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THE ANTI-PARROTING CANON

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I. INTRODUCTION

If an agency regulation and the statute authorizing the regulation have identical (or at least very similar) wording, do the statute and the regulation always mean exactly the same thing? The Supreme Court recently said yes,[1] naming the new doctrine the anti-parroting canon[2] because it denies extra deference to agencies that parrot the words of a statute into a regulation.

At first glance, this seems like a triumph for plain meaning interpretation—words have meaning, and the same words always have the same meaning. But, as recognized in other areas of law, the contextual information of *who is speaking* sometimes makes an interpretive difference.

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[1] *See* Gonzales v. Oregon, 546 U.S. 243 (2006).

[2] The term "antiparroting" was coined by Justice Scalia in his dissent. *See id.* at 278 (Scalia, J., dissenting) ("Even if there were an antiparroting canon, however, it would have no application here.").

The speaker's identity can be important when interpreting a statement because the identity tells us about the role and knowledge of the speaker. Agencies play a different role in the governmental structure than Congress does, and they have a higher level of expertise and knowledge in their subject areas. Both of these factors can lead agencies to convey different meanings even when using the same words that appear in a statute. The Supreme Court was mistaken when it categorically denied the possibility that the same words, spoken by two different institutional actors, can ever have different meanings.

Despite the flawed justification for adopting it, however, the anti-parroting canon does have merit. It is not a textual canon, but a structural one. The Court employed the anti-parroting canon in a way that prevents agencies from unilaterally seizing more power than Congress has granted them. While the canon is cloaked in textualist explanations, it actually grows out of the same separation of powers concerns that underlie the modern nondelegation doctrine.

Part II of this Article explains the anti-parroting canon as it was created and adopted by the Supreme Court, as well as the surrounding doctrine that created the need for it. Part III argues that the canon is not justified by ideas about plain meaning. Textualists recognize that plain meaning must be understood in context, and the identity of the speaker is a relevant contextual data point. Part IV makes the case that the anti-parroting canon is nonetheless a good one and explains the structural considerations that support its adoption.

II. DEFERENCE TO AGENCY INTERPRETATION OF REGULATIONS

First, some background doctrine. When an agency interprets its own regulation—one that the agency itself has written—it ordinarily gets the highest level of deference. Under this regime, called either *Seminole Rock* deference for the first case that propounded it or *Auer* deference for the case that explained it most thoroughly, an agency's interpretation will stand unless it is "plainly erroneous or

inconsistent with the regulation."[3] Most commentators understand *Auer* deference as being even stronger than the level of deference given in *Chevron*[4] cases.[5]

The anti-parroting canon is a recently created exception to *Auer* deference. When an agency regulation merely repeats the words of the statute without elaboration on a particular point, a later agency interpretation of that regulation does not get *Auer* deference. The interpretive task, according to the Court, is exactly the same as the task of interpreting the statute directly, since the phrase is the same in the statute and the regulation.[6] Thus, the appropriate level of deference is the level that the agency would get when interpreting the statute, which is *Chevron* or *Skidmore*[7] deference depending on the circumstances.[8] An agency does not receive extra deference

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[3] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). *See also* Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting and applying the same standard).

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

[5] *See* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 4 (1996) (characterizing *Auer* as "an indulgent if not downright abject standard of deference"); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099–1100 (2008) (empirically placing *Seminole Rock/Auer* deference above *Chevron* deference in a ranking of strong to weak deference regimes); Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito,* Chevron*,* Auer*, and* Chenery *in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1, 31 (2007) (describing *Auer* deference as "even more deferential than *Chevron* deference."). *But see* Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 569 (2006) ("*Seminole Rock* deference is about as strong as *Chevron* deference.").

[6] *See Gonzales*, 546 U.S. at 257 ("Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute.").

