SUBSTITUTION STRATEGIES

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Responding to Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006).

I. INTRODUCTION

Positive political theory (PPT) is not new to administrative law, but it is increasingly becoming part of the mainstream, as evidenced by the *Harvard Law Review*'s publication of Professor Stephenson's *Strategic Substitution Effect* (SSE).[1] Both the normalization of PPT and the publication of SSE are good for many reasons. One important reason is that criticisms of PPT in administrative law are beginning (although just barely) to push past a standard assortment of first order critiques. Historically, PPT administrative law work was subject to three types of objections. First, models were often assailed for using an unnecessarily complex technical apparatus to demonstrate a result that many readers found trivially true. Second, other critics complained that models made assumptions that were such radical oversimplifications of reality that they could not possibly provide actual insight into the reality of law and politics. Third, many models in administrative law historically produced results that fit so poorly with the world they knew that readers were forced to conclude that the entire PPT project was altogether fruitless — a failed endeavor based on faulty premises, foolish methodology, and fantastical predictions.

If SSE is any indication, we are reaching a turning point, as the Article is subject to none of these criticisms — or at least neither of the first two. The basic setup of the model is straightforward and nearly intuitive, balancing technicality with parsimony. The Article is characteristically innovative and insightful — precisely the sort of work that is rapidly becoming associated with Professor Stephenson's ideas and methods.

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[1] Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006).

II. SUMMARY

Administrative law is built on several doctrinal pillars. Perhaps the most prominent of these is the bundle of deference doctrines that guide judicial evaluation of agency judgments, particularly statutory interpretations.[2] As Stephenson says, "[a]dministrative law scholarship is obsessed with the appropriate scope of judicial review of agency decisions."[3] The core insight of SSE is that administrative agencies will trade off "textual plausibility" and "procedural formality." Advancing less plausible statutory interpretations is costly because it reduces the probability of winning in litigation; utilizing more formal procedures to develop and issue those interpretations is costly because formality consumes agency time, money, and other scarce resources.[4]

Although the Article is cast largely as an analysis of agency decisionmaking, a main implication is that one cannot know how to adjust judicial deference without analyzing how agencies will respond to those shifts, which in turn requires analysis of how courts will respond to agency behavioral changes, and so on.

The Article's title and much of the analysis suggests that agencies will strategically substitute. It is easy, however, to lose sight of precisely what is being strategically substituted. One reading of *United States v. Mead Corp.*[5] is that agencies must use procedural formality if they want deference to their views. A natural first impression is that this will produce desirable effects so long as procedures produce increased accuracy or greater democratic participation in agency decisionmaking. Stephenson shows that the effects are more ambiguous. The level of textual plausibility cannot be held constant; rather, if judges trade textual plausibility for procedural formality, an increase in formality will generate a reduction in textual plausibility.[6] Thus, it could easily be the case that grants of deference for formality will reduce the textual plausibility of those actions. This is an elegant and important point.

In the SSE world, judges care about two things: textual plausibility and agency flexibility. First, all else equal, courts want agencies to adopt more textually plausible statutory interpretations rather than less plausible ones. Therefore, courts prefer that agencies adopt interpretations that closely correspond to judges' own best reading of the statute.[7] Second, courts want to "maximize the agency's ability to ad-

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[2] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
[3] Stephenson, *supra* note 1, at 529.
[4] *Id.* at 530–31.
[5] 533 U.S. 218 (2001).
[6] Stephenson, *supra* note 1, at 552.
[7] *Id.* at 541.

vance its policy agenda."[8] Judges in the model recognize that agencies have policy expertise,[9] a greater ability to evaluate scientific evidence,[10] and enhanced democratic accountability.[11]

What makes the model — and indeed much of administrative law — go is the fact these two goals often conflict. Allowing an agency to adopt any interpretation without judicial checks maximizes policy flexibility, but risks agency overreaching. Aggressive judicial review undermines the ability of agencies to make sound policy judgments. Courts prefer to give agencies maximum flexibility in areas that the agency views as more substantively important. But, as SSE puts it, "[i]f we assume that the court's willingness to give the agency substantive latitude increases with the importance of the issue to the agency, the court faces a problem: the agency typically has better information about issue importance than the court."[12] Because judicial preferences and limitations are common knowledge, rational agencies have an incentive to exaggerate the importance of the issue being litigated, urging that every issue is one of "high importance," precisely the sort for which judges should most want to defer. And because courts know agencies will generally overstate the importance of underlying legal issues, courts might simply ignore all agency statements, treating them, in effect, as cheap talk.[13]

Both agencies and courts would be better off if the agency could credibly signal the importance of the issue. A theme throughout much of Stephenson's work is that costly signals are one such mechanism.[14] If the agency bears significant costs when it says, "This is a high importance issue," then it will tend not to make that claim when the issue is, in fact, a trivial one. Costly signals — both in models and the real world — are usually more credible than cheap ones.

