

THE STRATEGIC SUBSTITUTION EFFECT:  
TEXTUAL PLAUSIBILITY, PROCEDURAL FORMALITY,  
AND JUDICIAL REVIEW OF AGENCY  
STATUTORY INTERPRETATIONS

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*This Article presents a positive theoretical analysis of the relationship between the textual plausibility of an administrative agency's statutory interpretation and the procedural formality with which the agency promulgates that interpretation. The central claim is that, from the perspective of an agency subject to judicial review, textual plausibility and procedural formality function as strategic substitutes: greater procedural formality will be associated with less textual plausibility, and vice versa. Greater textual plausibility increases an agency's chances of a favorable judicial ruling but entails some sacrifice of policy discretion. Procedural formality is costly, but a reviewing court may give an agency more substantive latitude when the agency promulgates an interpretive decision via an elaborate formal proceeding. The court may view formal process as a proxy for variables that the court considers important but cannot observe directly, such as the significance of the interpretive issue to the agency's policy agenda. Because procedural formality and textual plausibility are both costly methods for increasing the agency's odds of surviving judicial review, a rational agency will choose the optimal mix of textual plausibility and procedural formality. Changes that increase or decrease the costs or benefits associated with one of these two variables will therefore have an indirect effect on the other variable as well. This Article develops the theoretical basis for this strategic substitution effect and explores its ramifications for administrative law.*

Administrative law scholarship is obsessed with the appropriate scope of judicial review of agency decisions.<sup>1</sup> This issue implicates questions not only about the scope or intensity of judicial oversight, but also about the relative significance of substance and procedure in judicial review of agency decisions. This Article, which focuses on review of agency legal interpretations, contends that the substantive

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<sup>1</sup> For but a small sampling of the voluminous literature on this issue, see CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION (1988); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; and Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522.

plausibility of agency interpretations to a reviewing court (which I refer to as “textual plausibility”<sup>2</sup>) and the procedural formality with which an agency promulgates those interpretations are linked at a fundamental behavioral level that the existing literature has not explored. Specifically, the textual plausibility and procedural formality of agency interpretive decisions function as “strategic substitutes” from the perspective of an agency subject to judicial review.<sup>3</sup> This Article develops the theoretical basis for this strategic substitution effect and explores its ramifications for administrative law.

The strategic substitution argument proceeds from the observation, occasionally noted but rarely pursued in depth, that courts often give an agency more substantive latitude when the agency promulgates an interpretive decision via an elaborate formal proceeding than when it announces its interpretation in a more informal context.<sup>4</sup> This behavior may arise because courts tend to view formal process as a proxy for variables that the court considers important but cannot observe directly, such as the significance of the issue to the agency’s mission or

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<sup>2</sup> I use “textual plausibility” as shorthand for the degree to which an agency’s interpretation corresponds to the interpretation that the reviewing court would adopt if the court had to interpret the statute without the benefit of the agency’s views. This terminology reflects the prominence that modern courts give to statutory text when assessing the reasonableness of a proposed interpretation. The terminology should not, however, be taken as an endorsement of textualism nor as an indication that the analysis applies only to textualist courts. The basic link between substance and process that this Article explores holds regardless of the method used to determine the substantive reasonableness of a statutory interpretation. See *infra* pp. 537–38.

<sup>3</sup> My use of the phrase “strategic substitution” differs in some respects from the more conventional usage of that term in the economics literature. Typically, goods or activities *A* and *B* are described as “strategic substitutes” when an increase in firm *X*’s production of *A* decreases the marginal benefit to firm *Y* of producing *B*. In contrast, *A* and *B* are “strategic complements” if greater production of *A* by firm *X* increases the marginal profitability of *B* to firm *Y*. See Jeremy I. Bulow et al., *Multimarket Oligopoly: Strategic Substitutes and Complements*, 93 J. POL. ECON. 488, 489, 494–95 (1985). In my discussion, I treat procedural formality and textual plausibility as outputs that are both “produced” by the agency. Nevertheless, my notion of strategic substitution is closely related to the more traditional concept, although the nonmarket nature of the strategic interaction between the agency and the court causes the analysis to differ somewhat. One can think of the agency as “producing” a level of procedural formality and the court as “producing” the stringency of the standard that will be applied to the substance of agency interpretations. These outputs are strategic substitutes in the sense that, as I show in this Article, increasing agency procedural formality decreases the marginal benefit to the court of a more stringent standard of substantive review, while an agency’s decision to decrease its level of procedural formality increases the marginal benefit to the court of a more stringent substantive standard. Alternatively, and equivalently, one can think of the agency as producing a level of textual plausibility and the court as producing a level of stringency for procedural review.

<sup>4</sup> The most extended treatments of this phenomenon of which I am aware are Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2137–48 (2002); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1437–42 (2004); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 225–28, 242 (2006); and Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 352–62 (1999).

the degree to which the agency's judgment reflects a sensible balancing of the relevant considerations. But although procedural formality and textual plausibility both increase the agency's odds of surviving judicial review, they are also both costly to the agency. Procedural formality is costly because of the time, effort, and resources that it requires, and perhaps also because it may trigger unwelcome external attention. Textual plausibility is costly because the agency often must sacrifice some of its policy goals in order to advance an interpretation that will appease the court.

If the agency is rational, it will try to secure judicial approval for its interpretation at the minimum possible cost to itself, which means it will neither adopt an interpretation that is more plausible than necessary nor use procedures that are more formal than necessary to satisfy the reviewing court.<sup>5</sup> In any given case, the agency must decide whether it is worth paying the costs associated with formal procedures in order to "purchase" greater judicial toleration of a more aggressive interpretation of the statute. Put another way, the agency must decide which costs it would rather bear: the costs of formal procedures or the costs of modifying its interpretation of the statute. Thus, interpretations advanced by agencies in more formal proceedings, such as notice-and-comment rulemaking,<sup>6</sup> will entail more aggressive stretches of statutory text, on average, than interpretations advanced in less formal contexts such as policy statements, guidance memoranda, or litigation briefs.<sup>7</sup>

The idea that substantive plausibility and procedural formality function as substitutes is unlikely to strike administrative law scholars

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<sup>5</sup> The first of these claims assumes the agency has an interest in interpreting the statutory text more aggressively than the court would otherwise be willing to let it, and the second claim assumes the agency does not benefit enough from additional procedures to adopt them on its own. However, there may be cases in which the agency's ideal interpretation of the statute is also highly plausible to the court, or in which the benefits to the agency of formal procedures are sufficiently high that the agency would adopt these procedures even without judicial review. In such cases, the agency's choice along the substantive or procedural dimension is unconstrained by judicial review.

<sup>6</sup> Technically, notice-and-comment rulemaking pursuant to section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (2000), is "informal." However, the judicial gloss on the APA has transformed section 553 rulemaking into an elaborate formal process. See *infra* pp. 553-54. The APA also includes a "formal rulemaking" category, but the Supreme Court has interpreted its triggering conditions so narrowly that it is rarely employed. See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 234-38 (1973); Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106-07 (2003).

<sup>7</sup> It is possible that procedural formality might also have moderating effects on agency interpretation, for example by encouraging an adversarial or deliberative process, but such effects are beyond the scope of this Article. Even if such moderating effects exist, the strategic substitution phenomenon will still give rise to an effect that cuts in the opposite direction.

as wholly novel.<sup>8</sup> After all, *United States v. Mead Corp.*<sup>9</sup> — the most prominent Supreme Court administrative law decision of the last several years — intimated that the amount of textual implausibility the Court would be willing to tolerate may depend on the procedural formality with which the agency promulgated its decision.<sup>10</sup> But while the basic logic of the strategic substitution effect may seem familiar and intuitive, I am not aware of any systematic scholarly analysis of the effect or its ramifications.

As this Article demonstrates, the strategic substitution effect has implications for a range of positive and normative debates about the impact of administrative law doctrines on agency behavior. Consider, for example, the debates that continue to rage over judicial doctrines that increase the costs of notice-and-comment rulemaking. It is often argued that these doctrines “ossify” rulemaking and cause agencies to

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<sup>8</sup> See *supra* note 4 and accompanying text. Substantive scrutiny and procedural review have long been contrasted as alternative approaches in the context of judicial review of discretionary policy choices, particularly in the 1970s debates between Chief Judge David Bazelon and Judge Harold Leventhal of the D.C. Circuit. Chief Judge Bazelon believed that, at least on issues involving complex subjects within an agency’s sphere of expertise, courts could not hope to review agency decisions on the merits, and so courts should instead focus on making sure that the agency employed a sufficiently open and adversarial procedure. Judge Leventhal believed that, even on complicated issues, reviewing courts had an obligation to learn as much as necessary to ensure that an agency’s decision was within the bounds of reasonableness. Compare, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 67 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring) (“Because substantive review of [technical] evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision-making by concentrating our efforts on strengthening administrative procedures . . .”), *with id.* at 69 (Leventhal, J., concurring) (“[J]udges have . . . to acquire the learning pertinent to complex technical questions in such fields as economics, science, technology, and psychology.”). For more on this debate, see Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599 (2002).

<sup>9</sup> 533 U.S. 218 (2001).

<sup>10</sup> See *id.* at 229–31; see also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 541–44 (2003) (arguing that courts should formally adopt a preference for agency actions taken through notice-and-comment rulemaking); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 884–88 (2001) (arguing that limiting *Chevron* deference to interpretations adopted pursuant to formal procedures preserves important process values). Not only have *Mead* and other cases drawn a connection between procedural formality and judicial deference, but several scholars also propose greater judicial attention to whether the administrative record demonstrates that an agency’s statutory interpretation is the product of reasoned decisionmaking, a proposal that would create indirect incentives for greater procedural formalization for interpretive decisions. See, e.g., Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 125–32 (1994); Mark Burge, Note, *Regulatory Reform and the Chevron Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?*, 75 TEX. L. REV. 1085, 1127–28 (1997). While the Supreme Court held that courts cannot impose procedural requirements beyond those mandated by the APA in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), this holding has not prevented courts — including the Supreme Court — from fashioning doctrines that influence the procedural formality of agency decisions. See *infra* pp. 553–54.

shift to less formal policymaking instruments such as opinion letters and guidance memos.<sup>11</sup> The strategic substitution effect and related phenomena mean that procedural costs also have other, less widely recognized impacts. Increasing procedural costs decreases the average textual plausibility of the interpretations that agencies adopt in formal contexts and may also decrease the average textual plausibility of the interpretations that agencies adopt informally. But by causing agencies to use informal procedures more frequently, increasing procedural costs may increase the expected textual plausibility of agency interpretations overall.

The strategic substitution effect is also relevant to debates over the appropriate level of deference to agency policy views. Doctrines that elevate the importance of agencies' ability to advance their agendas, and consequently instruct courts to place less emphasis on how well an agency's interpretation squares with the court's reading of the statute, encourage agencies to interpret statutes more aggressively. This effect is straightforward and unsurprising. But the strategic substitution phenomenon implies a second, less obvious effect as well. Increasing the weight the court attaches to agency policy views causes agencies to use formal procedures more frequently and for relatively less important issues. This result suggests that the voluminous literature on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>12</sup> and its progeny has completely overlooked a potentially important aspect of that line of cases.

The strategic substitution effect also has ramifications for the debates over the Supreme Court's controversial holding in *Mead*, which indicated a doctrinal link between procedural formality and judicial deference. While *Mead* is being treated in some quarters as a revolution,<sup>13</sup> at least one way to read the decision is as an implicit acknowledgement of the strategic substitution effect: courts defer more to for-

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<sup>11</sup> See, e.g., Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 272-74, 276-79 (1987); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 67-68, 81-82 (1995). For contrary views, see William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 395-98 (2000), and Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 514, 521 (1997).

<sup>12</sup> 467 U.S. 837 (1984).

<sup>13</sup> See, e.g., *Mead*, 533 U.S. at 239 (Scalia, J., dissenting) (describing *Mead* as an "avulsive change"); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); John F. Coverdale, *Chevron's Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 39, 40 (2003); Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 173-75 (2002).

mal agency decisions than to informal decisions because procedural formality is a proxy for other things that courts care about, thereby rendering textual plausibility relatively less important. On this reading, *Mead* was not a revolution, but simply an explicit endorsement of what most courts had already been doing for some time.<sup>14</sup> Alternatively, *Mead* might be read to imply that agency policy views are entitled to less *intrinsic* weight when a court reviews an informal agency decision. On this reading, *Mead* will increase agencies' incentives to use formal procedures, but will compel those agencies that proceed informally to adopt more textually plausible interpretations. These hypotheses are already commonplace.<sup>15</sup> The analysis in this Article reveals additional effects, however. First, the textual plausibility of interpretations adopted in *formal* proceedings may also increase as a result of *Mead*. Second, although *Mead* may increase the textual plausibility of both formal and informal interpretations, this increase in overall textual plausibility will be partially offset by a shift of some decisions from more plausible informal interpretations to less plausible formal interpretations.