[7] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[8] *See* United States v. Mead Corp., 533 U.S. 218, 227–239 (2001) (holding that *Chevron* deference is appropriate in some circumstances and *Skidmore* deference is appropriate in other circumstances).

when it parrots the language of a statute in its regulation and then interprets that regulation in lieu of the statute.[9]

The Supreme Court first adopted and applied the anti-parroting canon in *Gonzales v. Oregon*,[10] the assisted suicide case decided in 2006. The dispute in *Gonzales* was about the meaning of the phrase "legitimate medical purpose." Specifically, is prescribing a lethal substance under the Oregon assisted suicide law a legitimate medical purpose according to federal law and regulations? The federal Controlled Substances Act includes the phrase in statutory text, but does not define it: "The term 'valid prescription' means a prescription which is issued for a *legitimate medical purpose* by an individual practitioner licensed by law . . . acting in the usual course of the practitioner's professional practice."[11]

A regulation promulgated under the authority of the statute[12] essentially repeated this requirement without elaborating as to what constitutes a legitimate medical purpose. The agency stated, "A prescription for a controlled substance to be effective must be issued for a *legitimate medical purpose* by an individual practitioner acting in the usual course of his professional practice."[13]

The statute and the regulation are not completely identical. They differ in phrasing and tone. The statute gives a dictionary-style definition of the term "valid prescription," using "legitimate medical purpose" as part of the definition. The regulation is written in a more descriptive style, but still defines the requirements for a prescription to be effective. The regulation copies the phrases "legi-

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[9] *See Gonzales*, 546 U.S. at 257.

[10] 546 U.S. 243.

[11] 21 U.S.C. § 830(b)(3)(A)(ii) (2006) (emphasis added).

[12] *See* 21 U.S.C. § 821 (2006); 21 U.S.C. 871 (1970) (authorizing the Attorney General to promulgate certain types of regulations relating to the Controlled Substances Act).

[13] 21 C.F.R. § 1306.04(a) (2011) (emphasis added).

timate medical purpose" and "in the usual course of . . . professional practice" from the statute. Nothing about the phrase "legitimate medical purpose" is clarified by this regulation.[14] In substance, the statute and the regulation say the same thing, using the same key phrases.[15]

The first written explication of the phrase "legitimate medical purpose" came in an interpretive memo issued by the Attorney General. He purported to interpret the phrase as it appears in the regulation, not the statute. "[A]ssisting suicide is not a *'legitimate medical purpose'* within the meaning of 21 CFR 1306.04 (2001), and . . . prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act."[16]

The Supreme Court began its analysis by considering whether this statement from the Attorney General was an agency interpretation of its own regulation, thus receiving *Auer* deference,[17] or an agency interpretation of a statute, thus receiving *Skidmore* deference.[18] *Chevron* deference was held not to be appropriate because the Controlled Substances Act only gives a limited rulemaking role to the Attorney General directly.[19]

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[14] *See Gonzales*, 546 U.S. at 257 ("The regulation uses the terms 'legitimate medical purpose' and 'the course of professional practice,' but this just repeats two statutory phrases and attempts to summarize the others. It gives little or no instruction on a central issue in this case: Who decides whether a particular activity is in 'the course of professional practice' or done for a 'legitimate medical purpose'?") (citation omitted).

[15] In dissent, Justice Scalia made a startlingly weak argument that the regulation does not parrot the statutory text, but instead adds significant context. *See id.* at 278–79. Scalia's argument relies almost entirely on a footnote in a section of a prior case that is self-consciously dicta. *See* United States v. Moore, 423 U.S. 122, 136–37 ("Whether Dr. Moore could have been so prosecuted is not before the Court.").

[16] 66 Fed. Reg. 56,608 (Nov. 9, 2001) (emphasis added).

[17] *See Gonzales*, 546 U.S. at 256–58.

[18] *See id.* at 268–69.

[19] *See id.* at 258–61. *But see id.* at 281–84 (Scalia, J., dissenting) (arguing that the Attorney General's interpretive memo should receive *Chevron* deference).

As described above, the Court created an exception to the *Auer* deference regime. "[T]he existence of a parroting regulation," the Court announced, "does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."[20] Essentially, if the statute and regulation use the same language, the statute and the regulation must mean the same thing. The Court seemed to treat this as a categorical rule, not subject to exceptions. But in other contexts, the Court understands that particular circumstances, including the identity of the author, can be important to the meaning of a text.

III. PARROTING AND CONTEXT

The anti-parroting canon should be treated as a presumption, not a categorical rule. Usually, the same words do have the same meaning. However, this is not always the case. There are exceptions, even exceptions that the Supreme Court has recognized in other areas of law.

