REGULATING BY EXAMPLE

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ABSTRACT

Agency regulations are full of examples. Regulated parties and their advisors parse the examples to develop an understanding of the applicable law and to determine how to conduct their affairs. However, neither the legal nor theoretical literature contains any study of regulatory examples or explains how they might be interpreted. This Article fills this gap.

In this Article, we explore regulatory examples and set forth a theory for how to interpret them. We examine how regulatory examples, like common law cases, serve as data points that help communicate legal content. We argue that regulatory examples are best understood through analogical, or common law, reasoning, and illustrate this through a variety of examples.

Since regulatory examples are part of a broader regulatory and statutory scheme, the legal content of examples must also be reconciled with the rest of that law. We show how this reconciliation can be done through a variety of background interpretive approaches such as textualism or purposivism, and we argue for a default rule that treats the legal content in regulatory examples as co-equal with the non-example portion of the regulation. By acknowledging and exploring how regulatory examples communicate law, our theory places regulatory examples in dialogue with their broader regulatory and statutory schemes. This both empowers and constrains courts, agencies, and regulated parties in their efforts to understand the meaning of regulations.

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I. 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 different signaling language, including "such as,"[2] "for example"[3] or "for instance."[4]

Consider a 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

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

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

[3] *See, e.g.*, 12 C.F.R. Pt. 1005, Supp. I (providing examples to elaborate various definitions relating to electronic fund transfers); 10 C.F.R. § 963.17 (providing examples of various characteristics and criteria that would be relevant to evaluate the postclosure suitability of a geologic repository); 40 C.F.R. § 1-65.695 (providing examples of various types of information that may be required from engine tests).

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

[5] 14 C.F.R. § 382.21.

[6] 49 U.S.C. § 41705 (enacted 1986). A predecessor statute provided that air carriers must not "subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage

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 cold[8] nor a passenger with AIDS[9] presents a direct threat. The regulatory examples explain that the common cold is not serious enough, and AIDS is not sufficiently readily transmissible. In contrast, according to another regulatory example, 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? Or are they subservient to it? To the extent that regulatory examples can add additional meaning to regulations, how should meaning be drawn from them?

Despite the prevalence of examples across agency regulations,[11] 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 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.[12]

This Article fills this gap by supplying a theory of interpretation for regulatory examples. It considers only regulatory examples that are provided in final regulations

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in any respect whatsoever." § 404(b) of the Federal Aviation Act of 1958. The predecessor statute was repealed in connection with airline deregulation in 1978 and replaced with § 41705 in 1986. *See* James S. Strawinski, *Where is the ACAA Today? Tracing the Law Developing from the Carrier Access Act of 1986*, 68 J. AIR L. & COM. 385, 385-87 (2003) (describing the history of the predecessor statute and its repeal).

[7] 14 C.F.R. § 382.21(a), (b)(2).

[8] 14 C.F.R. § 382.21(b).

[9] *Id.*

[10] *Id.*

[11] *See infra* Part III.C.

[12] A contemporaneous paper addresses examples in tax regulations. *See* Yariv Brauner, *Why Examples* (working paper, Nov. 10, 2016, on file with authors).

that have emerged from a notice-and-comment rulemaking process.[13] In other words, it only considers federal regulations that have the procedural pedigree to qualify as "force of law"[14] rules entitled to *Chevron* deference.[15]

As we explore, some regulatory examples merely illustrate legal content stated elsewhere in the regulations ("illustrative examples"). But other examples implicitly make declarations about the law by adding content to the non-example portion of the regulation ("declaratory examples"). When regulatory examples implicitly declare new legal content, they do so by serving as data points that communicate law. Like cases, regulatory examples rely on facts and conclusions in order to communicate principles that can change over time. Accordingly, we argue that analogical reasoning, of the type used in common law analysis, should be used to identify the legal principles inherent in examples.

Our theory must also account for the fact that regulatory examples are situated within a broader regulatory and statutory scheme. We show how regulatory examples must be reconciled with the rest of the law. This second part in the process can be accomplished using different background interpretive approaches, such as textualism or purposivism. In other words, our theory of interpretation is consistent with, and extends the reach of, different existing background theories for regulatory interpretation. The principles that emerge from this two-part interpretive process can then be applied to different facts, in the way that principles drawn from judicial precedent can be applied to future cases.

Our approach anticipates that the broader regulatory and statutory scheme can change the meaning of the examples, and also that the regulatory examples can modify the interpretation of the broader regulatory and statutory scheme. We argue that a default interpretive framework should give 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

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[13] 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* https://www.irs.gov/uac/understanding-irs-guidance-a-brief-primer (last visited Jul. 20, 2016) (explaining that a revenue ruling is "the conclusion of the IRS on how the law is applied to a specific set of facts."). Preambles to regulations also may include examples. *See* Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. U. L. REV. 1252, 1268-69 (2016) (discussing use of examples in preambles); *see, e.g.*, American Federation of Labor and Congress of Indus. Orgs. V. Chao, 409 F.3d 377, 387 (D.C. Cir. 2005) (analyzing examples of circumvention of union reporting regulations given in a regulatory preamble, including "the use of joint training funds to host extravagant parties for trustees and to pay union officials supplementary salaries") (citing 67 Fed. Reg. at 79,283)*; see also* P&V Enterprises v. U.S. Army Corps of Engineers, 516 F.3d 1021 (D.C. Cir. 2008) (examples in notice of proposed rulemaking). Examples can be found in other related sources of law as well, including legislative history. *See, e.g.*, Gas Plus L.L.C. v. U.S. Department of the Interior, 510 F.Supp.2d 18, 30 (D.D.C. 2007) (analyzing Senate Report description of financing transaction with default remedy that would produce an "encumbrance" on Indian land) (citing S. Rep. No. 106-20 (commenting on 25 U.S.C. §81)).

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

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

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.

This argument for applying analogical reasoning to regulatory examples and treating what comes out of this process as co-equal to the non-example portion of the regulation raises a number of potential questions and objections. How can we claim that regulatory examples can clarify or modify the meaning of non-example text when agencies have not indicated that they intended for regulatory examples to be interpreted this way? Regulatory examples lack case law procedural protections such as standing, so how can we know that they are good law that can support case-law-like analogical reasoning? When we allow examples to change the law, do we improperly shift power to agencies or, alternatively to regulated parties, based on an ability of one or the other to better manipulate the content and interpretation of regulatory examples?

While these questions are important, we contend that they do not undermine our theory of interpretation. Our use of analogical reasoning does not rely on agency intent. Rather, we offer our theory as a canon, or default mode of interpretation, which applies in the absence of an instruction from an agency or legislature for regulatory examples to be read otherwise. Also, while regulatory examples do not meet the case or controversy requirement, the rulemaking process has other quality checks that make regulatory examples sound statements of how the law would apply to real facts. The fact that regulatory examples can emerge from the same process as other portions of a final regulation supports the role of regulatory examples as a source of law that is co-equal with the non-example portion of the regulation. Finally, we are not persuaded that our theory would systematically shift power, whether to agencies or to regulated parties. Neither necessarily has a general advantage in drafting or interpreting regulatory examples relative to the non-example portion of a regulation.

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

II. REGULATORY EXAMPLES: THE GAP IN THEORY AND LAW

Examples pervade regulatory schemes, and both agencies and regulated parties look to examples as important sources of guidance. Yet the existing literature contains neither any theory of regulatory examples nor any interpretive tool designed to apply to regulatory examples. Courts also lack any interpretive framework. This results in a lack of certainty and transparency regarding the meaning of regulatory examples.

A. Agency and Regulated Party Treatment of Examples

Federal regulations are full 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. Restatements,[16] model laws,[17] and the rules of various self-regulating groups[18] also use this abstract-plus-concrete format.

A set of proposed Treasury regulations addressing private equity management fee waivers[19] illustrates how regulatory examples matter to agencies and regulated parties. These regulations[20] say whether fund managers may claim preferential capital gains treatment if they "waive" a right to management fees and instead accept a right to receive a return related to the fund's investment in portfolio companies.[21] The alternative is taxation at higher, ordinary income rates, which typically apply to earned income.[22] The proposed regulations center on the "superfactor"[23] of "significant entrepreneurial risk,"[24] which is required to make an amount eligible for capital gains treatment.[25]

The proposed regulations provide a standard in the form of a list of facts and circumstances that determines whether "an arrangement lacks significant entrepreneurial risk."[26] But the bulk of the proposed regulations consists of six examples.[27] Each of the examples reaches a conclusion as to whether, based on the facts of the example,[28] there is significant entrepreneurial risk.[29] The agency's preamble, which introduces and summarizes the proposed regulations, discusses in detail the thinking behind the

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[16] *See, e.g.*, Restatement (Third) of Torts: Product Liability § 16 (1998) (providing general rule and nine "illustrations" on the topic of "increased harm due to product defect").