This Article develops the positive theoretical case for the strategic substitution effect and explores its ramifications for administrative law. This inquiry is an exercise in positive political theory rather than normative theory or empirical analysis.<sup>16</sup> That is, my objective is to de-

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<sup>14</sup> Before the Supreme Court's decisions in *Mead* and in *Christensen v. Harris County*, 529 U.S. 576 (2000), numerous courts of appeals gave informal interpretations less deference than would ordinarily be mandated by *Chevron*. See John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 937 & n.215 (2004). Of course, courts of appeals sometimes *did* confer *Chevron* deference on informal interpretations, see *id.* at 937 n.215, but *Mead* does not foreclose that option, see *Mead*, 533 U.S. at 230–31. Also, even if *Mead* did represent a significant departure from the *Chevron* framework, it would be consistent with an earlier approach in which courts explicitly considered multiple factors, including the thoroughness apparent in the agency's consideration of the issue. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1019–20 (1992). My analysis suggests that, however the doctrinal labels are shuffled and reshuffled, the behavior of agencies and courts will have the same central tendency. Informal interpretations will typically receive less actual deference than formal interpretations, and agencies will anticipate this and respond accordingly.

<sup>15</sup> See, e.g., *Mead*, 533 U.S. at 245–46 (Scalia, J., dissenting); Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1304 (2002); Manning, *supra* note 14, at 940–41; Sunstein, *supra* note 4, at 226–27.

<sup>16</sup> While this methodological approach differs from much legal scholarship, a well-established research program in the legal academy applies positive political theory to doctrinal controversies in administrative law. Contributions include Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431 (1996); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343 (2002); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671 (1992); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Per-*

rive behavioral predictions from clearly stated assumptions and logical principles. While this Article explores some normative and doctrinal implications of these predictions, it does not take a bottom-line position on whether the phenomena described are good or bad. And while the positive theoretical analysis generates an array of empirically testable hypotheses, I leave rigorous testing of these hypotheses to future research. Part I of the Article explains the basic analytical framework, highlighting key assumptions about incentives, information, and institutional structure. Part II discusses the strategic substitution effect in greater detail and considers its implications for doctrinal controversies in administrative law, including debates about the costs of procedural formality, the level of judicial deference to agency policy objectives, and the degree to which this level of deference depends on the formality of agency procedures. The Appendix presents the formal model on which most of the analysis in the Article is based.

### I. AGENCY STATUTORY INTERPRETATION AND JUDICIAL OVERSIGHT

The analysis presented in this Article focuses on the interaction between a single administrative agency and a single reviewing court, each of which is treated as a unitary rational actor. This is obviously a simplification. In the real world, there are multiple agencies and multiple courts, as well as numerous other influential actors, including Congress,<sup>17</sup> interest groups,<sup>18</sup> the Office of Management and Bud-

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*spective*, 68 U. CHI. L. REV. 1137 (2001); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1 (1994); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006); and Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114 (1998). Although this research program is distinctive in its explicit application of economics and formal political science, it is in many ways simply a development or elaboration of an even more deeply rooted tradition in administrative law scholarship that considers how legal doctrine and institutions structure the incentives of agencies, courts, and other actors. See, e.g., SHAPIRO, *supra* note 1; Mashaw & Harfst, *supra* note 11; McGarity, *supra* note 11; Pierce, *supra* note 11; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987); Sunstein, *supra* note 1.

<sup>17</sup> See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE* (1990); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

<sup>18</sup> See Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

get,<sup>19</sup> and the President.<sup>20</sup> The treatment of administrative agencies and multimember courts as unitary actors also simplifies away the complex internal decisionmaking dynamics that shape collective institutional choices.<sup>21</sup> A more complete analysis might incorporate other actors and unpack the internal decisionmaking processes of agencies and courts, but for reasons of tractability, expositional simplicity, and analytical isolation of a particular set of behavioral effects, this Article considers a simpler, more stylized setting. Section A discusses the interpretive objectives of the agency and the reviewing court, while section B considers how each actor will behave in light of its information and available choices. Section C derives from this analytical framework the central claim that textual plausibility and procedural formality are strategic substitutes from the agency's perspective.

### A. *The Objectives of Statutory Interpretation*

The starting point for the analysis is to specify what administrative agencies and courts are trying to accomplish when they interpret statutes. I assume that an administrative agency wants to secure whatever interpretation would best advance its substantive policy agenda. Whether that agenda is determined by the preferences of agency leadership or staff, by external political or interest group influence, or by some other source is immaterial to the present inquiry, as is the ideological tilt (regulatory or deregulatory, liberal or conservative) of that agenda. The analysis simply assumes that the agency has some set of policy objectives and that the agency's preferred construction of the statute is the one that best advances those objectives. Agencies, on this view, are interpretive instrumentalists, attaching no intrinsic importance to textual fidelity or analogous concerns.<sup>22</sup>

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<sup>19</sup> See Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

<sup>20</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475, 489 (1987).

<sup>21</sup> On the internal agency decisionmaking process, see ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1967), and JAMES Q. WILSON, *BUREAUCRACY* (1989). For discussion of collective decisions by multimember courts, see MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING* (2000), and Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).

<sup>22</sup> It is of course possible that some agency personnel, particularly agency lawyers, may feel some intrinsic obligation to respect the statutory text. Also, agencies may want to cultivate a reputation for fairness and impartiality in order to cultivate public support. See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 495 (2005). The desire to maintain public support may create an additional incentive for the agency to adhere to the most textually plausible reading of the statute. This consideration, however, may also cut in the other direction if the general public is less concerned with close readings of statutory texts

Of course, agencies may care about textual fidelity for instrumental reasons, and they care in this analysis because of the assumption that agency interpretive decisions are subject to review by a court that *does* care about textual fidelity.<sup>23</sup> Specifically, I assume that the court, all else equal, prefers interpretations that correspond as closely as possible to its own view of the “best” reading of the statute. The degree to which a court’s view of the best interpretation is influenced by the political ideology of the judges — a topic of considerable controversy<sup>24</sup>

than with the perceived fairness of ultimate outcomes. *Cf. id.* at 443–45, 448–52, 457–59 (finding that, in contrast to organized interest groups, most members of the general public who comment on proposed regulations focus on a regulation’s policy impact at a high level of generality, rather than on the connection between the regulation and the authorizing statute). Although the assumption that agencies are pure policy instrumentalists may be too strong in some circumstances, this Article’s analysis would be essentially unchanged if some component of the agency’s interpretive interests were driven by an inherent concern for textual fidelity as long as the court’s views and the agency’s views diverge to some extent.

<sup>23</sup> The assumption that the agency’s interpretation is judicially reviewable is reasonable given the strong presumption in favor of reviewability. *See* *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743 (1992). However, three important qualifications to this assumption should be highlighted. First, agency decisions not to act are often less susceptible to judicial review. An agency’s decision not to initiate an enforcement action is presumptively nonreviewable, *see* *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985), although this is not so if the nonenforcement decision is based on an interpretation of a statute, *see* Sunstein, *supra*, at 676–78. Also, while an agency’s refusal to initiate or complete a rulemaking procedure is usually reviewable, such “action-forcing” suits are typically more difficult to win than suits challenging enacted rules. *See* *Cellnet Comm’n, Inc. v. FCC*, 965 F.2d 1106, 1111–12 (D.C. Cir. 1992); *Nat’l Customs Brokers & Forwarders Ass’n of Am. v. United States*, 883 F.2d 93, 96–97 (D.C. Cir. 1989); *see also* James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits* at 30, 10 WIDENER L. REV. 1, 28–33 (2003). Second, standing jurisprudence may make it easier to secure judicial review of agency interpretations that injure the regulated community than those that injure a more diffuse class of regulatory beneficiaries. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 223–35 (1992). Third, and perhaps most important for this Article, procedural formality may itself affect the availability of judicial review, in that an informal interpretive rule or policy statement may be considered nonfinal or unripe. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1318 (1992); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 817–22 (2001). This concern should not be overstated, however, given that most courts will treat an agency interpretation as final and ripe if it is likely to have a significant practical impact on regulated parties. *See* Magill, *supra* note 4, at 1441. In general, this Article does not address these complications directly. Rather, the Article focuses on the set of cases in which the agency’s interpretation will be subject to judicial review regardless of its substantive content or procedural pedigree.

<sup>24</sup> *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998); William S. Jordan, III, *Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45 (2001); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

— does not matter here, nor do debates over the legitimacy of various interpretive methods.<sup>25</sup> All that matters is the assumption that the reviewing court can rank possible interpretations of the relevant statute on a continuum from most reasonable (that is, most agreeable to the court) to least reasonable.<sup>26</sup> I use the term “textual plausibility” as shorthand for this variable,<sup>27</sup> but this terminology is not meant to imply an endorsement of a particular interpretive method or a position on the role of political ideology in judicial decisionmaking.

Consider, as an illustrative example, the ongoing interpretive controversy over the Clean Water Act (CWA) prohibition of dumping dredge or fill materials into “navigable waters” without a permit from the Army Corps of Engineers.<sup>28</sup> The breadth of the category “navigable waters,” defined unhelpfully by the CWA as “the waters of the United States,”<sup>29</sup> has been litigated in the Supreme Court three times, most recently in *Rapanos v. United States*.<sup>30</sup> The assumption that agencies are interpretive instrumentalists implies that the Corps would like to adopt whatever definition of “navigable waters” best advances what the Corps sees as its policy mission under the CWA. For example, if the Corps sees its mission as preserving the environmental integrity of the nation’s hydrologic ecosystem, it may prefer to construe “navigable waters” broadly to cover not only traditional navigable-in-fact waters such as rivers and lakes, but also wetlands, isolated ponds, floodplains, wet meadows, prairie potholes that occasionally fill with rainwater, and the like. The Corps might reasonably conclude that

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<sup>25</sup> See, e.g., STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006); Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3 (Amy Gutmann ed., 1997).

<sup>26</sup> In the formal model in the Appendix, textual plausibility is captured by the *s* variable. The conceptualization of this variable as continuous contrasts with a view that sees courts as dividing all interpretive choices into two categories: “reasonable” interpretations, which are all equally acceptable, and “unreasonable” interpretations, which are all equally unacceptable. Although courts and commentators sometimes discuss interpretive reasonableness as if it were dichotomous, in my view the continuity assumption is more intuitively plausible and seems to fit better with practice.

<sup>27</sup> See *supra* note 2 and accompanying text.

<sup>28</sup> 33 U.S.C.A. §§ 1311(a), 1344(a), (d), 1362(6) (West 2001 & Supp. 2006). The example in the text, though based on an actual controversy, is stylized and should not be read as an endorsement of any view about the best reading of the CWA or as an empirical claim about the views of the Supreme Court or the Army Corps of Engineers.

<sup>29</sup> *Id.* § 1362(7).

<sup>30</sup> 126 S. Ct. 2208 (2006). The other two Supreme Court decisions relating to this issue are *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

such a broad definition would best advance its interest in protecting the environment.

The assumption that the reviewing court cares about textual plausibility means, in the context of this example, that the court can rank various interpretations of “navigable waters” in order of how reasonable those interpretations seem to the court in light of the statute’s text, structure, history, and perhaps the court’s own policy preferences as well. It is possible that the court might think the most plausible reading of “navigable waters” in the CWA includes only traditional waterways that are navigable-in-fact. The court might also think that extending “navigable waters” to include tributaries of traditional navigable waters and adjacent wetlands stretches the statutory text some, but not very much. A broader definition that includes isolated ponds and saturated meadows might seem like even more of a stretch, but not as much as a definition that includes depressions in dry land that fill with rainwater on rare occasions.

This example presumes that the court thinks the most plausible reading of “navigable waters” is limited to traditional navigable-in-fact waters, while the Corps prefers a broader construction that includes wetlands and tributaries. Nothing in this Article’s analytical framework requires the court to believe that the most textually plausible interpretation is narrower or more antiregulatory than the interpretation preferred by the agency. One could easily invert the CWA example so that the court believes the most plausible interpretation of “navigable waters” is broad, while the Corps believes that limiting the CWA to traditional navigable-in-fact bodies of water would best advance the Corps’s interests, which might include promoting economic development and reducing administrative burdens. The analysis of the relationship between textual plausibility and procedural formality would not change in any substantial way, as there would still be a gap between the interpretations preferred by the court and the agency.<sup>31</sup>

If textual plausibility were all the court cared about, its decision would be straightforward: the court would reject any interpretation that deviated from its ideal.<sup>32</sup> I assume, however, that the reviewing

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<sup>31</sup> A recent case in which an agency arguably stretched the statutory text in order to reduce rather than increase its authority is the EPA’s determination that the Clean Air Act does not authorize regulation of greenhouse gas emissions. See *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (2006). Of course, the nature of the agency’s interpretation might affect the availability of judicial review, see *supra* note 23, but this Article does not address that issue.

