The Penalty Default Canon

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Introduction

In this Article, we develop a theory of permissible congressional delegations based on the incomplete contracts literature.[1] In contract law, scholars assert that courts should and often do approach the task of filling gaps in incomplete contracts by developing a set of default rules that will govern the relationship between the parties in the absence of an explicit contractual provision to the contrary. The appropriate governing default rule is typically determined through a two-step process in which the first step is to determine the reasons for contractual incompleteness. The second step is to select a default rule based on those reasons.

For example, when a contract is incomplete for transaction cost or bounded-rationality reasons, commentators assert that the appropriate default rule should reflect the bargain that most parties would have reached on their own in the absence of such drafting limitations.[2] By contrast, when a contract is left incomplete for strategic reasons, many scholars propose "penalty" default rules that reduce the incentives for strategic behavior.[3] For instance, penalty default rules may be designed to induce the disclosure of information by one or both parties to the contract (an "information-forcing"

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1 We refer to contracts and statutes as "incomplete" if (1) the contract or statute has gaps, meaning that the contract or statute is silent on an issue; or (2) the contractual or statutory language is ambiguous, meaning that the words used are susceptible to multiple reasonable interpretations. As discussed *infra* note 20 and accompanying text, we consider the statute or contract incomplete even if authority to fill in the terms has explicitly been delegated to a court or agency. *See, e.g.*, U.C.C. § 2-201(1) (2002) (stating that "the contract is not enforceable . . . beyond the quantity of goods shown in such writing").

To illustrate the difference between gaps and ambiguities, consider the following examples. A contract for the sale of goods has a gap if it does not define the method of delivery. In contrast, the word "chicken" is ambiguous if it is subject to different interpretations depending on the context. *See, e.g.*, Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (exploring the meanings of "chicken"). Of course, neither contracts nor statutes are fully "complete" or "incomplete." Instead, incompleteness is a matter of degree.

2 *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989).

3 *See, e.g.*, *id.* at 93–94. Not all scholars agree that penalty default rules are workable. *See, e.g.*, Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 840 (2003).

rule), thus inducing the parties to bargain and more fully complete their own contract.[4] In other words, in contract law, the common assumption is that the appropriate default rule depends on the reasons for contractual incompleteness.

This same insight has been largely ignored, however, in the case law and scholarly debate addressing how courts should deal with incomplete statutes.[5] Although a variety of theories on the topic have been widely debated, few scholars embrace the contract law insight that courts should consider the reason for statutory incompleteness in developing default rules. Our proposal, by contrast, tracks the economic and legal theory on contracts to develop a two-step approach to the constitutionality of legislative delegations.

When faced with an interpretation dispute regarding an incomplete statutory provision, courts should first endeavor to discover the reasons for statutory incompleteness. If the provision is incomplete for strategic reasons, meaning that lawmakers created an intentionally incomplete statute in an attempt to shift responsibility for the negative impacts of law to other governmental branches, then the courts should penalize lawmakers by holding that the provision is so incomplete that it amounts to an unconstitutional delegation of legislative authority.[6] In this way, the courts encourage legislative reconsideration or, in anticipation of the penalty default, induce more precise legislative drafting. The Penalty Default Canon thus removes the responsibility-shifting option from lawmakers, and forces them to shoulder the blame for their decisions. If, however, the statutory provision is incomplete for other, nonstrategic reasons, then the default rule should reflect those reasons for incompleteness.

This contractual approach to statutory interpretation sheds new light on debates regarding the appropriate judicial response to statutory incompleteness, including the nondelegation doctrine, the *Chevron* doctrine, various canons of statutory construction, and the different interpretative theories that incorporate public choice insights. As will be shown, these doctrines, canons, and theories are at once too broad and too narrow in that they either neglect or assume the underlying cause of statutory incompleteness. The Penalty Default Canon, in contrast, requires courts to consider and base their decisions regarding the constitutionality of incomplete statutes on the likely causes of statutory incompleteness.

Part I of this Article provides a benchmark for the statutory analysis by discussing the relevant insights from the incomplete contracts literature. Part II applies those insights to the analysis of statutory incompleteness, with a

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4 *See* Ayres & Gertner, *supra* note 2, at 99.

5 Notable exceptions are Einer Elhauge, David Epstein, Sharyn O'Halloran, and Jonathan R. Macey. The work of each of these authors is discussed in detail throughout this Article. In addition, Ian Ayres and Robert Gertner briefly consider the use of penalty defaults for statutory interpretation in their article on contractual default rules. Ayres & Gertner, *supra* note 2, at 129–30.

6 Alternative grounds for declaring incomplete statutes unconstitutional are discussed *infra* note 261. Ideally, this penalty should be applied narrowly so that only the incomplete statutory provision, and not the entire statute, is declared unconstitutional. In some cases, however, the incomplete provision may be nonseverable from the statute. In such a case, the entire statute must be held unconstitutional.

particular focus on one potential source of incompleteness suggested by public choice theory—incompleteness designed to shift responsibility for certain legislative decisions onto the less politically accountable government branches. Part III develops the Penalty Default Canon by directing courts to consider the reasons for statutory incompleteness before selecting the applicable default rule. To aid courts in their default rule selection, Part III develops a three-step test for uncovering the source of statutory incompleteness. Part IV then illustrates the application of the Penalty Default Canon through examples of two statutory provisions that we argue Congress left purposely incomplete: (1) the "strong inference" pleading requirement of the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[7] and (2) section 6 of the Clayton Act.[8]

The Penalty Default Canon requires courts to declare responsibility-shifting statutory provisions unconstitutional delegations of legislative authority. Therefore, it substantially alters existing theories under which courts analyze legislative delegations, such as the nondelegation and *Chevron* doctrines. Accordingly, Part V compares and contrasts the Penalty Default Canon with these doctrines and argues that the Penalty Default Canon provides a superior means of enhancing electoral accountability. Part VI distinguishes the Penalty Default Canon from existing theories of statutory construction and argues for the Canon's superiority as a mechanism for discouraging legislative responsibility shifting.

I. Incomplete Contracts

Economists and legal academics often say that contracts are incomplete, meaning that the language of the contract fails to specify the rights and obligations of the parties in every future contingency. In other words, contracts inevitably have gaps and ambiguities. The reasons for contractual incompleteness can be roughly divided into four categories.[9] First, parties may leave gaps or ambiguities in contracts because the transaction costs of considering and drafting for a future contingency outweigh the benefits of having a more complete contract.[10] Second, the parties may leave the contract incomplete because they suffer from bounded rationality, meaning that they lack the foresight to see and contract on all relevant future contingencies. Third, the conduct underlying the contract may be observable to the parties, but unverifiable by courts or other third-party enforcers.[11] Finally, parties may

7 Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2000).

8 Clayton Act § 6, 15 U.S.C. § 17 (2000).

9 In addition, George Triantis has demonstrated several reasons why rational contracting parties may prefer incomplete contracts. George G. Triantis, *The Efficiency of Vague Contract Terms: A Response to the Schwartz-Scott Theory of U.C.C. Article 2*, 62 LA. L. REV. 1065, 1071–79 (2002).

10 Transaction costs are broadly defined to include "legal fees, negotiation costs, drafting and printing costs, the costs of researching the effects and probability of a contingency, and the costs to the parties and the courts of verifying whether a contingency occurred." Ayres & Gertner, *supra* note 2, at 92–93.