[17] Likewise, it is used in official comments regarding model laws. *See, e.g.*, McKinney's Uniform Commercial Code § 9-336, Official Comment (effective July 1, 2001) (providing examples to illustrate the application of the section).

[18] *See, e.g.*, NFL rules, http://www.nfl.com/videos/nfl-network-gameday/09000d5d8143b9e8/Good-call-Bad-Call, which are illustrated on a weekly basis in-season through the distribution of "good call" and "bad call" video clips to member teams.

[19] Gretchen Morgenson, *I.R.S. Targets Tax Dodge by Private Equity Firms*, N.Y. TIMES, Jul. 23, 2015, at B5.

[20] Prop. Treas. Reg. § 1.702-2, 80 Fed. Reg. 43,652 (proposed Jul. 23, 1015).

[21] *See* Gregg D. Polsky, *A Compendium of Private Equity Tax Games*, 146 TAX NOTES 615, 617-21 (Feb. 2, 2015) (describing fee waiver arrangements).

[22] *See* I.R.C. § 1.

[23] *See* Letter from Gregg D. Polsky to Internal Revenue Service, Nov. 16, 2015, at 5 [hereinafter Letter from Gregg D. Polsky].

[24] Notice of Proposed Rulemaking, 80 Fed. Reg. 43652, 43654 (stating that the regulations follow the Congressional view that this factor is the most important).

[25] Prop. Treas. Reg. § 1.707-2(c).

[26] *Id.*

[27] Prop. Treas. Reg. § 1.707-2(d).

[28] *Id.*

[29] *Id.*

conclusions reached in the examples,[30] and suggests circumstances in which the conclusion may have been different.[31] And the preamble requests suggestions about facts that should alter the conclusions reached in the examples.[32]

The importance of the examples to the regulatory scheme was not lost on the tax bar. The New York State Bar Association ("NYSBA") Tax Section discussed the examples in depth in its report on the proposed regulations.[33] Various law firm "client updates" analyzed the examples,[34] and one explained that the "examples are critical to understanding the implications of the new rules."[35] Client alerts contrasted bad examples with good examples. For instance, they highlighted the difference between Example 3 and Example 5, both of which suggest common private equity firm facts.[36] Example 3 would require recharacterization as services income for a fee waiver in exchange for an interest in gain "during any 12-month accounting period in which the partnership has overall net gain" and where the service provider in effect controls the timing of gain recognition.[37] Example 5 would not require recharacterization of a fee waiver in

[30] The Treasury Department frankly acknowledged the importance of the regulatory examples. The preamble to the regulation explains that the examples "illustrate the application of these regulations to arrangements that contain certain facts and circumstances that the Treasury Department and IRS believe demonstrate the existence or absence of significant entrepreneurial risk." REG-115452-14, I.R.B. 2015-32 (Aug. 10, 2015).

[31] *Id.*

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

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

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

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

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

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

exchange for an interest in partnership net income and gain over the life of the fund.[38]

The meaning of "significant entrepreneurial risk" in the regulations draws heavily on the examples. Indeed, some commentators argue that the examples have little to do with the factors listed under the "significant entrepreneurial risk" standard in the non-example portion of the regulations.[39] Because the examples are relatively salient and easy to understand, they help explain how the regulatory scheme works to nonexperts in the area. Law firms quickly embraced the examples to explain that Treasury meant to recharacterize some fee waiver agreements while reassuring clients that the regulations did not target "more common carried interests" used in the private equity industry.[40]

Advisors and regulated parties not only analyze regulatory examples. They also try to influence the content and/or the interpretation of the examples. The NYSBA report showcases this kind of negotiation. It explores various presumed reasons for the facts offered and conclusions reached in the examples. It then offers numerous edits, including factual changes and suggestions for new examples altogether.[41] For instance, with respect to Example 3, the NYSBA report asserts that a service provider's control over the timing of a gain recognition event is subject to constraints such as illiquidity and fiduciary duty. The NYSBA then suggests that perhaps the idea that the service provider controls the timing of gain recognition should be replaced with a requirement to reduce net gain by unrealized net loss.[42]

Regulatory examples are sometimes influenced by a variety of differing views, not just those of regulated parties. In the case of the fee waiver regulations, public interest watchdogs also expressed their views. One law professor, for instance, requested an example (to the disadvantage of taxpayers) about "cashless" fee waivers. His point is that the examples fail to sufficiently clarify that if a fee has already been earned, it cannot then be transformed into capital gain.[43]

The negotiation over the content of regulatory examples does not end when the regulations are finalized. Indeed, the style of the comments reflects the long-term nature

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

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

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

[41] NYSBA, *supra* note 33.

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

[43] *See* Letter from Gregg D. Polsky, *supra* note 23, at 5.

of the negotiation. The law professor's request for a cashless fee waiver example was presented as a "clarification" of the regulatory examples in light of the longstanding law of constructive receipt and related doctrines.[44] This approach leaves open the argument that even if a cashless fee waiver example does not make it into the regulations, the other regulatory examples should still be interpreted so as to foreclose capital gain treatment for cashless fee waivers. This framing illustrates that regulatory examples are pregnant with meaning. It prompts the question: How does one determine what they mean?

B. Gap in Theory

Notwithstanding the prevalence of examples throughout agency regulations, and their importance to regulated parties and agency officials, the legal literature contains little consideration of the meaning of regulatory examples. The lack of any existing theory of interpretation for regulatory examples is understandable. The scholarly field of regulatory interpretation has emerged recently.[45] A number of scholars have opened the regulatory "black box"[46] by offering tentative thoughts on how agencies interpret statutes,[47] or examining why agencies make particular regulatory choices, such as voluntarily constraining their own discretion.[48] But more administrative law scholarship focuses on when courts should defer to agency pronouncements.[49] Less attention has been paid to why agencies have chosen to draft guidance in a particular way, or what such drafting decisions should mean to courts, regulated parties, and the agency officials who must apply such pronouncements in the future.

As Kevin Stack has argued, the focus on standards of deference for regulations puts the cart before the horse. In order to apply any number of administrative law doctrines, a court must first interpret what an agency regulation means.[50] For instance, under *Chevron*, a court should defer to a regulation if it is a permissible interpretation of

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[44] *Id.*

[45] Kevin Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012); Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 MICH. L. REV. FIRST IMPRESSIONS 61, 61 (2015) ("Despite the publication of thousands of law review articles and judicial opinions on the interpretation of the Constitution, statutes, contracts, and other legal texts, to date little attention has been paid to the theory or practice of regulatory interpretation.").

[46] *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1003 (2015) (explaining that "agency statutory interpretation remains, to a large extent, a black box.").

[47] Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871 (2015); 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 (1990); *see also* Walker, *supra* note 46 (offering an empirical study regarding the question).

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

[49] The deference question, and when courts should defer, is 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).

