory examples provide legal content, how should they be interpreted?

B. *The Gap in Theory*

Notwithstanding the prevalence and influence of regulatory examples, the legal literature contains little consideration of the meaning of regulatory examples, or what role they should play in regulatory law. The lack of any existing theory of interpretation for regulatory examples is understandable. The scholarly field of regulatory interpretation has only emerged recently.³⁹ A number of scholars have opened the regulatory “black box”⁴⁰ by offering tentative thoughts on how agencies interpret statutes⁴¹ and examining why

36. *Id.*

37. *Id.* at 70,706 (explaining Examples 8 and 9); *id.* at 70,707 (explaining Example 7).

38. *See Recent Revisions to Exon-Florio “National Security” Reviews of Foreign Investment in the United States*, CLEARY GOTTLIEB 9 (2008), <http://www.clearygottlieb.com/news-and-insights/publication-listing/recent-revisions-to-exon-florio-national-security-reviews-foreign-investment-in-the-us24> [<http://perma.cc/PD4D-2L6C>] (analyzing investment partnership examples).

39. *See, e.g.*, Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 365-66 (2012) (noting that agency regulations “create” as well as “clarify” ambiguity and that courts lack a consistent approach).

40. *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1003 (2015) (“[A]gency statutory interpretation remains, to a large extent, a black box.”).

41. *See, e.g.*, Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 505-16 (2005) (noting the pressure of presidential instruction, congressional direction, and constitutional norms on agency action); Peter L. Strauss, *When the Judge Is Not the Primary Official with the Responsibility To Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 330 (1990)

agencies make particular regulatory choices, such as voluntarily constraining their own discretion.⁴² But more administrative law scholarship focuses on when courts should defer to agency pronouncements.⁴³ Less attention has been paid to what agency drafting decisions should mean to courts, regulated parties, and the agency officials who work with regulations.

As Kevin Stack has argued, the focus on standards of deference for regulations puts the cart before the horse. Understanding what an agency regulation means will help a court applying various administrative law doctrines.⁴⁴ For instance, under *Chevron*, a court should defer to a regulation if it is a permissible interpretation of the statute.⁴⁵ But knowing how to interpret the meaning of a regulation supports a determination of whether the regulation is a permissible interpretation.⁴⁶ Also, under *Auer/Seminole Rock*, a court should defer to an agency's permissible interpretation of its own regulation.⁴⁷ But some means of interpreting the regulation helps to define its bounds and support an analysis of whether the agency's own interpretation of it is allowed.⁴⁸

Scholars who have begun to examine regulatory interpretation in depth have drawn upon theories long applied to statutory interpretation. The statutory interpretation debate features many theories, including textualist,⁴⁹ purposivist,

(noting influence of “statutory language,” “present political forces,” and “prior political forces” apparent through “agency’s institutional memory”); Walker, *supra* note 40, at 1018-20 (summarizing results of empirical study of agency knowledge of interpretive canons).

42. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 884-91 (2009) (suggesting that agencies may constrain their own actions procedurally or substantively for reasons including “control of delegated authority” and “policy entrenchment”).

43. The deference question and when courts should defer is 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 Stevens’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).

44. See Stack, *supra* note 39, at 365-75 (referring to different judicial deference doctrines).

45. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 842-43 (1984) (laying out the famous two-part *Chevron* test).

46. See Stack, *supra* note 39, at 367-68.

47. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (“Because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.” (internal citations and quotations omitted)).

48. See Stack, *supra* note 39, at 371; see also *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (indicating that deference to agency interpretation is only warranted when regulatory language is ambiguous); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Moreover, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), may stand for the proposition that agencies are bound to their own regulations. See Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 570-71 (2006) (summarizing examination of *Accardi* case law). But, again, it helps to know how to interpret the regulation to decide, and to what extent, agencies should be bound. See Stack, *supra* note 39, at 375-76 (explaining connection between interpretation and *Accardi*).

49. See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 534, 546-477 (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, 91-92 (2006) (explaining that textualists prioritize “semantic context” and arguing that this properly effects legislative compromises made necessary by constitutional structure).

and intentionalist⁵⁰ interpretive schools. In the developing area of regulatory interpretation, Jennifer Nou has advocated applying textualism, which emphasizes understanding the meaning of the words on the page in their semantic context.⁵¹ Kevin Stack has set forth the case for purposivism, which seeks to effect the purpose of the law as enacted.⁵² And Lars Noah has applied intentionalism, which looks to the intent of the drafters.⁵³ But these theories of regulatory interpretation have not yet examined questions raised by many common regulatory drafting practices,⁵⁴ including the use of regulatory examples that are the subject of this Article.⁵⁵

C. Examples in Courts

Case law also lacks a framework for determining what function regulatory examples serve and how to draw meaning from regulatory examples. Courts do not agree on whether regulatory examples can make law or, if examples do make law, how to determine what that law is. Some courts downplay the importance of regulatory examples by focusing on non-regulatory text. Other courts go further and express that regulatory examples cannot serve as an independent, or determinative, source of law. On the other end of the spectrum, some judges

50. Purposivism and intentionalism are related schools. Purposivism seeks to effectuate the objective purpose of a statute. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1374-81 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947). Intentionalism focuses on the subjective intent of legislators. Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1568 (2010).

51. 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.”).

52. Stack, *supra* note 39, at 383-420; Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 878-79 (2015) (arguing that “the agency has obligations to pursue the statute’s ends” which limit its ability to follow presidential direction).

53. Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 280-82 (2000).

54. See Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 MICH. L. REV. FIRST IMPRESSIONS 61, 71-72 (2015), http://repository.law.umich.edu/mlr_fi/vol114/iss1/6 [http://perma.cc/UNA5-UB29] (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”).

55. The practice of using examples also exists in statutes. See, e.g., 42 U.S.C. § 256(c)(3)(B) (2012) (providing examples of “extraordinary circumstances”). Statutory interpretation theories do not, to our knowledge, consider the use of examples, at least in the United States. But see Ben Piper, *What, How, When and Why—Making Laws Easier to Understand by Using Examples and Notes*, in *OBSCURITY AND CLARITY IN THE LAW: PROSPECTS AND CHALLENGES* 181, 184-86 (Anne Wagmer & Sophie Cacciaguidi-Fahy eds., 2008) (explaining that provisions governing the interpretation of statutory examples in Australia vary from state to state). The practice of drafting examples in the United States is more common at the agency level. Cf. Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) (“Given the nature and level of government intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.”).

defer to regulatory examples. When courts do treat regulatory examples as a source of law, they take various approaches to make meaning of them.

To begin, some items 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 homing 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.⁵⁶

When courts do encounter regulatory examples that meet our definition—meaning examples that reach legal conclusions based on hypothetical facts—they take various, and often conflicting, approaches to such examples. Some courts downplay the importance of examples by focusing their analysis on the non-example text. For instance, in 2011, the Supreme Court in *Mayo Foundation v. United States*⁵⁷ upheld a decision that medical residents were employees for purposes of payroll tax liability. The relevant regulation included an on-point regulatory example that states that a “medical resident” regularly scheduled for more than forty hours per week at “University V” is an employee for purposes of payroll tax liability.⁵⁸ The Court acknowledged this example in its summary of the relevant law. But the Court focused its analysis principally on the non-example text of the regulation.⁵⁹ Other cases have also displayed a tendency to pay less attention to or avoid relevant regulatory examples in favor of the non-example portion of the regulatory text.⁶⁰

Some courts have gone further in their lack of respect for regulatory examples as a source of law by suggesting that regulatory examples “are not to be considered as dispositive of controversial issues”⁶¹ For instance, in *Tennessee Baptist Children’s Homes*, a childcare center operated by the Tennessee Baptist Convention contended that it was exempt from tax-exempt organization reporting requirements because it was “exclusively religious.” A regulatory example concluded that a church-affiliated orphanage was not exclusively religious, and thus had to report, because the childcare operations

56. See Nat’l Mining Ass’n v. Babbitt, 172 F.3d 906, 910 (D.C. Cir. 1999) (citing 30 C.F.R. § 817.121(c)(4)(iv) (2017) (promulgated by the Secretary of the Interior)).

57. *Mayo Found. v. United States*, 562 U.S. 44 (2011).

58. 26 C.F.R. § 31.3121(b)(1)-2(d)(3)(iii) (2017).

59. *Mayo*, 562 U.S. at 50, 58-60.

60. See, e.g., *Biovail Corp. v. FDA*, 448 F. Supp. 2d 154, 162 (D.D.C. 2006) (refusing to extract from examples any principle related to the proper degree of detail that the FDA owed to a drug applicant in a response); *Am. Coll. of Physicians v. United States*, 530 F.2d 930, 932 (Ct. Cl. 1976) (citing but not discussing on-point regulatory examples and instead focusing analysis on non-example portion of regulation).

61. *Tenn. Baptist Children’s Homes, Inc. v. United States*, 790 F.2d 534, 538-39 (6th Cir. 1986).

would independently support a tax exemption. However, the court refused to conclude that the regulatory example affected the meaning of the regulation. It held that the non-example portion of the regulation left open a material question of fact that could be decided by a jury.⁶²

On the other end of the spectrum, some judges are willing to defer to regulatory examples. For instance, consider the dissent in *Waterman*, a 1999 Fourth Circuit case.⁶³ 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.⁶⁴ The majority held that the amount was not "compensation received for active service" within the meaning of the statute.⁶⁵ 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.⁶⁶ There are other instances of courts deferring to examples as well.⁶⁷

Even when courts do decide to treat regulatory examples as a source of law, they use various approaches for making meaning of such regulatory examples. 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. The holistic analysis is more consistent with our argument here.

62. *Id.* (citing *Nico v. Commissioner*, 565 F.2d 1234, 1238 (2d Cir. 1977)) (addressing the use of itemized deductions versus standard deductions for nonresidents and concluding that "[w]e 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).

63. *See Waterman v. Commissioner*, 179 F.3d 123 (4th Cir. 1999) (King, J., dissenting).

64. *See* I.R.C. § 112(a) (2012).

65. *See Waterman*, 179 F.3d at 127-28.

66. *Id.* at 135 (King, J., dissenting) (citing 26 C.F.R. § 1.112-2(b)(5) Ex. 5) ("[T]he majority cannot convincingly distinguish Example 5 of the applicable regulation.")

67. *See, e.g., Estate of Timkin v. United States*, 601 F.3d 431, 435-37 (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 *Estate of 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. *Id.* at 435, 438-39. *See also* *Educ. 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) organization 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).

The cabined approach is illustrated by *Lorillard*, a 2014 decision in the District Court for the District of Columbia. 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.⁶⁸ The court held that a financial conflict arose because the consultant advised not only the FDA, but also companies who manufactured smoking cessation products, which directly competed with dissolvable tobacco.⁶⁹ 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. It 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.⁷⁰

In other words, the *Lorillard* Court relied on an example that frowned on consulting by physicians with business interests in regulated parties to ban consulting by a physician with a business interest in *competitors* of related parties. This approach relied on a regulatory example to extract a principle that could help decide the case. But it did not include a careful consideration of what the example meant as part of the regulatory or statutory 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 industry competitor in the review process might be viewed as a positive addition, not a disqualifying event.

A more holistic approach to identifying legal principles in regulatory examples is illustrated by such cases as *Washington Legal Foundation*.⁷¹

68. See *Lorillard, Inc. v. FDA*, 56 F. Supp. 3d 37, 51 (D.D.C. 2014), *rev’d sub nom.* R.J. Reynolds Tobacco Co. v. FDA, 810 F.3d 827 (D.C. Cir. 2016) (vacating the district court judgment for lack of standing).

69. *Id.* at 54.