11 A commonly cited example involves the level of employee effort required to satisfy the terms of an employment contract, for example, a best-efforts clause. The employee's effort might be observable by both the employee and employer. Nevertheless, if the effort level is

leave gaps in contracts for strategic reasons. For example, a party may fear that by revealing private information (for example, the value of performance), she would enable her contracting partner to garner a higher fraction of the gains from trade. Alternatively, both contracting parties may be fully informed, but choose nonetheless to form an incomplete contract in order to shift the costs of contract completion onto others, typically the publicly subsidized courts. In either case, the informed party or parties have an incentive to hide information, resulting in an incomplete contract.[12]

Legal scholars have responded to contractual incompleteness by developing a theory of default rules. Under this theory, contract doctrine provides a set of gap-filling terms. Contracting parties rely on these "gap fillers" to fill holes in their contracts, reducing the cost of contracting.

Legal scholars argue that the set of default rules supplied by courts and statutes should and often does reflect the principal source of contractual incompleteness.[13] If the contractual gaps result (at least primarily) from transaction costs, scholars argue that the appropriate default rule provides the term that most parties would want most of the time.[14] On the other hand, if large information asymmetries exist (fostering strategic behavior), many legal scholars argue that contract law should penalize the informed parties for failing to complete the contract.[15]

Scholars have identified two different types of strategic contracting behavior, necessitating two different types of information-forcing penalty default rules. When contractual incompleteness is attributable to strategic behavior by one contracting party with superior information, many scholars advocate a rule of contract construction that penalizes the better-informed party for failing to convey information to her contracting partner.[16] Some-

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unverifiable by the court, then any attempt by the parties to make the contract's payment term contingent on effort will fail, resulting in an incomplete contract. *See* Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, *in* 3 HANDBOOK OF PUBLIC ECONOMICS 1661, 1706 (Alan J. Auerbach & Martin Feldstein eds., 2002).

12 Ayres & Gertner, *supra* note 2, at 94. The reasons for contractual gaps and ambiguities are not mutually exclusive. Often, some combination of transaction costs, bounded rationality, verifiability, and strategic behavior will lead to contractual incompleteness.

13 Although the reasons for contractual incompleteness are central to the selection of the optimal default rule, scholars have identified other important considerations that might also be relevant. *See* Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Default Rules*, 51 STAN. L. REV. 1591, 1593 (1999) ("identif[ying] four other rationales for minoritarian rules based on (1) different private costs of contracting around, (2) different private costs of failing to contract around, (3) different public costs of filling gaps, and (4) ignorance of the law"). Because these considerations lack a clear analog when applied to statutes, we limit discussion to the underlying reasons for statutory incompleteness.

14 *See* Ayres & Gertner, *supra* note 2, at 89–91.

15 *See, e.g.*, *id.* at 94.

16 For example, the contract rule that limits damages to those that are reasonably foreseeable at the time of contracting may operate as an information-forcing rule. Many legal scholars argue that this default rule induces the informed party to reveal the true value of performance. *See* Hadley v. Baxendale, 156 Eng. Rep. 145, 147 (1854); Ayres & Gertner, *supra* note 2, at 101–03. The effectiveness of this penalty default depends on a host of factors, including the ease of conveying information, the distribution of private information in the pool of contracting parties, the stochastic nature of damages, and the bargaining power of the two parties. *See* Barry E. Adler, *The Questionable Ascent of* Hadley v. Baxendale, 51 STAN. L. REV. 1547, 1550–53 (1999);

times, however, both contracting parties behave strategically, leaving their contract purposely incomplete in order to shift the costs of completion to the courts.[17] In such a case, efficiency may require that the contact be invalidated or not enforced.[18] The invalidation penalty is designed, not to force the disclosure of information from one contracting party to another, but to force both contracting parties to reveal information to outside observers, usually the publicly subsidized courts, by dictating a result (contract invalidation) that neither party desires.[19]

The Penalty Default Canon falls into the second class of penalty default rules: a rule of invalidation designed to force the revelation of information to outside observers, in this case, the voting public. As will be discussed, the Canon invalidates (by holding unconstitutional) statutes whose incompleteness is designed to shift responsibility from the legislature onto other governmental branches.[20]

Accordingly, the Penalty Default Canon can be distinguished from existing proposals regarding the statutory interpretation of incomplete statutes. Although many of these proposals can be usefully conceptualized as penalty defaults, they are all rules of statutory construction, not rules of statutory invalidation, as is the Penalty Default Canon.[21]

Other scholars, for example, have argued for penalty defaults that construe incomplete statutes: (1) in the public interest;[22] (2) against the govern-

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Lucian A. Bebchuck & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. ECON. & ORG. 284, 285–86 (1991); Lucian Arye Bebchuck & Steven Shavell, *Reconsidering Contractual Liability and the Incentive to Reveal Information*, 51 STAN. L. REV. 1615, 1616–19 (1999); Posner, *supra* note 3, at 836–37 (noting that whether the *Hadley* rule works as a penalty default turns on many factors, which are hard to quantify).

17 Ayres & Gertner, *supra* note 2, at 127–28.

18 *Id.* at 95–96.

19 For example, under the Uniform Commercial Code, if the parties fail to specify quantity the court will refuse to fill in the resulting gap, and, in effect, void the contract. U.C.C. § 2-201(1) (2002); Ayres & Gertner, *supra* note 2, at 95–97 (discussing the Uniform Commercial Code's zero-quantity default rule). Similarly, corporate law statutes may refuse to enforce charters that fail to specify certain information, such as the number of authorized shares or the address of the corporation for service of process. *Id.* at 97–98.

20 *See infra* notes 231–79 and accompanying text (discussing the nondelegation doctrine and other constitutional principles relevant to the problem of incomplete law). This Article connects several distinct, but related, legal theories that are typically treated separately by legal scholars, including the theories of statutory interpretation of incomplete law and the nondelegation doctrine. This is because, when Congress enacts an incomplete law, it necessarily delegates authority to courts or agencies to fill gaps and resolve ambiguities in the statute. Accordingly, incomplete law can be divided into two categories: "implicit" delegations in which the statute contains a gap or ambiguity, but is silent as to how and by whom the statute should be completed; and "explicit" delegations in which the statute in question contains a gap or ambiguity and explicitly directs a court or agency to complete the statute. Because implicit and explicit incomplete law raise similar electoral-accountability concerns, the Penalty Default Canon treats the two types of incomplete statutes in the same way.

21 *See infra* notes 280–333 and accompanying text (discussing these alternative proposals and distinguishing them from the Penalty Default Canon).

22 *See, e.g.*, Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986) (Courts should

ment; or (3) against a politically powerful group.[23] Like the Penalty Default Canon, these rules of construction are designed to force information from lawmakers.

We reject the statutory construction approach, however, for three reasons.[24] First, it is difficult (sometimes impossible) to determine what it means to construe a statute "against the government," "against a politically powerful group," or "in the public interest." For example, in some cases in which the government is not a party, it may be unclear which ruling "the government" would favor, even assuming that all governmental branches are in agreement on the point. Similarly, it is not obvious what constitutes a politically powerful group. Finally, construing in the public interest requires subjective and controversial normative decisions at odds with the goal of promoting objective statutory interpretation.

Our second reason for rejecting the statutory interpretation form of the penalty default rule is that, given the subjective nature of such determinations, information-forcing rules that turn on statutory construction enable judges to use statutory interpretation to import their own policy preferences into the law.[25] This kind of judicial activism is more difficult, though not impossible, under the Penalty Default Canon. A judge who invalidates an incomplete, responsibility-shifting statute by declaring it unconstitutional (as she must under the Penalty Default Canon) is likely to draw more public scrutiny than, say, a judge who merely interprets a statute in a manner arguably consistent with the statutory language that also happens to favor her desired policy outcome.[26] As a result, we believe that most judges will hesitate to invoke the Penalty Default Canon when it is inappropriate to do so.