[50] Stack, *supra* note 45, at 365-75.

the statute.[51] But one must know how to interpret the regulation in order to know whether the regulation is a permissible interpretation of the statute.[52] Also, under *Auer / Seminole Rock*, a court should defer to an agency's permissible interpretation of its own regulation.[53] But one must have some means of interpreting the regulation, to know its bounds, and therefore be able to decide whether the agency's own interpretation of it is permissible.[54]

Scholars who have begun to examine regulatory interpretation in depth have drawn upon theories long-applied to statutory interpretation. The statutory interpretation debate features many theories, including textualist,[55] purposivist, and intentionalist[56] interpretive schools. Three principal articles regarding regulatory interpretation have each advocated applying one of these three principal methods of statutory interpretation. Jennifer Nou has advocated applying textualism, which emphasizes understanding the meaning of the words on the page in their semantic context.[57] Kevin Stack has set forth the case for purposivism, which seeks to effect the purpose of the law as written.[58] And Lars Noah has applied intentionalism, which looks to the intent of the drafters.[59] But these theories of regulatory interpretation have not yet examined the unique interpretive

[51] Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc. 467 U.S. 837 (1984).
[52] Stack, *supra* note 45, at 368.
[53] Auer v. Robbins, 519 U.S. 452 (1997).
[54] Stack, *supra* note 45, at 371; *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000) (indicating that deference to agency interpretation is only warranted when regulatory language is ambiguous). Moreover, under Accardi v. Shaughnessy, 347 U.S. 260 (1954), agencies are bound to their own regulations. But, again, one must know how to interpret the regulation to know how, and to what extent, agencies should be bound. Stack, *supra* note 45, at 375-76.
[55] *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546 (1983) (arguing that a group of legislators do not form a common purpose when enacting legislation and that a focus on legislative history materials produces an incentive to manipulate those materials); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006) (explaining that textualists prioritize "semantic content" and arguing that this properly effects legislative compromises made necessary by constitutional structure).
[56] Purposivism and internationalism are related schools. Purposivism seeks to effectuate the objective purpose of a statute. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1374-81 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947). Intentionalism focuses on the subjective intent of legislators. Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1568 (2010).
[57] 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.").
[58] Stack, *supra* note 45.
[59] Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 281 (2000).

questions raised by many common regulatory drafting practices[60] – including the use of the regulatory examples that are the subject of this Article.[61]

C. Examples in Courts

Case law also lacks a framework for determining the meaning of regulatory examples. Despite the prevalence and importance of regulatory examples, courts' approach to examples is haphazard. Some courts ignore regulatory examples without explanation. At other times, judges take the view that case outcomes should turn on examples. Still others engage in more extensive analysis to extract legal principles from examples.

Those courts that look for legal content in regulatory examples use different approaches to do so. Some use a cabined approach that draws conclusions from the regulatory examples without placing them in the context of other regulatory examples or in the context of the regulation or statute more generally. In other cases, courts conduct a more holistic analysis that draws support from other parts of the regulation (including other regulatory examples) as well as the regulatory and statutory scheme. But no court has attempted to articulate a framework for how regulatory examples should be analyzed.

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 honing in on relevant considerations, but they do not reach a conclusion as to how the agency thinks an issue would come out. Thus, a list of types of evidence that a mining company might bring forth to shift the burden of proof regarding damage causation is not a regulatory example.[62]

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[60] *See* Walker, *supra* note 45, at 71-72 (explaining that, while general theories for interpreting regulations deserve more attention, scholars should also "turn to perhaps more difficult questions about which other interpretive tools should be kept or discarded in the regulatory interpretation toolkit in light of how federal agencies actually draft rules in the modern administrative state").

[61] The practice of using examples also exists in statutes. *See, e.g.*, 42 U.S.C.A. § 256(c)(3)(B) (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 U.S. 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) (explaining that "[g]iven 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").

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

When a court does encounter a regulatory example that meets our definition -- meaning an example that reaches a legal conclusion based on hypothetical facts – it sometimes does not accord much weight to the example. Some courts have suggested that regulatory examples are "illustrative" only, meaning that the examples lack independent legal content and "are not to be considered as dispositive of controversial issues . . . ."[63] For instance, in *Tennessee Baptist Children's Homes*, a child care 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 child-care operations would independently support a tax exemption. However, the court treated the regulatory example as illustrative only, and held that the non-example portion of the regulation left open a material question of fact that could be decided by the jury.[64]

Other courts have ignored regulatory examples entirely without explanation. For instance, in 2011, the Supreme Court in *Mayo Foundation*[65] upheld a decision that medical residents were employees for purposes of payroll tax liability. There is an on-point regulatory example which states that a "medical resident" regularly scheduled for more than 40 hours per week at "University V" is an employee for purposes of payroll tax liability."[66] The Court ignored the example in its analysis, focusing instead on the non-example text of the regulation. Other cases have also displayed a tendency to avoid relevant regulatory examples in favor of relying on the non-example portion of the regulatory text.[67]

If some judges ignore examples, other judges take the view that courts should defer to them. For instance, consider the dissent in *Waterman*, a 1999 Fourth Circuit case.[68] 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.[69] The majority held that the amount was not "compensation received for active service" within the meaning of the statute.[70] The dissent argued that an example in the regulations was "controlling." The example provided that a reenlistment bonus earned while in a combat

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

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

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

[66] 26 C.F.R. § 31.3121(b)(1)-2(d)(3)(iii).

[67] *See, e.g.* Biovail Corp. v. FDA, 448 F.Supp. 2d 154, 162 (2006) (refusing to extract from examples any principle related to the proper degree of detail the FDA owed a drug applicant in a response); Am. College of Physicians v. U.S., 530 F.2d 930 (Ct. Clms. 1976) (citing to but then not discussing on point regulatory examples, instead focusing analysis on non-example portion of regulation).

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

[69] *See* I.R.C. § 112(a).

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

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.[71] There are other instances of courts deferring to examples as well.[72]

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

The cabined approach is illustrated by *Lorillard*, a 2014 decision in the D.C. District Court. In *Lorillard*, the issue was whether there was conflict of interest for a consultant who worked for the Food and Drug Administration (FDA) on regulating dissolvable tobacco products.[73] The court held that a financial conflict arose because the consultant also advised companies who manufactured smoking cessation products, which directly competed with dissolvable tobacco.[74] The *Lorillard* court based its decision on an FDA regulatory example. This example found no disqualifying interest when an FDA consultant "does not own stock in, or hold any position, or have any business relationship with the company developing the drug." The *Lorillard* court took this conclusion and extrapolated from it in two ways. The *Lorillard* court first assumed that the existence of a business relationship with the company developing a drug would disqualify a consultant. The court then decided that the existence of a business relationship with the competitor of the company developing the drug would also disqualify a consultant.[75]

In other words, the *Lorillard* court used an example that frowned on using physicians with business interests in regulated parties as government consultants to ban physicians with business interests in *competitors* of related parties as government consultants. This approach relied on a regulatory example to extract a principle that

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

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

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

[74] *Id.*

[75] *Id.*

could help decide the case. But, it did so in a "cabined" way because the extraction of principles from the regulatory example did not include a careful consideration of what the example meant as part of the regulatory and / 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 cases including *Washington Legal Foundation*. *Washington Legal Foundation* considered whether the Federal Advisory Committee Act (FACA) applied to an American Bar Association committee that advised the Department of Justice regarding nominees for federal judgeships.[76] Relevant regulations promulgated under FACA gave examples of groups not covered by the Act.[77]

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."[78] It cited four different examples of groups not covered by FACA under the regulatory example. It then drew out different principles from each example. For instance, the court reasoned that local groups who themselves initiated contact with the agency, and also primarily operational groups, were the sorts of groups who might be exempted.[79] 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.[80]

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

[77] 41 C.F.R. § 101-6.1004.

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

[79] *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).

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

Washington Legal Foundation provides a glimpse of what could be possible if courts had a robust framework for analyzing regulatory examples. This case engages in some reasoning by analogy from the facts and conclusion of the examples, while also trying to appreciate how the regulatory examples fit within the broader regulatory and statutory scheme. But the judge in this case did not have the benefit of a systematic framework for interpreting the regulatory examples that determined the outcome of the case. Courts in general are left to approach regulatory examples in an ad hoc fashion.

III. AN INTERPRETIVE THEORY FOR REGULATORY EXAMPLES

In this Part, we provide a theory of interpretation for regulatory examples. We explore how regulatory examples can either merely illustrate the non-example portion of the regulations or implicitly add content to the law. We explain how, when examples implicitly add content to the law, they do so incrementally and in a way that leaves the law open to future development. This is similar to the contributions made by common law cases. Based on these insights, we set forth a framework to identify the content that examples add to the law. There are two parts of our theory, which are meant to work in tandem or 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 must be reconciled with the broader regulatory and statutory scheme. The legal content of the examples and the non-example regulatory text are on equal footing, such that the interpretation of each should be stretched to accommodate the other.

A. The Nature of Regulatory Examples

Good writers know that readers like examples. Style manuals emphatically endorse examples, whether they are advising writers in general[81] or regulation writers in particular.[82] An agency drafter faces the task of "compress[ing] policy instructions" into

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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.") (Williams, J.) (majority opinion). On the other hand, the *Hilbert* dissent concluded that the principle was conjunctive and confined to the facts of the example: the employee is salaried only if there is a guaranteed amount *and also* any additions to pay are based on daily, not hourly, increments. *Id.* at 439 ("The essential distinction drawn by the DOL regulations is between payment on a salary basis (which presumably includes payment on a weekly or yearly basis) and payment on an hourly basis.") (Mikva, C.J.) (concurring in part and dissenting in part).