<sup>32</sup> Alternatively, if the court were to incur some fixed “decision cost” if it reversed the agency, the court might instead reject any interpretation that deviates from its ideal by more than some set amount. See Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347, 349–52 (1997); Tiller & Spiller, *supra* note 4.

court may care, at least to some degree, about the agency's ability to achieve its substantive policy objectives. The court may attach intrinsic significance to the agency's policy objectives because of the belief that agencies have superior expertise, are more politically accountable, or have implicitly been delegated discretionary authority by Congress. *Chevron*, the leading case on the deference issue, appears to endorse all of these ideas.<sup>33</sup> Another possibility, related to the notion of greater agency accountability, is that agency policy views may more accurately reflect the preferences of the current legislative and executive branches, which the court may care about for either intrinsic or instrumental reasons.<sup>34</sup> An additional reason that the court might think it important for the agency to be able to advance its agenda is a positive correlation between the political or ideological predilections of the court and the agency.<sup>35</sup> Whatever the reason, the bottom-line assumption is that, all else equal, the reviewing court prefers that agencies have as much freedom as possible to pursue their policy agendas.<sup>36</sup>

Returning to the CWA example, the assumption that the reviewing court cares about the agency's ability to advance its policy agenda means that even if the court thinks the most plausible reading of "navigable waters" includes only navigable-in-fact rivers and lakes, the court might nonetheless be willing to accept a broader definition — say, one that included tributaries of traditional navigable waters as well as nearby wetlands — if such an interpretation were sufficiently important to the Corps's interest in protecting the nation's hydrologic ecosystem. One can see evidence of something like this sort of thinking in Justice Kennedy's controlling opinion in *Rapanos*.<sup>37</sup> Justice

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<sup>33</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45, 865–66 (1984).

<sup>34</sup> See Elhauge, *supra* note 4, at 2126–31.

<sup>35</sup> See Cohen & Spitzer, *supra* note 16 (arguing that the Supreme Court will call for greater appellate court deference to agencies when the agencies' preferences align more closely with those of the Supreme Court); Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. (forthcoming Dec. 2006) (on file with the Harvard Law School Library) (hypothesizing that a court will impose a more demanding standard of review as the agency's policy preferences stray further from the court's).

<sup>36</sup> The analysis does, however, allow for the possibility that courts prefer to maximize their own power at the expense of the agency, in that one can set the weight the court attaches to the agency's views at zero.

<sup>37</sup> Justice Kennedy agreed with Justice Stevens's dissent that the plurality's definition of "waters" was unduly narrow, *see Rapanos v. United States*, 126 S. Ct. 2208, 2241–47 (2006) (Kennedy, J., concurring in the judgment), but unlike Justice Stevens, Justice Kennedy concluded the government had to show that the wetlands and tributaries at issue had a sufficient connection to traditional navigable bodies of water, *see id.* at 2247–50. Therefore, Justice Kennedy concurred in the plurality's judgment that the cases had to be remanded. *Id.* at 2250. As Justice Stevens pointed out, any assertion of Corps jurisdiction that satisfied Justice Kennedy would also satisfy the four dissenters (Justice Stevens's opinion was joined by Justices Souter, Ginsburg, and Breyer) and so would command a Court majority. *Id.* at 2265 (Stevens, J., dissenting). Justice Stevens

Kennedy criticized Justice Scalia's plurality opinion — which adopted an extremely narrow interpretation of “navigable waters”<sup>38</sup> — for, among other things, being “unduly dismissive of the [policy] interests asserted by the United States” in a broader definition and for giving “insufficient deference to Congress’ purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate.”<sup>39</sup> This language implies a belief that the judiciary must be sensitive to the agency’s policy interests when deciding whether the agency’s statutory construction is sufficiently plausible to merit deference.<sup>40</sup>

On the account sketched above, a court reviewing an agency interpretive decision has two broad objectives. First, the court would like, all else equal, to maximize the correspondence between the interpretation ultimately implemented and the court’s own view of the best reading of the statute. That is, the court would like to maximize textual plausibility. Second, the court would also like — again, all else equal — to maximize the agency’s ability to advance its policy agenda. The problem is that, except in those cases in which the agency’s most preferred interpretation happens to be the one the court thinks most textually plausible, these two interests will conflict. So, the degree to which the court will accommodate agency policy objectives will be constrained by the court’s interest in textual plausibility, and the court’s insistence on textual plausibility will be constrained by the court’s desire to give the agency some interpretive latitude.<sup>41</sup> To illus-

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also noted that the Corps would have jurisdiction in any case that passed the plurality’s test but failed Justice Kennedy’s. *Id.* The latter scenario seems highly improbable, however, given the nature of the respective tests.

<sup>38</sup> See *id.* at 2220–25 (plurality opinion).

<sup>39</sup> *Id.* at 2246–47 (Kennedy, J., concurring in the judgment).

<sup>40</sup> Justice Kennedy conceded that “environmental concerns provide no reason to disregard limits in the statutory text,” but insisted that the plurality’s reading of the text was incorrect. *Id.* at 2247. This statement could imply that Justice Kennedy views textual plausibility as binary rather than continuous, contrary to the assumption made in this Article. See *supra* note 26. An alternative reading, however, is that Justice Kennedy believes that the importance of the policy interests asserted by the government is relevant to the amount of interpretive stretching a reviewing court should tolerate and that the plurality was wrong to assert that the Corps stretched the statute beyond the permissible bounds.

<sup>41</sup> An interesting substantive interpretation of this tradeoff arises if one construes the court’s interest in textual plausibility as deriving from the court’s desire to enforce the views of the *enacting* Congress and construes the court’s interest in facilitating the agency’s policy agenda as reflecting the court’s desire to give effect to the preferences of the *current* Congress. On this view, the court may care about *both* the preferences of the enacting Congress *and* the preferences of the current Congress and may therefore settle on an interpretive strategy that balances these goals. This view contrasts with alternative approaches that presume the court must make a one-or-the-other choice between acting as the faithful agent of the enacting Congress or the current Congress. See John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263 (1992); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). The idea that the court

trate with the CWA example, the court's interest in textual plausibility does not necessarily mean it will insist on limiting Corps jurisdiction to navigable-in-fact rivers and lakes, but at the same time, the court's desire to give the agency room to pursue its policy goals does not mean that the court would tolerate, say, a decision by the Corps to extend CWA jurisdiction over all land in the country that gets occasional rainfall.

To describe how the court will trade off its interest in textual plausibility against its interest in facilitating the agency's policy agenda, one must characterize the relative importance of these interests from the court's perspective. I do this by referring to the weight the court attaches to the agency's policy views relative to the judicial interest in textual plausibility as the level of "intrinsic deference" that the court confers on the agency.<sup>42</sup> Intrinsic deference thus captures how important the court considers the agency's ability to realize its policy goals. Another way to think about the concept of intrinsic deference is as a measure of the court's "textualism," where lower levels of intrinsic deference indicate a more aggressively textualist court. The idea, again, is that intrinsic deference measures the relative importance to the court of the court's own conception of textual plausibility compared with the agency's ability to pursue its policy goals. Aggressively textualist courts are likely to place more weight on the former than on the latter, so textualist courts are likely to exhibit lower levels of intrinsic deference.<sup>43</sup>

It is essential to distinguish the concept of intrinsic deference from the degree of textual implausibility a reviewing court will be willing to tolerate before it declares the agency has gone too far. I refer to this latter concept as "actual deference." While intrinsic deference is an exogenous parameter that describes the relative weight the reviewing court attaches to competing objectives, the court's actual deference to agency decisions is an endogenous behavioral result of the interaction between the court and the agency. In the CWA example, intrinsic deference is the weight the court assigns to the Corps's policy mission relative to the court's interest in fidelity to the statutory text. In contrast, actual deference describes the most textually implausible interpretation of "navigable waters" that the court would tolerate. It is critical to keep the analytical and terminological distinction between

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balances its competing interests in advancing the purposes of both the enacting and current legislatures is more consistent with "dynamic" theories of statutory interpretation that advocate such balancing. See, e.g., ESKRIDGE, *supra* note 25.

<sup>42</sup> In the formal model presented in the Appendix, intrinsic deference is parameterized as  $\delta$ .

<sup>43</sup> See Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Scalia, *supra* note 1, at 521.

intrinsic deference and actual deference in mind, especially given that one of the key results of the analysis is that the level of actual deference may vary even if the level of intrinsic deference is held constant.<sup>44</sup>

Another possibility to consider is that the level of intrinsic deference may depend on the formality of agency procedures. For example, a court might treat agency policy views as less important when the court reviews an informal agency proceeding, perhaps because the court believes informal policymaking is likely to be worse on some dimension that the court cares about, independent of the signal that the use of informal procedures may send to the court about the importance the agency attaches to the interpretive issue. I am agnostic about the plausibility of courts' attaching this sort of intrinsic weight to procedural formality, but because at least some accounts of judicial doctrine or behavior imply such a tendency, it makes sense to allow for the possibility in the analysis.

This idea that courts may confer less intrinsic deference on informal agency interpretive decisions can be incorporated into the analytic framework developed here by allowing the court to "discount" the significance of the agency's policy views by some amount if the agency uses informal procedures. I will use the term "informality discount" to describe the degree to which this occurs. If there is no informality discount, then the court's intrinsic deference to agency policy views does not depend on what procedures the agency uses, though the level of actual deference may still differ. If the informality discount is absolute, then the court will not accept any deviation from its own view of the best construction of the statute unless the agency uses formal procedures. The informality discount may also take some intermediate value, such that the court still confers some intrinsic deference when reviewing informal agency interpretations, but not as much as it would have if the agency had proceeded formally.<sup>45</sup>

Before proceeding, it is worth noting that although this Article focuses on judicial review of agency interpretations of law, the same basic analytical framework could apply to review of other types of agency decisions. Suppose, for example, that the application of interest were not judicial review of an agency's interpretation of a statute, but were instead "hard look" review of a discretionary agency policy choice. In this context, it would not make sense to speak of the court evaluating the textual plausibility of the agency's decision. But it still would be sensible to imagine that the agency and the court have con-

<sup>44</sup> See *infra* section II.A, pp. 553–57.

<sup>45</sup> In the model presented in the Appendix, the informality discount is the parameter  $\alpha$ . When  $\alpha = 0$ , intrinsic deference is independent of procedural formality. Larger values of  $\alpha$  indicate a larger informality discount, and when  $\alpha = 1$  the agency receives no intrinsic deference absent formal procedures.

flicting preferences over some aspect of the decision that the court is able to observe. Instead of calling this variable “textual plausibility,” one could simply relabel it as “the ideological appeal of the decision to the court” or as “the court’s perception of the decision’s substantive rationality,” and the analysis developed in this Article would apply in essentially the same way.<sup>46</sup>

*B. The Strategy of Statutory Interpretation*

Although the agency’s objective is to secure an interpretation that maximizes its ability to achieve policy goals, it must make its interpretive decision in the shadow of judicial review. In some cases, the agency’s ideal interpretation may sufficiently correspond with the court’s ideal interpretation that judicial review imposes no substantial constraint on the agency. In other cases, the statute’s text may be sufficiently vague, or the court’s sympathies with the agency’s objectives sufficiently strong, that the court does not care much about textual plausibility.<sup>47</sup> In such cases, judicial review will be an insignificant constraint. The more interesting and substantively important cases, and the cases on which this Article focuses, are those in which the court would not be willing to uphold the agency’s most preferred interpretation of the statute. When an administrative agency finds itself in this sort of situation, its rational course of action is to stretch the statutory text in the direction of its most preferred interpretation as far as it can, just shy of the point at which the interpretation is so extreme that the reviewing court is likely to reject it.<sup>48</sup> So, in the CWA example, the Corps will try to figure out how much it can claim is covered by the term “navigable waters” without a majority of the reviewing court determining that the Corps’s interpretation is too implausible to merit deference.

This general claim may be subject to a variety of exceptions and qualifications. Perhaps in some cases agency decisionmakers care more about the symbolic value of taking a position than they care about actually achieving a policy outcome. This preference might lead agencies to ignore the judicial constraint on their interpretive freedom. There may also be cases in which an agency hews fairly closely to the court’s view in order to maintain a good reputation with the court, even if the agency could get away with a more aggressive interpretation. Notwithstanding these qualifications, it is reasonable to suppose that in most cases the agency will stretch the statute as far as it thinks

<sup>46</sup> See Stephenson, *supra* note 35.

<sup>47</sup> To put this in the terminology introduced in section A, intrinsic deference may be very high.

<sup>48</sup> Often, the task of making this assessment falls to the agency’s general counsel. See Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 LAW & CONTEMP. PROBS. 19, 22–24 (1998).

the reviewing court will let it, so that is the behavioral assumption I make.<sup>49</sup> I also make the simplifying assumption that the agency can accurately forecast how aggressively it can interpret the statute without triggering judicial reversal.<sup>50</sup>

In addition to deciding how aggressively to stretch the statutory language, the agency can decide whether it wants to promulgate its interpretation in a relatively formal proceeding, such as notice-and-comment rulemaking, or through a more informal mechanism, such as an interpretive rule or guidance memorandum.<sup>51</sup> Agencies do not always have this sort of procedural discretion, of course. Some statutes require that certain decisions be made via rulemaking or in other relatively formal settings.<sup>52</sup> Sometimes, agencies lack the authority to make rules, and so the only way for them to offer their interpretive views is through informal memoranda and the like.<sup>53</sup> Nonetheless, the assumption that agencies have a choice of procedural forms is realistic in a large and important set of cases.<sup>54</sup>

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<sup>49</sup> Another possibility is that the agency will promulgate its most preferred interpretation and accept that the court will cut back on it somewhat. This strategy may be optimal if the agency suffers no penalty from being reversed and if the court only excises those aspects of the agency's interpretation that go too far rather than rejecting the agency's view wholesale and substituting the court's own most preferred interpretation. The end result would then be identical to that discussed in the text, in that the final interpretation adopted is the most extreme interpretation that the court would be willing to uphold.