Finally, as discussed at length in Part VI of this Article, the Penalty Default Canon, with its focus on the reasons for statutory incompleteness, is more narrowly tailored than competing penalty defaults that take the form of rules of statutory construction. Because the Penalty Default Canon is imposed only when Congress has attempted to avoid electoral accountability

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"transform[ ] statutes designed to benefit narrow interest groups into statutes that in fact further the public's interest.").

23 *See, e.g.*, Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002) ("The justification for preference-eliciting canons thus need not rest in their correspondence to either legislative preferences or sound policy. The justification—and necessary predicate—is rather that the default result is more likely to be reconsidered (and deliberated) by the legislature because it burdens some politically powerful group with ready access to the legislative agenda.").

24 *See infra* Part VI (distinguishing further the Penalty Default Canon from other canons of construction).

25 *Cf.* Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* 48–49 (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper 03-9, 2003), *available at* http://www.law.uchicago.edu/academics/publiclaw/resources/50.crs.voting.pdf (last visited Mar. 27, 2004) (employing the political party of the appointing president as a proxy for ideology and finding that in many issue areas appellate judges' voting is affected by ideology).

26 In addition, to the extent that judges seek canons of construction and constitutional tools that maximize their discretion, they should avoid the Penalty Default Canon, as it reduces the set of incomplete laws subject to their interpretation. *See infra* note 100 (discussing this possibility).

through statutory incompleteness that provides no offsetting gains—in terms of lower transaction costs of lawmaking or a reliance on court or agency expertise—the Penalty Default Canon promotes electoral accountability while at the same time providing the flexibility necessary for effective lawmaking.

II. Law as an Incomplete Contract

Over the last twenty years, legal theorists, including public choice scholars, have analogized legal rules to contracts.[27] Under the public choice vision of this theory, new legislation reflects a deal between interest groups and lawmakers.[28]

In Section A of this Part, we briefly outline the major tenets of public choice theory that are relevant to an analysis of statutory incompleteness. Section B then employs the statute-as-contract metaphor to highlight the va-

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27 *See, e.g.*, J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT 101 (1998) (referring to public-utility regulation as a "contract between the state and the regulated company"); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter Easterbrook, *Statutes' Domain*]; Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) [hereinafter Easterbrook, *Foreword*]; William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Daniel A. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667 (1991); Macey, *supra* note 22.

The contract analogy has been questioned. *See, e.g.*, Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy of Statutory Interpretation*, 76 N.C. L. REV. 1145, 1149 (1998) (arguing that "a statute differs from a contract in fundamental ways").

28 In the traditional public choice version of this theory, the contract is between interest groups on the one hand, and lawmakers on the other. *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12–13 (1971). A related theory—pluralist theory—posits that the contract is among various interest groups. *See* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983). Under pluralist theory, lawmakers function primarily as disinterested aggregators of the preferences of various interest groups. In contrast to public choice theory, pluralist theory (at least as espoused by Becker and his followers) views such interest group bargains as welfare-enhancing. Becker's pluralist theory has been criticized on a variety of grounds, including empirical evidence that suggests legislators do not play such a passive role in lawmaking but, instead, perform a far more active function than merely rubber stamping deals struck by interest groups. *See, e.g.*, Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 60–65 (1998) (summarizing the arguments against pluralist theory). Some commentators have also analogized statutes to contracts among the enacting legislators themselves. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 705 (1992) (the authors—Mathew McCubbins, Roger Noll, and Barry Weingast—are collectively referred to as "McNollgast"). Finally, some scholars view regulation as a contract between the legislature, as the principal who enacts the law, and either an agency or court, as the agent who implements the law according to the principal's wishes. *See, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 65 (1999) (treating all delegatees—executive agencies, states, and courts—as agents of the legislature but focusing specifically on delegations to executive agencies as a principal–agent problem); William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 326 (1989) (suggesting that legislation is actually a deal between the legislature and the judge, who implements the law). The principal–agent model of legislation is not without its critics, however, and has generated an especially long and heated debate within political science circles. EPSTEIN & O'HALLORAN, *supra*, at 73–74 (discussing this debate). In our formulation, the enacting lawmakers are the parties to the legislative contract.

riety of potential reasons for statutory incompleteness. Finally, Section C details the theoretical and empirical debate regarding one possible reason for statutory incompleteness: strategic delegations designed to shift responsibility for certain legislative decisions onto other governmental branches.

A. Public Choice Theory

Public choice theory asserts that legislation is, at best, a transfer payment from less-organized to better-organized groups and, at worst, completely arbitrary.[29] According to the interest group branch of public choice theory, well-organized interest groups can overcome the free-rider problem that plagues group decision making.[30] In so doing, the interest group becomes an effective advocate for its members, extracting concentrated benefits from the government while imposing the costs of those benefits on less-organized groups—typically, broad-based segments of the public such as consumers.[31] Lawmakers facilitate this transfer and, in return, receive campaign contributions, votes, or bribes.[32] In short, public choice theory views legislation as a commodity bought by interest groups and sold by lawmakers, subject to the normal economic rules of supply and demand.[33]

All of this has consequences for social welfare. Although a transfer from one group to another does not represent a social loss, public choice theorists predict that legislation will often be inefficient; that is, the costs imposed on the less-organized group will outweigh the benefits obtained by the better-organized group.[34] Moreover, at any one time, multiple interest groups may compete for the transfer of concentrated benefits.[35] This competition, known as "rent seeking," wastes resources.[36]

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29 Public choice theory can be broadly divided into two branches: voting theory, based on the work of Kenneth Arrow, and interest group theory, based on the work of George Stigler. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 10–11 (1997). Voting theory, derived from Arrow's Impossibility Theorem, asserts that determinations based on majority rule may produce indeterminate, random, or shifting outcomes, a process known as "cycling." Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328, 328–29 (1950). *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1961). Interest group theory, on the other hand, views legal rules as the product of political bargains between interest groups and lawmakers. Stigler, *supra* note 28, at 3. In this Article, we discuss only the interest group branch of public choice theory.

30 MASHAW, *supra* note 29, at 19.

31 *Id.* at 19–20. The same logic implies that well-organized groups may block legislation with large, diffuse benefits and small, concentrated costs. For example, well-organized business interests may block environmental or product-safety legislation whose costs would be borne by the regulated industry and benefits spread among the general public. We refer to both types of activities as interest group transfers.

32 *See id.* at 15–21; William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

33 *See* Landes & Posner, *supra* note 32, at 877; Stigler, *supra* note 28, at 12.

34 *See* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 WEST. ECON. J. 224 (1967), *reprinted in* TOWARD A THEORY OF THE RENT SEEKING SOCIETY 44–50 (James M. Buchanan et al. eds., 1980).

35 *See id.*

36 Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 299–300 (1974); Tullock, *supra* note 34, at 39–50.

Public choice theory is not without its critics. In particular, scholars have criticized the public choice assumptions regarding the self-interested motivations of lawmakers,[37] the rationality of human behavior, and the inability of interest groups representing broad segments of the public to sufficiently overcome collective-action problems in order to meaningfully constrain interest groups representing concentrated interests.[38] In addition, many scholars have asserted that public choice theory lacks empirical support.[39]

We need not join this debate here. Our thesis does not depend on an assumption that interest group theory fully explains all law. In fact, we explicitly assert that it does not.[40] Instead, our hypothesis is merely that some subset of law may be attributable to interest group influence, and that legislators have control over the completeness of that law. As discussed in the following subsection, when a statute is particularly salient to organized interest groups, the voting public, or both, lawmakers may find it politically advantageous to delegate to another branch of government the authority to fill statutory gaps and ambiguities.[41]

B. The Decision to Delegate: Sources of Statutory Incompleteness

Many researchers in law, economics, and political science have combined the statute-as-contract insight with public choice theory's pessimistic view of the political process to build theories of statutory interpretation as well as policy arguments regarding the proper roles of the three governmental branches.[42] As a general rule, however, these scholars have not focused on the source of statutory incompleteness. When individuals' contracts are incomplete, the gaps and ambiguities must be filled in later through renegotiation or litigation. Similarly, when legislators leave statutes incomplete they delegate to courts or agencies—either purposely or accidentally—the authority to fill in the resulting gaps and ambiguities. Congress thus controls the amount of discretionary authority delegated to the other governmental branches through the level of detail contained in enacted legislation.