[81] *See, e.g.*, WILLIAM STRUNK JR. AND E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 2000) ("Prefer the specific to the general, the definite to the vague, the concrete to the abstract.").

[82] *See* Federal Plain Language Guidelines 70 (2011) ("Good examples can substitute for long explanations."); RUDOLF FLESCH, HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS AND CONSUMERS 70-80 (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[.]").

regulatory code.[83] Later, readers of the regulation must decode it.[84] Examples help with this coding and decoding process because they are outlines of stories. They are closer to the experience of a rule drafter and a rule interpreter 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.[85] The importance of examples as a means of making the law relatable is emphasized by Yariv Brauner in his contemporaneous paper that considers examples in tax regulations.[86]

Examples come from different sources. Sometimes agencies draft examples that describe a targeted transaction or situation.[87] Some examples repeat legislative history[88] or case law.[89] Other examples may be sua sponte hypotheticals developed by the agency to help it think through the drafting of a regulation.[90] Regulated parties may request examples that protect a position they have negotiated with the agency.[91]

Examples may explain the main and important target of the regulations, by giving the central case that prompted the rulemaking. They may be used to signal how the

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[83] 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).

[84] *See id.* (explaining that "subsequent actors" try to "discer[n] the meaning of these communications").

[85] *See* WILLIAM R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE AND ACTION (1987).

[86] Brauner, *supra* note 12, at 5-6 (citing cognitive science literature on how examples enable people to access the law).

[87] 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. Mayo Foundation v. United States, Brief for Petitioners, at 1-2, 2010 WL 4111636 (Aug. 6, 2010).

[88] For instance, many of the examples in the de minimis fringe benefit regulations are taken verbatim from the legislative history. *See* Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, H.R. 4170, 98th Cong., P.L. 98-369, 858-59 (noting "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").

[89] For instance, the example considered in the *Hilbert* case was itself based on a decided case. *See supra* note 80.

[90] 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* 26 C.F.R. § 1.36B-2(c)(2) (providing six examples to help explain eligibility for "government-sponsored minimum coverage").

[91] For instance, the dozens of regulatory examples that describe how the "universal capitalization" rules apply in income tax deal matter-of-factly with the concerns of one industry after another. *See* 26 C.F.R. § 1.263A (offering examples negotiated by airline industry, retail industry, and many others). As a result of collective action problems, the negotiation over incremental changes to regulations often involves only (or mostly) the most closely interested regulated parties and the government. *See, e.g.*, Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 855 (2010) (outlining how an interest group might accomplish a regulatory goal incrementally and thus fragment public opposition); *see generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 144 (1965) (noting "political advantages of the small groups of large units").

agency plans to allocate its enforcement resources.[92] 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.[93] Typically, examples are data points that help to define the contours of the law, but they do not occupy the field.[94]

Sometimes regulatory examples only illustrate law that is clear from the non-example portion of the regulation. We call these "illustrative" examples. But sometimes they do more. Examples that we call "declaratory" add to the content of the non-example portion of the regulation. Below we show the difference between illustrative and declaratory regulatory examples with a Health and Human Services regulation that precludes a health insurer from restricting hospital stay benefits for a new mother or newborn to "less than— (i) 48 hours following a vaginal delivery[.]"[95]

An illustrative example within this regulation illustrates the non-example portion of the regulation without adding any legal content. First it gives hypothetical facts: "A pregnant woman . . . goes into labor and is admitted to the hospital at 10 p.m. on June 11. She gives birth by vaginal delivery at 6 a.m. on June 12." Then it gives a legal conclusion: "[T]he 48–hour period described in paragraph (a)(1)(i) of this section ends at 6 a.m. on June 14."[96] This example is an illustrative example because it shows how the non-example portion of the regulation works without adding any legal content. Example 1 just illustrates a time passage calculation that was already fully specified in the non-example portion of the regulation.

Other examples within this regulation are declaratory. They add new legal content. 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."[97] 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."[98]

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[92] *See* Leigh Osofsky, *Concentrated Enforcement*, 16 FLA. TAX REV. 325 (2014).

[93] *See, e.g.*, Susan Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385 (2016) (defining terms).

[94] For instance, if a safe-harbor example says that "x" is permitted, we do not mean to suggest that it also means that "not x" is prohibited. Similarly, if a sure-shipwreck example says that "y" is prohibited, we do not take it to mean that "not y" is permitted.

[95] 45 C.F.R. § 148.170 (a)(1). The regulation provides further that "[i]f delivery occurs in a hospital, the hospital length of stay for the mother or newborn child begins at the time of delivery." 45 C.F.R. § 148.170 (a)(2).

[96] 45 C.F.R. § 148.170 (a).

[97] 45 C.F.R. § 148.170 (b)(1).

[98] 45 C.F.R. § 148.170 (b), Example 2.

This hospital discharge example is declaratory. It adds to the meaning of 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. In so doing, it changes the meanings of one or both of "payment" and "encourage" within the regulation. The example's new legal content is that coverage of services after discharge that would have been provided in the hospital do not constitute prohibited payments, even if they encourage early discharge as a practical matter.

When examples implicitly add meaning to the non-example portion of the regulation, they do so in an incremental fashion. The examples do not define the whole law. Instead, examples are open-textured. Like common law, they "stat[e]a principle rather than a rigid or specific rule and the principle is embedded in a set of facts."[99] The law offered by examples, like that offered by common law, "is always open to revision, modification, and elaboration."[100]

As illustrated by the hospital discharge example, regulatory examples help convey principles, such as the principle that coverage of services after discharge that would have been provided in the hospital is not a prohibited payment, even if the coverage encourages early discharge as a practical matter. Principles like these are embedded within the facts of examples. And, by nature, such principles are open to future revision. 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? 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. In this way, regulatory examples lend themselves to modification as new sets of facts arise, just like common law cases are inherently open to modification.

Examples need to be interpreted to the extent that they are declaratory. Or, to look at it from the opposite angle, if an example only illustrates the non-example portion of the regulation, the example provides no new content that needs to be interpreted. For instance, recall that the Supreme Court in *Mayo* considered whether a medical resident's wages were subject to payroll tax liability, but did not analyze an on-point regulatory example involving a medical resident at "University V."[101] Perhaps the Court put the example on the sidelines in its analysis because the example was only illustrative and did not add legal content to the rule that a student regularly scheduled to work at least 40

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[99] Charles F. Sabel & William H. Simon, *Destabalization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1061-62 (2004).

[100] *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) (explaining that "[t]he common law is an entity with more depth and complexity than a list of rules-it is a more intricate and open-textured web.").

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

hours per week would be subject to payroll tax liability. In contrast, a declaratory example communicates new legal content that must be interpreted as part of the regulation. Our interpretive theory provides a way to understand the meaning communicated by such declaratory examples.

B. What is Analogical Reasoning?

When regulatory examples implicitly add content to the law, we argue that analogical common-law reasoning can uncover the principles inherent in regulatory examples. Analogical reasoning, which applies in order to understand the open-textured principles offered by common law cases,[102] 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 early commentator called this approach "reasoning by example."[103] It has been described as involving the determination of similarity in relevant respects between existing cases and the case at hand, the identification of the revealed rule or principle, and the application of the rule or principle to the case at hand.[104]

To illustrate analogical reasoning, assume a case in which a defendant failed to securely latch the cage of a dangerous tiger in the zoo and injury to an adult resulted. The defendant in the tiger case was found negligent. Assume further a later case in which a defendant failed to securely latch the cage of a dangerous bear in the circus and injury to a child resulted. If relevant similarities exist between the two cases, then one may conclude that the defendant in the second case is also negligent. In particular, if the relevant factual similarities between the two cases include the presence of a strong and dangerous animal and an unlatched cage, 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.[105] Some

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[102] Sabel & Simon, *supra* note 99, at 1061-62.

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

[104] *See* Levi, *supra* note 103, at 501-02.