<sup>50</sup> More generally, I assume that the court and the agency have perfect information, with one important exception: the court may be uncertain about how important the interpretive issue is to the agency's policy agenda. *See infra* pp. 548–49. A potentially interesting extension, which I do not explore in this Article, might incorporate agency uncertainty regarding judicial preferences. Such uncertainty might arise because the agency cannot predict the composition of the appellate panel that will review its decision, because the issue is one on which the interpretive preferences of individual judges are hard to ascertain, or because of other reasons. When the agency is unsure of how the reviewing court will read the statute, or of how much textual implausibility the court will tolerate, the agency must decide how much it is willing to gamble that it will get a sympathetic judicial ear. This extension raises a number of complications that, while interesting, are secondary to the main point of this Article, and so I leave them to future research.

<sup>51</sup> The normal notice-and-comment requirements of § 553 do not apply to “interpretative rules [or] general statements of policy.” 5 U.S.C. § 553(b)(A) (2000). The scope of this exception is one of the most confusing and controversial issues in administrative law. *See* Anthony, *supra* note 23, at 1313–16; Manning, *supra* note 14, at 893–97; Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 548–49 (2000).

<sup>52</sup> *See* Magill, *supra* note 4, at 1389 & n.12. Also, judicial doctrine on the distinction between interpretive and legislative rules may affect the agency's freedom to announce interpretations of statutes in less formal contexts. *See infra* note 107. Alternatively, however, judicial doctrine regarding agency freedom to announce certain interpretive decisions only after relatively formal proceedings might be characterized not as an exogenous constraint, but rather as the manifestation of a rational judicial decisionmaking process that reflects the considerations examined in this Article.

<sup>53</sup> *See* Magill, *supra* note 4, at 1387–88.

<sup>54</sup> *See id.* at 1386.

What relevant differences between formal and informal procedures might influence the agency's procedural choice? One of the most salient differences is that formal procedures are more costly for the agency. The costs associated with procedural formality include delay, staff time, money, and perhaps more intensive scrutiny from Congress or other overseers.<sup>55</sup> It is widely believed that these procedural costs are substantial and that they are often a significant consideration in agency decisionmaking.<sup>56</sup>

If these are the costs of procedural formality, what are the benefits? One possibility is that the agency may believe that certain procedures improve the quality of its decisions or generate more political support for the agency. To the extent that this is so, agencies may adopt formal procedures independent of judicial review or any other form of oversight. Another possibility, more central to the analysis in this Article, is that formal procedures that go above and beyond what the agency would otherwise choose to employ may improve the agency's prospects before the reviewing court.

The idea that the procedural formality of an agency decision can buy the agency more deference from the reviewing court has appeared in the literature.<sup>57</sup> There is also some evidence of this phenomenon in reported decisions. Most prominently, *Mead* explicitly stated that higher levels of procedural formality may merit greater judicial deference.<sup>58</sup> Some of the separate opinions in *Rapanos* also suggest that procedural formality might bear on judicial tolerance for expansive agency interpretations. For example, although Chief Justice Roberts joined Justice Scalia's plurality opinion, he also filed a separate opinion criticizing the Corps for abandoning a proposed rulemaking to clarify its interpretation of its statutory jurisdiction.<sup>59</sup> The Chief Justice suggested that the Corps would have been entitled to substantial deference had it completed this rulemaking.<sup>60</sup> But his view concerning the relevance of the Corps's failure to complete the proposed rulemaking was somewhat opaque. As Justice Kennedy pointed out, it was unclear how the Corps could have satisfied Justice Scalia's plurality opinion, which the Chief Justice joined, if the Corps's interpretation of "navigable waters" — whether adopted in a rulemaking context or

<sup>55</sup> In the formal model in the Appendix, the cost of formal procedure is denoted *k*.

<sup>56</sup> See, e.g., McGarity, *supra* note 11; Pierce, *supra* note 11.

<sup>57</sup> See *supra* note 4 and accompanying text.

<sup>58</sup> See *infra* section II.C, pp. 560–63.

<sup>59</sup> See *Rapanos v. United States*, 126 S. Ct. 2208, 2235–36 (2006) (Roberts, C.J., concurring).

<sup>60</sup> See *id.* at 2236 (declaring that, in light of the ambiguous but not unlimited terms of the CWA, the Corps "would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of [its] authority" if it had completed a proposed rulemaking on the meaning of "navigable waters" following the Court's decision in *SWANCC*, and criticizing the agency for choosing to "adhere to its essentially boundless view of the scope of its power").

otherwise — extended beyond what the plurality declared reasonable.<sup>61</sup> One possible interpretation of the Chief Justice’s concurrence is that the Corps would have been entitled to more interpretive leeway had it adopted a somewhat more limited interpretation through notice-and-comment rulemaking, even if that interpretation had extended beyond what Justice Scalia would have allowed.

The idea that the Corps might have broader interpretive authority when it relies on more formal procedures is also evident in Justice Kennedy’s opinion, which asserted that the relevant inquiry is whether the regulated area has a “significant nexus” to a traditional navigable-in-fact body of water.<sup>62</sup> Justice Kennedy made clear that he would not accept at face value an assertion by the Corps that a particular wetland or tributary meets this test.<sup>63</sup> Instead, the Corps has two options. It can establish a “significant nexus” on a case-by-case basis,<sup>64</sup> which will often require a substantial evidentiary showing. Alternatively, the Corps can adopt regulations identifying categories of tributaries or wetlands that have a significant nexus to navigable waters in a sufficiently large number of cases, thus obviating the need for costly (and judicially scrutinized) case-specific determinations.<sup>65</sup> This statement implies that the Corps may have more leeway if it acts via rulemaking. Justice Breyer’s dissent took this notion further by urging the Corps to promulgate a rule that defines more precisely — and more favorably to the Corps — the meaning of the “substantial nexus” test.<sup>66</sup> Though none of these opinions was entirely clear on the impact that a rulemaking would have on the Corps’s interpretive freedom, they all suggested that more procedural formality might result in greater judicial deference.

Why might a reviewing court confer more actual deference on an agency interpretation adopted in a relatively formal proceeding, such as notice-and-comment rulemaking? There are at least two possibilities. First, the court may believe procedural formality is positively correlated with high-quality agency decisionmaking. Greater procedural formality may indicate to the court that the agency’s underlying policy choice merits more respect, especially if the court lacks the expertise to evaluate that choice substantively. The court may, for example, believe that procedural formality facilitates the accurate

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<sup>61</sup> *Id.* at 2247 (Kennedy, J., concurring in the judgment).

<sup>62</sup> *Id.* at 2247–48.

<sup>63</sup> *See id.* at 2248–52.

<sup>64</sup> *See id.* at 2249.

<sup>65</sup> *See id.* at 2248.

<sup>66</sup> *See id.* at 2266 (Breyer, J., dissenting) (“[T]he Court, contrary to my view, has written a ‘nexus’ requirement into the statute. But it has left the administrative powers of the Army Corps of Engineers untouched. That agency may write regulations defining the term . . . . And the courts must give those regulations appropriate deference.” (citations omitted)).

evaluation of complex issues, promotes reasoned deliberation, or prevents special-interest capture.<sup>67</sup> Ultimately, the specific reason is of secondary importance here. Indeed, the court's beliefs about the effect of formal procedures on agency decisionmaking need not be correct. The key is that the degree to which the court cares about the agency's ability to achieve its policy objectives depends in part on whether the agency identifies those objectives through a relatively formal process. To put this idea in the terminology developed in section A, the informality discount may be greater than zero — that is, the level of intrinsic deference to agency views may be lower if the agency proceeds informally — if the court perceives a connection between procedural formality and decisional quality.

A second reason procedural formality may influence the court's decision is that the very costliness of formal procedures provides the court with valuable information about how important the interpretive question at issue is to the agency's policy agenda.<sup>68</sup> It is reasonable to suppose that interpretive issues vary in their importance to agencies and that an agency's incentive to interpret a statutory provision aggressively will be stronger for issues that the agency views as very important.<sup>69</sup> For less important issues, agencies will still prefer to secure interpretations that advance their policy agendas, but this incentive will be weaker. Moreover, just as an agency has a stronger incentive to interpret a statute aggressively if it involves a very important issue, the court has a stronger incentive to tolerate an aggressive agency interpretation when the agency views the issue as very important.<sup>70</sup>

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<sup>67</sup> See Sunstein, *supra* note 4, at 225 (suggesting that *Mead* might be explained by the view that formal procedures “safeguard[] against arbitrary, ill-considered, or biased agency decisions”); see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985) (describing reviewing courts' efforts to “ensure that the agency has not merely responded to political pressure but that it is instead deliberating in order to identify and implement the public values that should control the controversy”). But see Sunstein, *supra* note 4, at 227 (raising questions about the degree to which notice-and-comment rulemaking actually increases the quality of agency interpretations). Another possibility is that the initiation of a formal process such as notice-and-comment rulemaking may generate more political support for the agency's proposal, see Cuéllar, *supra* note 22, at 494–95, which would enhance the agency's prospects on judicial review. See Martha Minow, *Recognition, Redistribution, Resistance in U.S. School Reforms* 20 n.52 (2006) (unpublished manuscript, on file with the Harvard Law School Library) (“Proposing a rule and leaving it in that proposed state may reflect a political strategy. The administration gains points from supporters for pursuing this policy, avoids court challenge to it, and generates potential support from both experimentation and research efforts . . .”). This sort of argument has a different substantive flavor from the anti-capture/pro-deliberation argument that formal procedures can increase the court's perception of the quality of the agency's policy views, but it has the same basic structure.

<sup>68</sup> For a fuller development and elaboration of this argument, see Stephenson, *supra* note 35.

<sup>69</sup> In the formal model in the Appendix, the relative importance of the interpretive issue is parameterized as  $\theta$ .

<sup>70</sup> It is essential to clarify this last claim. It might seem that if an issue is particularly important, then the court would also care more about getting the interpretation “right” as a matter of

That is, the importance of an interpretive issue to the agency will also matter to the reviewing court, at least as long as the reviewing court treats the agency's policy views as entitled to some level of intrinsic deference.<sup>71</sup>

The CWA example illustrates these ideas nicely. Imagine that the court thinks that extending Corps jurisdiction over isolated wetlands that do not join with a traditional navigable waterway involves a fairly serious stretch of the statutory language, but the court thinks it is important that the Corps be able to advance its substantive goal of protecting the nation's hydrologic ecosystem. The Corps might view the inclusion of isolated wetlands within the scope of its jurisdiction as vital to this policy mission, or the Corps might view the inclusion of isolated wetlands as somewhat valuable but hardly essential. If the former, then the reviewing court's commitment to supporting the agency's mission, coupled with the importance of the interpretive decision at issue to the success of that mission, would lead the court to tolerate the stretch of the text that the Corps's construction would entail. If the latter, however, the court would be unwilling to accept the Corps's broad interpretation because the issue would be of insuffi-

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text and would therefore be less tolerant of aggressive agency interpretations. Insofar as the general importance of an issue strengthens the court's interest in ensuring textual plausibility, however, that interest is implicitly incorporated into the level of intrinsic deference. The concept of "importance" relevant to the argument developed here is the importance of an issue to the agency's policy agenda, given some constant level of intrinsic deference. The substantive claim is that, given a nonzero level of intrinsic deference, the court will be more willing to cut the agency some slack if the interpretive question at issue is very important to the agency's policy objectives. Of course, if the court does not think it appropriate to give more latitude when the interpretive issue is very important to the agency, then the agency will not have an incentive to convince the court that an issue is important, via formal procedures or otherwise.

<sup>71</sup> Both the signaling argument and the quality-enhancement argument can be thought of as versions of the claim that procedural formality can assist the agency by generating a record it can use to defend a decision in court. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1493-94 (1992). The signaling explanation and the quality-enhancement explanation differ as to the *reason* an extensive record improves the agency's prospects before the court. A third possibility, advanced by Tiller & Spiller, *supra* note 4, at 352-62, is that formal procedures that entail high decision costs for the agency also raise the reviewing court's decision costs of reversing. This hypothesis is quite different from the arguments developed in this Article, which assume that the intrinsic effort cost to the court of reversing an agency decision is independent of the procedural form employed by the agency. This Article contends that formal procedures can influence judicial behavior not because they raise intrinsic barriers to judicial reversal, but rather because they create outcome-based incentives for the court to accept agency interpretive decisions. This approach connects the cost of formal procedures to the agency to the value of formal procedures to the court, whereas in Tiller and Spiller's argument, the fact that certain procedures have high decision costs for the agency and high reversal costs for the court appears to arise by coincidence. That said, while the analysis developed here differs from the decision cost argument espoused by Tiller and Spiller, the arguments are not mutually exclusive, and Tiller and Spiller may well be correct that certain costly procedural devices are attractive to agencies because their use raises courts' decision costs of reversing.

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cient policy importance to justify the attendant sacrifice of textual plausibility.