Statutes, like contracts, can be more or less complete, but will inevitably have some gaps and ambiguities. Like Epstein and O'Halloran, we believe

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37 *See* Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 202–03 (1988); Abner J. Mikva, *Foreword* to *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 169 (1988). Others, however, argue that this controversy is overblown, as self-interest is neither a necessary nor sufficient condition for interest group theory. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 53–54 (1994).

38 Croley, *supra* note 28, at 45–50; Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309, 320–22 (2002).

39 DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 17–37 (1991); MASHAW, *supra* note 29, at 44; Croley, *supra* note 28, at 52–56.

40 *See infra* notes 42–73 and accompanying text (discussing the reasons for statutory incompleteness).

41 Delegations may also be made to states and private parties.

42 *See* Easterbrook, *Foreword*, *supra* note 27, at 51; Easterbrook, *Statutes' Domain*, *supra* note 27, at 544; Eskridge, *supra* note 27, at 278–79; Macey, *supra* note 22, at 225–27; *see also infra* Part VI (discussing canons of statutory construction).

that Congress will delegate discretionary authority to other governmental branches whenever the benefits outweigh the costs,[43] other than in instances of inadvertent statutory incompleteness. By contrast, when legislators perceive that, despite the demands on their time and resources, they will benefit from making policy directly, they will enact precise legislation that leaves courts and agencies with little discretion in implementing the law.[44]

Because the reasons for statutory incompleteness closely track the reasons for contractual incompleteness discussed in Part I of this Article, a contractarian analysis of the lawmaking process helps to define instances in which legislators are likely to broadly delegate power to other governmental branches. For example, lawmakers might enact an incomplete statute to avoid the transaction costs associated with reaching agreement on more precise statutory language.[45] In addition, lawmakers might leave statutory gaps or ambiguities because they cannot foresee and account for all the future contingencies to which the law might apply. Lawmakers, after all, suffer from the same cognitive limitations as other contracting parties. Lawmakers also might enact an incomplete statute to give courts or agencies the flexibility to adapt the statute to changing circumstances, or because they do not (whereas a court or agency might) have the expertise to define precisely the scope of the legal obligations. Finally, lawmakers might enact an incomplete statute for strategic reasons. In particular, lawmakers might leave gaps in a statute to avoid the political costs associated with specific statutory language. For example, Congress may delegate discretionary authority to courts or agencies in an attempt to shift responsibility for any negative impacts of the law to other branches, or to hide transfers to specific interest groups. We term these responsibility-shifting delegations.[46]

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43 EPSTEIN & O'HALLORAN, *supra* note 28, at 197. Perhaps the most important of these costs is the loss of congressional control inherent in any such delegation. This cost, however, can be mitigated by a variety of administrative and oversight procedures. *See* McNollgast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989). In addition to those discussed *infra* notes 44–73 and accompanying text, the benefits of delegation (from a rational legislator's perspective) include avoiding the bicameralism and supermajority requirements (in the event of a real or threatened presidential veto) that reduce speed and flexibility in lawmaking, and avoiding the costs associated with legislative logrolls and the congressional committee system. EPSTEIN & O'HALLORAN, *supra* note 28, at 7–8.

44 *See, e.g.*, EPSTEIN & O'HALLORAN, *supra* note 28, at 201–03.

45 *See supra* note 43 (discussing the costs).

46 Responsibility-shifting delegations constitute only one category of strategic delegations. Commentators have asserted two other broad categories of strategic delegations: constituency relations and the "policy lottery" or "regulatory lottery." EPSTEIN & O'HALLORAN, *supra* note 28, at 30–32. Under the various versions of the constituency-relations explanation, legislators may (1) delegate in order to reduce their workload and free up time for constituency relations, (2) purposely expose their constituents to imperfect agency regulation in order to curry favor by intervening on behalf of constituents, or (3) threaten uncooperative constituents with costly regulation if they refuse to provide campaign contributions. *Id.* at 30–31; MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 47–49 (1977) (arguing that legislators delegate to agencies in order to curry favor by correcting problems that arise); HENRY G. MANNE & ROGER LEROY MILLER, AUTO SAFETY REGULATION: THE CURE OR THE PROBLEM?

There are at least three different versions of the responsibility-shifting explanation for delegations. In one of the earliest expositions of the argument, Peter Aranson, Ernest Gellhorn, and Glen Robinson (collectively, "AGR"), argued that whenever groups of unequal power clash over legislation, responsibility-shifting delegations allow Congress to avoid blame for bad outcomes while claiming credit for good outcomes.[47] By making a delegation to courts or agencies, combined with general language designed to appease the weaker group (such as an exhortation to regulate in the public interest), the weaker group—say consumers—will be mollified by the belief that legislators have taken some action to address their concerns. At the same time, the more powerful group—industry interests, for example—will be satisfied knowing that they can bring their greater resources and influence to bear on court and agency interpretations.[48] AGR thus predict broad delegations to agencies when the benefits from new law are concentrated within one well-organized group and precise legislation when such benefits are diffuse.[49]

Interestingly, political scientists David Epstein and Sharyn O'Halloran propose a new variation on the responsibility-shifting theory that predicts exactly the opposite results. According to Professors Epstein and O'Halloran, some laws provide few benefits for which Congress may effectively claim credit, but carry the possibility of a substantial political downside,

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102–10 (1976) (discussing various arguments that legislators use agency delegations as a means to threaten uncooperative constituents).

According to the policy-lottery explanation, interest groups at an impasse over new legislation will prefer that lawmakers delegate to an agency because each group prefers the uncertainty of a future agency decision to the status quo. *See* FARBER & FRICKEY, *supra* note 39, at 82–83 ("Even if they are just as likely to lose as win, [interest groups] may prefer to buy into an 'administrative lottery' as opposed to having no legislative action at all."); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 57–58 (1982) [hereinafter Fiorina, *Legislative Choice*] ("Progressive elements who favored stronger regulation than actually passed, and industry interests who favored weaker may each have been willing to gamble (and try to convince those similar to them to gamble) on the possibility that administrative regulation would produce an outcome closer to their ideal than the legal proposals which were the alternative. Under this interpretation Progressives were not naïve and stupid, just players of a long-shot who lost."). This argument, however, assumes that interest groups are risk-preferring, in contrast to the common economic assumption of risk aversion or risk neutrality. *See* FARBER & FRICKEY, *supra* note 39, at 83 (arguing that it is unclear whether welfare is reduced through the policy lottery); MASHAW, *supra* note 29, at 142–45 (same). In this Article, we address only the responsibility-shifting argument.

47 Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 6–58 (1982). The theory was first proposed by the political scientist Morris Fiorina, on whose work Peter Aranson, Ernest Gellhorn, and Glen Robinson (collectively, "AGR") build. *See* Fiorina, *Legislative Choice*, *supra* note 46, at 33.