70. *Id.*

71. *Washington Legal Found. v. U.S. Dep’t of Justice*, 691 F. Supp. 483, 496 (D.D.C. 1988). Other courts also take a holistic approach similar to the approach in *Washington Legal Foundation*. See, e.g., *Hilbert v. Dist. of Columbia*, 23 F.3d 429 (D.C. Cir. 1994). An example in a Department of Labor regulation provided that the salaried requirement is met when an employee is paid daily or on a shift basis, if the employee is assured of receiving minimum weekly wages. This “minimum guarantee plus extras” regulation is now found, with some modifications, at 29 C.F.R. § 541.604 (2016). The regulation considered in *Hilbert* was 29 C.F.R. § 541.118(b) (1993). Its facts are similar to those in *McReynolds v. Pocahontas Corp.*, 192 F.2d 301 (4th Cir. 1951)). In *Hilbert*, 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*, 23 F.3d at 432 (“If it is consistent with salaried status to calculate *deductions* from employees’ pay on an hourly basis, it is just as consistent with salaried status to calculate *additions* to their pay on that basis.”). 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. *Id.* at 439 (Mikva, C.J., concurring in part and dissenting in part) (“The essential

Washington Legal Foundation considered whether the Federal Advisory Committee Act (FACA) applied to an American Bar Association (ABA) committee that advised the Department of Justice regarding nominees for federal judgeships.⁷² Relevant regulations promulgated under FACA gave examples of groups not covered by the Act.⁷³

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.”⁷⁴ It cited four examples of groups not covered by FACA under the regulatory example. It then drew out principles from the examples. For instance, the court reasoned that local groups who themselves initiated contact with the agency and primarily operational groups were the sorts of groups who might be exempted.⁷⁵ 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 considered the broader regulatory and statutory scheme when it looked at legislative purpose. Second, the *Washington Legal Foundation* Court considered the regulatory examples as a body rather than focusing on only one.

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 conclusions of the examples, while also considering how the regulatory examples fit within the broader regulatory and statutory scheme. But, while *Washington Legal Foundation* provides some support for this approach to regulatory examples, courts do not agree about how to make meaning of regulatory examples or whether they serve as an independent source of law. This creates uncertainty and unpredictability regarding this frequently used regulatory tool. In the next two Parts, we make the case that regulatory examples make law, and that they should be interpreted through a process that integrates analogical reasoning of examples with the rest of the regulatory and statutory scheme.

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.”)

72. See *Washington Legal Found.*, 691 F. Supp. at 496 (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).

73. 41 C.F.R. § 101-6.1004 (2000).

74. *Washington Legal Found.*, 691 F. Supp. at 490.

75. 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).

II. Examples Make Law

A. *What Regulatory Examples Offer*

Good writers know that readers like examples. Style manuals emphatically endorse examples, whether they are advising writers in general⁷⁶ or regulation writers in particular.⁷⁷ An agency drafter faces the task of “compress[ing] policy instructions” into regulatory code.⁷⁸ Later, readers of the regulation must decode it.⁷⁹ Examples help with this coding and decoding process because they are outlines of stories. They are closer to the experience of a drafter and a reader than are abstract, logical rules. Often, the person reading the example can draw upon his or her own experience to explain and validate the story.⁸⁰ Examples can make the law more relatable and understandable.⁸¹

Examples come from various sources. Sometimes agencies draft examples that describe a targeted transaction or situation.⁸² Some examples repeat legislative history⁸³ or case law.⁸⁴ Some translate words into math.⁸⁵ Other

76. See, e.g., WILLIAM STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 21(4th ed. 2000) (“Prefer the specific to the general, the definite to the vague, the concrete to the abstract.”).

77. See *Federal Plain Language Guidelines*, PLAIN LANGUAGE ACTION & INFO. NETWORK (PLAIN) 70 (2011), <http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/FederalPLGuidelines.pdf> [<http://perma.cc/DX7L-QK3W>] (“Good examples can substitute for long explanations.”); Rudolf Fleisch, *HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS AND CONSUMERS* 70-80 (1979) (advocating examples to explain the meaning of law in regulations and advising regulation writers not to “try to make them up”); THOMAS A. MURAWSKI, *WRITING READABLE REGULATIONS* 45 (1999) (“Use examples . . .”).

78. Mathew D. McCubbins & Daniel B. Rodriguez, *Deriving Interpretive Principles from a Theory of Communication and Lawmaking*, 76 *BROOK. L. REV.* 979, 986 (2011) (describing law as a problem of communication).

79. See *id.* (explaining that “subsequent actors” try to “discern[] the meaning of these communications”).

80. See WILLIAM R. FISHER, *HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE AND ACTION* 64 (1987) (arguing that human beings have an “inherent awareness of . . . what constitutes a coherent story”).

81. See Brauner, *supra* note 11, at 6 (citing cognitive science literature on how examples enable people to access the law); cf. Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 *N.Y.U. L. REV.* 1183, 1189-92, 1200-10 (exploring how agencies’ use of visual media affects the communication of complex regulatory issues).

82. 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. Brief for Petitioner at 1-2, *Mayo Found. v. United States*, 562 U.S. 44 (2011) (No. 09-837), 2010 WL 4111636, at *1 (Aug. 6, 2010).

83. For instance, many of the examples in *de minimis* fringe benefit regulations are taken verbatim from the legislative history. See JOINT COMM. ON TAXATION, 98TH CONG., *GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984*, at 858-59 (Comm. Print 1985) (noting “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”).

84. For instance, the example considered in the *Hilbert* case was itself based on a decided case. See *supra* note 71 (discussing regulatory example).

85. See, e.g., 26 C.F.R. § 1.1273-1(f) Ex. 3 (2017) (defining “weighted average maturity” as “4.994 years, equal to [(4 years * \$600/\$101,200) + 5 years * (\$100,600/\$101,200)]”).

examples may be *sua sponte* hypotheticals developed by the agency to help it think through the drafting of a regulation.⁸⁶ Regulated parties may request examples that protect a position they have negotiated with the agency.⁸⁷

Examples may explain the main 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.⁸⁸ 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.⁸⁹ Examples are data points that help to define the contours of the law, but they do not occupy the field.⁹⁰ The most influential examples consider close cases.

Different examples add to the legal content of the regulation to different degrees. Some examples may only illustrate the legal content already offered in the non-example portion of the regulation. Take, for instance, 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”⁹¹ An example in the regulations illustrates how this works. The example provides the following 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 the example 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.”⁹² This example illustrates a

86. For instance, regulations promulgated under the Affordable Care Act include a series of examples about the interaction of Medicaid eligibility and Medicare eligibility and eligibility for health insurance benefits under the Affordable Care Act. Most of these examples were presumably written on a blank slate, since no prior experience existed to help identify useful fact patterns. *See id.* § 1.36B-2(c)(2) (providing six examples to help explain eligibility for “government-sponsored minimum essential coverage”).

87. For instance, the dozens of regulatory examples that describe how the “uniform capitalization” rules apply in income tax deal matter-of-factly with the concerns of one industry after another. *See id.* § 1.263A-1 (offering examples negotiated by airline industry, retail industry, and others). The drafting of regulatory examples may sometimes involve 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 the “political advantages of the small groups of large units”).

88. *See* Leigh Osofsky, *Concentrated Enforcement*, 16 FLA. TAX REV. 325, 338-44 (2014) (discussing project-based enforcement generally); *see also* 26 C.F.R. § 1.6011-4(c)(4) (offering examples of transactions that are “substantially similar” to a listed tax shelter transaction).

89. *See, e.g.,* Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385, 1391-92 (2016) (defining terms).

90. For instance, if a safe-harbor example says that *x* is permitted, it does not also mean that not *x* is prohibited. Similarly, if a sure-shipwreck example says that *y* is prohibited, it does not also mean that not *y* is permitted.

91. 45 C.F.R. § 148.170(a)(1) (2017). 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.” *Id.* § 148.170(a)(2).

92. *Id.* § 148.170(a)(ii).

time passage calculation that was already specified in the non-example portion of the regulation, rather than adding any significant legal content.⁹³

But other examples more clearly offer information that is not conveyed in 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 . . . or rebates to a mother to encourage her to accept less than the minimum protections available under this section.”⁹⁴ 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” as a payment made to encourage discharge, “because the follow-up visit does not provide any services beyond what the mother and her newborn would receive in the hospital.”⁹⁵

This hospital discharge example offers information that is not conveyed in the non-example portion of the regulation. 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. Example 2 appears to limit the meanings of one or both of “payment” and “encourage” within the regulation. In order to make sense of the example, these words must be interpreted so as to allow the provision of services after discharge at home rather than in the hospital, even if the at-home services encourage early discharge as a practical matter.

When examples offer information that is not conveyed in the non-example portion of the regulation, the question becomes: what should we make of such information? Can examples serve as an independent source of legal content? Or, should examples be viewed as subservient to the non-example portion of the regulation? Should we disregard any information offered in the example that does not merely illustrate the non-example text? Put simply, can regulatory examples make law?

B. Examples Co-Equal with the Rest of Regulation

We argue that, as a default rule, neither the non-example portions of the regulation nor the examples are a more important source of legal content. Instead, they are co-equal sources of law, and each should inform the meaning

93. Even this example could be said to contribute content, in the sense that it says that “delivery” occurs when the mother “gives birth.” This seems the most likely meaning of the term, but it is possible that “delivery” might be thought to mean something different, such as when a doctor enters the room to assist in the delivery. *Id.* § 148.170(a).

94. *Id.* § 148.170(b)(1).

95. *Id.* § 148.170(b) Ex. 2.

of the other.⁹⁶ As a result, the interpretation of the non-example text and the examples should stretch to accommodate the other, much like courts stretch the interpretation of treaties and statutes in an effort to make them meet.⁹⁷ Thus, regulatory examples can provide new legal content that can modify the interpretation of non-example text.

If there is a conflict between the non-example text and the examples, then there must be a mistake in one of them. The mistake could be in the example. For instance, the regulatory drafters may have correctly expressed the rules in the non-example text and written an incorrect example.⁹⁸ Or, the mistake could be in the non-example text.⁹⁹ The drafters may have failed to write the non-example text so as to produce a particular result in a given transaction, which is correctly characterized in the example.

Since the examples and non-example text should work together, only rarely would a mistake exist that would make them incompatible. And it is not possible to systematically predict which of the non-example text or the examples is wrong in such a case. The default rule treats examples and non-example text as co-equal sources of law.

The legal content offered by examples should be respected as a form of law because examples serve as a useful communication tool. There is no reason to force agencies to communicate all law abstractly, rather than being able to rely on a combination of abstract law and regulatory examples. Readers' ability to understand examples means that examples can be more efficient than abstract

96. See Part III (exploring how each should inform the other).

97. See, e.g., Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 574 (2007) (reporting the "clear finding" that for courts, "questions of treaty enforcement all turn on the usage of rules like *Charming Betsy* to interpret legislation so as not to conflict with treaty obligations"). The *Charming Betsy* canon encourages harmonization of the "law of nations," generally understood to mean treaties, with congressional statutes. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

98. For instance, a 1954 Senate Report gives an incorrect example. It relates to Section 302 of the Internal Revenue Code, which allows a corporate stock redemption to be treated as a disposition of stock, rather than a dividend, if it is "substantially disproportionate." This requires, among other things, that the shareholder's percentage ownership of voting stock post-redemption is less than 80 percent of the percentage ownership of voting stock prior to the redemption. See I.R.C. § 302(b)(2)(D) (2012). The Senate report gives an example that produces a reduction in percentage ownership from about fifty-five percent to about forty-nine percent, which does not meet the eighty percent test. See S. REP. NO. 83-1622, at 23 (1954). It appears that the drafter of the legislative history failed to reduce the denominator, or the total number of shares outstanding, in the calculation. See Sarah B. Lawsky, *Formalizing the Code*, 70 TAX L. REV. 377, 391 (2017) (giving an example) (citing Harry A. Bernbach, *Substantially Disproportionate Redemptions Under the 1954 Act*, 33 TAXES 597, 600 (1955)).

99. For instance, proposed Treasury regulations addressing private equity management fee waivers contain non-example text emphasizing the "superfactor" of "significant entrepreneurial risk" and listing relevant risk factors. Prop. Treas. Reg. § 1.707-2(c), 80 Fed. Reg. 43,652, 43,658 (Jul. 23, 2015). Accompanying examples do not transparently consider the listed factors. Some commentators contend that the examples take the proposed regulations in a direction that cannot be predicted from the rest of the regulation. See, e.g., Bradley T. Borden et al., *Proposed Anti-Fee Waiver Regulations: A Blueprint for Waiving Fees?*, 57 TAX MGMT MEMO. 87, 100-02 (2016) (providing a chart showing that the examples do not consider the risk factors from the non-example portion of the regulations).

rules. Treating examples as co-equal law empowers agencies to use them to communicate effectively.