If 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. This claim, admittedly a simplification, flows from the idea that agencies have a better understanding of the practical consequences of their interpretive decisions, as well as greater sensitivity to the salience of an issue to the President, Congress, or affected parties. Furthermore, the agency has an incentive to characterize all issues as high-importance issues in order to obtain greater judicial indulgence. In the CWA example, the Corps has an incentive to tell the court that including isolated wetlands within the definition of "navigable waters" is crucial to the Corps's mission even if the Corps actually views this extension of jurisdiction as of only modest importance.<sup>72</sup>

The agency's decision regarding the level of procedural formality can help mitigate this asymmetric information problem. Because formal procedures are costly to the agency, they can provide a credible signal to the court that the agency views an interpretive issue as quite important. Consider how agency incentives differ as issue importance varies. For low-importance issues, the agency's decision to interpret the statute aggressively improves the agency's welfare, but not by very much. If formal procedures are sufficiently expensive, then on a low-importance issue it is irrational for an agency to promulgate an aggressive interpretation in a formal proceeding, even if the court would uphold it; the agency would be better off adopting a more textually plausible interpretation in an informal setting. For a high-importance issue, by contrast, the agency would gain a lot from a more aggressive interpretation — so much that it would do better by adopting an aggressive interpretation in a costly formal proceeding than by adopting a more moderate interpretation in an informal proceeding, as long as the court would be willing to uphold the former as well as the latter. Under these conditions, then, the court can infer from an agency's use of formal procedures that the importance of the interpretive issue to the agency's agenda must be relatively high. Because the court cares more about the agency's views on high-importance issues, the court is willing to uphold more aggressive statutory interpretations when they are promulgated via more formal procedures.<sup>73</sup>

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<sup>72</sup> This claim assumes the court cannot verify the agency's assertions. If it could, the agency's incentive to misrepresent would be reduced in proportion to the probability of the court's independently learning the truth.

<sup>73</sup> This signaling argument depends on the notion that the agency can assess the importance of an issue *before* deciding on the procedures to employ, while the court *never* directly observes the

Though courts rarely frame their interest in agency procedural formality in precisely these terms, judges make occasional suggestions along these lines.<sup>74</sup> Chief Justice Roberts's concurrence in *Rapanos* may be an example. The Chief Justice complained that although the Corps considered a rulemaking to clarify the scope of its CWA jurisdiction, it eventually abandoned the process.<sup>75</sup> One way to read the Chief Justice is as faulting the Corps for maintaining a broad interpretation of the statute despite its apparent unwillingness to invest the time and effort needed to complete the rulemaking process. The implication — albeit subtle and perhaps subconscious — is that if the Corps is not sufficiently committed to a relatively broad reading of the statute to bear the costs associated with a notice-and-comment rulemaking, then its claim that a broad interpretation is critical to its policy agenda does not deserve to be taken very seriously.

Justice Kennedy's opinion might also be interpreted in costly signaling terms. Recall that Justice Kennedy would require one of two things if the Corps wants to assert jurisdiction over wetlands or tributaries that do not have an immediate and obvious connection to a navigable-in-fact body of water. Either the Corps must adopt a regulation establishing that certain types of wetlands or tributaries have a substantial nexus to navigable waters as a categorical matter, or else the Corps must make an individualized showing that a particular wetland or tributary has such a nexus.<sup>76</sup> While both a general regulation and a specific determination are judicially reviewable on the merits, review on the merits would involve difficult technical and scientific questions, and courts are particularly reluctant to second-guess the re-

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issue's importance to the agency. The former assumption rests on the notion that an agency typically knows the basic contours and implications of its interpretive choice before deciding whether to initiate a formal proceeding. See Elliott, *supra* note 71, at 1492, 1494–95. The latter assumption is grounded in the notion of superior agency expertise and accountability, as well as agencies' incentive to convince courts that all issues are really high-importance issues.

Furthermore, formal procedures can function as a signal only if the agency correctly believes that the court presumes an issue is more important if the agency uses formal procedures. If the court does not attach enough significance to the agency's procedural choice, the agency will never bother using formal procedures. Also, while the discussion in the text and the formal analysis in the Appendix explain how and why costly procedures can function as a credible signal of issue importance, they cannot explain why this *particular* signal is the one selected. Why, then, would procedural formality, and not some other costly activity, come to perform a signaling function? One plausible explanation is that the relevant institutions and doctrines were not designed with this sort of costly signaling in mind, but rather evolved into a signaling role over time. A related explanation is that the court may derive other benefits from formal procedures, including the perceived increase in decisionmaking quality discussed earlier, such that the court sees procedural formality as a more efficient form of credible signaling than other options. For a fuller discussion of this set of issues, see Stephenson, *supra* note 35 (manuscript at 27–29).

<sup>74</sup> See Stephenson, *supra* note 35 (manuscript at 25–26 & n.92).

<sup>75</sup> See *Rapanos v. United States*, 126 S. Ct. 2208, 2235–36 (2006) (Roberts, C.J., concurring).

<sup>76</sup> See *id.* at 2248–49 (Kennedy, J., concurring in the judgment).

sponsible agency's determinations in such contexts.<sup>77</sup> That said, both a categorical rulemaking and an adequate case-specific showing entail costs for the agency — either the costs associated with the rulemaking process, or the costs of procuring and introducing scientific evidence (and rebutting opposing experts) in an enforcement proceeding. Even if the reviewing court is ill-equipped to evaluate the agency's scientific showing on the merits, the cost of making this showing helps ensure that the Corps will assert jurisdiction over nonnavigable wetlands and tributaries only when it perceives doing so as sufficiently important.<sup>78</sup>

### C. *The Strategic Substitution Effect*

The foregoing characterization of the interpretive objectives and strategies of agencies and courts leads straightforwardly to the central positive theoretical claim of this Article: as long as the court confers some level of intrinsic deference on agency policy views, an agency will interpret statutes more aggressively when it uses formal procedures than when it proceeds informally.<sup>79</sup> Put another way, the level of actual deference to agency interpretive decisions will be higher when the agency proceeds formally, even holding the level of intrinsic deference constant.<sup>80</sup> The reason is that increased textual plausibility and greater procedural formality are alternative ways for the agency to “purchase” judicial acquiescence to the agency's interpretive decision. If the agency moderates its interpretation to make it more palatable to the reviewing court, the agency buys greater judicial indulgence by making concessions on a dimension the court cares about (textual plausibility), but it also pays a price by sacrificing some of its ability to achieve policy goals. If the agency uses formal procedures, it pays a different sort of price (the direct costs of procedural formality), but in

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<sup>77</sup> See *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

<sup>78</sup> While this Article focuses on the agency's choice of procedures, the analysis could apply to any choice made by the agency concerning an action that is costly to the agency but that indicates to a reviewing court that the agency's decision is likely to be of higher quality, greater importance, or both. Consider, for example, the suggestion that courts should pay more attention to the point in the agency hierarchy at which an interpretive decision is made. See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201. Insofar as decisions made by higher-ups are more costly (because of greater outside scrutiny or the fact that senior officials have higher opportunity costs for their time) or are likely to be of higher quality (because the people making them are more expert or accountable), the arguments concerning the agency's choice of procedural formality apply directly to agency decisions about the point in the bureaucratic hierarchy from which to issue an interpretation.

<sup>79</sup> If the court gave agency views no intrinsic deference under any circumstances, then the only interpretation the court would uphold is the one that the court thinks is most textually plausible; in that case, the agency would never bother using formal procedures.

<sup>80</sup> The formal expression of this result is given in Inequality (5) in the Appendix. See *infra* p. 569.

doing so it buys judicial toleration for more aggressive interpretations of the statute. This greater toleration may arise for either or both of the two reasons discussed in section B: procedural formality may be positively correlated with the quality (from the court's perspective) of agency policy choices, or the agency's willingness to bear the costs of formal procedures may credibly signal that the agency views the interpretive question at issue as important.

Because the agency is rational, it never purchases more judicial sympathy than it needs; it just chooses which currency to offer. A clear empirical prediction follows: controlling for other factors, we should expect more actual deference to agency interpretive choices, and hence more aggressive agency interpretations, when the agency makes its interpretive choice via costly formal procedures. Again, this difference in actual deference should exist even if the formality of agency procedures has no effect whatsoever on the amount of intrinsic deference that courts confer on agency policy views. The implicit behavioral tradeoff between procedural formality and textual plausibility also has a number of surprising implications for the impact of various administrative law doctrines on agency behavior. I take these up in Part II.

## II. IMPLICATIONS OF THE STRATEGIC SUBSTITUTION EFFECT

This Part considers the implications of the strategic substitution phenomenon for various administrative law doctrines, including doctrines that increase or decrease the costs of formal agency procedures (section A), doctrines that raise or lower the intrinsic deference that courts confer on agency policy preferences (section B), and doctrines that strengthen or weaken the link between the level of intrinsic deference and the formality of agency procedures (section C). In each context, the strategic substitution effect and associated phenomena highlight important behavioral dynamics that the existing literature has largely ignored but that are essential for a complete positive and normative assessment of these doctrines.

### A. *The Costs of Procedural Formality*

Judicial decisions have substantially raised the cost to agencies of certain modes of procedure. Most strikingly, courts have interpreted the notice-and-comment rulemaking provisions of the Administrative Procedure Act<sup>81</sup> (APA) in such a way that notice-and-comment rulemaking, though nominally informal, has in fact come to resemble an elaborate "paper hearing."<sup>82</sup> The APA, as interpreted by the courts,

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<sup>81</sup> 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. IV 2004).

<sup>82</sup> See Barron & Kagan, *supra* note 78, at 231; Kagan, *supra* note 20, at 2266–68.

requires agencies undertaking rulemaking to provide supporting documentation along with the notice of proposed rulemaking;<sup>83</sup> to respond in detail to all substantial comments, which may number in the hundreds or thousands even after consolidation of duplicative comments;<sup>84</sup> and to proffer a lengthy justification for the final rule, including explanations for why alternatives were rejected.<sup>85</sup> Whatever the other salutary or pernicious effects of these requirements, one clear consequence is an increase in the cost to agencies of notice-and-comment rulemaking. Critics of the current doctrine focus on this fact, arguing that increasing procedural costs “ossifies” rulemaking and drives agencies to rely more on interpretive rules, guidance documents, and adjudication in order to avoid the strictures that courts have imposed on rulemaking.<sup>86</sup> Even scholars more sympathetic to the existing doctrine accept, and sometimes embrace, the fact that the courts have made rulemaking a more daunting proposition for agencies.<sup>87</sup>

This Article provides a framework for considering the behavioral impact of judicial decisions that raise the cost of rulemaking or other relatively formal procedures. The analysis is consistent with the claim that increasing procedural costs decreases the probability that agencies will use formal procedures.<sup>88</sup> More importantly, the analysis shows that changes in procedural costs have other effects that have received much less attention. For example, because the strategic substitution phenomenon implies that formal agency interpretations typically will be less textually plausible than informal interpretations, one effect of shifting more agency interpretive decisions from relatively formal proceedings to relatively informal proceedings will be to increase the average textual plausibility of agency decisions, all else equal. To put the same point in a slightly different way, an increase in procedural costs that drives more agencies to make policy informally will increase the degree to which the court’s reading of the statute constrains the agency’s interpretive discretion. This effect may be a matter for cele-

<sup>83</sup> See *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530–32 (D.C. Cir. 1982); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977).

<sup>84</sup> See *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1080–81 (D.C. Cir. 2003); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216–17 (D.C. Cir. 1983).

<sup>85</sup> See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852–54 (D.C. Cir. 1987).

<sup>86</sup> See sources cited *supra* note 11.

<sup>87</sup> See, e.g., Mark Seidenfeld, *Agency Decisions To Regulate* (2005) (unpublished manuscript, on file with the Harvard Law School Library); cf. Stephenson, *supra* note 35 (manuscript at 20) (suggesting that ossification “may be the pejorative name assigned to the effective screening out by judges of regulations that are sufficiently low-value that they would be considered irrational, and therefore unlawful, by a fully informed reviewing court”).

<sup>88</sup> The formal derivation of this result is given in Equation (8) in the Appendix. See *infra* p. 570.

bration, concern, or indifference. Whatever one's normative perspective, the critical positive insight is that changes in procedural costs will not only change the form or frequency of agency interpretive decisions, but will also alter the substance of those decisions in an important and reasonably determinate way.

Of course, this discussion is incomplete because it neglects the effect of changes in procedural costs on the level of courts' actual deference to formal and informal agency interpretations. If formal procedures signal the importance of an interpretive issue to the agency, then increasing the costs of such procedures will increase actual deference to formal interpretations. If procedures are more costly, the agency's decision to use procedures sends a stronger signal that the agency thinks the issue is important. So, agencies that employ formal procedures despite the increase in procedural costs will advance more aggressive statutory interpretations than they would have if formal procedures had been cheaper.<sup>89</sup> For similar reasons, an agency's decision to forgo formal procedures sends an implicit signal that the importance of the issue to the agency is relatively low, and this signal is weaker when the costs of procedural formality are high. So, increasing the costs of formal procedures leads the court to allow agencies to stretch the text further in an informal context than would have been the case if procedural formality were less expensive.<sup>90</sup>

Therefore, as procedural costs increase, the average textual plausibility of agency interpretations announced in formal contexts decreases, and the average textual plausibility of agency interpretations announced in informal contexts also decreases. But the increased cost of formal procedures will shift some agency interpretive decisions from formal to informal settings, which has a countervailing effect on average textual plausibility. As procedural costs increase, then, we will see less plausible interpretations on issues that are of very high priority or very low priority for the agency; for issues in an intermediate range of importance, the agency will switch from issuing relatively aggressive interpretations in formal proceedings to issuing more moderate interpretations in informal settings. The overall effect of increasing procedural costs on the average textual plausibility of agency interpretive decisions, at least under the assumptions of this analysis, will be

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<sup>89</sup> The formal derivation of this result is given in Equation (9) in the Appendix. See *infra* p. 570.