48 Daniel Farber and Phillip Frickey cast this same argument in terms of monitoring costs. FARBER & FRICKEY, *supra* note 39, at 81. For example, if two interest groups have opposing views on a piece of legislation, lawmakers may want to avoid alienating either group in order to maximize their chances of reelection. *Id.* If the two interest groups have different capacities to monitor and influence the relevant agency, legislators may pass an incomplete law that favors the interest group that cannot effectively monitor or influence the agency; thus, pleasing this group of "poor monitors." *Id.* The statute, however, satisfies the "good monitors" too, because they know that the agency will construe statutory ambiguities in their favor. *Id.*

49 Aranson, Gellhorn & Robinson, *supra* note 47, at 57.

particularly if regulatory failures tend to be highly publicized and salient to voters.[50]

Airline safety regulation provides a useful example.[51] The beneficiaries of such legislation are airline passengers, who are diffuse and poorly organized, while the costs are concentrated in the airline industry, which is well organized and politically active.[52] Furthermore, because regulation requires technical expertise, it is likely to be time consuming.[53] Legislators intent on maximizing their chances for reelection thus should only want to retain control over such regulation if there are substantial offsetting benefits.[54] In fact, however, legislators are likely to derive few benefits if airline safety regulation works well and no disasters occur.[55] Airline crashes, by contrast, tend to be highly salient and widely publicized with significant political costs to any elected official with direct responsibility for airline safety guidelines.[56]

In addition, Congress's incentive to monitor the agency is reduced because legislative and agency preferences are likely to be closely aligned in this instance; both seek to reduce the number of airline crashes without imposing prohibitive costs on the airline industry.[57] Thus, the costs to legislators of precise legislation defining safety requirements far exceed the potential benefits of retaining control and claiming credit for any successes.[58] Accordingly, Epstein and O'Halloran predict that Congress will delegate when, as in this example, benefits are diffuse or likely to go unnoticed, and will retain power when benefits can be narrowly tailored to specific constituencies.[59]

In this Article, we emphasize another reason for responsibility-shifting delegations.[60] We propose that Congress has an incentive to responsibility shift whenever two or more powerful interest groups are at odds over particular statutory language, or on those relatively rare occasions when statutory language is extremely important to both powerful interest groups and the general public. In such instances, Congress may seek to employ statutory incompleteness to avoid *fully* alienating any interest group, while still retaining the freedom to argue to voters that they have enacted a statute that is prolabor, proenvironment, or conforms to some other ideology that has broad electoral support.[61]

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50 EPSTEIN & O'HALLORAN, *supra* note 28, at 7–9.

51 *Id.* at 8.

52 *Id.*

53 *Id.*

54 *Id.* at 9.

55 *Id.* at 8.

56 *Id.* Imagine, for example, the potential political backlash after an airline crash if it were discovered that members of the congressional committee in charge of enacting airline safety guidelines also received substantial campaign contributions from the airline industry.

57 *Id.*

58 *Id.*

59 *Id.* at 8–9.

60 William Eskridge also mentions this rationale for responsibility-shifting delegations, but does not develop the theory in detail. *See* Eskridge, *supra* note 27, at 288–89.

61 This is not to say that the battle produces no winners or losers. Instead, the point is that no group achieves a total victory, yet no group suffers full defeat either. The remainder of the electorate, meanwhile, is left out of the game entirely. *See infra* notes 62–67 and accompanying text (providing an example of this scenario).

In making this assertion, we do not assume that interest groups are so naive as to be fooled by duplicitous congressional maneuvering. Instead, we argue that all of the actors directly engaged in the legislative process, including many powerful interest group leaders, tend to demonstrate a highly sophisticated understanding of judicial and legislative processes and the likely judicial or agency response to contested provisions. Nevertheless, there will be times when all affected interest groups (after recognizing that their hoped-for legislative victory is unattainable) knowingly accept a second-best alternative in exchange for congressional removal of their respective worst-case scenarios. Unfortunately, ill-informed voters are left unaware of the rules of this game, permitting legislators to blame courts and agencies when later interpretations appear to undermine legislative mandates.

To illustrate, consider the battle for passage of section 6 of the Clayton Act, discussed in more detail in Part IV.B of this Article.[62] In that case, the best scenario for business interests would have been an absence of legislation referencing the rights of labor organizations.[63] The worst-case scenario, by contrast, would have been exactly what labor interests had been lobbying for years to get—a complete exemption of organized labor and its activities from the antitrust laws. Congress, however, opted for the middle ground—incomplete statutory language that was likely to be (and later was) interpreted by a Supreme Court considered hostile to organized labor as a mere codification of the status quo, accompanied by symbolic language to the effect that human labor was not a commodity.[64]

Section 6, however, was simply never the prolabor victory that critics of the Supreme Court's decision in *Duplex Printing Press Co. v. Deering*[65] assumed that it was.[66] In addition, legislative and other historical documents demonstrate that labor leaders, including Samuel Gompers, were aware of this, despite their public statements to the contrary. Section 6 thus should be seen as a sign that, at the time, organized labor was politically weak relative to business groups. Labor's preferred statutory alternative—a complete exemption of organized labor from the antitrust laws—was not forthcoming

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62 *See infra* notes 169–230 and accompanying text.

63 This is because business interests were satisfied with the status quo, which permitted the existence of labor organizations but did not protect any of their activities from prosecution under the antitrust laws. In addition, that status quo was unlikely to change absent congressional action, due to judicial hostility to organized labor. GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 99–125 (2003); *infra* notes 169–230 and accompanying text (discussing the Clayton Act).

64 Clayton Act § 6, 15 U.S.C. § 17 (2000) ("The labor of a human being is not a commodity or article of commerce."). Although the ambiguous language settled on in section 6 was unlikely to change the status quo, particularly given Supreme Court hostility to organized labor at that time, it was still only a second-best alternative and thus a concession to labor interests. This was because the ambiguity of the statute and the symbolic preamble to the provision always presented the possibility that courts would interpret the provision as altering the then-existing rights of labor unions. In addition, as discussed *infra* note 69 and accompanying text, the public perception that courts had undermined legislative attempts to assist organized labor created an environment that facilitated future labor victories. *See Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 468–69 (1921) (interpreting section 6 of the Clayton Act as codifying the status quo).

65 *Duplex*, 254 U.S. 443.

66 *See infra* Part IV.B (discussing section 6 of the Clayton Act and the *Duplex* decision).

from Congress, despite decades of lobbying and negotiation. Labor settled for the best that it could get—ambiguous statutory language that at least carried the possibility, however remote, of altering the status quo.

Because legislative attempts to responsibility shift and evade electoral accountability through incomplete statutes will succeed only if voters are fooled, one might question why interest groups, such as organized labor, dissatisfied with legislative results do not inform their constituents and the electorate of congressional manipulation of the legislative process, thus defeating congressional attempts to shift responsibility onto courts and agencies. Although initially puzzling, decisions by interest groups to endorse unsatisfactory statutes make sense if considered in the light of broad, long-term organizational and individual goals.[67]

First, interest group leaders directly involved in the lobbying process are agents of that group. Interest groups thus suffer from the same principal–agent issues that affect other groups in which decision-making authority has been delegated to one individual or a small group of individuals. Having expended enormous organizational time and resources on lobbying the legislature for a particular outcome, interest group leaders may hesitate to admit outright defeat. Instead, they have an incentive to portray the resulting legislation in the best possible light, and paint themselves as effective organizational leaders.[68]

Such posturing should not be viewed entirely as agent shirking, however. Compromise legislation, accompanied by legislative and interest group public statements to the effect that the legislation achieves long-sought-after interest group goals, can play an important role in long-term political change, even if the parties anticipate that court or agency interpretations will thwart immediate political victory.[69]

Returning to the example of organized labor's battles for an antitrust exemption, although the Court's decision in *Duplex* meant that the Clayton Act did not achieve broad-based protection for the activities of labor unions, labor was later able to use the Act to elicit public support for a real legislative victory.[70] As George I. Lovell has pointed out, allegations of judicial hostility to and interference with the rights of labor organizations "helped to create a

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67 In addition, interest groups are subject to a variety of pathologies, depending on interest group type, the issue involved, and the political climate. *See* Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 427–39 (2000) (discussing these pathologies with respect to a variety of interest groups).