SSE emphasizes that procedural formality is one main source of costs for administrative agencies. The extensive time and the resources required to generate a new rule is the stuff of legend in most introductory administrative law courses.[15] Unlike much administrative law scholarship that lampoons these costs, SSE celebrates them.

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[8] *Id.*

[9] *Id.* at 531–32.

[10] *Id.* at 532 n.8 (discussing the 1970s debate between Judges Bazelon and Leventhal about how judges could best review agency judgments about scientific evidence).

[11] *Id.* at 540.

[12] *Id.* at 550.

[13] *Id.*

[14] *See, e.g.*, Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753 (2006).

[15] *See generally* Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013 (2000); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

When an agency interprets a statute using costly formal procedures, a court can infer that the issue is an important one to the agency precisely because these procedures consume time, money, and resources. Accordingly, the agency should only be willing to bear these costs when the issue is of sufficient importance to justify the expenditure. If so, courts can give agencies greater leeway — that is, they can uphold less textually plausible statutory interpretations — when agencies utilize costly procedural formality. Courts can therefore effectively tailor deference doctrines — deferring a lot on issues of great importance. All is good in this world of administrative law.

III. SOME PROBLEMS AND EXTENSIONS

The world that SSE describes is an intriguing one. Unfortunately, it is a far cry from our world. While the underlying logic in SSE is powerful, it also seems inconsistent with much administrative law. This is not, of course, a critique of the internal coherence of the model, but when the divergence is so stark, it suggests there is fundamental confusion in either the courts or SSE itself.

A. Partial Mismatch

Consider the most prominent deference doctrine in administrative law, *Chevron* doctrine, which governs judicial review of agency statutory interpretations.[16] *Chevron* now requires a three-step inquiry. At Step Zero,[17] courts ask whether Congress delegated — and the agency exercised — the authority to act with the force of law (law-interpreting authority), and whether the agency exercised that authority.[18] If the answer to these questions is "no," the agency's view does not qualify for *Chevron* deference, but may qualify for *Skidmore* deference.[19] If the answer to these questions is "yes," *Chevron*'s ubiquitous two-step inquiry follows. Courts first ask whether Congress clearly and directly resolved the precise question at hand. If so, the agency and the court must give Congress's direction effect. If not, the agency's interpretation should be upheld so long as it is reasonable.[20]

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[16] *See generally* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

[17] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006). The term is originally from Thomas W. Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

[18] *See* Barnhart v. Walton, 535 U.S. 212 (2002); United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576 (2000); *see also* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1486 (2005); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

[19] Skidmore v. Swift & Co., 323 U.S. 134 (1944); *see generally* Kristin E. Hickman & Matthew D. Krueger, *In Search of the "Modern"* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007).

[20] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

One key *Chevron* debate has been whether there is (or was) an exception for "major questions."[21] In a series of well-known cases, the Court declined to give deference to agency interpretations of what have been called "major questions," or particularly important substantive policy issues.[22] No deference was given to the FDA's judgment that tobacco was a drug and that the agency therefore had authority to regulate.[23] No deference was given to the FCC's decision to exempt nondominant carriers from rate-filing requirements.[24] Similarly, no deference has usually been given to agency interpretations bearing on preemption,[25] or an agency's own jurisdiction.[26] Elsewhere I have argued that these "major questions" exceptions are best understood as part of an emerging Step Zero doctrine.[27] But regardless of how one categorizes them — as trumps, exceptions, or Step Zero doctrine — these cases stand for the proposition that courts are much less likely to give deference to agency interpretations of major social or economic significance.[28] This state of affairs seems precisely inverse to the assumed or predicted behavior of courts in the SSE framework. It is precisely when issues are of utmost importance to the agency, that courts should defer most. It is not clear what to make of this divergence. On the one hand, Stephenson is quite candid that his goal is not to explain existing doctrine or even necessarily to suggest doctrinal reforms. But it is at least mildly awkward that one major strand of deference jurisprudence appears to give less deference in precisely the context where SSE suggests it should give most.

Perhaps, however, what I have described as deference conflates two distinct ideas from SSE: intrinsic deference and actual deference. Intrinsic deference is the weight the court attaches to the agency's policy views relative to the judicial interest in textual plausibility (represented in SSE's model as δ). Lower levels of intrinsic deference indicate more textualist courts or courts that are less willing to give agencies interpretive flexibility. Actual deference is the degree of textual implausibility a reviewing court will be willing to tolerate before it concludes the agency has gone too far.[29] But if the Step Zero–major questions

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[21] *See* Sunstein, *supra* note 17, at 193.