A. ROLE

The anti-parroting canon means that courts assume a statute and a regulation using the same language must mean the same thing. When considering language parroted from the Constitution into a statute, however, the Court has come to an entirely different conclusion. The jurisdictional grants to federal courts are worded almost identically in the Constitution and statutes, but those words have been interpreted to mean quite different things.

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[20] *Id.* at 257 (majority opinion).

For federal question jurisdiction, the Constitution states that "[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[21] The parroting statute, 28 U.S.C. § 1331, says, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[22] There are some relevant differences here. Congress has established federal district courts and given them certain powers and a role in the three-tiered structure of the federal judiciary. The statute also limits itself to civil actions, not criminal ones. But the description of the cases courts can hear is essentially the same as what appears in the Constitution.[23]

Despite the nearly identical wording, the courts have interpreted these two provisions to mean quite different things. In *Osborne v. Bank of the United States*,[24] in an opinion by Chief Justice John Marshall, the Court held that the constitutional grant of juris-

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[21] U.S. CONST. art. III, § 2, cl. 1.

[22] 28 U.S.C. § 1331 (2006).

[23] Numerous commentators have agreed that the constitutional and statutory grants use functionally identical language. *See, e.g.*, Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 52 (2007) ("[T]he fundamental grants of judicial power found today in 28 U.S.C. §§ 1331 and 1332 . . . are imperfect mirrors—but mirrors nonetheless—of the constitutional statements in Article III, Section 2."); Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal-Question Jurisdiction*, 38 HASTINGS L.J. 597, 598 (1987) ("The problem is exacerbated because there are two 'arising under' clauses with which the Court must deal."); Ray Forrester, *The Nature of a "Federal Question"*, 16 TUL. L. REV. 362, 364 (1946) ("The definitive words of the statute, 'arising under,' are identical with the words of the Constitution."); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 309 (2007) ("Article III authorizes and the Judicial Code grants federal subject matter jurisdiction over civil cases 'arising under' federal law.").

[24] 22 U.S. 738 (1824).

diction extends to any case that raises any federal question whatsoever, regardless of whether that question is explicit or not. The Court held that because the Bank of the United States was a federally-chartered corporation, and thus owed its very existence to federal law, the federal courts had jurisdiction over any case involving the Bank. The dispute in *Osborne* was only a contract claim, not involving the construction of the Bank charter on its face, but the Court pointed out that the legitimacy of the charter could potentially come up as a defense in the case, even if that was unlikely.[25] The possibility that a court might construe a federal statute in the course of resolving a case is enough to create jurisdiction under the grant in Article III of the Constitution.

Yet when Congress used almost the same words from Article III in a statute, in a provision with apparently identical plain meaning, the Court construed that statute to mean something quite different from the words of Article III. The well-pleaded complaint rule requires that, in order to create statutory "arising under" jurisdiction, a federal question must appear in the plaintiff's complaint itself, not in anticipated defenses.

"[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution."[26]

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[25] *See Osborne*, 22 U.S. at 824.

[26] Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

The situation is similar in diversity jurisdiction, where the constitutional and statutory phrases are, if anything, even more similar. The Constitution states that "the judicial power shall extend to all cases . . . between citizens of different states."[27] The statutory grant of jurisdiction, 28 U.S.C. § 1332, uses exactly the same phrases: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . [c]itizens of different States."[28] The only additions here are the requirement that it be a civil action (which is implicit anyway because a criminal action will not arise between private citizens), and the amount-in-controversy requirement. The phrasing of the diversity requirement is identical in the two sources: "between citizens of different states."

But once again, we find that the courts have interpreted these identical provisions differently. The constitutional grant permits cases with minimal diversity—that is, where at least one party is a citizen of a different state.[29] The statutory grant requires complete diversity—if any plaintiff is a citizen of the same state as any defendant, there is no federal jurisdiction.[30] If Congress wants to grant jurisdiction over cases with minimal diversity, it must use different words to do so.[31]

Scholarly commentary on the differing interpretations of jurisdictional grants has been almost uniformly in agreement with what

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[27] U.S. CONST. art. III, § 2, cl. 1.

[28] 28 U.S.C. § 1332 (2006).