<sup>90</sup> This result, shown in Equation (10) in the Appendix, see *infra* p. 570, does not hold if the informality discount is 100% ( $\alpha = 1$ ) because, in that case, the court allows no deviation from its most preferred reading if the agency proceeds informally.

either zero or positive, depending on the magnitude of the informality discount.<sup>91</sup>

If judicial doctrines that increase the costs of procedural formality also increase the court's assessment of the expected quality of agency decisions — for example, by encouraging more deliberation or by preventing agency capture<sup>92</sup> — then the analysis may differ slightly. As before, an increase in procedural costs will cause the agency to make more of its decisions informally, which will increase average textual plausibility due to the strategic substitution effect. Also as before, the expected textual plausibility of those decisions that the agency continues to issue in formal proceedings will decrease. This latter effect, however, will be stronger if more costly formal procedures increase the amount of intrinsic deference that courts confer on agency policy views. Thus, in that sort of situation, we cannot be sure whether an increase in the costs of formal procedures will cause average textual plausibility to increase or decrease unless we make additional assumptions about how much a given doctrine increases the court's perception of expected decisional quality. The basic qualitative effects, however, are essentially the same.

The preceding discussion highlights several predictions about the effects of judicial doctrines that increase the costs associated with rulemaking or other more formal modes of procedure. Consistent with much of the existing literature, the analysis predicts that increasing the costs of formal procedures increases the probability that agencies will avoid such procedures and instead make policy by less formal means. In addition to this well-understood phenomenon, the analysis predicts that doctrines that increase the costs of formal proceedings will tend to decrease the textual plausibility of the interpretations that agencies announce in such proceedings. Increases in the cost of formal procedures may also decrease the textual plausibility of *informal* agency interpretations. So, if we were to compare average textual plausibility before and after an increase in the cost of formal procedures, *controlling for the level of procedural formality*, we would expect textual plausibility to decrease. If, however, we wanted to predict the effect of changes in the cost of formal procedures on average textual plausibility *independent of the procedural form employed*, the two effects just discussed — the increase in the textual plausibility of both formal and in-

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<sup>91</sup> This result is given in Equation (12) in the Appendix, *see infra* p. 570, which shows that the effect of procedural costs on average textual plausibility is positive if there is some informality discount ( $\alpha > 0$ ). If the court confers just as much intrinsic deference on informal interpretations as on formal interpretations ( $\alpha = 0$ ), changes in procedural costs have no effect on average textual plausibility because, under the assumptions of the model developed in the Appendix, the positive and negative effects of changes in procedural costs exactly offset each other.

<sup>92</sup> *See supra* pp. 547–48.

formal interpretations, and the shift of some set of interpretive decisions from formal to informal proceedings — would cut in opposite directions. If procedural formality functions primarily as a costly signal of issue importance, we would expect average textual plausibility either to increase or to remain unchanged. If procedural formality enhances the court's conviction that the agency's policy views deserve respect, the net result is less clear and will depend on how powerful that effect is relative to the agency's shift from more formal to less formal policy instruments.

Normative evaluation of these effects depends on one's views about contested questions regarding the inherent value of formal procedures and the desirability of stringent administrative compliance with courts' readings of statutory texts. But to the extent that the existing normative debate omits consideration of the behavioral effects analyzed in this Article, it is critically incomplete. Consider one illustration. Suppose you believe that doctrines that increase the costs of rulemaking tend to induce agencies to do more of their interpretive work through informal memoranda and that you think this is a bad thing because rulemaking enhances legitimacy, transparency, or other public values. Suppose you also believe that courts have an institutional obligation to enforce statutes as written and that courts typically confer too much deference on agency policy views. Now imagine a proposed doctrinal innovation that would substantially increase rulemaking costs without any direct effect on the quality of the interpretive decisions that agencies announce. If the strategic substitution effect is ignored, the normative call is easy: this doctrinal innovation should be rejected. If, however, the strategic substitution effect and its related implications are considered, the question becomes much harder. The shift from formal to informal decisionmaking has a cost in that it reduces agency reliance on rulemaking, but it may also have a benefit in the form of increased agency fidelity to the judicial construction of the relevant statutory text. It is entirely possible — though not inevitable — that this benefit would outweigh the cost.

#### *B. Intrinsic Judicial Deference to Agency Policy Views*

A key feature of the argument developed in this Article is that the desirability of a given interpretive decision to the court is positively correlated with the desirability of that decision to the agency. This correlation is captured by the concept of intrinsic deference. The existence of any intrinsic deference means that the court is willing to sacrifice some degree of textual purity if the agency's interpretation advances policy goals that the agency considers sufficiently important or that the court views as otherwise deserving of respect. Understanding the effect of the level of intrinsic deference on judicial and agency behavior is important given that many of the most significant cases in

administrative law, particularly *Chevron* and its progeny, bear on the question of how much importance a court should attach to an agency's policy views. Although the theoretical rationale for *Chevron* is famously murky,<sup>93</sup> one of the points emphasized in the opinion is that statutory interpretation often involves questions of policy, and on such questions the agency's views — including both the agency's policy goals and its assessment of the relative importance of those goals — are deserving of special judicial solicitude.<sup>94</sup> That said, the weight a reviewing court should attach to agency policy preferences, as compared with the court's view of the best reading of the statutory text, is the subject of considerable controversy.<sup>95</sup>

This Article does not aspire to resolve the knotty normative questions bound up in this debate. The analysis does, however, shed light on the behavioral implications of changes in the level of intrinsic deference. The most obvious effect of increasing intrinsic deference, of course, is to increase actual deference, which enables agencies to interpret their statutory mandates more aggressively and to promulgate less textually plausible interpretations.<sup>96</sup> The less obvious and more interesting effect is that increasing intrinsic deference increases the probability that the agency will use formal procedures, whereas decreasing the level of intrinsic deference causes agencies to use formal procedures less frequently.<sup>97</sup>

Crucially, these effects hold even if the court gives just as much intrinsic deference to informal interpretations as to formal interpretations — that is, even if there is no informality discount. To see the reason for this, recall that procedural formality may enable the agency to send a credible signal that the interpretive issue is very important to the agency. This signal, in turn, induces the court to allow the agency to interpret the statute more aggressively. The greater the degree of intrinsic deference, the more the agency's stake in the interpretive outcome matters to the court. Consequently, the impact of procedural formality on the amount of textual implausibility that the court will tolerate is greater when intrinsic deference is high than when it is low. So, as intrinsic deference increases, the agency becomes more willing to

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<sup>93</sup> See Merrill & Hickman, *supra* note 10, at 863–72.

<sup>94</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864–66 (1984).

<sup>95</sup> See, e.g., Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Pierce, *supra* note 43; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

<sup>96</sup> The formal version of this result is given in the Appendix by Equations (14), (15), and (16). See *infra* p. 571.

<sup>97</sup> This result is demonstrated formally in the Appendix by Equation (13). See *infra* p. 571.

incur procedural costs for relatively less important issues.<sup>98</sup> The result is similar if the primary role of procedural formality is to assure the court that the agency's policy preferences reflect a wise, deliberative judgment. It is more important to the court that the agency's policy views are the result of an elaborate process if the court assigns greater intrinsic weight to the agency's views relative to the court's own view of the best construction of the statute. So, this theory about the role of administrative procedures also predicts that as intrinsic deference increases, holding all else constant, the agency's incentive to use formal procedures increases.

On both of these accounts, increasing intrinsic deference increases an agency's probability of using formal procedures by making procedural formality more attractive for less important issues. If the level of intrinsic deference is relatively low, there will be a set of interpretive decisions that are not quite important enough to make the policy gains the agency could achieve from more aggressive interpretations worth the costs of procedural formality. As intrinsic deference increases, the amount of additional textual implausibility that the court will tolerate if the agency uses formal procedures will rise. So, for this set of cases, the increase in intrinsic deference means that it may become worthwhile to incur the additional costs of formal procedures.

The fact that increases in intrinsic deference increase agencies' propensity to employ formal procedures means that a decision like *Chevron* — if it really does stand for greater intrinsic deference — is likely to increase agency reliance on formal procedures such as rule-making. Conversely, decisions that cut back on *Chevron* or otherwise deemphasize judicial respect for agency policy views are likely to induce agencies to make more of their interpretive decisions in less formal contexts. Similarly, if a more textualist approach to statutory interpretation implies a lower level of intrinsic deference, an increase in textualism will decrease agencies' propensity to employ rulemaking or other formal procedures to advance their interpretive views. If procedural formality and textual plausibility are both viewed as desirable, proposals to alter the level of intrinsic deference will therefore present a tradeoff: increasing intrinsic deference increases procedural formality but reduces textual plausibility, while decreasing intrinsic deference

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<sup>98</sup> This effect attenuates the court's willingness to tolerate textual implausibility in formal settings. As Equation (14) in the Appendix shows, *see infra* p. 571, this indirect positive effect on textual plausibility does not offset the direct negative effect of intrinsic deference on textual plausibility. The fact that increasing intrinsic deference makes the agency more willing to use formal procedures in close cases also reduces the court's tolerance of textual implausibility in informal settings. In the formal model, this indirect positive effect is large enough to offset the negative effect of intrinsic deference on textual plausibility only if there is no informality discount, as shown in Equation (15). *See infra* p. 571.

has the opposite effect. If one takes the contrary normative position — that courts should care less about imposing their own views about statutory meaning and that agencies should not rely so much on costly formal procedures such as rulemaking — the relevant tradeoff will be identical, though one’s bottom-line conclusion would reverse. In either case, the discussion is incomplete if the tradeoff is ignored.

### C. *The Informality Discount*

The strategic substitution effect also has significant implications for whether courts do or should reduce intrinsic deference to agency policy views when the agency employs informal rather than formal procedures. One explanation for this informality discount, suggested by language in *Mead*, is the belief that agency views are more likely to be the product of a well-considered judgment when formal procedures are employed and that courts are typically more deferential to such deliberative judgments.<sup>99</sup> Another explanation, also associated with *Mead* and subsequent commentary, is that procedural formality may be a proxy for congressional intent to delegate discretionary policymaking authority to the agency and that such congressional delegation is entitled to judicial respect.<sup>100</sup>

The precise meaning of *Mead*, both in general and with respect to the significance of procedural formality, is difficult to discern. Indeed, the immediate impact of the decision appears to have been widespread confusion in the courts of appeals,<sup>101</sup> and the Justices themselves continue to squabble over what the opinion actually held.<sup>102</sup> This confusion notwithstanding, one plausible simplified interpretation of *Mead* is that agencies are generally entitled to greater judicial deference when they use formal procedures than when they do not. Even if this is not invariably the case — *Mead* emphasized that informal interpretations may sometimes be entitled to *Chevron* deference,<sup>103</sup> and at least one member of the *Mead* majority has indicated that some formal

<sup>99</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (stating that “a relatively formal administrative procedure tend[s] to foster . . . fairness and deliberation”).

<sup>100</sup> See *id.* at 229–30; Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 814 (2002) (“Congress will tend to command the use of relatively formal procedures only when the action has important consequences, and agency action that binds with the force of law has such consequences.”).

<sup>101</sup> See Bressman, *supra* note 13, at 1457–74; Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 349–55 (2003).

<sup>102</sup> Compare *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2718 (2005) (Scalia, J., dissenting) (construing *Mead* as requiring “some unspecified degree of formal process” before an agency action qualifies for *Chevron* deference), with *id.* at 2712 (Breyer, J., concurring) (reading *Mead* to hold that “the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency’s interpretation of a statute”).

<sup>103</sup> *Mead*, 533 U.S. at 230–31.

interpretations may not be<sup>104</sup> — it appears to be fair as a first-order generalization.

Even if we temporarily accept this simplified version of the *Mead* holding, the conceptual distinction between actual deference and intrinsic deference highlights a critical ambiguity in the case. One way to interpret a holding that informal agency interpretations are entitled to less “judicial deference” is as a restatement, in doctrinal form, of the strategic substitution effect: the level of *actual* deference to agency interpretations will be lower when the agency’s interpretation is informal even if the level of *intrinsic* deference is constant. Thus, even though many commentators herald or condemn *Mead* as an administrative law revolution,<sup>105</sup> at least this aspect of the holding — that informal agency interpretations receive less deference than more formal interpretations — may simply be a doctrinal restatement of both actual practice and much of the existing case law.<sup>106</sup> An alternative interpretation of *Mead*, however, is that it stands for the proposition that agencies are entitled to less *intrinsic* deference when they proceed informally. That is, *Mead* might be read to hold that the agency’s policy views are simply less relevant to the interpretive question at issue if the agency has eschewed formal procedures. On this interpretation, *Mead* implies that the Court has increased the informality discount. If this is how *Mead* is interpreted, then understanding its likely impact requires considering the behavioral effects of changes in the informality discount.<sup>107</sup>

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<sup>104</sup> See *Brand X*, 125 S. Ct. at 2712–13 (Breyer, J., concurring). Justice Breyer, who joined the majority opinion in *Mead*, noted in *Brand X* that formal proceedings may be insufficient to trigger *Chevron* deference “because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation.” *Id.* at 2713.