Consider the Department of Transportation regulation that addresses whether an airline may bar a sick passenger from boarding a plane. The abstract language in the regulation tells the airline to identify passengers who pose a “direct threat” and to “consider the significance of the consequences of a communicable disease and the degree to which it can be readily transmitted by casual contact.”¹⁰⁰ What does “readily transmissible by casual contact” mean? Toe fungus is transmissible; venereal disease is transmissible. Yet this is not what the regulation drafter means by “readily transmissible by casual contact.” Perhaps the drafter could attempt to abstractly define “readily transmissible by casual contact.” The drafter might write, for instance, that “readily transmissible by casual contact” means that a healthy person who sits beside an ill person in a space with recirculated air for three hours has a twenty percent chance of catching the illness.

But what is the point of this approach? Wouldn’t the abstract rule often be derived from the regulators’ consensus regarding particular diseases? Often, regulatory examples can do a better job of explaining the law the agency means to establish. Presumably for this reason, the Department of Transportation employs examples in this regulation to elaborate the law. The regulatory examples state:

[Example 1]: 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.

[Example 2]: AIDS 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.

[Example 3]: SARS may be readily transmissible in an aircraft cabin environment and has severe health consequences. Someone with SARS probably poses a direct threat.¹⁰¹

The examples leverage both the regulators’ and readers’ ability to understand concrete applications. Requiring solely abstract communication would unnecessarily block the agency’s access to a trusted communication strategy that is used by effective writers.

In addition to their usefulness, regulatory examples should be accorded equal legal status because readers of examples naturally understand them to mean something. As an illustration of how readers understand examples, consider one of the most well-known regulatory examples in tax law. This

100. 14 C.F.R. § 382.21(b)(2) (2017).

101. *Id.*

regulatory example reveals how much cash can be transferred in a “tax-free” corporate merger or reorganization.¹⁰² In the regulatory example, the target corporation shareholders receive consideration composed of forty percent stock in the acquirer corporation and sixty percent cash. The example concludes that the so-called “continuity of interest” requirement is satisfied. There is nothing in the regulations except for this example that mentions the forty percent stock minimum, and prior to the example, the leading piece of administrative guidance on this point was a Revenue Procedure that provided a fifty percent stock minimum for private letter ruling purposes.¹⁰³

Tax advisors nationwide rely heavily on this regulatory example to issue strong opinions that mergers “will” be tax-free if at least forty percent of the consideration in the deal is stock of the acquirer corporation.¹⁰⁴ These opinions matter. They are often issued in public deals and expose clients to securities litigation risk if the conclusion is wrong.¹⁰⁵ They also put lawyers’ reputations on the line.¹⁰⁶

It is plain in the instance of the forty percent continuity of interest regulatory example that regulated parties and their advisors changed their behavior in response to a regulatory example. We think this is true for regulatory

102. 26 C.F.R. § 1.368-1(e)(2)(v) Ex. 1 (2017).

103. Rev. Proc. 86-42, 1986-2 C.B. 722. The example does not clearly state that it is giving information for purposes of the continuity of interest threshold. Instead, it is titled, “Application of signing date rule,” and the forty percent threshold is mentioned in passing, as the example explains that the measurement date for consideration is the date the deal is signed, rather than the date it closes, or the date escrow is released. 26 C.F.R. § 1.368-1(e)(2)(v) Ex. 1. However, the regulation’s preamble states, as an answer to a notice-and-comment question, that “the IRS and Treasury Department believe that this [forty percent] principle is equally applicable to cases in which the signing date rule does not apply as it is to cases in which the signing date rule does apply.” T.D. 9225, 2005-2 C.B. 716.

104. See, e.g., Todd B. Reinstein, *Final Continuity of Interest Regulations Decrease the Hazards of Entering Into A Tax-Free Reorganization*, PEPPER HAMILTON (Dec. 7, 2005), <http://www.pepperlaw.com/publications/final-continuity-of-interest-regulations-decrease-the-hazards-of-entering-into-a-tax-free-reorganization-2005-12-07/> [<http://perma.cc/LT37-CT8X>] (“Over the years, there has been a lengthy debate in the corporate tax community with regard to what percentage of equity consideration an acquiring corporation needed to issue in order to satisfy the COI requirement to qualify the transaction as a tax-free merger. The final regulations now provide an example in which the COI requirement is met when the target shareholders received forty percent acquirer stock and 60 percent cash. Thus, the IRS has officially acknowledged that the COI requirement will be met when at least forty percent of the consideration is stock.”); see also *IRS Proposes New Continuity of Interest Regulations that Relax the Qualifications for Tax Free Treatment in Certain M&A Transactions*, PAUL HASTINGS 1 (Sept. 2004), <http://www.paulhastings.com/publications-items/details?id=a89ede69-2334-6428-811c-ff00004cbded> [<http://perma.cc/FJ83-7P4P>] (explaining that the same example offered in the proposed regulations “provides solid authority for the proposition that only forty percent of the acquisition consideration must consist of equity in the acquiring corporation to qualify as a tax-free merger” and that “[t]hus, a merger where each target shareholder is paid forty percent in acquirer stock . . . should qualify as a tax-free merger”).

105. See Bob Woodward, *Tax Opinions*, ABA SECTION OF TAXATION, 2010 WL 4607769, at *3-23 (Sept. 23, 2010) (exploring both when tax opinions are used and the potential accompanying liability).

106. Charles T. Haag & Zachary A. Keller, *Honored in the Breach: Issues in the Regulation of Tender Offers for Debt Securities*, 9 N.Y.U. J.L. & BUS. 199, 250 n.254 (2012) (noting the “significant reputational” risk in giving overly aggressive opinions and providing example in the tax context).

examples in general.¹⁰⁷ In other words, regulatory examples have the power to change regulated parties' behavior in the same way as non-example regulatory text would. Recognizing examples' status as law helps to coordinate agency and regulated parties' expectations regarding the role of examples, and encourages agencies to adequately consider what the examples are communicating.

One could counter that our case for treating examples as law is circular. Agencies use regulatory examples to communicate law under the assumption that the examples make law. And regulated parties respond to the examples as a source of law under the same assumption. If it were clear that examples did not have the power to communicate law, then agencies would not use them as law, and regulated parties would not respond to them as law.

Depriving examples of the ability to make law might be desirable, the argument would go, because it would increase transparency and strengthen the rule of law. Without regulatory examples, agencies would be forced to state anything they wanted to communicate in the form of abstract rules. Regulated parties then would not have to parse examples to determine their meaning. Rather, they could obtain the same legal content through more transparently offered abstract rules.

Sometimes, this might work. That is, the agency might be able to, and perhaps would instead choose to, write an abstract rule rather than an example. For instance, an abstract rule could express the concept that forty percent stock is sufficient for continuity of interest. So, perhaps in some cases, abstract rules could replace examples' legal content if examples could not make law.

But, in other situations, the legal content of the regulations would suffer if examples were omitted. In these cases, being forced to use an abstract rule would reduce the quality of the communication and make the law less clear. The examples covering diseases on airplanes illustrate this problem, as outlined above.¹⁰⁸ Without the ability to see the meaning of the abstract "direct threat" rules applied in practice to a passenger with a cold, AIDS, or SARS, regulated parties would likely look at less formal guidance (outside of regulations) or seek inside information about the agency's approach in particular cases. Pushing examples out of regulations would decrease, not increase, the transparency of the law, and in a skewed fashion that exacerbates the informational advantage of sophisticated parties that have greater access to the agency's informal views.¹⁰⁹ While, of course, regulations often are not the end of agency guidance, and regulated parties frequently look outside regulations for more information,

107. See *supra* notes 27-38 and accompanying text for FINSA as another example of the influence of regulatory examples.

108. See *supra* text accompanying note 101 (discussing "direct threat" and passengers with a cold, AIDS, and SARS).

109. See Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1312-17 (2016) (exploring the dominant role of interest groups in agency processes); Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 485 (2017) (discussing the problem of only certain taxpayers who sought rulings having access to secret tax law).

limiting agencies' ability to use regulatory examples as a communication strategy would arbitrarily and unnecessarily reduce the capacity of regulations to communicate the law. Agencies should be able to communicate through concrete examples or abstract formulations in regulations themselves, with the understanding that both will have the same capacity to make law.

C. *Second-Class Status?*

1. The Option of Second-Class Status

Despite the utility of regulatory examples and their influence on regulated parties, a number of arguments can be made against treating them as co-equal with non-example text. These arguments would support giving regulatory examples second-class legal status.¹¹⁰ A second-class approach might provide that the non-example text would govern, such that the examples would not have the ability to change the meaning of the non-example text.

Several arguments could be offered for this view. The written structure of non-example text and regulatory examples might suggest that examples should be subordinate to non-example text. The heterogeneity of examples might push against a universal co-equal status for examples. Allowing examples to make law could problematically shift the balance of regulatory power. Administrative examples presented other than in final regulations do not necessarily have the “force of law,” perhaps suggesting the same should be true for regulatory examples. Finally, agencies have not clearly shown that they intend for examples to make law. We consider and respond to each of these arguments in turn.

2. Structural Subordination

To begin, the way that examples are structurally presented in regulations might suggest they should be subordinate to the non-example portion of the text. For instance, regulatory examples are often 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.

But the argument that examples are structurally subordinate to the non-example portion of the regulation can be rebutted with an opposing canon of construction. In particular, one canon of construction provides that the specific controls the general.¹¹¹ Examples are certainly the more specific components of

110. There is a practical problem with the second-class approach, which is that a second-class approach would present the problem of how to identify a regulatory example. We have defined regulatory examples broadly—as a portion of a regulation that applies law to hypothetical facts. This definition does not require, for instance, that examples are separately listed under a section headed, “Examples.”

111. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2012-13 (2011) (explaining the canon that the specific provision controls over the

regulation, compared to non-example text. This canon of construction would suggest that, instead of being subordinate, examples should dominate the interpretation of a regulation. With the “structural subordination” and “specific controlling the general canons” at loggerheads, neither provides a clear interpretive guide.

3. Heterogeneity

The heterogeneity of examples may also seem to push against a general rule that accords them equal status as law. Examples are used more heavily by some agencies compared to others and in some time periods more than others. The group within an agency responsible for generating the examples might often be the group with direct enforcement responsibility—for instance, the IRS rather than Treasury—but not always.¹¹² Regulatory examples differ in provenance, since they might be based on court cases, legislative history, translation into mathematical formulas, *sua sponte* examples, audit anecdotes, regulated party requests, and other sources.¹¹³ They differ as to whether they describe answers in easy cases or hard cases.¹¹⁴ They differ as to whether they hew carefully to the non-example text in the regulation, or whether they present applications that are difficult to reconcile with the rest of the regulation.¹¹⁵ They differ as to whether they are carefully considered by opposing parties during notice and comment. This heterogeneity may suggest that examples cannot be subject to any general rule about their legal status.

However, the heterogeneity of the back stories of regulatory examples does not change our argument in favor of treating examples as a co-equal form of law. Heterogeneous institutional process and heterogeneous reasons for regulations apply both to non-example text and to regulatory examples. The heterogeneity of regulations generally does not undermine the status of any particular regulation as a form of law. Rather, administrative law manages regulatory heterogeneity by subjecting regulations to a uniform set of procedural requirements under the Administrative Procedure Act and a uniform body of law controlling judicial deference to agency regulations.

general provision). *But see* *Xilinx, Inc. v. Commissioner*, 598 F.3d 1191, 1196 (9th Cir. 2010) (refusing to allow the specific to control the general and instead “resolv[ing] the ambiguity based on the dominant purpose of the regulation”).

112. Teams that draft tax regulations include representatives from the Treasury and IRS. INTERNAL REVENUE MANUAL § 32.1.1.3 (Aug. 11, 2004), <http://www.irs.gov/irm/> [<http://perma.cc/LY5D-SH45>].

113. *See, e.g., supra* notes 82-87 (giving examples of different kinds of regulations).

114. *Compare* 14 C.F.R. § 382.21(b)(2) Ex. 1 (2017) (giving the easy case answer that common cold is not a “direct threat”), *with id.* § 382.21(b)(2) Ex. 3 (posing the hard case that SARS “probably poses a direct threat”).

115. A Health and Human Services example that calculates time passage after a baby’s delivery is fully consistent with the non-example text, for instance. *See supra* text accompanying notes 91-93. Management fee waiver regulatory examples that do not appear to consider the factors listed in the non-example text are difficult to reconcile with the rest of the proposed regulations. *See supra* note 99.