[29] *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967).

[30] *See* Strawbridge v. Curtiss, 7 U.S. 267 (1806); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003) 1459 ("[U]nder all the varying formulations of the general grant of diversity jurisdiction in successive judiciary acts, the [*Strawbridge*] decision has been consistently interpreted as requiring diversity of citizenship as between each plaintiff and each defendant.").

the courts have done, at least from an interpretive point of view. Some scholars quarrel with the well-pleaded complaint rule[32] or the complete diversity requirement,[33] but critiques of the principle that identical constitutional and statutory text can mean different things are few and far between.

The differing interpretations are based not on textual differences, but on policy and principle. The Framers of the Constitution were performing a different task than the writers of statutes. They wanted to allow flexibility for a large number of situations that might arise in the future.[34] Thus, the constitutional grant is interpreted broadly because that allows Congress discretion to "pick and choose" which parts of the range of jurisdiction it wants to actually grant to the courts.[35] The operative statutory grant is interpreted narrowly because Congress probably did not intend to flood the courts with a huge number of marginally federal suits.[36] Congress may choose to grant federal courts the maximum possible jurisdiction permitted under Article III, but under the current interpretive

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[31] *See, e.g.*, 28 U.S.C. § 1369 (2006) (providing for federal jurisdiction with minimal diversity in multi-party litigation cases).

[32] *See generally* Doernberg, *supra* note 23.

[33] *See, e.g.*, Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 222–24 (1982) (advocating the abolition of the complete diversity requirement); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979).

[34] *See* James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642 (1942) ("Before the Convention was the question of how much power should be granted or denied the federal government—not for a year, nor for a decade, and not under ascertainable political and economic conditions, but rather for so long a period as the Constitution should endure . . . .").

[35] *See* Freer, *supra* note 23, at 312.

[36] *See, e.g.*, Bassett, *supra* note 23, at 55 ("These constitutional boundaries form the parameters within which Congress may enact federal jurisdictional statutes."); Freer, *supra* note 23, at 313.

regime, Congress would have to speak exceptionally clearly to accomplish that goal.

One might argue that Congress should have been more specific in the statute rather than repeating the broad words of the Constitution. That is a fair criticism. In fact, as important as these policy considerations may be, there is no evidence for the claim that Congress, when using the same words as the Constitution, meant by those words anything different than the Constitution means. To the contrary, there is a significant amount of evidence that Congress meant the grants to be identical in scope.[37] The policy of different interpretation appears to have been implemented by the Supreme Court alone.[38] In fact, the Supreme Court initially interpreted statutory "arising under" jurisdiction as broadly as the Article III grant before reversing course a few years later.[39]

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[37] *See* Doernberg, *supra* note 23, at 603 ("There is almost no legislative history concerning the intended scope of 'arising under' in the 1875 Act, but what little exists is unambiguous [that Congress intended a grant coextensive with the constitutional limits]."); Forrester, *supra* note 23 (examining the legislative history and contemporary academic commentary on the 1875 Act and finding widespread agreement that the statutory grant was identical to the constitutional grant); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 568 (1985) ("The sparse legislative history of the 1875 act establishing general federal question jurisdiction suggests that Congress intended the grant to be as broad as the Constitution allowed."). *See also* Freer, *supra* note 23, at 313 & n.19 ("In its choice of operative language in jurisdictional statutes, though, Congress has seemed unaware of the policy difference between constitutional and statutory provisions. With both federal question and diversity of citizenship jurisdiction, Congress adopted verbatim the broad operative language from the Constitution.").

[38] *See* Freer, *supra* note 23, at 313 ("The Supreme Court, and not Congress, has animated the policy of broad constitutional authorization with narrow statutory grants. It has done so by interpreting identical language to mean different things, depending upon whether the language is found in Article III or in the Judicial Code.").

[39] *See id.* at 314–17 (recounting the development of the Court's interpretation of "arising under" jurisdiction).