<sup>105</sup> See, e.g., Bressman, *supra* note 13; Coverdale, *supra* note 13; Weaver, *supra* note 13.

<sup>106</sup> See *supra* note 14.

<sup>107</sup> The informality discount may also be relevant to other issues, such as which procedural devices agencies may invoke to make certain decisions. Though it is now settled that agencies can announce new rules in formal adjudications, this issue has historically been a subject of controversy. See *SEC v. Chenery Corp.*, 332 U.S. 194, 209, 212–13, 216–18 (1947) (Jackson, J., dissenting) (arguing that an agency cannot make new rules in the context of an adjudication); *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 493–97 (2d Cir. 1973), *aff’d in part and rev’d in part*, 416 U.S. 267 (1974). A similar debate continues to rage about when an agency may invoke the “interpretive rule” exception to § 553, discussed in note 51 above. These controversies may be viewed as disputes over the informality discount. A rule that says an agency must make certain decisions via rulemaking could be characterized as imposing a high informality discount, in that courts would give agencies little policymaking discretion if they failed to proceed with the requisite formal procedures. Conversely, a claim that an agency should be able to announce its interpretive views without engaging in rulemaking might imply that the informality discount ought to be zero, or at least quite low, because such a view implies that courts should respect agency policy views even when the agency acts informally.

Two effects of changing the informality discount are intuitive and straightforward. First, increasing the informality discount makes it more likely that agencies will use formal procedures to get the deference “bonus” associated with doing so. Second, increasing the informality discount will increase the textual plausibility of those agency interpretations that are announced in informal proceedings.<sup>108</sup> This second effect follows immediately from the fact that increasing the informality discount reduces intrinsic deference, and hence actual deference, when the agency proceeds informally.

When procedural formality functions primarily as a signal of issue importance, increasing the informality discount will have additional effects on the textual plausibility of agency interpretations adopted in formal and informal contexts. First, because increases in the informality discount increase the deference boost associated with procedural formality, such increases will make it worthwhile for agencies to use formal procedures in cases in which the issue would otherwise not be sufficiently important to justify the procedural cost. This means that an agency’s decision to use formal procedures sends a relatively weaker signal that the issue is important than would have been the case if the informality discount were lower. As a result, increasing the informality discount will decrease actual deference to formal interpretations as well as informal interpretations.<sup>109</sup> Second, and by similar logic, increasing the informality discount means that an agency’s decision to forgo formal procedures sends a relatively stronger signal that an issue is unimportant. This reinforces the tendency of actual deference to informal interpretations to decline as the informality discount increases.

Next, consider the impact of the informality discount on the average textual plausibility of agency interpretations. On one hand, increasing the informality discount will increase the textual plausibility of informal agency interpretations and, if the signaling account is valid, will also increase the textual plausibility of formal agency interpretations. Both of these effects will tend to increase average textual plausibility overall. On the other hand, increasing the informality discount will also induce agencies to make a greater number of interpretive decisions in formal proceedings. The strategic substitution phenomenon means that this third effect will tend to decrease the average textual plausibility of agency interpretations. So, the overall impact of the informality discount on average textual plausibility is complicated. For relatively unimportant decisions that the agency would make in-

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<sup>108</sup> The formal versions of these results are given in the Appendix by Equations (17) and (18). See *infra* pp. 571–72.

<sup>109</sup> The formal version of this result is given in the Appendix by Equation (19). See *infra* p. 572.

formally even after an increase in the informality discount, textual plausibility will increase. For decisions that are so important that the agency would have used formal procedures even without the increase in the informality discount, textual plausibility may also increase. For the decisions in the middle range of importance, an increase in the informality discount causes the agency to shift from relatively moderate informal interpretations to more aggressive formal interpretations. Under the assumptions employed in this analysis, the net effect of an increase in the informality discount is to increase average textual plausibility.<sup>110</sup> However, this result (which may not generalize) is less substantively important than the observation that an increase in the informality discount may increase the textual plausibility of very important or very unimportant issues, but decrease the textual plausibility of intermediate issues.

The upshot is that the full impact of *Mead*, and of other doctrines related to agency choice of procedural form, cannot be understood without attention to the relationship between procedural formality and textual plausibility as alternative devices that agencies can use to secure judicial acquiescence in their interpretive decisions. For example, it is intuitive to conclude that *Mead* will decrease actual judicial deference to agency interpretations because a subset of these decisions — those reached informally — are entitled only to *Skidmore*<sup>111</sup> respect rather than full *Chevron* deference. The analysis presented here supports that conclusion, but it also reveals other important effects. By increasing the informality discount, *Mead* also increases agency reliance on formal procedures, and the strategic substitution effect implies that agencies will typically interpret their mandates more aggressively when they opt for a higher level of procedural formality. Thus, for at least a subset of interpretive decisions, *Mead* might actually decrease textual plausibility. Debates about the wisdom of *Mead* must be sensitive to all of the opinion's likely behavioral effects, not merely those that are most immediately apparent.

### III. CONCLUSION

This Article presents a positive theoretical analysis of the relationship between the textual plausibility and procedural formality of agency statutory interpretations. The Article's central claim is that, under a set of stylized but reasonable simplifying assumptions, textual plausibility and procedural formality function as strategic substitutes. Increasing either the textual plausibility or the procedural formality of an agency's interpretive decision increases the agency's chances of

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<sup>110</sup> This result is presented in Equation (20) in the Appendix. See *infra* p. 572.

<sup>111</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

surviving judicial scrutiny. But both of these options impose costs on the agency, and so the agency will rationally choose the mix of textual plausibility and procedural formality that secures the greatest net benefit. Changes that increase or decrease the costs or benefits associated with one of these two variables (plausibility and formality) not only will have a direct effect on *that* variable, but, because of the agency's rational optimization, will have an indirect effect on the *other* variable as well.

The analysis generates a variety of predictions regarding the behavioral effects of various administrative law doctrines. Several of these predictions are straightforward and consistent with standard arguments in the literature. It is unsurprising, for example, that increasing the costs of procedural formality causes agencies to shift to less costly informal modes of interpretation, that increasing courts' intrinsic deference to agency views increases the aggressiveness of agency statutory interpretation, and that discounting the intrinsic deference accorded to informal interpretations makes formal procedures more attractive and increases the textual plausibility of informal interpretations. Other behavioral predictions, however, are less intuitive and more novel. These include the predictions that increased procedural costs will reduce textual plausibility when one controls for the level of procedural formality, but may increase average textual plausibility overall; that increasing intrinsic deference to agency views will increase agencies' use of formal procedures; and that discounting the intrinsic deference conferred by courts reviewing informal proceedings can increase the textual plausibility of both formal and informal agency interpretations, but may actually reduce the textual plausibility of a set of agency interpretations by shifting them from informal to formal modes of promulgation.

These results suggest that several of the most important and long-standing debates in administrative law — including the debate about judicial construction of the APA's procedural requirements and the debate about the appropriate level of judicial deference to agency policy views — are incomplete in critical respects. Each of these discussions tends to focus on one type of intuitive behavioral relationship — in the former case, the effect of procedural costs on agency propensity to use formal procedures and, in the latter, the effect of intrinsic deference on the textual plausibility of agency interpretations — and to debate the normative implications and empirical magnitude of this relationship. But the strategic substitution phenomenon means that each of these discussions must also consider the empirical and normative dimensions of *other* behavioral relationships: the effect of procedural costs on textual plausibility and the effect of intrinsic deference on procedural formality.

The connection between textual plausibility and procedural formality is more readily apparent in cases, like *Mead*, that make an explicit

doctrinal link between them. The strategic substitution effect might apply to the *Mead* line of cases in one of two ways. First, *Mead* might be read as stating that the level of *actual* deference to agency interpretations should generally be lower if the agency's decision is informal. If so, then this Article's analysis supports the view that this aspect of *Mead*, despite whatever short-term confusion it may sow, was basically a doctrinal non-event. The *Mead* holding, in this light, simply acknowledged the strategic substitution effect, though the decision itself may not be framed in quite those terms.

Alternatively, *Mead* could be read as a call for less *intrinsic* deference to agency policy views if the agency has promulgated its interpretation in a relatively informal context — that is, *Mead* may imply a larger informality discount. If so, the strategic substitution phenomenon reveals that the two most intuitive behavioral effects of such a holding — an increase in the textual plausibility of informal interpretations and an increase in the probability that agencies will use formal procedures — interact in an important way. Whereas the former effect will tend to increase the average textual plausibility of agency interpretations, the latter effect will tend to reduce it. Moreover, the types of cases in which the agency will interpret its statutory mandate more or less aggressively are likely to change in predictable ways as a result of *Mead*: Agencies will tend to interpret statutory provisions less aggressively for very important or very unimportant issues, but for issues in the middle, they will switch from informal procedures to formal procedures. As a consequence, they will interpret statutory provisions more aggressively in those intermediate cases.

While this Article is hardly a complete analysis of this complex set of issues, it highlights a number of potentially significant relationships among textual plausibility, procedural formality, and other variables. These results may apply not only to judicial review of agency interpretations of law or other aspects of administrative law doctrine, but also to other areas of law. Indeed, it is common for a decisionmaker subject to judicial review to be able to appease the court either by altering the substance of the decision or by using additional procedures. This situation arises in criminal law, constitutional law, corporate law, and elsewhere. In all of these settings, explicit recognition and analysis of the strategic substitution effect may lead to additional insights concerning the behavioral effects of various doctrinal or institutional changes.

Of course, it remains to be seen whether these results prove robust. At several points, this Article highlights simplifying assumptions that, while useful in developing the main theoretical insights, ought to be

relaxed in future research.<sup>112</sup> Also, the ultimate test of any positive theory is its ability to explain and predict real-world behavior.<sup>113</sup> Therefore, rigorous empirical testing, though well beyond the scope of this Article, is a necessary part of the research agenda. The ambition of this Article, in addition to generating a set of novel theoretical insights, is to lay the groundwork for future theoretical and empirical research along these lines. This sort of positive research program on the consequences of various administrative law doctrines is essential for addressing some of the most hotly contested normative and doctrinal debates in public law.

#### APPENDIX

This Appendix presents the formal model on which most of the analysis in the body of this Article is based. Section A describes the basic structure of the model: the players, their information, the potential actions, and the order of play. Section B presents each player's utility function. Section C characterizes the equilibria of the game, focusing on the separating perfect Bayesian equilibrium. Section D derives comparative statics results of interest.

##### *A. Players, Information, Actions, and Order of Play*

The game includes two strategic players, an agency *A* and a court *C*. At the beginning of the game, nature randomly selects the issue

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<sup>112</sup> Useful extensions would include expanding the range of procedural alternatives, allowing procedures to play a more nuanced role in administrative decisionmaking, introducing uncertainty about the preferences of the reviewing court, allowing for the possibility of repeated interactions, and incorporating other players such as Congress or litigants.

<sup>113</sup> That said, some of the most important contributions to social science theory have been valuable precisely because, despite their superficially plausible assumptions, they generate predictions that are inaccurate in important respects. Such contributions include the median voter theorem, see Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 26–30 (1948) (predicting that the outcome of a majority-rule voting regime will reflect the preferences of the median voter), the rational voter paradox, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260–74 (1957) (discussing a model implying that potential voters motivated by a desire to influence election outcomes will hardly ever vote in national elections), the collective action problem, see MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 53–65 (1965) (predicting that large groups with common interests will typically be unable to organize to advance those interests), and the convergence hypothesis, see Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q.J. ECON. 65, 69–71 (1956) (predicting that differences in the marginal product of capital will cause poor countries to grow more quickly than rich ones, leading to an eventual reduction in income inequality). Thus, Milton Friedman is only partly right in his claim that the value of a positive model is measured by the accuracy of its predictions rather than the plausibility of its assumptions. See MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 15 (1953). In some cases, a positive model can be extremely useful because, despite the apparent plausibility of its assumptions, it makes empirical predictions that are consistently inaccurate. Explaining the reasons for such inaccuracy often generates research on previously neglected aspects of the relevant topic.

importance parameter  $\theta$  from a uniform distribution on the  $[0, 1]$  interval. The agency observes  $\theta$ , but the court does not.

The agency then makes two simultaneous decisions. First, the agency chooses the amount  $s \geq 0$  by which it “stretches” the statutory text, where  $s = 0$  denotes the interpretation that the reviewing court would view as most textually plausible, and higher values of  $s$  denote greater stretching in the direction of the agency’s preferred policy outcome.<sup>114</sup> Second, the agency chooses the level of procedural formality  $p \in \{0, 1\}$ , where  $p = 1$  denotes the choice to use formal procedures and  $p = 0$  denotes the choice to proceed informally. If the agency selects  $p = 1$ , it suffers utility loss  $k > 0$ .