[105] *See, e.g.*, Scott Brewer, *Exemplary Reasoning: Semantics, Pragamatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 942-49 (1996). *But see* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1184-85 (1999) (explaining various views that analogical reasoning may not be a distinct form of logical reasoning). Deductive logic relies on "if – then" type of reasoning, whereby if the premise is true, then the conclusion necessarily follows. Brewer, *supra*, at 947. Inductive logic relies on a large number of observations to conclude that if a specific set of facts occurs, a conclusion is likely to follow. *Id.* at 944-45. In contrast, case law reasoning is a less logically

contend that it does not even require the conscious identification of a guiding principle,[106] but rather can be mediated by cognitive processes that are not necessarily articulated.[107] In the hard cases, where there are competing principles that might seem equally supported by the principles of similarity and relevance, some scholars have suggested that the results of analogical reasoning should accord with high-level moral principles[108] or reasoned policymaking.[109]

In its most self-conscious form, analogical reasoning includes both the articulation of possible principles from fact patterns, and also "test[ing] [of a principle] against other possibilities."[110] 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 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 the principle that motivates the result in the tiger case 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

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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.

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

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

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

[109] *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").

[110] Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 757 (1993); *see* Brewer, *supra* note 105, 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").

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.

Our use 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.[111] 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 and relevance and / or motivating principles.

Moreover, because analogical reasoning respects the incremental and open-textured nature of the law offered by cases, it has the capacity to evolve legal principles over time. As more facts about the world arise or become apparent (such as, for instance, the development of trenches designed to keep animals in), the governing principles will 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.[112]

C. Application of Analogical Reasoning to Regulatory Examples

This Part III.C illustrates how analogical reasoning should apply to declaratory regulatory examples, which contain implicit legal content. This is the first part in our theory of interpretation. We present three regulatory examples: one dealing with fringe benefits, one dealing with a health insurer's right to ask for genetic information, and one dealing with diseases on airplanes. In Part III.D, we give a longer illustration of the application of the second part of our interpretive theory, which reconciles the legal content of the examples with the rest of the regulatory and statutory scheme. These two parts 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. Fringe benefits

When an employer provides an employee with perks, such as use of a company car or free coffee at work, having the perks treated as "de minimis fringe benefits" for tax purposes is favorable for the employee. This is because de minimis fringe benefits are excluded from compensation income for tax purposes. The regulation that defines these benefits provides that "de minimis fringe" means "any property or service (after taking into account the frequency with which similar fringes are provided …) so small as to make accounting for it unreasonable or administratively impracticable."[113]

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

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

[113] 26 C.F.R. § 1.132-6(a). This language follows the statute. I.R.C. § 132(e)(1).

This language, which is both technical and abstract, 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 reasonably comfortable American office, circa 1984.[114] Employees may make "occasional" personal photocopies and "local telephone calls."[115] 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."[116] The regulations conclude that these are all examples of de minimis fringes.[117]

On the other hand, the regulations also offer examples of perks that are not de minimis fringes.[118] 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.[119]

Many readers will easily connect the examples to their own experience.[120] For instance, 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?[121] 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 examples, the regulation offers readers an easier way to access the abstract non-example rules.

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[114] They are based on Section 132(d)'s legislative history, which accompanied a statute enacted in 1984. *See supra* note 88.
[115] 26 C.F.R. § 1.132-6(e)(1).
[116] *Id*.
[117] *Id.*
[118] 26 C.F.R. § 1.132-6(e)(2).
[119] *Id.*
[120] *See* Brauner, *supra* note 12 (explaining the cognitive process through which a reader understands an example by connecting its facts to the reader's own experience).
[121] *See* RICHARD SCHMALBECK, LAWRENCE ZELENAK AND SARAH B. LAWSKY, FEDERAL INCOME TAXATION 212 (4th ed. 2015) (describing "Larry," who consumes "gourmet coffee" and "croissants" with "particular enthusiasm").

But examples do more than offer an easier means of accessing the abstract rules. As with cases, the hypothetical facts and conclusions in the examples implicitly shape the meaning of the law. This raises the question: what do the examples mean? How do they modify the regulation? And how can the examples, together with the non-example portion of the regulation, be interpreted so as to guide conclusions as to future sets of facts? We argue that analogical, case law-like reasoning should guide the interpretation of regulatory examples and that the meaning of examples must be reconciled with the broader regulatory and statutory scheme.

For instance, the non-example language in the regulations[122] 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 also 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 will be "unreasonable or administratively impracticable." 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.[123] Thus, the examples suggest that whether the perk is given to the employee base at large or only a small subset of employees is another factor, in addition to the size and frequency of the perk, that helps determine whether the perk is "unreasonable or impracticable to account for."

We can test the principles drawn from the examples by considering additional hypotheticals, consistent with the practice of analogical reasoning. For instance, what if two employees get married, and their employer pays for their wedding? It strains credulity to argue that such a perk would qualify as a de minimis fringe. Even putting

[122] *See* 26 C.F.R. § 1.132-6(a) (defining de minimis fringe as "any property or service (after taking into account the frequency with which similar fringes are provided …) so small as to make accounting for it unreasonable or administratively impracticable").

[123] 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).

aside many of the nuanced questions regarding the proper interpretation of the regulation, this perk would be large and easy to account for, and so should not qualify for de minimis treatment. 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.[124] 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.

2. Genetic information and health insurance

Examples also add legal content in the regulations under the Genetic Information Nondiscrimination Act of 2008, or GINA.[125] This law balances patient privacy and nondiscrimination goals against insurers' interests in receiving the information necessary to process health insurance claims. The non-example portion of the GINA regulations prohibits insurers from using genetic information for underwriting purposes, but permits insurers to condition coverage for specific medical benefits on such information, provided that the insurance company may not require more than "the minimum amount of genetic information necessary" to process the claim.[126] The more that insurers may use genetic information to screen for the provision of medical benefits, 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 exemption.

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. Example 2 is a paradigm case. Its facts provide that 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, and the insurer may request that the patient provide genetic test results before paying for the early mammogram.[127]

Example 3 goes further afield. It explains that "the latest scientific research" shows that if a breast cancer patient has a certain gene, a certain medicine is not helpful "in up to 7 percent of breast cancer patients." The example says that the insurer can

[124] 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.

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

[126] 45 C.F.R. § 148.180(f)(1)(iii).

[127] 45 C.F.R § 148.180(g) Example 2.

request evidence of the absence of that gene and deny payment if the gene is present.[128] A patient might consider this outcome a fairly extreme result for a treatment that apparently might work in 93% of cases.

Example 3 is a good test case for our argument for analogical reasoning as applied to regulatory examples. Absent analogical reasoning, one might read the example as offering the fixed rule that an insurer may demand genetic information and deny treatment if the genetic information indicates that there is but a 7% chance of the treatment failing. But the open-textured nature of analogical reasoning suggests, in contrast, that this example must be used to guide future analysis, rather than to establish bright-line rules. Other relevant factors in future cases might include the strength of and basis for the scientific consensus, evidence showing the quality of the results in the other 93% of cases, and side effects and other collateral costs for the named drug, tamoxifen.

In contrast to Examples 2 and 3, Example 1 prohibits an insurance company from asking for 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." 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 results of the insured's test as a prerequisite to paying for that test.[129] 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 and Examples 2 and 3 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 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 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."[130]

However, analogical reasoning suggests that this is not the best reading of why Example 1 reaches a different conclusion than Examples 2 and 3. 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.[131] In the HDSA scenario, there is less reason to believe that the insurance company already had evidence of the requisite family history, because there is no suggestion that the policy that covers Sam, the insured, also

[128] 45 C.F.R § 148.180(g) Example 3.
[129] 45 C.F.R § 148.180(g) Example 1.
[130] *Id.*
[131] *Id.*

covers his father, who is the individual diagnosed with Huntington's disease. If Sam's father's test results are not available, then presumably the insurance company could ask for other information including, potentially, Sam's own test results[132] – which, if positive, also provide evidence of family history.

Each GINA regulatory example, as well as the contrasts between them, shapes the law through analogical reasoning. The examples range from providing a clear paradigm case of the "medical appropriateness" exception with the early mammogram example to more complex facts, which suggest additional relevant factors for consideration. This set of regulatory examples illustrates that it can be difficult to definitively draw conclusions from potentially incomplete sets of facts. But, even in tough cases, using the analogical reasoning tools of relevance, similarity, and governing principles is key to making disciplined arguments about the meaning of regulatory examples.[133]

3. Diseases on planes

As a final illustration of how regulatory examples add content to law, consider the problem of whether a sick passenger may board an airplane.[134] On 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 health interest in avoiding transmission of disease. How should the two interests be balanced?

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."[135] 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."[136]

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?