If we take the *Gonzales* majority seriously when they say that the same words must always have the same meaning, this differing interpretation of jurisdictional requirements makes no sense. In *Gonzales*, the Court held that a regulation that parrots a statute must mean the same thing as the statute—that the task of interpreting the regulation is identical to the task of interpreting the statute. Why not then apply the same reasoning to language that is parroted from the Constitution to a statute? If the interpretive task is identical, the two phrases must be understood to mean the same thing. The fact that the parroted jurisdiction statutes have been so consistently interpreted differently should give pause. The role of the writers of a document can legitimately have an effect on the interpreted meaning of their words.

B. KNOWLEDGE

The background knowledge of writers can also have a significant effect on their meanings.

One of the primary reasons for creating agencies and for deferring to their judgment is that agencies are staffed by experts in the subject matter they regulate.[40] Scientists and environmental policy analysts staff the EPA, while telecommunications professionals staff the FCC. Few members of Congress have such detailed expertise in any of these areas, let alone all of them. Agency staff have the understanding necessary to create and interpret rules in ways that provide the best solutions to real-world problems, so Congress often chooses to let them do so.

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[40] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in the best position to do so . . . .").

The picture is more complicated than this, of course. Politics, agency capture, poor bureaucratic incentives and other factors can diminish the positive impact of agencies. Nonetheless, expertise is a major factor in describing the role and effectiveness of agencies.

That expertise, that background knowledge, can work against the anti-parroting canon. The agency's expert understanding of the area being regulated could mean that regulations that seem clear and obvious to the agency might seem vague to a non-expert reader.[41] Even when Congress and an agency use the same words, the agency's extensive background knowledge of the subject matter can cause it to mean different things by the same words. One possibility is that Congress may have used a phrase in layman's terms while the agency uses the same phrase as a term of art. In that case, the statute written by Congress should be interpreted using ordinary public meaning, but the regulation written by the agency should be interpreted to have a technical definition.

The Supreme Court touched on this dilemma in a 1951 case involving labor relations, though the issue was not presented as starkly as I have described it here. In *National Labor Relations Board v. Highland Park Manufacturing Co.*,[42] the Court was tasked with interpreting a statute that forbade the NLRB from adjudicating a labor dispute unless the officers of the union involved and "any national or international labor organization of which it is an affiliate" had filed affidavits affirming that they were not members of the Communist party.[43] The union officers had filed these statements, but

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[41] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 681 (1996) ("Agencies may . . . have insights into regulatory history, context, or purpose that may not be readily apparent to even the most seasoned federal judge.").

[42] 341 U.S. 322 (1951).

[43] *Id.* at 323.

the union was affiliated with the Congress of Industrial Organizations (CIO), whose officers had not filed them.

The NLRB argued that it had the power to adjudicate the case because the CIO was not a "national or international labor organization," but was technically a "federation."[44] The question for the Court was whether the statute used the term "national or international labor organization" in its ordinary sense or its technical meaning in the field of labor relations.

Had the NLRB been the organization writing the phrase "national or international labor organization," it would probably have meant it in the technical sense. When the NLRB confronted the issue in the course of adjudicating an earlier dispute, it held that organizations like the CIO were not such organizations within its understanding.[45]

Congress, however, was not full of labor relations experts. The Court held that the statute should be read in accordance with its plain meaning to the non-technical public.[46] Even the fact that the statute's sponsors and drafters were likely labor relations specialists did not persuade the Court to use the technical meaning.[47]

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[44] *Id.* at 324 ("[T]he C.I.O. . . . is regarded in labor circles as a federation rather than a national or international union.").

[45] N. Va. Broadcasters, Inc., 75 N.L.R.B. 11, 13 (1947) ("We are familiar with no use of the term 'national or international labor organization' which includes parent federations such as the AFL or the CIO within its meaning. On the contrary, every definition or description of the structure of these two federations clearly indicates that the AFL and the CIO are different from 'national' or 'international' labor organizations.").

[46] *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 324–25 (1951) ("If Congress intended geographic adjectives to have a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition.").

[47] *See id.* at 326–27 (Frankfurter, J., dissenting) ("Its sponsors were familiar with labor organization and labor problems and it was doubtless drawn by specialists in labor relations. If they used terms having a special meaning within the field, such words of art, in the absence of contrary indications, must be given that meaning.").