After observing  $s$  and  $p$ , the court selects the holding  $h \in \{0, 1\}$ , where  $h = 1$  denotes a decision to uphold the agency’s interpretation and  $h = 0$  denotes a decision to substitute its own interpretation. The final interpretation given legal effect is  $sh$ , that is,  $s$  if the court upholds the agency’s interpretation and 0 if the court adopts its own interpretation.

To summarize, the order of play is as follows:

- Step 0: Nature chooses  $\theta \sim U[0, 1]$ ;
- Step 1: Agency chooses  $s \geq 0$  and  $p \in \{0, 1\}$ ;
- Step 2: Court chooses  $h \in \{0, 1\}$ .

### B. Utility Payoffs

The agency’s final utility payoff,  $U_A$ , is given by:

$$U_A = \theta sh - pk. \quad (1)$$

The court’s final utility payoff,  $U_C$ , includes two components. First, the court’s interest in textual plausibility means that it suffers a utility loss equal to  $s^2h$ .<sup>115</sup> Second, the court believes that the agency’s

<sup>114</sup> It may seem counterintuitive to suggest that an agency always has an incentive to stretch the statute an infinite amount, but this modeling framework can also apply to situations in which the agency wants to stretch the statute by only a finite amount. Imagine that the textual implausibility of the agency’s interpretation is represented by variable  $x$ , and the agency’s ideal deviation from the court’s view of the most plausible interpretation of the statute is equal to 1. The agency in this case would never want to propose an  $x > 1$  because such a choice, even if upheld, would give the agency a lower utility than it would receive if it selected  $x = 1$ . So, we can restrict attention to the values of  $x$  between 0 and 1. To adapt this situation to the modeling framework presented above, we can define  $s$  as  $x / (1 - x)$ , which has a lower bound at  $s = 0$  and approaches infinity as  $x$  approaches 1.

<sup>115</sup> The use of a quadratic utility function is arbitrary; the qualitative results hold for any strictly convex function. I use a quadratic function because it is conventional and has convenient mathematical properties.

policy views are entitled to some intrinsic deference parameterized as  $\delta \geq 0$ , where  $\delta = 0$  implies that the court ascribes no weight to the agency's preferences, and higher values of  $\delta$  indicate higher levels of intrinsic deference. Additionally, the court may treat the agency's policy views as entitled to less weight when the agency's interpretation is informal. The model captures this possibility via an informality discount  $\alpha \in [0, 1]$ . Hence,  $\delta$  is the weight the court attaches to the agency's policy views when  $p = 1$ , and  $\delta(1 - \alpha)$  is the analogous weight when  $p = 0$ .

Given these assumptions, the court's final utility payoff,  $U_c$ , is:

$$U_c = h[(1 - \alpha + \alpha p)\delta\theta s - s^2]. \quad (2)$$

Note that  $\theta$  appears in the court's utility function even though, at the time the court makes its decision, it cannot observe  $\theta$ . The court will maximize its expected utility based on its beliefs about the value of  $\theta$ .

### C. Equilibrium

The equilibrium solution employed is perfect Bayesian equilibrium, with two refinements. First, the court's beliefs about  $\theta$  are restricted to be independent of  $s$ . Second, if the agency were to make an out-of-equilibrium choice of  $p$ , the court's posterior belief about  $\theta$  would be the same as its prior belief.

Under these conditions there may be a pooling equilibrium in which the agency always chooses  $p = 0$  and  $s = \delta(1 - \alpha) / 2$ , the court always chooses  $h = 1$ , and the court's belief about  $\theta$  in all cases is that  $\theta = 1 / 2$ .

I focus on the separating equilibrium, which is more substantively interesting than the pooling equilibrium. To characterize this equilibrium, it is helpful to use some additional notation. First, define  $T$  as the value of  $\theta$  such that the agency chooses  $p = 1$  if  $\theta \geq T$ , but chooses  $p = 0$  otherwise.<sup>116</sup> Because of the assumption that  $\theta$  is uniformly dis-

<sup>116</sup> Because of the restriction that the court's beliefs about  $\theta$  are independent of  $s$ , the candidate separating equilibria to consider are those in which the agency's selection of  $p$  depends on  $\theta$ . The only possible separating equilibrium in this set, given the assumptions, is the one in which the agency chooses  $p = 0$  for a sufficiently low  $\theta$  (that is,  $\theta < T$ ) and chooses  $p = 1$  otherwise. To see this, assume that there is some  $\theta$ , denoted  $\theta^*$ , for which the agency's optimal decision is to select  $p = 1$  and  $s = s_1$ , where  $s_1$  is the largest  $s$  that would be upheld by the court if the court observes  $p = 1$ . For  $p = 1$  to be optimal for the agency when  $\theta = \theta^*$ , it must be the case that  $\theta^*s_1 - k \geq \theta^*s_0$ , where  $s_0$  is the largest  $s$  the court would uphold if it observes  $p = 0$ . This can be written as  $\theta^* \geq k / (s_1 - s_0)$ . It follows from this that for any  $\theta > \theta^*$ , it will also be true that  $\theta \geq k / (s_1 - s_0)$ , meaning that the agency would also choose  $p = 1$ . By similar logic, if the agency chooses  $p = 0$

tributed,  $T$  can be interpreted as the probability that the agency chooses  $p = 0$ . Next, let  $\theta_1$  denote the court's belief about  $\theta$  if the agency uses formal procedures — that is,  $\theta_1 = E(\theta | p = 1)$  — and let  $\theta_0$  denote the court's belief about  $\theta$  if the agency proceeds informally — that is,  $\theta_0 = E(\theta | p = 0)$ . Because  $\theta$  is distributed uniformly, it follows that  $\theta_1 = (T + 1) / 2$  and  $\theta_0 = T / 2$ .

If the agency chooses  $p = 1$ , the court will choose  $h = 1$  if  $\delta\theta_1 s - s^2 \geq 0$ . This can be rewritten as  $\delta(T + 1) / 2 \geq s$ . It follows that if the agency selects  $p = 1$ , the agency's optimal  $s$ , denoted  $s_1$ , is:

$$s_1 = \frac{\delta(T + 1)}{2}. \quad (3)$$

Similarly, if the agency chooses  $p = 0$ , its optimal  $s$ , denoted  $s_0$ , is:

$$s_0 = (1 - \alpha) \frac{\delta T}{2}. \quad (4)$$

It follows immediately from Equations (3) and (4) that:

$$s_1 = \delta \left( \frac{T + 1}{2} \right) \geq (1 - \alpha) \delta \frac{T}{2} = s_0. \quad (5)$$

Inequality (5) establishes the strategic substitution effect. If a separating equilibrium exists, it will always be the case that  $s_1 > s_0$ .

Next, consider the agency's choice of  $p$ . If the agency chooses  $p = 1$ , it will be able to implement  $s_1$  but will incur cost  $k$ . If the agency chooses  $p = 0$ , it will be able to implement  $s_0$  and will not have to pay  $k$ . So, the agency will choose  $p = 1$  if but only if  $\theta s_1 - k \geq \theta s_0$ . This condition can be rewritten as:

$$\theta \geq \frac{2k}{\delta(1 + \alpha T)}. \quad (6)$$

Because Inequality (6) establishes the conditions under which the agency would choose  $p = 1$ , it can be used to identify the threshold value  $T$ :

$$T = \min \left\{ \frac{2k}{\delta(1 + \alpha T)}, 1 \right\}. \quad (7)$$

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and  $s = s_0$  for a given  $\theta = \theta^*$ , it follows that the agency would also choose  $p = 0$  and  $s = s_0$  for any  $\theta < \theta^*$ .

By applying the quadratic formula, the result in Equation (7) can be rewritten as  $T = \min\{[(1 + 8\alpha k / \delta)^{1/2} - 1] / 2\alpha, 1\}$ . However, this additional step is not necessary to perform the comparative statics analysis discussed in the next section.

If  $T = 1$ , the only equilibrium will be the pooling equilibrium. If  $T < 1$ , however, then there will be a separating equilibrium in which the agency will sometimes use formal procedures but sometimes will not, depending on  $\theta$ . The next section performs comparative statics analysis on  $T$ , assuming that  $T < 1$ .

#### D. Comparative Statics

1. *Changes in Procedural Costs.* — The marginal effect of changes in  $k$  on  $T$  is:

$$\frac{dT}{dk} = \frac{2}{\delta(1 + 2\alpha T)} > 0. \quad (8)$$

This equation establishes that the probability that the agency chooses  $p = 0$  is increasing in  $k$ . Next, consider the effects of  $k$  on  $s_1$  and  $s_0$ . These are given by:

$$\frac{ds_1}{dk} = \frac{1}{1 + 2\alpha T} > 0 \quad (9)$$

and

$$\frac{ds_0}{dk} = \frac{1 - \alpha}{1 + 2\alpha T} \geq 0. \quad (10)$$

Equation (9) implies that as the costs of procedures increase, the interpretations that agencies adopt in formal contexts become less textually plausible. Equation (10) implies that, except in the special case in which  $\alpha = 1$ , the textual plausibility of informal agency interpretations also decreases as formal procedures become more costly.

Next, consider the impact of  $k$  on overall expected textual plausibility, denoted  $S = Ts_0 + (1 - T)s_1$ . Substituting the values from Equations (3) and (4) for  $s_1$  and  $s_0$  gives:

$$S = T\left((1 - \alpha)\delta\frac{T}{2}\right) + (1 - T)\delta\left(\frac{T + 1}{2}\right) = \frac{\delta(1 - \alpha T^2)}{2}. \quad (11)$$

Therefore, the marginal effect of a change in  $k$  on  $S$  is:

$$\frac{dS}{dk} = -\frac{2\alpha T}{1 + 2\alpha T} \leq 0. \quad (12)$$

Unless  $\alpha = 0$ , increasing  $k$  increases the average textual plausibility of agency decisions. If  $\alpha = 0$ , however, changes in  $k$  have no effect on average textual plausibility.

2. *Changes in Intrinsic Deference.* — The marginal effect of a change in  $\delta$  on  $T$  is:

$$\frac{dT}{d\delta} = -\frac{T(1+\alpha T)}{\delta(1+2\alpha T)} < 0. \quad (13)$$

Substantively, Equation (13) means that as the amount of intrinsic deference increases, the probability that the agency uses formal procedures increases. This is true even if the court gives just as much intrinsic deference to informal interpretations as to formal interpretations (that is, even if  $\alpha = 0$ ).

The marginal effects of changes in  $\delta$  on  $s_1$  and  $s_0$  are:

$$\frac{ds_1}{d\delta} = \frac{1}{2} \left( 1 + \frac{\alpha T^2}{1+2\alpha T} \right) > 0 \quad (14)$$

and

$$\frac{ds_0}{d\delta} = \frac{\alpha(1-\alpha)T^2}{2(1+2\alpha T)} \geq 0. \quad (15)$$

Equation (14) indicates that when the agency chooses  $p = 1$ , the degree to which it stretches the statutory text to reach its preferred result will increase as  $\delta$  increases. Equation (15) shows that increasing  $\delta$  will typically increase the amount the agency will stretch the statute in informal settings as well. This latter effect does not hold, however, if  $\alpha = 1$  or  $\alpha = 0$ . In these special cases, changing  $\delta$  has no effect on the textual plausibility of informal interpretive choices.

Finally, the marginal effect of  $\delta$  on  $S$  is:

$$\frac{dS}{d\delta} = T \frac{ds_0}{d\delta} + (1-T) \frac{ds_1}{d\delta} - \frac{dT}{d\delta} (s_1 - s_0) > 0. \quad (16)$$

The result establishes that increased intrinsic deference to agency policy views increases the average aggressiveness of agency statutory interpretations.

3. *Changes in the Informality Discount.* — The marginal effect of  $\alpha$  on  $T$  is:

$$\frac{dT}{d\alpha} = -\frac{T^2}{1+2\alpha T} < 0. \quad (17)$$

The marginal effects of  $\alpha$  on  $s_0$  and  $s_1$  are:

$$\frac{ds_0}{d\alpha} = -\frac{\delta T}{2} \left( \frac{1+T+\alpha T}{1+2\alpha T} \right) < 0 \quad (18)$$

and

$$\frac{ds_1}{d\alpha} = -\frac{\delta T^2}{2} \left( \frac{1}{1+2\alpha T} \right) < 0. \quad (19)$$

Notice that changes in  $\alpha$  have two effects on overall expected textual plausibility and that these effects cut in opposite directions. On one hand, increasing  $\alpha$  increases the expected textual plausibility of both formal and informal interpretive choices, which would tend to increase overall textual plausibility. On the other hand, increasing  $\alpha$  increases the probability that the agency will choose  $p = 1$ , and this shift will tend to reduce average textual plausibility. Under the assumptions of this model, the former effect dominates, as can be seen by the marginal effect of  $\alpha$  on  $S$ :

$$\frac{dS}{d\alpha} = -\frac{\delta T^2}{2} \left( \frac{1}{1+2\alpha T} \right) < 0. \quad (20)$$

One must be cautious in interpreting this result. The fact that the negative effect dominates the positive effect may depend on the model's functional form restrictions, in particular the uniform distribution of  $\theta$ , and so may not generalize. The important qualitative result is the existence of these cross-cutting effects.