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

[133] *Cf.* Emily Sherwin, *supra* note 105 ("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.").

[134] 14 C.F.R. § 382.21.

[135] 14 C.F.R. § 382.21(a).

[136] 14 C.F.R. § 382.21(b)(2).

Three 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."[137] The second says that AIDS [138] does not present a direct threat -- although AIDS has "severe health consequences," it is not "readily transmissible in an aircraft cabin environment."[139] The third says that SARS [140] "probably poses a direct threat," – it "may be readily transmissible" and "has severe health consequences."[141]

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. For instance, concluding that the common cold does not present a direct threat does not prevent a more serious, easily transmissible disease from being treated as a direct threat. As the SARS example confirms, the regulations are hesitant to even express a definitive outcome when diseases are severe and may be readily transmissible. In this sense, the examples only offer limited data points. They do not fully occupy the field.

But these limited data points nonetheless provide a framework that extends beyond the limited 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 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 passengers who are engaging in passing, rather than more involved, contact. 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. In other words, if more involved contact produces a risk of AIDS transmission on an airplane, passengers must 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

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[137] 14 C.F.R. § 382.21(b).

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

[139] 14 C.F.R. § 382.21(b).

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

[141] 14 C.F.R. § 382.21(b).

transmissible, as in the SARS example, the regulation only concludes that a direct threat "probably" exists. The SARS epidemic involved a deadly disease that was widely reported to have spread via air travel.[142] Yet SARS is offered as the close case, where the public access interest and the public health interest just about balance.[143] Once again, the examples, when read analogically, rely on data points to communicate in a fashion that extends beyond the contours of the examples, even while in some cases declining to definitively commit to a particular principle or outcome in the examples themselves.

D. Reconciling Analogical Reasoning with Regulatory and Statutory Scheme

While, as illustrated above, regulatory examples call for the type of analogical reasoning found in the common law, regulatory examples are also different than purely common law cases because they are contained in regulations, which are attached to statutes. Interpretation of regulatory examples therefore must also consider the broader regulatory and statutory scheme.

In the hierarchy of sources of law, the statute governs, if there is a conflict between the statute and regulations.[144] Moreover, even if the statute does not clearly address an issue, the statute nonetheless can inform regulatory interpretation. Within the 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, we argue they are co-equal sources of law, and that each should inform the meaning of the other.[145] As a result, the interpretation of each of the non-example text and the examples

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[142] *See, e.g.*, Alexandra Mangili & Mark A. Gendreau, *Transmission of Infectious Diseases During Commercial Air Travel*, 365 THE LANCET 989, 989 (2005) (noting air travel's "important role" in the spread of SARS).

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

[144] *Chevron*, 467 U.S. at 842-43.

[145] *Compare* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 214 HARV. L. REV. 1939, 2012-13 (2011) (discussing the basic interpretive principle that the 'specific governs the general,' meaning that a more specific law displaces a more general law that speaks to the same question).

must be stretched so as to accommodate the other, much like courts stretch the interpretation of treaties and statutes in an effort to make them meet.[146]

As a general matter, the non-example text and the examples should be able to be stretched so as to accommodate each other. Examples are meant to clarify, exemplify and / or add to the non-example text, but not to disagree with it.[147] 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 inadvertently written the example in such a way that it is not consistent with the non-example text. Or, the non-example text may be the mistake. For instance, the regulatory drafters could have written the regulations so as to address and prevent a particular type of transaction, which is correctly characterized in an example. The drafters may have then tried to write the non-example text so as to produce a particular result in the transaction in question. But, the drafters may make a mistake in drafting these abstract rules. Since the examples and non-example text are meant to work together, only in the rare case would a mistake exist that would make them incompatible. And it is not possible to make a general statement about which of the non-example text or the examples is in error in such a case. Rather, one would have to examine the regulatory and statutory scheme and perhaps the regulatory drafting process more broadly to determine whether the drafters made a mistake in the non-example text or in the examples.

In the general case, reconciling regulatory examples with the rest of the regulatory and statute scheme can be done through different background approaches to regulatory interpretation, such as textualism or purposivism.[148] In other words, our approach offers a new tool to understand regulatory examples. It brings regulatory examples into the interpretive conversation. It is consistent with, and extends the reach of, existing, background interpretive theories. For instance, while most interpretive approaches advise reading text in context,[149] the existing background interpretive approaches 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.[150] Purposivists emphasize the policy context for a regulation, and may look to statements of regulatory purpose, like the regulations' introductory preamble, for

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

[147] *See supra* Part IIIA (discussing illustrative and declaratory examples).

[148] Manning, *supra* note 55, 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).

[149] Vasquez, *supra* note 146.

[150] Manning, *supra* note 55, at 91; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 407-08 (1942).

evidence of examples' meaning. Other interpretive approaches may blend these different emphases.[151]

To illustrate how to reconcile interpretations that flow from analogical reasoning of regulatory examples 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.[152] 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."[153] The instruction in the statute is to avoid "discrimination" against an "individual," and the statute's language and vision for including people with disabilities follow that of other antidiscrimination statutes, such as those in the public accommodation and employment context.[154] Perhaps the anti-discrimination roots of the statutory 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,[155] 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

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

[152] 14 C.F.R. § 382.21(b).

[153] 49 U.S.C. § 41705 (enacted 1986). A predecessor statute provided that air carriers must not "subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." § 404(b) of the Federal Aviation Act of 1958. The predecessor statute was repealed in connection with airline deregulation in 1978 and replaced with § 41705 in 1986. *See* James S. Strawinski, *Where is the ACAA Today? Tracing the Law Developing from the Carrier Access Act of 1986*, 68 J. AIR L. & COM. 385, 385-87 (2003) (describing the history of the predecessor statute and its repeal).

[154] *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").

[155] 14 C.F.R. § 382.21(b) (emphasis added).

steps.[156] It states that if a passenger has a medical certificate describing measures designed to prevent transmission of the disease, the passenger may be able to fly, even if the passenger poses direct threat.[157] If a direct threat exists, a cross-referenced regulation requires the "select[ion]" of "the least restrictive response."[158] All of these features suggest an individualized approach.

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.[159] The earlier regulation listed a number of factors to consider in the determination of whether a passenger presented a direct threat, without any clear demarcation of relative importance or how they should be employed to make a determination.[160] The preamble explains that the current version was intended to provide greater certainty and less discretion.[161]

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).[162]

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[156] 14 C.F.R. § 382.19(c)(1)-(2).

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

[158] *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." 14 C.F.R. § 318.3.

[159] 73 FR 27614-01, at 27624 (May 13, 2008).

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

[161] *Id.*

[162] *Id.*

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)."[163] 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.[164] The non-example portion of the regulations support an individualized assessment, not a general determination that passengers with SARS always pose a direct threat.[165] In contrast, the preamble supports a categorical approach that an airline can treat SARS as a direct threat and therefore restrict passengers with SARS.[166]

Regardless of the preferred background method 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.[167] The non-example portion of the direct threat regulation is much more specific about which factors must be considered in making a direct threat determination than prior versions of the regulation. It emphasizes severity and ease of transmissibility now as the important factors for a direct threat determination.[168] 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 strong purposivist, for instance, may adhere to the preamble's clear conclusion that SARS categorically poses a direct threat.[169] Such an approach may read Example 3's

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[163] *Id.* at 27648.

[164] *See supra* text accompanying notes 135-141.

[165] *See supra* text accompanying notes 155-158.

[166] *See supra* text accompanying notes 159-163.

[167] The middle-ground approach that we use in this analysis subscribes to a "practical" school of interpretation that privileges enacted text but also assesses the meaning of a given provision based on evidence from a number of reliable sources, based on their relative importance and reliability in a given context. *See* Eskridge & Frickey, *supra* note 151.

[168] *See infra* text accompanying notes 155-158. Indeed, the cross-referenced passenger disability provision actually uses language almost identical to the old version of the communicable disease regulation. *Compare* 14 C.F.R. § 382.19 *with* 14 C.F.R. § 382.51 (prior to May 13, 2008). In discussing the passenger disability provision (which remains current), the preamble to the current version of the regulations explains that carriers must make an "individualized assessment." 73 FR 27614-01 (May 13, 2008). Clearly, the current version of the regulations meant to maintain a more individualized approach in the general passenger disability context than in the communicable disease context.