68 *See* LOVELL, *supra* note 63, at 48 (stating that "labor leaders became more willing to compromise at crucial moments when they needed to be able to claim and celebrate a legislative victory").

69 *See id.* at 159 ("AFL leaders may have hoped that even if the provisions failed in the courts, they would still mark an important symbolic victory that would make it easier to win more decisive legislation from Congress the next time around.").

70 *Id.* at 50 (stating that the Clayton Act "later became an important weapon in the AFL's struggle to broaden public support for the right of workers to organize without judicial interference").

political climate in which judicial rulings against labor organizations would be increasingly perceived as illegitimate."[71]

In the case of labor unions' battle for power and legitimacy, these tactics seem to have paid off. As Lovell has observed, "[O]ne of the most powerful arguments for passing the Norris–LaGuardia Act in 1932 . . . was that the Supreme Court had earlier usurped congressional power by making hostile rulings on the Clayton Act of 1914."[72] Failed statutes can thus constitute important weapons in future political battles.[73]

C. *The Responsibility-Shifting Debate*

1. *The Theoretical Debate*

Critics, including Daniel Farber, Phillip Frickey, and Jerry Mashaw, dismiss the responsibility-shifting argument outlined in Part II.B on the grounds that it presupposes that lawmakers can fool the electorate through broad delegations.[74] They argue that a rational voter will realize that she is at a disadvantage in monitoring and influencing agency or court decision making.[75] As a result, voters should anticipate that broad delegations are not likely to be in their best interest and punish (by voting out of office) lawmakers who pass incomplete statutes.[76]

This critique assumes, however, that the only reason lawmakers enact incomplete statutes is for strategic advantage. As discussed previously, there are a host of reasons why lawmakers might enact an incomplete statute. Many of these reasons are unproblematic, and can even be welfare-enhancing. For example, voter welfare may be enhanced when lawmakers delegate due to a lack of expertise; to allow agencies or courts the flexibility to craft legal rules in response to changing technologies or circumstances; or to reduce the transaction costs associated with legislating more precisely. There is simply no reason for voters to punish lawmakers for delegations of this sort.[77]

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71 *Id.*

72 *Id.*

73 *Id.*

74 *See* FARBER & FRICKEY, *supra* note 39, at 81–82; MASHAW, *supra* note 29, at 146–47. Eric Posner and Adrian Vermeule reject the responsibility-shifting argument on different grounds, arguing that Congress would not want to give away its power to agencies. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1746 (2002). We believe, however, that Posner and Vermeule overestimate the costs of delegations—loss of control—and underestimate the benefits—reduced workloads, the ability to shift responsibility for bad decisions to other governmental actors, etc. Rational legislators should delegate happily whenever these benefits outweigh the costs. *See supra* notes 42–59 and accompanying text (discussing the costs and benefits of delegations). Furthermore, as previously discussed, Congress possesses the means to monitor courts and agencies to whom it has delegated power, thus reducing the loss of control inherent in any congressional delegation. *See supra* note 57 and accompanying text.

75 *See* FARBER & FRICKEY, *supra* note 39, at 81; MASHAW, *supra* note 29, at 146–47.

76 MASHAW, *supra* note 29, at 146–47

77 *See* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 109–28 (2000) ("suggest[ing] reasons why voters might often prefer to delegate policymaking authority to agencies").

Voters, however, are able to observe only the fact that an incomplete statute has been enacted and thus are unlikely to be aware of lawmaker motivations, particularly if (as may often be the case) those motivations are mixed. In short, incomplete statutes are a noisy signal. Voters do not know whether the passage of an incomplete statute was driven by public interest or public choice reasons. A rational voter, therefore, would not automatically punish lawmakers for enacting incomplete statutes. As a result, savvy lawmakers may be able to use statutory incompleteness to cloak responsibility-shifting delegations without fear of reprisal from the electorate. When this is the case, lawmakers can mask their true political preferences, undermining electoral accountability.

Jerry Mashaw rejects this electoral-accountability argument against broad delegations on two grounds. Mashaw first maintains that voters choose representatives based on ideology rather than specific votes on certain legislation, and then contends that it is more important that voters know the general ideological tendencies of politicians (i.e., prolabor, probusiness, proenvironment) rather than know legislators' votes on specific pieces of legislation.[78]

Yet responsibility shifting is problematic precisely because it permits legislators to mask their true preferences through meaningless ideological statements, while at the same time satisfying interest group pressure or avoiding responsibility for difficult decisions. As long as Congress can engage in responsibility-shifting delegations, voters will find it more difficult to ascertain legislators' true ideologies.[79]

Mashaw also questions whether voters get better information about interest group transfers when statutes are specific.[80] He argues that lawmakers can hide interest group transfers in specific, complex legislation as well as through broad delegations.[81] To make the point, he uses the example of the federal budget, which, he says, "can hardly be carried, much less read."[82]

We have no quarrel with Mashaw's argument that specific and incomplete statutes suffer from the same problems in terms of the potential for welfare-reducing interest group transfers. Courts, however, have options with respect to incomplete statutes that they do not have with respect to complete statutes. As discussed in detail in Part V of this Article, the nondelegation doctrine (and, perhaps, other constitutional doctrines) provides a logical basis for declaring incomplete statutes unconstitutional. Although some

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78 MASHAW, *supra* note 29, at 146.

79 In economic terms, representative democracy presents the familiar principal–agent problem, with the voters as principals and lawmakers as agents. *See* Macey, *supra* note 22, at 244–45; Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 3 (1994). Any agency relationship creates costs. These costs depend on two aspects of the relationship: (1) the principal's ability to monitor the agent, and (2) the extent to which the agent and the principal's interests diverge. Strategic delegations make it more difficult for voters to monitor lawmakers. Preventing such delegations, therefore, decreases the monitoring costs of the electorate and, as a result, the agency costs inherent in representative democracy. *Id.* at 21.

80 *See* MASHAW, *supra* note 29, at 146–47.

81 *Id.*

82 *Id.* at 147.

commentators, most notably Richard Epstein, have argued that statutes (whether incomplete or complete) that operate as explicit wealth transfers might be unconstitutional, this view does not appear to be widely accepted among constitutional law scholars.[83] Accordingly, the Penalty Default Canon necessarily addresses only incomplete statutes and provides no guidance for a court faced with a statute containing an explicit interest group transfer, such as a farm subsidy. Because such a statute lacks incompleteness and, hence, a delegation to a court or agency, it would not fall within the scope of the nondelegation doctrine.

Mashaw is correct, however, that precise legislative drafting does not eliminate the potential for strategic behavior by lawmakers.[84] Congress may react to interpretative strategies such as the Penalty Default Canon by creating precise, but incredibly lengthy and complex statutes that—through their sheer density—prevent voters from ascertaining the truth.[85]

Nonetheless, forcing Congress to legislate in this manner provides a benefit: it increases the cost of strategically incomplete statutes. If it were cheaper—in terms of voter discovery and reaction—for lawmakers to pass specific, complex statutes to accomplish strategic delegations then they would do just that. Why would they bother with incomplete statutes that are subject to possibly erroneous judicial or agency interpretation? The logical conclusion (reinforced by empirical evidence) is that, in certain circumstances, lawmakers find incomplete statutes the most attractive vehicle for responsibility shifting.[86] The Penalty Default Canon removes this vehicle and, as a result, forces lawmakers to use other, more expensive, mechanisms to accomplish responsibility-shifting goals.