[22] *See id.*

[23] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33, 159–61 (2000).

[24] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228–34 (1994).

[25] *See generally* Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004).

[26] *See, e.g.*, Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354 (1988); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); United Transp. Union — Ill. Legis. Bd. v. Surface Transp. Bd., 183 F.3d 606 (7th Cir. 1999); Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995).

[27] *See* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201.

[28] *See* Sunstein, *supra* note 17, AT 231–32.

[29] Stephenson, *supra* note 1, at 542.

line of cases is taken either as a statement of when courts should defer or as an indicator of when courts do defer, then a basic building block of Stephenson's model seems not entirely stable.

B. Empty Sets, Full Sets, and Modest Puzzles

Suppose all agency actions can be categorized as either plausible or implausible and that all procedural devices are either costly or not costly. In this categorical world, there are four types of actions: (1) costly and plausible; (2) costly and not plausible; (3) not costly and plausible; and (4) not costly and not plausible. What does the SSE framework suggest about these categories?

As a class, costly and plausible interpretations should not exist. Agencies should/will use costly devices to advance implausible interpretations and advance plausible interpretations using not costly devices. Costly and implausible interpretations should be upheld by courts. The agency's choice of costly procedural formality credibly signals that the issue is an important one. Courts should defer in precisely these cases. Not costly and not plausible interpretations should be small set, but should be struck down by courts when they arise. Not costly and plausible interpretations should be upheld. The agency did not credibly signal high issue importance, but the advanced interpretation is textually plausible.

What is interesting about this typology is that what the model predicts should be empty or at least largely unpopulated sets are in fact quite full. Regulatory policy is full of plausible interpretations issued using costly formal procedures. True, most casebooks are not focused on these policies because the ensuing litigation is either nonexistent or uninteresting. Most agency interpretations issued in notice and comment rulemaking probably fall into this class.

The set of not costly (informal) implausible interpretations is similar. A recurrent complaint in administrative law during the past decade has been that too much agency policy is issued using informal mechanisms. There is no shortage of textually implausible interpretations issued using guidance documents. From the SSE perspective, the very existence and magnitude of this class presents a modest puzzle. That said, courts are clearly quite skeptical of these views, and so SSE is likely right about judicial treatment in litigation.

C. Lumpy Choices & Noisy Signals

The SSE framework does, however, fit quite naturally with a different theme in administrative law doctrine: mainly, that agencies

should be given flexibility about how to issue policy.[30] Absent a clear congressional directive, agencies may typically choose whether to use formal or informal rulemaking,[31] rulemaking or adjudication,[32] and action or inaction.[33] Letting the agency choose which procedures to use facilitates the SSE signaling mechanism. If the agency were required to use formal adjudication to issue a certain subset of policies, the costliness of the procedures would not reveal anything about how important the issue is to the agency. As a result, SSE provides an alternative foundation for these long-existing administrative law doctrines. The agency should be given flexibility with respect to procedural devices not only because the agency knows best how to allocate internal resources, but also because background flexibility will allow procedural choices to reveal meaningful information to courts about issue importance.

There are, however, exceptions. If this idea is correct, it suggests that the legislative rule doctrine is not only opaque,[34] but also counterproductive. A superficial gloss on the legislative rule doctrine requires that agencies may not issue certain types of policies using informal policy mechanisms, at least not to the extent that the policies will be deemed legally binding.[35] From a costly signaling perspective, this doctrine is exactly backward. Courts ought not require that agencies use formal procedures to issue certain types of policies; rather, courts should let the agency choose and infer issue importance on that basis of that choice. Other scholars have suggested a similar approach to legislative rules: let the agency choose how to issue the policy but only attach legal significance to the judgment if adequate formality was utilized.[36] The SSE idea is similar and suggests another reason that

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[30] *See generally* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1429–30 (2004).

[31] *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973).

[32] *See* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) ("In performing its important functions . . . an administrative agency must be equipped to act either by general rule or by individual order."); *see generally* Kevin M. Stack, *The Constitutional Foundation of* Chenery, 116 YALE L.J. 952 (2007).

[33] *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). *See generally* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004); Eric Biber, *Two Sides of the Same Coin: Judicial Review Under APA Sections 706(1) and 706(2)*, 26 VA. ENVTL. L.J. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981961.

[34] *See generally* Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. (forthcoming 2007), *available at* http://ssrn.com/abstract=996662.

[35] *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 917 (2004).

[36] *See* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001); *see also* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 950 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part).

courts ought not require that formal procedures be utilized for certain types of new rules.