The Administrative Procedure Act prescribes the same process—notice and comment—for all final regulation content without regard to whether the final regulation happens to include examples.¹¹⁶ Whether a regulation contains examples or not, the procedural requirements laid down by the Administrative Procedure Act support the validity of the regulatory content, without need to apply different standards to particular aspects of regulatory text. The procedural pedigree of notice and comment is an important feature of “force of law” guidance that has been held eligible for *Chevron* deference.¹¹⁷ Existing law offers no justification for different degrees of deference to portions of a final regulation based on whether they contain examples or non-example text.

Making the back story for a regulatory example essential to its interpretation could foil the effort to accept the legal content offered by the example. One cannot always discover this back story. This is partly because not all agency proceedings occur in open session. It is also partly because the back story is not necessarily harmonious. Players within the institution of an agency may have various reasons for consenting to a regulatory example, making it more difficult to determine the actual reasons for an example.¹¹⁸ Lack of knowledge of the back story does not erase the legal content offered by a regulatory example’s text, just as lack of knowledge of the back story of a regulation does not erase the legal content offered by the non-example portion of the regulation, and lack of knowledge of the back story of a statute does not nullify or demote the statute.

It is not that we view every regulatory example as an equally important source of law regardless of its quality or relevance. This is not the point we mean to make. Our point is that examples can make law (although of different content and varying levels of importance based on the particular example) and, when they do so, the law they make is co-equal with the legal content offered by the abstract regulatory text.

For instance, some examples only give answers in easy cases, and some give answers in hard cases. A regulatory example that gives an obvious answer

116. See 5 U.S.C. § 553 (2012) (providing notice-and-comment procedures); see also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 533-34 (2003) (explaining how notice and comment “promote[s] the values of fairness, predictability, and participation important to a genuinely nonarbitrary administrative state”).

117. See *United States v. Mead*, 533 U.S. 218, 226-27 (2001) (developing the “force of law” dividing line). See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001) (exploring what type of agency interpretations are eligible for *Chevron* deference).

118. One could, in theory, look to important decision points in the history of a rulemaking project to help determine the meaning of a rule. But informational limitations would often reduce the usefulness of this approach. It also relies on regulatory history in a way that may not be consistent with all of the dominant schools of interpretation. See Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1300 (1990) (noting relationship between textualism and a rejection of legislative history). But see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1839 (2010) (discussing modified textualism’s potential incorporation of legislative history). We mean to offer a framework for making meaning of regulatory examples that is compatible with each of the dominant schools of interpretation.

in an easy case¹¹⁹ does not offer as much valuable legal content as an example that gives a result in a hard case, or even merely identifies the hard case.¹²⁰ Also, many examples provide safe harbors (or sure shipwrecks), meaning that they give the answer on a certain set of facts, and leave open the answer on other facts.¹²¹ These examples do not say how the law applies to all potential facts, and they do not create bright line rules. An example that says that a passenger with a cold does not present a direct threat does not mean that a passenger with anything more serious than a cold presents a direct threat. To say that forty percent continuity of interest is sufficient does not mean that thirty-nine percent continuity of interest is not sufficient.

4. Regulatory Power Shift?

Treating examples as co-equal with non-example text could favor either agencies or interest groups if one side had a comparative advantage in writing or interpreting regulatory examples. In other words, if the process of producing and interpreting regulatory examples were more skewed than the process of producing and interpreting non-example regulatory text, then it might seem more suitable for the examples not to receive the same treatment as non-example regulatory text.¹²² For instance, if interest groups write most regulatory examples, then honoring examples' legal content might empower those groups. If, on the other hand, regulatory examples are less likely to attract scrutiny from regulated parties compared to other, more abstract portions of a regulation, then our method might hand an agency relatively more power.

As to the possibility that examples allow agencies or regulated parties to shift regulatory power, we are aware of no evidence suggesting that agencies, as a general matter, give any more or less thought to regulatory examples than to any other parts of a regulation, or that regulated parties or the public are any more or less focused on them. It is likely that the focus on examples varies from

119. See, e.g., 26 C.F.R. § 1.162-2(b)(2) (2017) (offering example that a trip including five weeks of vacation and one week of work is not a business trip).

120. For instance, the regulatory example that concludes that an airline passenger with SARS “may” present a direct threat considers a hard case. See *supra* text accompanying note 101.

121. See *supra* text accompanying note 89.

122. For instance, one might propose that examples should only be issued in less formal guidance documents not entitled to *Chevron* deference. See *Mead*, 533 U.S. at 226-27 (refusing to apply *Chevron* deference to agency pronouncements lacking “force of law”). For a discussion of some of the many forms of informal guidance that agencies use, see Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1332-55 (1992); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398-400 (2007); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166-68 (2000). Under current law, informal guidance that interprets agency regulations may receive substantial deference anyway, under the *Auer/Seminole Rock* doctrine. But the debate about deference for informal guidance acknowledges that less-than-*Chevron* deference may be appropriate. See, e.g., Kristin E. Hickman, *Contemplating a Weaker Auer Standard*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 23, 2016), <http://yalejreg.com/nc/contemplating-a-weaker-auer-standard-by-kristin-e-hickman> [<http://perma.cc/L82C-36LG>].

regulation project to regulation project. Sometimes, regulated parties and their advisors pay careful attention to regulatory examples during the notice-and-comment process. Sometimes, the development of the examples could even precede the development of the non-example text in the regulations, as when an agency writes a regulation to respond to an identified problem. Without reason to think that regulatory examples are systematically easier to exploit than non-example portions of a regulation, we cannot say that treating regulatory examples as co-equal sources of law will shift the balance of power between agencies and regulated parties.

5. Other Examples May Not Make Law

Agencies provide examples outside final regulations in informal administrative guidance that offers concrete legal answers based on either past or prospective fact patterns. One of us has examined this phenomenon in the context of IRS publications and guidance.¹²³ SEC no-action letters¹²⁴ and the Social Security Program Operations Manual Systems (POMS)¹²⁵ are just two of many other types of administrative guidance that provide concrete legal answers based on past or prospective fact patterns.

Just like regulatory examples, the examples offered in informal administrative guidance are understandable and salient for many regulated parties. But examples offered outside of formal regulations often lack status as an independent source of law. For instance, a court should not give judicial deference under *Chevron* to examples issued in items of informal guidance, such as field manuals, that lack the “force of law.”¹²⁶ Some might wonder why regulatory examples should be accorded status as law if these other examples offered in informal guidance, which can fill a very similar role, are not. Conversely, some may wonder whether our argument pushes in favor of treating these informal examples as co-equal law as well. This would diverge from the usual understanding that less deference applies to less formal guidance.¹²⁷

123. Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 207-28 (2017) (illustrating “categories and examples” in IRS publications).

124. *No Action Letters*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/fast-answers/answersnoactionhtm.html> [<http://perma.cc/65HB-XQ67>] (providing general information regarding no-action letters).

125. See, e.g., *DI 26525.030 MIE Examples*, SOC. SECURITY ADMIN., <http://secure.ssa.gov/apps10/poms.nsf/lnx/0426525030#c> [<http://perma.cc/VG6F-DXJX>] (providing examples of certain conditions that warrant the creation of certain types of diaries).

126. *United States v. Mead*, 533 U.S. 218, 226-27 (2001) (“We hold 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.”).

127. For a discussion of the problem of compelled compliance with respect to this less formal guidance, see, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000); Anthony, *supra* note 122, at 1327-32; and Randolph J. May, *Ruling Without Real Rule—Or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303, 1309-12 (2001).

Our answer to this concern starts by acknowledging that existing law, and most commentators, accept that final regulations generally receive greater judicial deference than more informal administrative guidance. For instance, under existing administrative law, *Chevron* deference is due to a final notice-and-comment regulation's reasonable interpretation of an ambiguous statute.¹²⁸ Often, less deference is due to more informal guidance, although the line that divides guidance that merits "force of law" *Chevron* deference from guidance that merits "power to persuade" *Skidmore* deference is disputed.¹²⁹

In this paper, we mean to focus on the largely unexamined use of examples, rather than on what informal guidance has the force of law. It is true that, under existing administrative law, many examples found in informal guidance—in a press release, say—do not have "force of law" and would not be entitled to *Chevron* deference.¹³⁰ But the reason they do not have the force of law is not because they are examples. Rather, it is because they are contained in a kind of guidance that does not have the force of law.

Our analysis here sets informal guidance aside. Instead, we focus on regulatory examples found in final, notice-and-comment regulations. This focus allows us to clearly present our argument that examples make law that is co-equal with the law made by other regulatory text.

6. Agency Intent

Finally, some might argue that, consistent with intentionalism, we must look to agency intent to decide what to make of regulatory examples.¹³¹ Intentionalism is a prominent interpretive school of thought that looks to the drafters' intent to determine the meaning of a provision.¹³² Scholars and courts

128. *Mead*, 533 U.S. at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 509 (2013) ("Where an agency employs notice-and-comment rulemaking under clear congressional authority to adopt rules and regulations, there is little doubt that the courts will treat the rule both as legislative and as eligible for *Chevron* deference.")

129. See *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (warning that the fact that an agency previously reached an interpretation without notice-and-comment rulemaking does not necessarily deprive the interpretation of *Chevron* deference); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) ("[*Chevron* deference] does not necessarily require an agency's exercise of express notice-and-comment rulemaking power . . .").

130. See Russell L. Weaver, *The Undervalued Nonlegislative Rule*, 54 ADMIN. L. REV. 871, 880 (2002) (citing a press release as an example of a non-legislative rule issued in a format that does not deserve *Chevron* deference).

131. See, e.g., 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).

132. One problem with intentionalism is that it is difficult to prove or show the intent of a lawmaking institution. 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 the canonical critique of the intentionalist approach, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). The statutory interpretation method of purposivism was developed largely in response to some of these perceived defects of intentionalism. See

that have supported intentionalism have argued that intentionalism is essential to protect the power of the lawmaker to say what the law is.¹³³ 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.¹³⁴ As applied to regulatory examples, it may be problematic to accord examples co-equal legal status absent some indication that the drafting agency actually intended them to be read in such a way.

As to agency intent, it is true that we cannot claim that agencies generally intend for regulatory examples to contribute to the legal content of a regulation. It is likely that many agency drafters simply have not thought about it.¹³⁵ 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.¹³⁶ In the forty percent continuity of interest example discussed above, it appears that the example drafters were concerned with timing of measurement of consideration value. The example may not have been conceived as an example about the minimum percentage of stock consideration required in a merger in order for the merger to qualify as tax-deferred.¹³⁷ Yet, in the course of writing the regulation, the agency drafters disclosed information about the stock threshold the government thought was sufficient, and that information survived vetting in the notice-and-comment process. Accepting the continuity of interest sufficiency of forty percent stock consideration is necessary to reach the conclusion of the example. Whether the regulatory drafters were focused on this specific point or not, they communicated the forty percent threshold, and regulated parties adapted their behavior in response to the communication.¹³⁸ Our argument is that, absent a very clear statement by the regulatory drafters that they are not communicating any additional legal content through regulatory examples, legal content that is communicated through the regulatory examples is law.

In contrast, the second-class approach would rest on assumptions about how agencies act (or should act) that are not necessarily correct. The second-class approach assumes that agencies first think of the abstract rule and then consider how to illustrate it through examples. (Or, alternatively, the second-

William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332-33 (1990).

133. 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 the relationship between intentionalism and legislative supremacy).

134. *Id.*

135. Cf. Walker, *supra* note 40, at 1020-34 (finding that agency rule drafters have uneven knowledge of interpretive canons).

136. See Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 967-68 (2005) (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”).

137. See *supra* note 103.

138. See *supra* text accompanying note 104.

class approach seeks to change agencies' behavior so that agencies first think of the abstract rule and then they consider how to illustrate it through examples.) There is no reason to think that agencies generally proceed from abstract to concrete when they make rules, or to think that agencies should do so. Sometimes this could be the case. But it would be just as reasonable for an agency to start with the premise that a SARS patient poses a difficult case for the regulation of diseases on airplanes as for an agency to start with a conceptual idea about severity and contagion. Regulations featuring examples that describe banned transactions, such as tax shelters, show other situations where it seems likely that the concrete came before the abstract.¹³⁹ Even though the task of agency regulation is to make general rules and not decide specific cases, in many cases the quality of the general rule will be better if the agency states concretely how some fact patterns come out.