2. *The Empirical Debate*

Critics also reject the responsibility-shifting explanation for broad delegations on empirical grounds, noting that many broad delegations appear to harm interest groups.[87] Viewing statutes through an incomplete contracts framework, however, helps explain these otherwise puzzling empirical anomalies. If the reasons for incomplete law parallel the reasons for incomplete contracts, then this result is not surprising. Not all delegations are empirically consistent with responsibility-shifting explanations because not all delegations are undertaken for responsibility-shifting reasons. As discussed in

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83 *See* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 714–17 (1984) (arguing that some explicit interest group transfers are unconstitutional).

84 MASHAW, *supra* note 29, at 147 ("The sad truth is that legislators can as easily convey information selectively or take up inconsistent positions in specific statutes as in more general ones.").

85 *See, e.g.*, *id.* at 146–48 (discussing specific statutes that voters have little chance of understanding).

86 *See infra* notes 87–98 and accompanying text (discussing the empirical evidence regarding responsibility-shifting delegations).

87 Farber and Frickey, for example, argue that it is not clear that broad delegations always correlate with monitoring costs; that is, in some cases, broad delegations appear to harm well-organized interest groups. FARBER & FRICKEY, *supra* note 39, at 81. In other cases, they observe broad delegations where all the affected groups are well-organized. *Id.*

this Subsection, the empirical evidence is consistent with a more nuanced model of legislative behavior that accounts for the disparate causes of statutory incompleteness, including responsibility-shifting explanations.

As discussed in Part II.B, statutes may be incomplete to save on transaction costs, to permit future flexibility, or because the lawmakers cannot foresee all future contingencies to which the law might apply. This implies that we should see relatively more congressional delegations in highly technical areas that require much expertise and information and in which technology may change quickly. The empirical evidence supports this prediction; complex issue areas—particularly space, foreign relations, and technology—are delegated at much higher rates than others.[88]

Congress may also delegate in order to shift responsibility for negative outcomes onto courts or agencies. Recall from Part II.B that there are three versions of the responsibility-shifting theory for delegations: the AGR version, which predicts broad delegations when benefits are concentrated, and precise legislation when benefits are diffuse; the Epstein & O'Halloran version, which predicts that Congress will delegate power over laws that provide very few benefits for which Congress may effectively claim credit, but carry the possibility of a substantial political downside; and the version proposed in this Article, which asserts that Congress has an incentive to delegate authority when two or more powerful interest groups are at odds over statutory language, or when statutory language has particular relevance to interest groups and the general public.

It is unclear whether empirical evidence supports the AGR prediction that statutes providing concentrated benefits are more frequently delegated. A recent study shows that some delegations providing concentrated benefits, such as trade policy and agriculture, do follow the AGR prediction, with delegations at relatively high rates compared to other policy areas.[89] The study authors, however, do not attribute these delegations to responsibility shifting.[90]

In contrast, Epstein and O'Halloran provide substantial empirical evidence in support of their version of the responsibility-shifting theory.[91] In a recent study of post–World War II legislative enactments, Epstein and O'Halloran find that "[w]hen the targeting of benefits is difficult and the risks of ill-informed policy great, . . . legislators are willing if not eager to cede discretionary authority to executive agencies."[92] They conclude that

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88 *See* EPSTEIN & O'HALLORAN, *supra* note 28, at 198–99, 230.

89 *Id.* at 198–203.

90 Instead, they posit that agricultural policy is delegated at high rates because discretion is supplied to the executive as a bribe for presidential support of congressional agricultural programs. *Id.* at 221. Trade policy, they argue, is delegated because it offers legislators "too much of a good thing." *Id.* at 223. In other words, logrolling is so pervasive that it presents a tragedy of the commons. As an example, Epstein and O'Halloran cite the Smoot–Hawley Tariff Act of 1930, ch. 497, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.), in which Congress provided benefits to nearly every congressional district, resulting in tariffs on 3,221 items and contributing to the Great Depression. EPSTEIN & O'HALLORAN, *supra* note 28, at 223 (discussing the Smoot–Hawley Tariff Act of 1930).

91 EPSTEIN & O'HALLORAN, *supra* note 28, at 201–06.

92 *Id.* at 203.

Congress delegates most frequently in those areas where the benefits of legislation are widely dispersed or go barely noticed, but mistakes can be salient and catastrophic, such as drug and product safety, workplace safety, and nuclear weapons.[93] In other words, in areas where Congress may find it hard to claim credit for any benefits of regulation, they concentrate instead on avoiding blame for any negative consequences.[94]

By contrast, legislators are reluctant to cede control over policy that permits a narrow tailoring of benefits to constituents. For this reason, tax policy—which affords opportunities for the granting of favors to narrow constituencies, or even specific individuals—is rarely delegated.[95] This is despite the fact that taxpayers as a group may blame legislators for periodically raising general tax rates.[96] Similarly, Congress normally directly controls social security policy, which benefits a large and politically active group, as well as minimum-wage laws, which may be less valuable for the opportunity they afford to benefit low-wage workers (who tend to be poorly organized and vote less frequently than other demographic groups) than for the opportunity to exclude certain types of businesses from the laws' requirements.[97]

Finally, through intensive case study, researchers have identified several statutory provisions in which Congress appears to have delegated authority to courts or agencies through incomplete statutory language when two or more powerful interest groups were at odds over statutory language.[98] Accordingly, there is also some empirical support for the third version of the responsibility-shifting explanation for legislative delegations developed in this Article.

III. The Penalty Default Canon

As demonstrated in the previous Part II.B of this Article, statutes—like contracts—are necessarily incomplete, with inevitable gaps and ambiguities. Sometimes, these gaps and ambiguities are inadvertent, as when Congress is unable to foresee the complete set of future events to which the law might apply. At other times, Congress makes a conscious decision to delegate au-

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93 *Id.* at 198–200.

94 *Id.* at 198–206.

95 *Id.* at 201–03. For example, one item cancelled in President Clinton's first use of the line-item veto was a tax provision that would have benefited a single, wealthy Texan—Harold C. Simmons. *Id.* at 203 n.5.

96 *See id.* at 203.

97 *Id.* For example, the Fair Labor Standards Amendment of 1974, 29 U.S.C. §§ 201–219 (2000), raised the minimum wage but granted overtime exemptions to a variety of businesses, including movie theaters, small logging operations, small telegraph agencies, and growers of a certain type of tobacco. *Id.*

98 *See generally* LOVELL, *supra* note 63, at 255 (arguing that various provisions of the Clayton Act, 15 U.S.C. §§ 12–27a (2000), 29 U.S.C. §§ 52–53 (2000), the Norris–LaGuardia Act, 29 U.S.C. §§ 101–115 (2000), the Wagner Act, ch. 117, 46 Stat. 1084 (1931) (repealed 1943), and the Erdman Act, ch. 370, 30 Stat. 424 (1898) (repealed), were left intentionally vague for this reason); Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 633–34 (2002) (arguing that the "strong inference" provision of the PSLRA was left intentionally vague for this reason).

thority to other governmental branches. When the decision to delegate is driven by transaction cost or relative expertise reasons, then statutory incompleteness may compromise electoral accountability but nonetheless provides countervailing benefits. As demonstrated in Part II.C, however, both theory and empirical evidence implicate another, more worrisome reason for intentional delegations: shielding legislators from responsibility for policy outcomes.