Put somewhat differently, SSE shows why agencies should be given the flexibility to choose procedures, but externally imposed procedural requirements are no better for the credible signaling problem when imposed by Congress than when imposed by courts. Unfortunately (at least for the SSE vision), procedural requirements are imposed extensively by Congress. Indeed, the blend of procedures required by organic statutes and the Administrative Procedure Act (APA) serves as the conceptual foundation for all of the administrative state. When Congress requires that an agency use certain procedures for certain actions, how an agency issues its decision reveals nothing to a court about issue importance. By implication, either Congress should drop procedural requirements from agency statutes — an outcome that is not only unlikely but that will also strike many administrative lawyers as ludicrous — or the SSE theory cannot work for those agency actions constrained by specific statutory requirements.

It is true, of course, that agencies are not always — or perhaps even usually — constrained in this way. Often agencies can choose from a menu of procedural devices. Even if the first-best world for SSE would lack any congressionally imposed procedures, it does not follow that an agency's choice from a menu of procedures with varying costs reveals nothing to courts. On the contrary, when an agency chooses formal adjudication instead of informal adjudication, the difference in costs is genuine and therefore informative. But the choice of procedures is lumpy rather than continuous, and therefore less informative than it might otherwise be.

To be just a bit more forceful, note that virtually no agency utilizes formal rulemaking these days to issue policy.[37] And agencies may not usually issue legally binding policies of general applicability by relying on informal adjudication, at least if the policy is to have a binding legal effect.[38] Thus, for agencies governed by the APA, the choice is a stark one: informal rulemaking or formal adjudication.[39] For most judicial review of most agency actions, this will be the procedural choice that allegedly reveals whether the issue is of high or low importance.

I confess I have no powerful intuition about which of these procedures is typically more costly for agencies. Many notice and comment records are extensive and consume many years of agency resources.

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[37] *But see* Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (requiring agencies to consider explicitly the use of formal rulemaking).

[38] *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); Funk, *supra* note 36, at 1326.

[39] Although other agencies utilize formal adjudication to make policy, the mechanism is most often associated with the National Labor Relations Board.

On the other hand, some records are modest, and the duration of rulemakings short. The shortest formal adjudications are certainly less lengthy than the longest informal rulemakings. Perhaps the conventional wisdom is that formal anything is more costly than informal anything, but this seems too crude to do much good for a judge in the SSE world. Indeed, if the costliness of informal rulemaking and formal adjudication is even similar, then most courts will be able to glean very little about issue importance from an agency's choice of procedures. Again, this is not a critique of the internal coherence or even theoretical contribution of the paper; it is merely to suggest that we remain much further from the SSE world than it might first appear.

D. There Are Costs, and Then There Are Costs

Lastly, I offer one minor quibble and one possible extension. SSE convincingly shows that a strategic agency will trade off textual plausibility and procedural formality. The trouble is that in Stephenson's model textual plausibility and procedural formality are not true substitutes for each other. The degree of textual plausibility is summarized by the degree of "stretching" (defined in SSE's model as *s*) the agency does. As *s* increases, the agency advances an interpretation that is less textually plausible. But unlike formality, which imposes a direct cost on an agency, stretching does not. A little stretching is no more or less inherently costly for an agency. Rather, the "cost" of textual implausibility is that the probability of losing in litigation increases. If this is a genuine cost, then why ought not a court infer issue importance from a lack of textual plausibility? In the context of the model, a court can infer nothing from the degree of stretching (textual implausibility) an agency uses. But so long as the costs of implausibility are genuine, why should agencies not seek to signal issue importance by advancing wildly implausible interpretations? The system could not be sustained, because judges would uphold crazy interpretations (assuming crazy interpretations are costly). But crazy interpretations are costly precisely because judges are likely to strike them down. If judges are likely to uphold them, then crazy interpretations would not be costly, in which case judges could not infer anything about issue importance, and so on and so on. Still, on some views, there are independent costs to an agency from issuing absurd interpretations. If there is monitoring of the agency by Congress or interest groups, a series of absurd interpretations might result in lower funding, oversight hearings, bad press, or the removal of agency heads. If any of these things is true, then implausible interpretations would produce direct rather than indirect costs to the agency, and therefore judges might reasonably infer issue importance as a function of textual plausibility.

IV. Conclusion

In sum, I suggest that the SSE intuition fits awkwardly with some major strands of administrative law. But these are mainly peripheral concerns that manifest themselves on the frontiers of the SSE theory and applications. There is no doubt that SSE is an important and innovative piece of scholarship. I am delighted, therefore, to have had the privilege of commenting on it.