D. A Default Rule of Interpretation

Rather than relying on a specific view of agency intent, or a particular paradigm for how an agency should make law, our method 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.¹⁴⁰ A

139. See, e.g., 26 C.F.R. § 1.901-2(e)(5)(iv)(D) Exs. 1-12 (2017) (giving examples of “U.S. borrower,” “U.S. lender,” “joint venture,” and other transactions in regulations precluding foreign tax credit benefits in “structured passive investment arrangements”). See Susan C. Morse & Robert Deutsch, *Tax Anti-Avoidance Law in Australia and the United States*, 49 TAX L. 111, 129-31 (2016) (explaining the U.S. government’s multi-pronged effort to crack down on foreign tax credit generator transactions).

140. See, e.g., Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 343-444 (2010) (“[C]anons 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), 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, 2420 (2006).

large literature considers interpretive canons.¹⁴¹ They are useful¹⁴² but controversial. Karl Llewellyn famously showed that, for every canon, there is an offsetting counter-canon, and that this malleability undermines claims of predictability and coordination.¹⁴³ 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.¹⁴⁴

Since our method is a default rule, agencies could avoid the co-equal approach we suggest by promulgating a different rule of interpretation for regulatory examples.¹⁴⁵ For instance, if an agency wants to offer examples that

141. 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 that expanded judicial review of agency decisions “put[s] additional pressure on administrative agencies to imitate the judicial interpretive voice”).

142. *See, e.g.*, CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 147-57* (1990) (listing advantages, disadvantages, and possible uses of interpretive norms); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66-67 (1994) (“Interpretive regimes serve both rule-of-law and coordination purposes.”).

143. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions 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); Louis Fisher, *Statutory Construction: Keeping a Respectful Eye on Congress*, 53 S.M.U. L. REV. 49, 49 (2000); Radin, *supra* note 131, at 873-75; *see also* 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.”).

144. *See, e.g.*, Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183 (arguing that “maxims of statutory interpretation . . . capture something important about the meaning of words”).

145. The possibility of agencies saying how their examples should be interpreted raises a variety of questions that merit examination in future work. When and how might an agency be able to argue that a default canon should not apply in a given situation? Can an agency promulgate a rule that invalidates a long-applied canon? What if doing so interferes with well-settled interpretations of existing regulations? How should the rule that purports to change the interpretation of examples itself be interpreted? An Internal Revenue Manual reference to regulatory examples illustrates this set of questions. The manual says that regulation drafting teams “may use examples in the regulation to illustrate specific provisions.” It recommends parsimonious examples, featuring necessary facts upon which legal conclusions may rest. It then states that, “An example cannot be the source of a rule.” INTERNAL REVENUE MANUAL, *supra* note 112, § 32.1.4.4.7 (Aug. 11, 2004). Perhaps this text means only that an example must be annexed to non-example text. Perhaps it is supposed to mean more than that. But should an

merely illustrate the non-example portion of the regulations, without modifying or amplifying the law, the agency should very clearly say so.¹⁴⁶ A weaker statement, such as that certain examples “illustrate” the non-example rules, would not be enough to preclude reading the examples to modify or amplify the law. Requiring a clear and unambiguous opt-out is appropriate because the opt-out asks the reader to interpret the example in a way that is contrary to what a reader is naturally inclined to do.

For instance, the forty percent continuity of interest example is preceded by the following language: “The following examples illustrate the application of” the regulatory provision addressing the time for determining continuity of interest.¹⁴⁷ Should the use of the word “illustrate” or the reference to the provision addressing the *time* for determining continuity of interest block taxpayers from relying on the example as a source of law that establishes that forty percent stock consideration is a sufficient *amount* for continuity of interest? We think it should not block such reliance. This language is too weak. The natural reaction of taxpayers is to extrapolate from the forty percent example a forty percent safe harbor threshold.¹⁴⁸ The forty percent threshold has to be acceptable in order for the Treasury’s overall conclusion to be true. If the government wishes to change that inclination, it must be clearer.

In contrast, very clear statements by the agency can change or limit the power of examples. One such statement is in the Texas Disciplinary Rules of Professional Conduct.¹⁴⁹ A preface to the rules acknowledges that “lawyers may find interpretive guidance in the principles developed in the Comments” but also limits the scope of the comments: “The Comments . . . frequently illustrate or explain applications of rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules. The Comments do not, however, add obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments.”¹⁵⁰ This statement carefully explains what the examples cannot do: They cannot give the Texas ethics board power that is not independently supported by the rules themselves. This language

internal agency manual be capable of modifying a default method of interpretation applicable to final notice-and-comment regulations? We think not. The Treasury Department’s own acknowledgment of the legal content of the forty percent continuity of interest rule, *see supra* note 103, suggests that the manual does not in fact block examples’ ability to make law.

146. There is a parallel with nonprecedential judicial opinions. *See, e.g.*, Amy E. Sloan, *If You Can’t Beat ‘Em, Join ‘Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 929-51 (2008) (explaining the need for a formalized role for nonprecedential opinions).

147. 26 C.F.R. § 1.368-1(e)(2)(v) Ex. 1 (2017).

148. *See supra* text accompanying note 104.

149. These rules are provided by the State Bar of Texas, an “administrative agency of the state’s judicial branch.” *See About Texas Bar*, STATE BAR TEX., http://www.texasbar.com/AM/Template.cfm?Section=About_Texas_Bar_Home&Template=/CM/HTMLDisplay.cfm&ContentID=36590 [<http://perma.cc/7AWK-ZBN8>].

150. *Texas Disciplinary Rules of Professional Conduct*, STATE BAR TEX., at Preamble ¶¶ 7, 10 (Mar. 22, 2016), <http://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm> [<http://perma.cc/JK26-EFKQ>].

leaves open the possibility that the comments might *decrease* the power of the commission, and it sidesteps the issue of whether the rules themselves are supposed to be interpreted and understood entirely in isolation from the comments. Nevertheless, this is an example of agency language that we think has a specific effect on the meaning of the examples, or comments, offered in the guidance.

III. An Interpretive Method for Regulatory Examples

Having made the case that regulatory examples make law, in this Part we provide a method for their interpretation. Our framework contains two parts which are meant to work in dialogue with each other, rather than in a strict order. The first part uses analogical, common law reasoning to uncover the principles inherent in regulatory examples. In the second part, the results of the analogical reasoning are reconciled with the broader regulatory and statutory scheme, under a variety of background approaches, such as textualism or purposivism.

A. Analogical, or Case Law, Reasoning

When regulatory examples implicitly add content to the law, analogical, or case law, reasoning can uncover the principles inherent in regulatory examples. Analogical reasoning, which applies in order to understand the open-textured principles offered by common law cases,¹⁵¹ is the paradigmatic way that lawyers reason from case to case or, put another way, from one or more sets of particular facts and results to another. One commentator called this approach “reasoning by example.”¹⁵² It has been described as involving the determination of similarity in relevant respects between existing cases and the case presented, the identification of the revealed rule or principle, and the application of the rule or principle to the case at hand.¹⁵³

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

151. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1061-62 (2004) (describing how the common law is open-textured and open-ended).

152. 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 (Richard McKeon ed., 1941).

153. See Levi, *supra* note 152, at 501-02.

between the two cases include the presence of a strong and dangerous animal and an unlatched cage, one might conclude that 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.¹⁵⁴ Some contend that it does not even require the conscious identification of a guiding principle,¹⁵⁵ but rather can be mediated by cognitive processes that are not necessarily articulated.¹⁵⁶ 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 moral principles¹⁵⁷ or reasoned policymaking.¹⁵⁸

In its most self-conscious form, analogical reasoning includes both the articulation of possible principles from fact patterns, and also the “test[ing] [of a principle] against other possibilities.”¹⁵⁹ Articulating a principle and considering what conclusions it would yield for various hypothetical fact patterns allow the governing principle to be more carefully specified. To the extent that applying the principle would reach inappropriate outcomes on hypothetical facts, the

154. See, e.g., Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 946-49 (1996) (noting the role of abduction in analogical reasoning); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1184-85 (1999) (explaining the various views that analogical reasoning may not be a distinct form of logical reasoning). Deductive logic relies on an “if, then” type of reasoning, whereby if the premise is true, then the conclusion necessarily follows. See Brewer, *supra*, at 947-48. 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. See *id.* 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.

155. See, e.g., Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1211-29 (2001) (exploring how cognitive science patterns including mapping and constraints explain analogical reasoning); F.M. Kamm, *Theory and Analogy in Law*, 29 ARIZ. ST. L.J. 405, 413-14 (1997) (arguing that analogy allows conclusions to be reached without deep theoretical justification); Frederick Schauer, *Analogy in the Supreme Court: Lozman v. City of Riviera Beach*, 2013 SUP. CT. REV. 405, 409, 421 (explaining how people mediate between particulars without having to resort to a consciously understood rule).

156. For a description of the cognitive science of analogical reasoning, see KEITH J. HOLYOAK & PAUL THAGARD, *MENTAL LEAPS: ANALOGY IN CREATIVE THOUGHT* 19-20 (1995).

157. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 254-58 (1987) (emphasizing the importance of morality in judicial decisionmaking).

158. 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”).

159. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 757 (1993); see also Brewer, *supra* note 154, 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”).

principle can be modified, so that it reaches outcomes that better accord with the underlying policy or meaning of law.

To illustrate, recall the caged dangerous animal examples. One could determine that the tiger case and the bear case have relevant similarities, and that the bear case involved negligence, without necessarily articulating the principle that motivates the result in the tiger case. However, articulating this principle can be helpful in applying the principle 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.

Applying the principle 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 expected 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. Given these additional, hypothetical facts, the preferred principle might not turn on latching the cage. Perhaps the principle is that the failure to take reasonable measures to contain a dangerous animal is negligent.

Meaning can be made of regulatory examples through this process of identifying and testing principles from fact patterns, which is consistent with at least some versions of analogical reasoning.¹⁶⁰ Like cases, regulatory examples are open-textured, in that they “stat[e] a principle rather than a rigid or specific rule and the principle is embedded in a set of facts.”¹⁶¹ Examples provide data points, but leave other questions unanswered. In this sense, the law offered by examples, like that offered by cases, “is always open to revision, modification, and elaboration.”¹⁶² Principles can be gleaned from examples by considering both how a conclusion was reached on an example's facts and how that principle would interact with the conclusion on future sets of facts.

Take, for instance, the hospital discharge example that concludes that coverage for a home follow-up visit to a mother who leaves the hospital early is not a prohibited payment “because the follow-up visit does not provide any

160. See Brewer, *supra* note 154, at 962; Sunstein, *supra* note 159, at 757. Other proponents of some form of reasoning based on particular results may dispute the analogical reasoning label. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 86-98 (1990) (calling analogical reasoning “an unstable class of disparate reasoning methods”); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 180-87 (1995) (emphasizing the deductive nature of what is referred to as analogical reasoning). We do not mean to enter the debate regarding whether analogical reasoning is a distinct form of reasoning. Rather, we use the analogical label to identify the case law-like method of interpretation that we propose.

161. Sabel & Simon, *supra* note 151, 1061-62 (2004).

162. *Id.* at 1062; see also Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637, 1639 (2005) (“The common law is an entity with more depth and complexity than a list of rules—it is a more intricate and open-textured web.”).

services beyond what the mother and her newborn would receive in the hospital.”¹⁶³ The principle that emerges from this regulatory example is that at-home services that do not exceed what the mother would have been entitled to receive in the hospital are not prohibited payments. As with a case, this principle is both embedded within the facts of the example and can be applied to and elaborated through future fact situations. For instance, what if a health insurer offers a new mother an at-home visit with a specially certified nurse if the new mother discharges from the hospital before her 48 hours is up? Does the special certification of the nurse distinguish this at-home visit from the at-home visit approved in the hospital discharge example in the regulations? Would a similar service be available in the hospital? Applying the principle of the example to the case of the specially certified nurse would, one way or the other, modify the meaning of prohibited payment. The principle of the home discharge example is thus derived both from considering the conclusion reached on the facts of the example and from considering its application to future facts, which also modify the principle.

Our use of this form of analogical reasoning to understand the meaning of regulatory examples draws on a discipline known and familiar to lawyers. It may not be 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.¹⁶⁴ But despite the lack of formal, logical process, analogical reasoning requires conclusions to be justified based on reasonable, even if not indisputable, claims of similarity, relevance, and principles.