In *Highland Park Manufacturing*, only a single writing was at issue, and the Court had to decide whether that statute used ordinary or technical meaning. In a case of parroting, it's quite possible that a statute uses ordinary meaning, but happened to hit on a phrase that also has a technical meaning. When an agency with expertise in the field reads that phrase and uses it again in a regulation, the agency staff understands that same phrase in its technical meaning, not the ordinary meaning. The rewriting is perhaps not really a parroting in this case—the author of the regulation has his own meaning when he writes the same words. Alternatively, one might say that the agency's expert knowledge caused it to misunderstand the statute it was parroting.

C. ROLE AND KNOWLEDGE IN GONZALES V. OREGON

In the foregoing sections, I've argued that an agency's role and knowledge can make a difference in the meaning of its words, compared to those same words when written by Congress. However, that does not mean that an agency will *always* mean something different when it uses the same words as Congress. Indeed, more likely than not, the same words written by an agency and Congress will have the same meaning. Different meanings for the same phrase are the exception, not the rule.

There is no reason to believe that the regulation at issue in *Gonzales v. Oregon* had any different meaning than the statute it parroted. The Supreme Court seems to have gotten it right in this case, and simply made its words too categorical, ignoring the possibility of exceptions in the future.

When the Supreme Court interpreted the constitutional and statutory jurisdiction grants differently, it did so based on the under-

standing that constitutions and statutes play different roles.[48] The Constitution grants all the power that Congress may ever exercise. Statutes are selective exercises of these constitutional powers.

Agency-authorizing statutes are analogous to a constitution in certain respects. While the statute is itself an exercise of Congress's power to legislate on a particular subject, it is also a grant of power to an agency to make more specific regulations on the subject. Congress may well choose to grant more power than an agency wishes to exercise at any given time. When Congress delegates, it by definition gives the agency a range of options from which to choose.[49]

Congress's use of the phrase "legitimate medical purpose" in the Controlled Substances Act may have left some room for maneuvering. The Attorney General, however, was only authorized to promulgate regulations relating to "the registration and control of the manufacture, distribution, and dispensing of controlled substances"[50] and for "the efficient execution of his functions."[51] This was not a wide-ranging grant of power to regulate the subject matter of medical practice. Instead, Congress circumscribed the Attorney General's rulemaking power in this area. The role of the agency in this situation is less analogous to the role of Congress under the Constitution than other agency-Congress relationships might be. Thus, there is less reason to depart from the presumption that similar language has similar meaning.

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[48] *See supra* Part III.A.

[49] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 861-62 ("We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. . . . [I]t would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.").

[50] 21 U.S.C. § 821 (2006).

[51] 21 U.S.C. § 871 (2006).

The agency's expertise in the subject matter also is not a major player in *Gonzales*. The phrase "legitimate medical purpose" sounds like the type of phrase that could have a technical meaning, but apparently it does not have any commonly defined meaning in the medical industry.[52] Nor does the phrase "usual course of professional practice," which is also repeated in both the statute and the regulation.[53] Since there is no technical meaning of the terms used in the statute and regulation, it is unlikely that the agency's knowledge of medicine and pharmaceuticals caused it to mean something different when using the same phrases that Congress did.

IV. STRUCTURAL CONSIDERATIONS: PARROTING AS POWER GRAB

The *Auer* deference regime was surprisingly uncontroversial when it was first created in *Seminole Rock* in 1945. As late as 1996, John Manning described deference to an agency's interpretation of its own regulations as "one of the least worried-about principles of administrative law."[54] But beginning with Manning's own article and taken up by several other scholars and judges, the *Auer* principle has come increasingly under attack. The anti-parroting exception to *Auer* deference may be a response to these criticisms.[55]

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[52] The government did not argue to the Court that the words of the regulation had a different meaning than the words of the statute. *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

[53] *See* David B. Brushwood, *Defining "Legitimate Medical Purpose"*, 62 AM. J. HEALTH-SYS. PHARMACY 306, 307-08 (2005) (distinguishing the statutory phrase "usual course of . . . practice" from the medical-industry term of art "scope of practice," which has a well-understood technical meaning).

[54] Manning, *supra* note 41, at 614. *See also* Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 99–100 (2000) (noting that the *Seminole Rock/Auer* standard has been largely uncontroversial among scholars and in the courts until recently).