[169] *Compare, e.g.*, Nou, *supra* note 57, *with* Stack, *supra* note 45 (each relying heavily on preambles for interpretation, but in a case for textualist interpretation and purposive interpretation, respectively). The use

"probably" conclusion to cover only situations in which there was possibly (but not definitely) transmissibility. This reading implies that, as long as a patient has SARS and it is readily transmissible, SARS poses a direct threat. Moreover, a purposivist may argue 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.

A strong textualist, on the other hand, may be less inclined to look to provisions in the preamble, particularly when the preamble arguably conflicts with the text of the actual regulation.[170] Since the actual regulation situates the examples within a regulatory framework that still calls for an individualized approach, a strong textualist may be more inclined to favor an individualized interpretation. She may be more inclined to dismiss the idea that SARS categorically poses a direct threat.

The point here is not to advocate for one or another background approach to regulatory interpretation, such as purposivism or textualism. Rather the goal is to show that regulatory examples play an important role in illuminating a regulation's meaning regardless of the background, interpretive approach. Analogical reasoning allows the guidance from regulatory examples to be pieced together with other regulatory and statutory materials to develop a fuller regulatory interpretation. The approach we offer thereby both dovetails with, and extends the reach of, the various existing background frameworks for regulatory interpretation.

IV. RESPONDING TO OBJECTIONS

In this Part, we respond to objections to the theory of interpretation we offer. We consider three objections: uncertainty about agency intent, a lack of case law safeguards, and the possibility that endorsing regulatory examples as a source of law may shift power, whether to agencies or to regulated parties.

A. What Does the Agency Intend?

Under our theory of interpretation, reading regulatory examples carefully in an analogical fashion reveals legal principles embedded in the examples.[171] Some might

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

[170] *See, e.g.*, Nou, *supra* note 57, 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.").

[171] Although, as indicated previously, some regulatory examples may merely illustrate the non-example portion of the law without adding any new legal content. *See supra* text accompanying notes 95-98.

object that we have not shown that agencies intend to communicate principles through regulatory examples. If surveyed, some regulatory drafters might say that when they wrote the examples they simply were communicating the situations that came to their minds when drafting the regulations. Agency drafters might not characterize the regulatory examples as sources of new law that shape the understanding of the non-example text.

Some might also argue that the way that examples are presented in regulations suggests they should be subordinate to the non-example portion of the text. For instance, the examples are usually provided after a more general statement in the regulations. The very use of the prefacing word, "Example" might be thought to suggest that the drafters consider the examples to be merely illustrative, or subordinate.[172]

On the other hand, one canon of construction provides that the specific controls the general.[173] Examples are certainly the more specific components of regulation. Do agencies mean for examples to trump the rest of the regulations?

The school of interpretation known as intentionalism might support the argument that we must look to agency intent to decide what to make of regulatory examples.[174] Intentionalism looks to the drafters' intent to determine the meaning of a provision.[175] Scholars and courts that have supported intentionalism have argued that intentionalism is essential to protect the power of the lawmaker to say what the law is.[176] If the legislature (or, in the administrative context, the regulator) is the lawmaking body, then courts must be bound by the intent of the legislature in interpreting the law.[177] As applied to regulatory examples, if the agency did not intend for regulatory examples to be interpreted analogically to communicate legal principles, then using analogical reasoning to interpret regulatory examples this way may violate the agency's prerogative.

We cannot claim, in response, that agencies generally intend for regulatory examples to be read in accordance with the analogical approach we set forth in Part III. It is very likely that many agency drafters simply have not thought about it.[178] Yet the determination of legal principles from a series of concrete results does not require that the

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[172] A comparison might be made to interpretive principles for introductory material in statute. Stack, *supra* note 45, at 392.

[173] *See* Manning, *supra* note 145 (explaining the canon that the specific controls the general).

[174] Intentionalism itself has been chipped away at by a number of critiques over the years. Legal realism and public choice theory have argued that finding credible evidence of intent is exceedingly difficult and that the draft of enacted law often reflects innumerable motives and compromises. For a canonical critique of the intentionalist approach, see, for example, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). *But see* Noah, *supra* note 59 (arguing for an intentionalist view of agency regulations). The statutory interpretation method of purposivism was developed largely in response to some of these perceived defects of intentionalism. Eskridge, & Frickey, *supra* note 151, at 332-33.

[175] Eskridge & Frickey, *supra* note 151, at 325-32.

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

[177] *Id.*

[178] *Cf.* Walker, *supra* note 46.

decision maker in each particular case was aware of the legal principles.[179] Our argument is that analogical reasoning (plus reconciliation with the rest of the regulatory and statutory scheme) offers the best means of making sense of regulatory examples, in the absence of evidence that the drafters intended for them to be read differently.

Our theory can be thought of as a canon of interpretation, or a set of default conventions that can be used to make sense of particular drafting choices or answer certain interpretive questions.[180] A large literature considers interpretive canons.[181] They are controversial.[182] Karl Llewellyn famously showed that, for every canon, there is an offsetting counter-canon, and that this malleability undermines claims of predictability and coordination.[183] But despite some of the asserted problems with canons, interpreters

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[179] *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").

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

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

[182] *See, e.g.*, CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 147-57 (1990); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66-67 (1994).

[183] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). Others have shown how canons are often used to make text seem clear, and unambiguously in accord with a court's interpretation, even if the analysis is not that simple. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 67, 93-94 (2005). Canons might, for instance, promote a textualist mode of interpretation over an interpretation that looks to legislative purpose, while masking this deliberate interpretive choice behind a seemingly neutral canon. *See, e.g.*, *id.*; Louis Fisher, *Statutory Construction: Keeping a Respectful Eye on Congress*, 53 SMU L. REV. 49, 49 (2000); Radin, *supra* note 174, at 873-75; 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.").

still require tools to understand the meaning of legal material, and canons can supply such tools when meaning is not otherwise clear.

Our theory is a default rule, as agencies could avoid the approach we suggest by using a different drafting approach, or promulgating a different rule of interpretation for regulatory examples.[184] Our theory also plays to the strengths of legal interpreters, since analogical reasoning is a fundamental legal skill, universally taught and practiced. Our theory has the further advantage that it is consistent with a plausible account of agency intent. It is reasonable to conclude that agencies are trying to communicate the same legal content using two verbal strategies. The non-example portion of the regulation uses an abstract strategy, while the examples use a concrete communication strategy. We see no reason to provide a preference for the abstract over the concrete (or vice versa).[185]

Nor do we have reason to believe that the agency process is designed to produce first a rule, which is the controlling source of law, and then the examples as an afterthought. Factual situations often provide the push for regulatory guidance. Perhaps the examples are, in many cases, the motivating source of law, and the non-example text is the afterthought. In this case, agency drafters may be offering the non-example text as a way to try to communicate in an abstract way what they in fact first understood or communicated through an example. In any case, both the examples and the non-example portion of the regulation can go through the same process that provides the force of law rationale for *Chevron* deference.[186] We see no reason to prefer one over the other as a source of law.

B. Lack of Case Law Safeguards

Another objection to our theory is that examples are not case law. We import analogical reasoning from the case law context,[187] where judicial decisions meet the requirements of case law safeguards designed to ensure good law. Requirements such as the "case or controversy"[188] prerequisite ensure that cases are based on actual facts,[189]

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[184] Sometimes rulemakers do provide instructions for interpreting examples. *See, e.g.*, Texas Disciplinary Rules of Professional Conduct, Preamble ¶10 ("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."). 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?

[185] *See supra* text accompanying notes 84-86.

[186] *See infra* footnotes 201-202 and 204-206 and text accompanying them for further discussion of this point.

[187] *See, e.g.*, Sunstein, *supra* note 110, at 741 (noting that analogical reasoning "dominates the first year of law school" and that "it is a characteristic part of brief-writing and opinion-writing as well").

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

[189] *See, e.g.*, Valley Forge Christian College v. Americans 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

that they emerge from an adversarial process,[190] 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.[191]

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.[192] 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.[193] Adjudication through an adversarial process means that the parties on both sides can make vigorous, opposing arguments.[194] The fact that the judge must specify and enforce a remedy means that she must take responsibility for, and presumably think through, the hard practical consequences of her decision.[195] 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.

While the connection between actual facts and a regulatory example is more general than that of a litigated case, a regulatory example's relationship with facts is still sufficient to say that the regulatory example arises out of facts from the world.[196] Regulatory examples often articulate stylized summaries of a typical case that prompted the example (as well as perhaps also the broader regulation) rather than the exact particulars of one person's situation. The 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 a hypothetical patient's effort to provide the minimum

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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").