Regulatory examples do not have the same reach as cases. An example in a Department of Health regulation might not affect the interpretation of a Securities and Exchange Commission regulation, for instance. But within their sphere, regulatory examples leave much unsaid, and in this sense they are open-textured in the same way that cases are open-textured. Because analogical reasoning respects the incremental and open-textured nature of the law offered by cases, it has the capacity when applied to regulatory examples 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 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.¹⁶⁵

163. 45 C.F.R. § 148.170(b)(ii) Ex. 2 (2017).

164. *But see* Joshua C. Teitelbaum, *Analogical Legal Reasoning: Method and Evidence*, 17 AM. L. & ECON. REV. 160 (2015) (presenting one such recent attempt).

165. *But see* Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 80-87 (1996) (arguing that the accretive nature of analogical reasoning can entrench past mistakes).

B. Distinctions Between Examples and Cases

A possible objection to our use of analogical reasoning to draw meaning from examples is that examples are not cases. In case law, requirements such as the “cases” or “controversies”¹⁶⁶ prerequisite ensure that cases are based on actual facts,¹⁶⁷ that they emerge from an adversarial process,¹⁶⁸ and that they result in a judge’s decision on 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.¹⁶⁹

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.¹⁷⁰ 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.¹⁷¹ Adjudication through an adversarial process means that the parties on both sides can make vigorous, opposing arguments.¹⁷² The fact that the judge must specify and enforce a remedy means that she must take responsibility for the hard, practical consequences of her decision.¹⁷³ All of these features mean that the outcome of a case is more likely to reflect a careful consideration of how the law should apply to the facts presented.

166. U.S. CONST. art. III, § 2.

167. See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 472 (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”).

168. 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 depends for illumination of difficult . . . questions”).

169. Cf. *Alexander*, *supra* note 165, at 80-86 (identifying the risk of entrenching prior mistakes through the common law reasoning process).

170. 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 (1988) (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”).

171. See, e.g., Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 172, 177 (David Luban ed., 1983) (“Discerning the truth is so important to 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.”).

172. 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.”).

173. See 13B *CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE* § 3533.1 (3d ed. 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”).

While a regulatory example's connection to real-world facts is less direct than that of a litigated case, this connection is sufficiently strong to support the assertion that regulatory examples arise out of facts from the world.¹⁷⁴ Regulatory examples often articulate stylized summaries of a typical case that prompted the example (and perhaps the broader regulation) rather than the exact particulars of one person's situation. The generality of a regulatory example's facts may mean that it represents the experience of more regulated persons. For instance, when a regulatory example describes an insurer's effort to induce a new mother to discharge early from the hospital, it tries to convey the situation of many insurance companies that might offer similar types of inducements.¹⁷⁵

Similarly, while regulatory examples do not directly impose a consequence on a specific party, they do have real-world results that give the agency motivation to adequately consider the impact of the examples. When a regulatory example states, for instance, that certain services offered to a new mother will not count as prohibited inducements, there is no specific insurance company that receives a judgment to that effect. 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.¹⁷⁶ In this sense, the regulatory example has a consequence, in an even more widespread fashion than a case, even though the result generally will apply prospectively 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 provides regulated parties and members of the public the opportunity to comment on regulations, including regulatory examples. Agencies must respond with reasoned explanations.¹⁷⁷ 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, in the case of regulations generally as well as regulatory examples specifically. On one end of the spectrum, the notice of proposed rulemaking may provide a detailed preview of the text of the proposed regulations, and the notice-and-comment process may involve the statement and defense of strong

174. See *supra* Section II.A (listing and illustrating possible sources for regulatory examples).

175. See *supra* text accompanying notes 93-95.

176. 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.

177. See, e.g., *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (invalidating an agency "explanation [that ran] counter to the evidence before the agency").

adversarial positions.¹⁷⁸ On the other end of the spectrum, the regulatory text generally and/or the regulatory examples within it may not be subject to serious pre-promulgation contest.¹⁷⁹

Yet the notice-and-comment process applicable to regulations generally, including regulatory examples, 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.¹⁸⁰ And yet, these known deficiencies of the adversarial process do not invalidate analogical reasoning in the case law context.

Likewise, the placement of a regulatory example within the process applicable to final agency regulations is a sufficient prerequisite for the application of analogical reasoning. The process, along with other checks on agency power,¹⁸¹ helps legitimize and justify regulations generally.¹⁸² If a particular regulatory example is not actually contested in the notice-and-comment process, this does not invalidate the legitimacy of that example, or of regulatory examples generally.¹⁸³ If there is a problem of insufficient process, it is a broader administrative law concern that applies to regulations more generally.

As a separate matter, justiciability requirements like the case-or-controversy prerequisite also enforce separation of powers between the legislative and judicial branches. Separation of powers concerns motivate the case or controversy requirements as a means of preventing courts from engaging

178. 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”).

179. The agency may claim that final regulations are exempt from the notice-and-comment process. 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).

180. See, e.g., David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS 83, 92 (D. Luban ed., 1983) (“[T]he adversary system is justified, not because it is a good way of achieving justice, but because it is a good way of hobbling the government and we have political reasons for wanting this.”); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*, 44 VAND. L. REV. 45, 65-102 (1991) (describing various reasons for breakdown of adversarial process in the prosecutorial context).

181. For example, judicial review is one such check. See, e.g., Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 667 (1996) (“[C]ourts’ reviewing power is the citizen’s bulwark against improper and abusive agency actions . . .”).

182. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 541-44 (2003) (describing how notice-and-comment procedures help legitimize agency rulemaking).

183. Indeed, one could argue that certain parts of the regulatory preamble (including, potentially, examples) are subject to the same amount of process as the promulgated regulatory text. See Stack, *supra* note 12, at 1273-77 (describing how preambles may be subject to extensive process). But we maintain the traditional distinction between regulatory text and preamble, while acknowledging that the preamble can inform the interpretation of the regulation. See *infra* Section IV.D.

in general legislative lawmaking.¹⁸⁴ Such requirements do not apply to agency regulations generally, or, therefore, to regulatory examples specifically.¹⁸⁵ Some might argue that, by reaching concrete conclusions (although hypothetical and prospective), regulatory examples start to look enough like adjudications, or cases, that they should be subject to the justiciability requirements like the case or controversy requirement. This concern evokes a deeper discomfort with agency power, as it is currently exercised, and a sense that such power is infringing on the power of branches of government. This concern is real,¹⁸⁶ but, we believe, not uniquely raised by agency use of examples.

C. Applying Analogical Reasoning to Regulatory Examples

We turn now to the question of how to find meaning in regulatory examples. In this Section, we illustrate analogical reasoning through three groups of regulatory examples: one dealing with a health insurer's right to ask for genetic information, one dealing with diseases on airplanes, and one dealing with fringe benefits. In Section IV.D, we illustrate the second part of our interpretive method, which reconciles the legal content of the examples with the rest of the regulatory and statutory scheme. These two parts of this analysis do not have a specific order. In a given case, the interpreter might toggle back and forth between them to understand the meaning of the regulation.

1. Genetic Information and Health Insurance

The Genetic Information Nondiscrimination Act of 2008, or GINA, balances patient privacy and nondiscrimination goals against insurers' interests in receiving the information necessary to process health insurance claims.¹⁸⁷ The

184. See, e.g., *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (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 “confine the federal courts to a proper judicial role”).

185. There is a strand of administrative law that considers the choice administrative agencies have between adjudication and rulemaking. Under the doctrine known as *Chenery II*, an agency has the discretion to choose its method. *SEC v. Chenery Corp.*, 332 U.S. 194, 201-02 (1947). *Chenery II* is not implicated by regulatory examples as a general matter because these examples are not adjudicative. Even though they use concrete explanations, they do not assign consequences to particular persons on a retroactive basis. Cf. Russell L. Weaver & Linda D. Jellum, *Chenery II and the Development of Federal Administrative Law*, 58 ADMIN. L. REV. 815, 816-17 (2007) (explaining that *Chenery II* relates to the question of whether “legislative procedure” is required for “broad, prospective rules”).

186. The literature regarding the legitimacy of agencies is vast. For a seminal, skeptical view of agency legitimacy, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233-49 (1994).

187. Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended at 42 U.S.C. § 2000ff (2012)). There are a number of different regulations in different portions of the code of federal regulations implementing the act. See 74 Fed. Reg. 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.*

non-example portion of certain regulations under GINA prohibits insurers from using genetic information for underwriting purposes, but permits insurers to condition coverage for specific medical benefits on such information, although the insurance company may only require “the minimum amount of genetic information necessary” to process the claim.¹⁸⁸ The more that insurers may use genetic information to screen claims, the less protection is offered by the prohibition on using genetic information for underwriting purposes. In other words, the non-example portion of the regulations features a general rule and an exception that threatens to swallow it. Examples in the GINA regulations begin to show the bounds of the exception.

Examples 2 and 3 deal with breast cancer screening and treatment indicated (or not) by genetic mutations. Both examples allow insurers to require evidence of a patient’s own genetic information. Together, Examples 2 and 3 reveal that an insurer sometimes may ask for genetic information to determine whether to allow or deny treatment. In Example 2, the presence of a gene mutation supports early mammograms. This is offered as an example of a situation where “genetic information is necessary” to determine medical appropriateness.¹⁸⁹ As a result,

188. 45 C.F.R. § 148.180(f)(1)(iii) (2017). The full text of this section reads:

(iii) *Medical appropriateness.* An issuer in the individual market may limit or exclude a benefit based on whether the benefit is medically appropriate, and the determination of whether the benefit is medically appropriate is not within the meaning of underwriting purposes. Accordingly, if an issuer conditions a benefit based on its medical appropriateness and the medical appropriateness of the benefit depends on a covered individual’s genetic information, the issuer is permitted to condition the benefit on the genetic information. An issuer is permitted to request only the minimum amount of genetic information necessary to determine medical appropriateness, and may deny the benefit if the covered individual does not provide the genetic information required to determine medical appropriateness. See paragraph (g) of this section for examples illustrating the applicability of this paragraph (f)(1)(iii), as well as other provisions of this section.

Id.

189. Example 2 reads as follows:

(i) *Facts.* Individual *J* has an individual health insurance policy through Issuer *V* that covers a yearly mammogram for participants starting at age 40, or at age 30 for those with increased risk for breast cancer, including individuals with BRCA1 or BRCA2 gene mutations. *J* is 33 years old and has the BRCA2 mutation. *J* undergoes a mammogram and promptly submits a claim to *V* for reimbursement. *V* asks *J* for evidence of increased risk of breast cancer, such as the results of a genetic test, before the claim for the mammogram is paid.

(ii) *Conclusion.* In this *Example 2*, *V* does not violate paragraphs (e) or (f) of this section. Under paragraph (e), an issuer is permitted to request and use the results of a genetic test to make a determination regarding payment, provided the issuer requests only the minimum amount of information necessary. Because the medical appropriateness of the mammogram depends on the covered individual’s genetic makeup, the minimum amount of information necessary includes the results of the genetic test. Similarly, *V* does not violate paragraph (f) of this section because an issuer is permitted to request genetic information in making a determination regarding the medical appropriateness of a claim if the genetic information is necessary to make the determination (and the genetic information is not used for underwriting purposes).

in Example 2, the insurer may request that the patient provide genetic test results before paying for the early mammogram.¹⁹⁰

Example 3 is the converse of Example 2. In Example 3, “the latest scientific research” shows that if a breast cancer patient has a certain gene, a certain medicine is not helpful, and up to seven percent of breast cancer patients have the gene.¹⁹¹ The example says that the insurer can request evidence of the absence of that gene and deny payment if the gene is present.¹⁹²

In contrast to Examples 2 and 3, Example 1 prohibits an insurance company from asking for a patient’s genetic test results. Example 1 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.”¹⁹³ The insured undergoes a celiac disease test “after his son is diagnosed with celiac disease.” The example concludes that the insurer may not request the test results for the insured father as a prerequisite to paying for that

Id. § 1.148.180(g) Ex. 2 (2017)

190. *Id.* § 148.180(g) Ex. 2.

191. Example 3 reads as follows:

(i) *Facts.* Individual *K* was previously diagnosed with and treated for breast cancer, which is currently in remission. In accordance with the recommendation of *K*’s physician, *K* has been taking a regular dose of tamoxifen to help prevent a recurrence. *K* has an individual health insurance policy through Issuer *W* which adopts a new policy requiring patients taking tamoxifen to undergo a genetic test to ensure that tamoxifen is medically appropriate for their genetic makeup. In accordance with, at the time, the latest scientific research, tamoxifen is not helpful in up to 7 percent of breast cancer patients with certain variations of the gene for making the CYP2D6 enzyme. If a patient has a gene variant making tamoxifen not medically appropriate, *W* does not pay for the tamoxifen prescription.