[55] *See* Pierce, *supra* note 5, at 605–06 (advocating the anti-parroting canon of *Gonzales* as a partial response to the problems of *Auer*). *But see* Thomas L. Casey, III, *Towards Function and Fair Notice: Two Models for Effecting Executive Policy Through*

Manning argues that the *Auer* regime violates constitutional separation of powers principles by combining lawmaking and law-exposition functions within the same branch of government.[56] Justice Scalia, though a supporter of *Auer* deference when the anti-parroting canon was created in 2006,[57] has more recently come to agree with Manning about these problems.[58] In Scalia's words, "[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."[59] An agency that knows it will be responsible for interpreting its own regulations and will rarely be contradicted by courts has very little incentive to be clear and precise up-front in its regulations.[60]

Changing Agency Interpretations of Ambiguous Statutes and Rules, 2008 MICH. ST. L. REV. 725, 756–57 (describing *Gonzales* as an outlier from a trend of increasing deference to agencies); Johnson, *supra* note 5, at 8 (describing a trend of increasing deference to agencies).

[56] Manning, *supra* note 41, at 617.

[57] *See Gonzales*, 546 U.S. at 277 (Scalia, J., dissenting) ("[T]his case calls for the straightforward application of our rule that an agency's interpretation of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation.'" (citing Auer v. Robbins, 519 U.S. 452, 461 (1997))).

[58] *See* Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring) ("[W]hile I have in the past uncritically accepted [*Auer*], I have become increasingly doubtful of its validity."). As recently as five months before the *Talk America* decision, Justice Scalia joined a unanimous opinion that reaffirmed and applied the *Auer* standard. *See* Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871 (2011).

[59] *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring).

[60] *See id.* ("[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases."); J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to* Chevron*: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 67 (2010) ("[T]he lenient deference standard announced in *Auer* for informal interpretations of an agency's own ambiguous regulations may be readily exploited . . . ."); Manning, *supra* note 41, at 655 ("[S]ince the agency can say what its own regulations mean (unless the

This is the major difference between statute-regulation and Constitution-statute parroting. Congress has no power to interpret its own statutes. When Congress copies a constitutional phrase into a statute, it does not gain any additional power or deference from other branches of government. Courts and agencies interpret the laws, so Congress has to make a tradeoff between clarity and ceding control to another branch of government.[61]

An agency faces no such tradeoff. Because it has the power to interpret its own regulations under a strong deference regime, the agency can indulge in regulatory vagueness without fear of having its preferences overturned at the interpretation stage. This incentive for vagueness undermines the democratic responsiveness values embodied in notice-and-comment rulemaking.[62] The true meanings of regulations are not worked out in the notice-and-comment process when affected parties have the opportunity to comment and object. Instead, they are created through agency interpretations of regulations, a process in which the public has no input.[63] Additionally, increased vagueness in regulations means that affected parties may not have adequate notice of the rules that will be applied to them.[64]

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agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision.").

[61] *See* Manning, *supra* note 41, at 654 ("If Congress omits to specify its policies clearly during the process of bicameralism and presentment, it does so only at the price of forfeiting its power of policy specification to a separate expositor beyond its immediate control.").

[62] *See* Manning, *supra* note 41, at 662.

[63] *See Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring) ("This [regulatory vagueness that empowers later agency interpretation] frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.").

[64] *See id.* (noting that vague regulations decrease predictability in the application of law); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1993) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more

These concerns are magnified when parroting comes into play. *Auer* deference always disincentivizes agencies from writing clear regulations, but the ability to get strong deference by simply parroting the statute discourages agencies from writing anything new into regulations at all. A smart agency operating under a pro-parroting regime would immediately enact the exact text of its authorizing statute into a regulation promulgated through notice and comment. Any clarifications could then be done through interpretation of the statute, transforming the *Chevron* deference regime into the stronger *Auer* regime and avoiding the application of *Skidmore* altogether. The agency need not go to the trouble of writing even vague regulations. Copying the vague words of Congress would serve just as well, if not better.[65] The agency would have no incentive to bring its expertise to the regulatory questions at the outset.[66]

Parroting also prevents meaningful public participation in notice-and-comment to a greater extent than other types of vague regulations. When an agency promulgates a proposed regulation that consists of language parroted from a statute, affected parties have essentially nothing they can object to aside from the fact of continu-

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cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.").