[190] *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").

[191] *Cf.* Alexander, *supra* note 112, at 80-86 (examining the phenomonen of entrenching prior mistakes through the common law reasoning process).

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

[193] *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.").

[194] *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.").

[195] *See* CHARLES A. WRIGHT ET AL., 13B FED. PRAC. & PROC. JURIS. § 3533.1 (3d ed. Updated April 2016) (noting the concern of justiciability doctrines such as standing, ripeness and mootness "that courts may be more prone to improvident decisions when nothing immediate seems to be at stake").

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

information necessary to obtain payment for a genetic test, it tries to convey the situation of many patients who seek insurance coverage for similar tests.[197]

Similarly, while regulatory examples do not directly impose a consequence on a specific party, they do have real world consequences that give the agency motivation to adequately consider the impact of the examples. When a regulatory example states, for instance, that certain information may not be required as a prerequisite to payment for a genetic test, there is no specific person that receives a judgment requiring an insurance company to pay for her test. In that sense, there is no concrete result. But the regulation amounts to the agency's commitment that, when the case does come up, the articulated result will follow.[198] In this sense, the regulatory example has a result, in an even more widespread fashion than a case, even though the result will apply prospectively (usually) and to persons not yet identified.

Moreover, although regulations are not subject to an adversarial process, they are subject to a public process that can help ensure that the regulatory examples are well considered. The notice and comment requirement of the Administrative Procedure Act requires that regulated parties and other members of the public have the opportunity to comment on regulations, including regulatory examples, and agencies must respond with reasoned explanations.[199] 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.[200] 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 adversarial positions.[201] 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.[202]

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[197] *See supra* text accompanying notes 125-133 (discussing GINA examples).

[198] 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.

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

[200] The Administrative Procedure Act does not actually require agencies to include the text of proposed regulations (including regulatory examples) in the notice of proposed rulemaking. 5 U.S.C. § 553. However, the addition of regulatory examples after the notice and comment process may be a response to the comments received, which would arguably make the examples an important output of the process.

[201] *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"). The proposed management fee waiver regulations described above provide an example of contested regulatory examples. *See* text accompanying notes 19-44.

[202] Or, 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).

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.[203] 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,[204] help legitimize and justify regulations generally.[205] 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.[206] 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 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 in general legislative lawmaking.[207] Such requirements do not apply to agency regulations generally, or, therefore, to regulatory examples specifically.[208] Some might argue that,

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[203] *See, e.g.*, David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 92 (D. Luban ed. 1983) ("the 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 prosecutorial context).

[204] 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 . . . . ").

[205] *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

[206] From the opposite perspective, 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 13 (for description of varying practices with respect to contemporaneous guidance documents, such as preambles). In such cases, one could argue that the legitimizing nature of notice and comment should perhaps extend to the preamble as well. We maintain the traditional distinction between regulatory text and preamble, while arguing that the preamble should help inform the ultimate interpretation of the regulation. *See supra* Part III.D. However, the relationship between preamble and text, especially in light of varying procedural practices with respect to preamble and text promulgation, merits additional consideration as part of the continued development of a theory of regulatory interpretation.

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

[208] 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. *See* SEC v. Chenery Corp., 332 U.S. 194 (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.*

by reaching concrete conclusions on facts (albeit hypothetical), 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 the enumerated branches of government. This concern is real and widely shared,[209] but, we believe, not uniquely raised by agency use of examples. While agency use of examples perhaps deserves more attention in projects that contemplate whether agency power has extended too far, attention to such issues does not undermine the case for using analogical reasoning for the examples that do, in fact, exist.

C. Will Respecting Examples' Legal Content Shift Power?

Some may argue that acknowledging regulatory examples' legal content shifts the balance of power, whether to agencies or to regulated parties. A comparative advantage in writing or interpreting regulatory examples on the part of either agencies or interest groups could mean that treating the examples as bona fide sources of law favors one side or the other. 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 deference as non-example regulatory text.[210]

For instance, if, as an empirical matter, interest groups write most regulatory examples, then honoring examples' legal content might empower those interest 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 theory might hand an agency relatively more power. Or, if the flexibility of analogical reasoning provides more wiggle room in interpreting regulatory examples compared to non-example text,[211] then perhaps our theory advantages agencies, because they would have a wide range of interpretations available to them after promulgation of the examples, and agencies would receive deference for their own interpretations of the examples under the

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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").

[209] 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 Administative State*, 107 HARV. L. REV. 1231 (1994).

[210] For instance, one might propose that examples should only be issued in less formal guidance documents not entitled to *Chevron* deference. *See, e.g.* United States v. Mead, 533 U.S. 218, 226-27 (2001) (refusing to apply *Chevron* deference to agency pronouncements lacking "force of law"). For discussion of some of the many forms of informal guidance that agencies use, see, for example, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Policymaking*, 92 CORNELL L. REV. 397 (2007); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159 (2000); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992). Under current law, informal guidance 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 Hickman, *Contemplating a Weaker Auer Standard*, YALE J. ON REG: NOTICE AND COMMENT (Sept. 23, 2016) http://yalejreg.com/nc/contemplating-a-weaker-auer-standard-by-kristin-e-hickman.

[211] Brewer, *supra* note 105, at 985-89 (discussing analogical reasoning and rule of law).

Auer/*Seminole Rock* doctrine.[212] The common thread in these objections is the possibility that examples are subject to systematically different process – whether empirically or as a matter of law – compared to non-example regulatory text.

We are not persuaded of the merits of these concerns, because we are not persuaded that the process applicable to promulgating and interpreting regulatory examples systematically differs from the process applicable to any other portions of final agency regulations. As a matter of formal process, it is the same. The Administrative Procedure Act applies the same requirements to all parts of final regulations.[213] As to the empirics, 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. Probably the focus on examples varies from regulation project to regulation project. Indeed, as illustrated previously, regulated parties and their advisors often pay careful attention to regulatory examples.[214] 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. We know of no evidence that interest groups are able to sneak in examples without agencies noticing, nor is there evidence that agencies are able to sneak in examples without proper scrutiny from the public or from interest groups, in each case as compared to other parts of the regulation.

With respect to the concern that our use of analogical reasoning in particular expands discretion to provide post hoc, nonobvious interpretations of regulatory examples (whether by agencies or by others) we reply that our theory actually narrows discretion to interpret regulatory examples.[215] It does this by providing a framework that sets the parameters for interpretations of regulatory examples. For instance, with the regulatory examples regarding diseases on planes, analogical reasoning makes clear that both severity and ease of transmissibility must be present in order to exclude a passenger from a plane.[216]

In other words, ours is a theory of regulatory interpretation that helps delineate the parameters of agency regulations. The framework proposes an interpretation of regulatory examples that respects the legal content in the examples. But it also provides a

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[212] *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 659-60 (1996) (discussing deference to agencies and rule of law). *But see* Cass Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 83 U. CHI. L. REV. __ (forthcoming 2017), *available at* https://ssrn.com/abstract=2716737) (arguing that no empirical or anecdotal evidence exists that agencies take advantage of *Auer* in the way suggested by Scalia and Manning).

[213] *See, e.g.*, Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1334-42 (2010) (surveying work on interest groups' capture of regulatory process and adding the idea of information capture).

[214] *Supra* Part IIB.

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

[216] *Supra* Part III.C.3.

framework for understanding such content and insists that the meaning of the regulatory examples must be reconciled with the rest of the regulatory and statutory scheme. In short, our theory brings examples into the conversation of regulatory interpretation. It both empowers and constrains courts, agencies, and regulated parties.

V. 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.

This Article supplies an interpretive theory of regulatory examples, which is offered as a default canon of construction. We explore how, like cases, regulatory examples offer open-textured principles that shape the law. Accordingly, we argue that when regulatory examples add content to the law, this content is best interpreted through analogical, case-law like reasoning. The guidance from analogical reasoning should also be reconciled with the broader regulatory and statutory scheme. We place regulatory examples and non-example text on equal footing and require the interpretation of each to be stretched to accommodate the other.

In offering a theory for regulatory examples, we bring them into the interpretive conversation. Examples pervade regulations and, we argue, subtly shape the law. By exploring how they do so, and how to integrate our theory with existing, background, theories of interpretation, we offer a way to make sense of regulating by example.