(ii) *Conclusion.* In this *Example 3*, *W* does not violate paragraph (e) of this section if it conditions future payments for the tamoxifen prescription on *K*’s undergoing a genetic test to determine the genetic markers *K* has for making the CYP2D6 enzyme. *W* also does not violate paragraph (e) of this section if it refuses future payment if the results of the genetic test indicate that tamoxifen is not medically appropriate for *K*.

Id. § 1.148.180(g) Ex. 3.

192. *Id.* § 148.180(g) Ex. 3.

193. Example 1 reads as follows:

(i) *Facts.* Individual *I* has an individual health insurance policy through Issuer *U* that covers genetic testing for celiac disease for individuals who have family members with this condition. *I*’s policy includes dependent coverage. After *I*’s son is diagnosed with celiac disease, *I* undergoes a genetic test and promptly submits a claim for the test to *U* for reimbursement. *U* asks *I* to provide the results of the genetic test before the claim is paid.

(ii) *Conclusion.* In this *Example 1*, under the rules of paragraph (e)(4) of this section, *U* is permitted to request only the minimum amount of information necessary to make a decision regarding payment. Because the results of the test are not necessary for *U* to make a decision regarding the payment of *I*’s claim, *U*’s request for the results of the genetic test violates paragraph (e) of this section.

Id. § 1.148.180(g) Ex. 1 (2017)

test.¹⁹⁴ Example 1 departs from Examples 2 and 3 when Example 1 provides that the insurance company may not request the results of the insured’s own genetic information, i.e., the results of the celiac disease test. From an analogical reasoning perspective, this raises the question: what does the distinction between Example 1, on the one hand, and Examples 2 and 3, on the other hand, communicate about the limits on insurers asking for genetic information?

At least one advocacy group has suggested that Example 1 means that, in general, an insurance company may not ask for an insured individual’s own test results to show family history. The Huntington Disease Society of America (HDSA) website features “Sam”, who gets a test for Huntington’s disease after Sam’s father is diagnosed with that condition. Sam’s insurance covers such testing if there is a family history. The insurance company requests the test results for Sam, the insured son, before paying the claim for Sam’s test. The HDSA concludes that if an insurance company requests Sam’s test results, that “may have violated GINA because . . . it is not necessary for his insurance to learn the results of Sam’s own test.”¹⁹⁵

However, analogical reasoning suggests that this is not the only possible reading of Example 1. In Example 1, there is good reason to believe that the family history evidence was already in the insurance company’s hands. This is because the insured individual had dependent care coverage and the insured individual’s son had the disease.¹⁹⁶ In the HDSA scenario, there is less reason to believe that the insurance company already had evidence of the requisite family history, because the insured individual is the son, not the father, of the individual known to have the disease. There is no suggestion in the HDSA description that the policy that covers Sam, the insured, also covers his father, who is the individual diagnosed with Huntington’s disease. If Sam’s father’s test results are not available, then perhaps the insurance company could ask for other information including, potentially, Sam’s own test results¹⁹⁷—which, if positive, also provide evidence of family history.

2. Diseases on Planes

As another illustration of how regulatory examples add content to law, consider the problem of whether a sick passenger may board an airplane.¹⁹⁸ On the one hand, passengers have an interest in equal access to common carriers, which is based in anti-discrimination law. On the other hand, there is a public

194. *Id.*

195. *The Genetic Information Nondiscrimination Act*, HUNTINGTON’S DISEASE SOCIETY OF AM., <http://hdsa.org/living-with-hd/gina/> [<http://perma.cc/H242-RH2P>].

196. 45 C.F.R § 148.180(g) Ex. 1.

197. In other words, the insurance company might request Sam’s test results if it did not have access to other evidence of family history.

198. 14 C.F.R. § 382.21 (2017).

health interest in avoiding transmission of disease. How should the two interests be balanced?

As previously mentioned, a Department of Transportation regulation addresses this tension. It states that an airline may not restrict passenger transportation based on the passenger having a communicable disease or other medical condition unless the passenger's condition poses a "direct threat."¹⁹⁹ It says that in evaluating the threat of a disease, the airline must "consider the significance of the consequences of a communicable disease and the degree to which it can readily be transmitted by casual contact."²⁰⁰

This standard presents a series of interpretive questions. Should an airline measure the danger presented by a disease by reference to a typical healthy passenger, or should it consider whether fellow passengers include any individual with a compromised immune system? Should "casual contact" account for the inevitable proximity and recirculated air of the air cabin environment? Should it assume well-behaved passengers? May an airline deny transportation if a passenger's illness is communicable, but not serious? If the illness is serious, but not communicable?

The regulatory examples help. The first says that the common cold does not present a direct threat—although a cold is "readily transmissible in an aircraft cabin environment," it "does not have severe health consequences."²⁰¹ The second says that AIDS does not present a direct threat—although AIDS has "severe health consequences," it is not "readily transmissible in an aircraft cabin environment."²⁰² The third says that SARS "probably poses a direct threat"—it "may be readily transmissible" and "has severe health consequences."²⁰³

When the regulation writers say in the examples how the law applies to particular facts, they do not explain how the law would apply to all cases. As the SARS example confirms, the drafters are even hesitant to express a definitive outcome when diseases are severe and may be readily transmissible. In this sense, the examples only offer limited data points. As we explained previously, they do not fully occupy the field.

But these limited data points nonetheless provide a framework that extends beyond the examples themselves. For instance, the examples assume passengers with no special vulnerability to illness. As far as this set of examples is concerned, eggshell passengers have no special rights. By concluding that a common cold is not a direct threat, the regulations communicate that an airline cannot exclude one sick passenger on the grounds that another passenger has a compromised immune system that makes a common cold very dangerous. Instead, the regulations require that every airline passenger accept some level of

199. *Id.* § 382.21(a).

200. *Id.* § 382.21(b)(2).

201. *Id.* § 382.21(b)(2) Ex. 1.

202. *Id.* § 382.21(b)(2) Ex. 2.

203. *Id.* § 382.21(b)(2) Ex. 3.

exposure to disease, just as individuals accept some level of exposure elsewhere in public spaces in their daily lives, at work, school, errands and so forth.

The examples also assume a limited range of activities for passengers on airplanes. The conclusion that AIDS is not “readily transmissible” is possible because of the underlying view that passengers are not sharing needles, for instance, or that, if they are, it is not the business of the airline to protect them. If passenger behavior produces a risk of AIDS transmission on an airplane, passengers bear that risk themselves, as far as these regulations are concerned.

The examples also convey that the “direct threat” threshold sets a fairly high bar. The airline must consider conjunctively (not disjunctively) two factors: the seriousness and the transmissibility of the disease. A disease that is only serious, like AIDS, does not pose a direct threat. A disease that is only readily transmissible, like a cold, also does not pose a direct threat. Where a disease is clearly serious and “may be” readily transmissible, as in the SARS example, the regulation only concludes that a direct threat “probably” exists. The SARS outbreak of 2003 involved a deadly disease that was widely reported to have spread via air travel.²⁰⁴ Yet in the regulations, promulgated in 2008, SARS is offered as a close case where the public access interest and the public health interest could just about balance.²⁰⁵

3. 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. De minimis fringe benefits are excluded from compensation income for tax purposes. The regulation that defines these benefits provides that “de minimis fringe” means “any property or service the value of which is (after taking into account the

204. See, e.g., Alexandra Mangili & Mark A. Gendreau, *Transmission of Infectious Diseases During Commercial Air Travel*, 365 LANCET 989, 991-92 (2005) (noting air travel’s “important role” in the spread of SARS).

205. One possibility is that Example 3 implies that the existence of both conditions would establish a direct threat. A close, textual reading of the examples suggests this possibility. The common cold example and the AIDS example refer to a disease that “*is* readily transmissible” or “*is not* readily transmissible,” respectively. 14 C.F.R. § 382.21(b) (emphasis added). 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.” *Id.* (emphasis added). “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”). *May*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/may> [<http://perma.cc/Q9ZL-R9H2>]. 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, potentially implying that severity and definite ease of transmissibility would be a direct threat.

frequency with which similar fringes are provided . . .) so small as to make accounting for it unreasonable or administratively impracticable.”²⁰⁶

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/or “infrequent” define what is “unreasonable” or “impracticable” to account for? If so, how do they do so?

The regulations help answer these questions by providing examples. First, the regulations offer examples of the amenities available in a comfortable American office, circa 1984.²⁰⁷ Employees may make “occasional” personal photocopies and “local telephone calls.”²⁰⁸ They are provided with work snacks of “coffee, doughnuts and soft drinks” and treated to (or subjected to) “occasional cocktail parties, group meals, or picnics.”²⁰⁹ The regulations conclude that these are all examples of *de minimis* fringes.²¹⁰

On the other hand, the regulations also offer examples of perks that are not *de minimis* fringes.²¹¹ These examples paint the picture of employee perks that go above and beyond the regular office amenities. They include “season tickets,” “private country club” membership, and a weekend at a “hunting lodge” provided to an employee.²¹²

Many readers will easily connect the examples to their own experience.²¹³ Some may think of coffee fetched from the office kitchenette and wonder why it was even necessary to write the coffee example. Did lawmakers seriously consider the possibility that work coffee might be taxable compensation? Did they really need to offer the example to preclude this outcome? Others may read the example of coffee, doughnuts and soft drinks and wonder how far it extends. What if an employee enjoys free coffee and doughnuts every single workday? Are the snacks still excluded from income?²¹⁴ Whether or not the reader finds the outcomes of the examples intuitive, they are helpful. They are understandable and relatable. People can anchor their understanding of the examples in their own experience. By telling a story of what *de minimis* fringes look like through

206. 26 C.F.R. § 1.132-6(a) (2017). This language follows the statute. *See* I.R.C. § 132(e)(1) (2017).

207. They are based on Section 132(d)’s legislative history, which accompanied a statute enacted in 1984. *See supra* note 83 (describing the Congressional report).

208. 26 C.F.R. § 1.132-6(e)(1).

209. *Id.*

210. *Id.*

211. *Id.* § 1.132-6(e)(2).

212. *Id.*

213. *See* Brauner, *supra* note 11 (explaining the cognitive process through which a reader understands an example by connecting its facts to the reader’s own experience).

214. *See* RICHARD SCHMALBECK ET AL., *FEDERAL INCOME TAXATION* 212 (4th ed. 2015) (describing “Larry,” who consumes “gourmet coffee” and “croissants” with “particular enthusiasm”).

examples, the regulation offers readers an easy way to access the abstract non-example rules.

The fringe benefit examples also modify the understanding of the non-example portion of the regulations. For instance, the non-example language in the regulations²¹⁵ could be read to suggest that only benefits that are small *and* infrequent will be “unreasonable” or “impracticable” to account for. But the sketches provided by the examples suggest otherwise. Some of the examples of de minimis fringe benefits are small but frequent, such as work coffee. Some of the examples are infrequent but also large, such as an occasional cocktail party (if the party is sufficiently fancy). The examples communicate that the non-example text does not have to be read in a conjunctive fashion.

The non-example portion of the regulations could also be read to suggest that small size and infrequency are the only two factors that determine whether accounting for a perk will be “unreasonable or administratively impracticable.”²¹⁶ But the relevant similarities and differences in the examples’ facts are not limited to the size or frequency of the benefit. One feature that distinguishes the good (de minimis) examples from the bad (not de minimis) examples is whether a small group of employees receives the benefit. The examples to the good suggest that the listed perks are available to employees in general, or at least to some decently sized subgroup of employees. The perks of making local phone calls, drinking work coffee, or attending “picnics for employees and their guests” are, as a matter of general experience, available to larger groups of employees. In the examples to the bad, a country club membership or the ownership of season tickets is often allocated to an individual employee or some small subset of employees.²¹⁷ Thus, the examples suggest that whether the perk is widely or narrowly available may help determine whether the perk is “unreasonable or impracticable to account for.”²¹⁸ It is easier to keep track of a benefit delivered individually to identified employees.²¹⁹

215. See 26 C.F.R. § 1.132-6(a) (2017) (defining de minimis fringe as “any property or service the value of which is (after taking into account the frequency with which similar fringes are provided . . .) so small as to make accounting for it unreasonable or administratively impracticable”).