[65] An anti-parroting rule does not entirely cure the problem of vague regulations, of course. The agency must do more work to create its own vague regulation without using the words of the statute, but the basic *Auer* rule of strong deference to an agency's interpretation of its own regulations will still apply. *See Casey*, *supra* note 54, at 756–57 (noting "the ease with which administrative agencies can avoid the anti-parroting rule by simply modifying any statutory language incorporated into an interpretive rule"). Still, the fact that the agency puts some of its own effort and thought into the regulations and takes the new language through notice and comment proceedings provides at least some protection.

[66] *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006) ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.").

ing vagueness. The statutory language will control regardless of regulations, so any objections to the substance of the parroted regulatory language are useless. A group of doctors, for example, would gain nothing by objecting that the regulations implementing the Controlled Substance Act require that prescriptions be for a legitimate medical purpose, because that requirement comes from the statute. The best strategy for an affected party in this situation might be to comment on how it thinks the language should be interpreted, but such comments are unlikely to motivate the agency to be more specific.

In addition to being a worst-case-scenario of the separation of powers problems inherent in *Auer* deference, the underlying justification for giving agencies the power to interpret their own regulations does not apply in parroting situations. The high level of deference is justified because the provision being interpreted by the agency "is a creature of the [agency's] own regulations."[67] The agency that thought up the regulatory requirement is in the best possible position to know what it meant by the words it wrote.

In *Auer* itself, the statute at issue was the Fair Labor Standards Act, which exempted "bona fide executive, administrative, or professional" employees from overtime pay.[68] The statute had nothing at all to say, however, about who counts as a bona fide executive, administrative, or professional employee. The Secretary of Labor promulgated regulations that created a test based on whether the employee was paid on a salary basis.[69] The entire test was a creature of the regulation, not mentioned anywhere in the statute, so interpreting an ambiguity in the regulation meant interpreting something completely created by an agency.

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[67] Auer v. Robbins, 519 U.S. 452, 461 (1997).
[68] 29 U.S.C. § 213(a)(1) (2006); *Auer*, 519 U.S. at 454.
[69] *Auer*, 519 U.S. at 455.

A parroting case, by contrast, involves a provision that is *not* a creature of the agency. The phrase that appears in a regulation is copied from a statute. The provision is an invention of Congress. At most, it is elaborated or clarified by the agency, but in some cases, such as the *Gonzales v. Oregon* regulation, it may be essentially identical and without further clarification. In this situation, the agency has no special authorship over its regulation because it merely copied the text without being a true author or creator of the provision.

V. CONCLUSION

The Supreme Court announced the anti-parroting canon as a textual rule. Because the language used in the regulation in *Gonzales* was exactly the same as the language of the statute, the Court saw the interpretive question as "not the meaning of the regulation but the meaning of the statute."[70] Yet, the fact that a statute and a regulation use the same words should not always lead to the conclusion that they mean the same thing. The agency's institutional role and its background knowledge are different from the role and knowledge of Congress. Those differences can sometimes create different meaning in the same words.

Sometimes, though, is not the same as always. Instances of parroted language taking on a new meaning because of an agency's role and knowledge will likely be few and far between. Identical language does not *necessarily* mean the same thing in different contexts, but it is *likely* to mean the same thing. From a textual standpoint, the anti-parroting canon would be unobjectionable if treated as a presumption rather than a categorical rule. Identical language in a regulation and a statute should be presumed to have the same meaning unless there is evidence that the agency's role or knowledge caused it to have a different meaning.

At the same time, the anti-parroting canon serves an important structural role. Under *Auer* deference, agencies have a strong incentive to "promulgate mush"[71] and then clarify through informal interpretations that will receive heightened deference from courts. Perhaps the anti-parroting canon is the Court's way of eliminating the worst-case scenario, the *reductio ad absurdum* of *Auer* deference. Or perhaps it is the first step toward rethinking the *Auer* regime altogether. Either way, a structural explanation for the anti-parroting canon allows it to coexist with the understanding that text must be understood in its full context.

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[70] *Gonzales*, 546 U.S. at 257.
[71] Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997).