216. *Id.*

217. There are “good” individual transfer examples to the contrary, but they involve small transfers that are not based on seniority or rank, such as a bouquet of flowers or fruit sent “on account of illness.” See 26 C.F.R. § 1.132-6(e)(1) (stating that “flowers, fruit, books, or similar property provided to employees under special circumstances (e.g., on account of illness, outstanding performance, or family crisis)” are de minimis).

218. 26 C.F.R. § 1.132-6(a).

219. This principle is different than the more formal rule against nondiscrimination in favor of highly compensated employees, which does not apply to de minimis fringe benefits. I.R.C. § 132(j)(1) (2017). Indeed, other de minimis fringe benefit examples make clear that de minimis fringes can be given to a group of highly compensated employees. For instance, “occasional typing of personal letters by a company secretary” is a de minimis fringe. 26 C.F.R. § 1.132-6(e)(1). The point here is that if a fringe benefit singles out a particular employee (or employees) for a benefit that could be offered to other employees but is not, the fringe benefit is less likely to be de minimis. Coffee offered to only one employee, rather than the workforce at large, would be such an example.

We can test the principles drawn from the examples by considering additional hypotheticals. For instance, what if two employees get married, and their employer pays for their wedding?²²⁰ It strains credulity to argue that such a perk would qualify as a *de minimis* fringe. This perk would be large and easy to account for, and so should not qualify for *de minimis* treatment, even if it could be described as an “occasional cocktail party.” The principles gleaned from analogical reasoning of the regulatory examples also reach this sound result. Even though a wedding party is probably infrequent, it is valuable and specifically directed to two individual employees, not to a large group of employees.²²¹ Focusing on the fact that this valuable perk is directed to two employees suggests that the wedding party should be treated as taxable compensation income. The fact that the analogical reasoning principles reach this reasonable conclusion helps to affirm the principles themselves.

To be clear, analogical reasoning does not necessarily yield one definite meaning from regulatory examples. A reader could look at the examples we discussed above and argue that they support a different principle than the ones we suggest. That is the nature of analogical reasoning. One could perhaps argue, for instance, that the examples given of *de minimis* fringes do not turn on whether the fringe benefit is given to a small number of employees, but rather on how easy the fringe benefit is to account for. This reading of the examples would make ease of accountability a more important factor for the non-example portion of the regulation, and the examples would be used in this reading to provide real-life gloss regarding the ease of accountability. Our claim here is not that one particular reading of examples is going to be clearly right following the application of an analogical process, but rather that the analogical reasoning tools of relevance, similarity, and governing principles support disciplined arguments about the meaning of regulatory examples.²²² Analogical reasoning sets parameters within which reasonable arguments can be made about the meaning of regulatory examples.²²³

220. Cf. Emily Peck, *Real-Life Dream Boss Wants to Pay for Your Wedding*, HUFFINGTON POST (May 26, 2016, 3:10 PM), http://www.huffingtonpost.com/entry/chieh-huang-boxed-wedding_us_57472d50e4b055bb117178ab [<http://perma.cc/L9ZE-BJJS>] (reporting on a company that pays wedding expenses and college tuition).

221. The individual nature of the benefit is stronger if the employees make decisions about the party, such as venue, menu, guest list, and so forth.

222. Cf. Sherwin, *supra* note 154, at 1197 (“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.”).

223. Even under *Auer*, an agency’s interpretation is bound by permissibility, *see supra* note 48, and analogical reasoning provides a discipline for determining permissibility of a given interpretation.

D. Reconciling Regulatory Examples with the Regulatory and Statutory Scheme

Regulatory examples do not sit in isolation. Understanding their meaning also requires integrating results from the analogical process with the rest of the regulatory and statutory scheme. Reconciling regulatory examples with the rest of the regulatory and statutory scheme can be done through various background approaches to regulatory interpretation, such as textualism or purposivism.²²⁴ In other words, our approach is consistent with, and extends the reach of, existing background interpretive theories.

In terms of the existing background interpretive theories, while most approaches advise reading text in context, they differ in terms of what context matters. Textualists tend to emphasize semantic context, and may focus on textual clues, such as non-example regulatory text, to supply evidence of examples' meaning.²²⁵ Purposivists emphasize the policy context for a regulation, and may look to statements of regulatory purpose, like the regulations' introductory preamble, for evidence of examples' meaning. Other interpretive approaches may blend these emphases.²²⁶

To illustrate how to reconcile analogical reasoning interpretations and the broader regulatory and statutory context, we return to the Department of Transportation's example that states that SARS on airplanes "probably" poses a direct threat.²²⁷ The example's indecision invites the conclusion that the public access and public health concerns of the regulation are closely in balance for a passenger with SARS. Can an effort to reconcile the example with its regulatory and statutory context clarify the meaning of this example?

The source statute for this regulation states, in part, that "an air carrier . . . may not discriminate against an otherwise qualified individual on the . . . grounds [that] the individual has a physical or mental impairment."²²⁸ The instruction in the statute is to avoid "discrimination" against an "individual," and the statute's language for including people with disabilities follows that of other antidiscrimination statutes, such as those in the public accommodation and employment context.²²⁹ Perhaps the anti-discrimination roots of the statutory

224. See, e.g., Manning, *supra* note 49, at 78-91; 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).

225. See Manning, *supra* note 49, at 91 ("Textualists give primacy to semantic context . . ."); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994) (emphasizing "linguistic data, dictionary definitions, and canons"); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 407-08 (1942) (rejecting the idea of legislative "will").

226. See, e.g., Eskridge & Frickey, *supra* note 132, at 345-62 (describing a practical approach to interpretation in the statutory context).

227. 14 C.F.R. § 382.21(b) (2017).

228. See *supra* note 6.

229. 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").

provision point in favor of individualized assessments. However, it is also possible to achieve anti-discrimination objectives through a general 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 carves out exceptions to the anti-discrimination dictate of the statute. In sum, 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. The non-example portion of the regulation acknowledges the relevance of the seriousness and communicability of a disease,²³⁰ but also mentions other factors that should be taken into account. It 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.²³¹ It states that if a passenger has a medical certificate provided by the passenger’s own doctor describing measures designed to prevent transmission of the disease, the passenger may be able to fly, even if the passenger poses direct threat.²³² If a direct threat exists, a cross-referenced regulation requires the “select[ion]” of “the least restrictive response.”²³³ All of these features suggest an individualized approach, rather than a categorical rule that would, for instance, allow exclusion of all SARS patients.

In contrast, the preamble supports general or categorical policies. It suggests that the current rule was meant to depart from the overwhelming emphasis placed on individual assessment in a prior version of the rule. According to the preamble, the revisions to the current regulations responded to requests for “greater guidance” regarding the rules.²³⁴ The earlier regulation listed a number of factors to consider in the determination of whether a passenger

230. 14 C.F.R. § 382.21(b).

231. *Id.* § 382.19(c)(1)-(2).

232. 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.

Id. § 382.21(c) (2017). 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.” *Id.*

233. *Id.* 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 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.” *Id.* § 318.3.

234. 73 Fed. Reg. 27,614-01, 27,624 (May 13, 2008).

presented a direct threat, without any clear demarcation of relative importance or how they should be employed to make a determination.²³⁵ The preamble explains that the current version was intended to provide greater certainty and less discretion.²³⁶

The preamble reveals its categorical view with respect to SARS in particular:

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).²³⁷

The preamble also states:

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).²³⁸

Together, these provisions reveal the preamble's clear view that SARS meets the severity and transmissibility requirements and poses a direct threat as a categorical or general rule, so that airlines could implement general measures targeted at passengers with SARS.

To recap: The regulatory examples indicate that a "direct threat" determination for SARS requires a determination of severity and transmissibility, and is a close call.²³⁹ The non-example portion of the regulations support an individualized assessment, not a general determination that passengers with SARS always pose a direct threat.²⁴⁰ In contrast, the preamble

235. 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 (repealed May 13, 2008).

236. See 73 Fed. Reg. at 27,615 (stating that in "the Department's experience . . . detailed standards and requirements are essential").

237. *Id.* at 27,648.

238. *Id.* at 27,624.

239. See *supra* text accompanying note 227.

240. See *supra* text accompanying notes 230-233.

supports a categorical approach that an airline can treat SARS as a direct threat and therefore restrict passengers with SARS.²⁴¹

Regardless of the preferred background theory of interpretation (in other words, textualism, purposivism, or an alternative), it is hard to escape the conclusion that, relative to the prior version of the regulation, the current version of the diseases-on-airplanes regulation moves away from an individualized approach toward a general rule approach.²⁴² 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 compared to prior versions of the regulation. It emphasizes severity and ease of transmissibility as the important factors for a direct threat determination.²⁴³ But despite this clear trend toward a general rule approach, the choice between an individualized assessment and a categorical decision that SARS is a direct threat may differ based on the chosen background interpretive approach.

A textualist may be less inclined to look to provisions in the preamble, particularly when the preamble makes a general statement that conflicts with the text of the actual regulation.²⁴⁴ Since the actual regulation situates the examples within a regulatory framework that still calls for an individualized approach, a strong textualist may favor an individualized interpretation. She may dismiss the idea that the regulations should be interpreted to mean that SARS categorically poses a direct threat.

A purposivist, in contrast, may adhere to the preamble's clear conclusion that SARS categorically poses a direct threat.²⁴⁵ Such an approach may read Example 3's "probably" conclusion to cover only situations in which there was

241. See *supra* text accompanying notes 234-238.

242. The middle-ground approach that we use in this analysis subscribes to a "practical" school of interpretation. This kind of interpretation privileges enacted text, but also assesses the meaning of a given provision based on evidence from a number of reliable sources, depending on their relative importance and reliability in a given context. See Eskridge & Frickey, *supra* note 132, at 345-62.

243. See *supra* text accompanying notes 199-200. The current version of the regulations provides a more individualized approach in the general passenger disability context than in the communicable disease context. Indeed, the cross-referenced passenger disability provision uses language almost identical to the old version of the communicable disease regulation. Compare 14 C.F.R. § 382.19 (2017), with 14 C.F.R. § 382.51 (repealed 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 assessment." 73 Fed. Reg. 27,614-01 (May 13, 2008).

244. See, e.g., Nou, *supra* note 51, 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.")

245. Compare, e.g., Nou, *supra* note 51, at 118-20, with Stack, *supra* note 39, at 398-401 (each relying heavily on preambles for interpretation, but analyzed under a 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)); see also Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669, 684-85 (2015) (explaining that under a purposivist method of regulatory interpretation, the two privileged sources are the text of the regulation and the explanation of the regulation in the preamble).

possibly (but not definitely) transmissibility. Perhaps the SARS example means to anticipate some future, more hygienic state of the world in which SARS is in fact not transmissible in an airplane environment. This reading implies that, as long as a patient has SARS and it is readily transmissible, SARS poses a direct threat. Or, a purposivist might argue more forcefully that the preamble embraces, as a factual matter, the conclusion that SARS is definitely readily transmissible. It would follow that SARS, in all cases, 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 show that regulatory examples play an important role in illuminating a regulation's meaning regardless of the background interpretive approach. Recognizing regulatory examples as a form of law and using analogical reasoning to make meaning of them allows the guidance from regulatory examples to be pieced together with other regulatory and statutory materials to develop a fuller regulatory interpretation. The method we offer both dovetails with, and extends the reach of, various existing background theories for regulatory interpretation.

Conclusion

Scholars have proposed how background theories of interpretation, such as purposivism, textualism, and intentionalism, should apply to regulations. But theories of regulatory interpretation have not yet considered many unique interpretive questions raised by common regulatory drafting practices. One such common practice is the use of regulatory examples, or statements of legal conclusions based on hypothetical facts within the text of final regulations. Although examples are widely used, their legal status remains subject to doubt.

This Article argues that regulatory examples make law. Treating regulatory examples as a co-equal form of law empowers agencies to use concrete communication strategies and honors regulated parties' tendency to respond to examples as a form of law. We show how examples' legal content is best discovered through analogical, case-law-like reasoning. We also show how the guidance from analogical reasoning must be reconciled with the broader regulatory and statutory scheme, and how this can be done in a manner that is consistent with existing, background interpretive approaches.

This Article brings regulatory examples into the interpretive conversation. Examples pervade regulations and play an important, but unsettled, role in regulatory law. Understanding how meaning should be made of them can improve the common practice of regulating by example.