Regardless of the reasons for statutory incompleteness, when faced with an incomplete statute, courts and agencies must decide whether and how to interpret that statute in order to determine the extent to which it can be applied to the dispute at hand. In this Part, we argue that courts should look to contract law for guidance on how to perform this task, and detail our proposal for judicial review of incomplete law: the Penalty Default Canon.

The core insight of the Penalty Default Canon is that the primary point of departure for the judicial review of incomplete statutes must be the source of statutory incompleteness, as determined by an analysis of the legislative history. In Section A, we discuss the use of legislative history to uncover strategic incompleteness and argue that using legislative history to uncover the source of statutory incompleteness is easier to accomplish and presents fewer problems than the use of legislative history to determine congressional intent. We are under no illusions, however, that uncovering the source of statutory incompleteness is easy or necessarily a task that courts will undertake with enthusiasm. Accordingly, in Section B we develop a three-part test to determine whether Congress left a statute incomplete for responsibility-shifting reasons.

A. The Penalty Default Canon and Legislative History

In contract law, as noted, scholars argue that courts should and often do approach the task of filling gaps in incomplete contracts through a set of default rules that will govern the relationship between the contracting parties in the absence of a contrary agreement. We believe that the interpretation of incomplete statutes should be approached in the same manner, through a set of statutory default rules that guide courts in filling gaps and resolving ambiguities in any given statute. As in contract law, the optimal system of statutory default rules should take into account the many reasons for statutory incompleteness. To prevent responsibility-shifting uses of incompleteness, we suggest that courts penalize lawmakers by declaring the incomplete statutory provision in question an unconstitutional delegation of legislative authority whenever lawmakers employ statutory incompleteness to avoid electoral accountability and the incompleteness provides no offsetting benefits.[99]

The Penalty Default Canon, however, does not represent a free-wheeling approach to statutory interpretation, empowering judges to strike down any statutory provision that does not comport with their policy prefer-

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99 Alternative constitutional arguments are explored *infra* note 261.

ences.[100] Instead, a line is drawn based on the likely source of incompleteness, which is determined through an examination of the legislative history.

Admittedly, determining the source of statutory incompleteness will often be a difficult task for courts. The literature is rich with discussions of a related issue: the perils of using legislative history to determine the meaning of incomplete statutes. Using legislative history to ferret out sources of incompleteness differs, however, from the traditional (and maligned) use of legislative history, in which a court attempts to decipher legislative intent.[101] Under the Penalty Default Canon, instead of looking to legislative history to decide what Congress meant by certain words or phrases, the court uses legislative history to discover why lawmakers did not define the statute in a more complete fashion.[102]

The task of determining the meaning of an incomplete statute is often rendered even more difficult by the tendency of lawmakers to purposely muddy the legislative history by articulating inconsistent interpretations of various key statutory provisions—interpretations that often favor opposing interest groups.[103] This same tendency, however, makes it easier for courts to perform the task required by the Penalty Default Canon. The inconsistent statements reveal that lawmakers recognized the chance of multiple interpretations. In other words, lawmakers were aware that the statute in question contained a gap or ambiguity. As a result, the court can safely conclude that the statute was not left inadvertently incomplete—a necessary, but not sufficient, condition for the application of the Penalty Default Canon.

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100 In fact, we believe that most judges will hesitate to apply the Penalty Default Canon for two reasons. First, we suspect that judges (especially circuit court judges) will want to avoid the public scrutiny that comes from declaring laws unconstitutional. Second, incomplete statutes necessarily increase judicial discretion by allowing judges to fill gaps and resolve ambiguities. By forbidding judges from interpreting incomplete statutes under certain circumstances, the Penalty Default Canon restricts this discretion. Accordingly, to the extent that judges seek to maximize their own discretion, they have little incentive to apply the Penalty Default Canon.

101 *See, e.g.*, Begier v. IRS, 496 U.S. 53, 68 (1990) (Scalia, J., concurring) ("Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record."); Blanchard v. Bergeron, 489 U.S. 87, 97–100 (1989) (Scalia, J., concurring) (criticizing the Court's citation of congressional committee reports in support of its holding); *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) ("Legislative history offers wilful judges an opportunity to pose questions and devise answers, with predictable divergence in results. These and related concerns have lead [sic] to skepticism about using legislative history to find legislative intent.").

102 This alternative use of legislative history does not presuppose any grand "intent" by Congress, which is a collective body subject to problems of cycling, agenda setting, and logrolling. *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) ("Individuals have intentions and purpose and motives; collections of individuals do not."). Further, this alternative use does not run into separation-of-powers problems because it does not give authority to "interpret" the statutory text to the bill's sponsors, lawmakers who sit on committees, or staff writers who put together legislative materials. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 710–11 (1997) (arguing that the use of legislative history in statutory interpretation facilitates impermissible legislative self-delegation); *see also infra* note 110 and accompanying text (discussing the problem of ascribing a single intent to a collective body).

103 Grundfest & Pritchard, *supra* note 98, at 633.

In addition, a default rule that explicitly relies on legislative history may induce the creation of a more complete and accurate history.[104] If lawmakers know that courts will rely on legislative history to determine the reasons for statutory incompleteness, they may take greater care to state any disagreements over meaning or intent on the record, and take further steps to assure the accuracy and widespread dissemination of important legislative materials.[105]

In the following Section, we develop a three-part test for applying the Penalty Default Canon. In Part IV, this test is applied to two statutory provisions that we argue Congress left purposely incomplete: the "strong inference" pleading standard of the Private Securities Litigation Reform Act of 1995 and section 6 of the Clayton Act.

B. The Penalty Default Test

Application of the Penalty Default Canon proceeds in three steps. First, the court should inquire whether Congress left the statutory provision incomplete on purpose or inadvertently.[106] If the latter, the Penalty Default Canon does not apply because inadvertent incompleteness cannot, by definition, be the result of a desire by lawmakers to avoid electoral accountability. Second, within the class of purposely incomplete statutes, the court should ask whether the incompleteness reasonably can be explained as a desire to harness the expertise of courts or agencies, or to reduce the transaction costs associated with lawmaking. Third, in the remaining statutes, the court should ask whether the incomplete provision in question falls into the category of statutes for which strategic delegation is likely to provide some benefit to legislators that outweighs the costs of delegating legislative authority. This is likely to be the case whenever (1) the provision embodies a policy choice that carries with it the potential for large political costs if events go poorly, while providing few benefits for which legislators can effectively claim credit if things go well; or (2) two (or more) powerful interest groups stand on opposite sides of the issue.[107] Because courts should err on the side of upholding statutes, we begin with an assumption of constitutionality. Accordingly, only

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104 Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2068 (2002).

105 *Id.* (stating that a default rule of relying on legislative history may induce the legislature to "publish committee mark-ups, identify the bill sponsor on the record, state whether certain articulated views represent a consensus among the enacting coalition, and require that committee members sign the committee reports to make sure they reflect the full committee's views").

106 This analysis applies by statutory provision, not by statute. This distinction is important because any single statute may have a host of gaps and ambiguities, some driven by transaction costs, others by a desire to harness judicial or agency expertise, others by a desire to avoid responsibility for certain decisions, and still others by some combination of these factors. To simply classify a statute (as opposed to a statutory provision) as purposely incomplete is too broad an inquiry.

107 Although we do not necessarily reject the AGR version of the responsibility-shifting argument, we do not include the AGR category of statutes likely to be delegated (laws with concentrated benefits) in our test for a variety of reasons. First, as discussed *supra* notes 89–90 and accompanying text, the empirical evidence with regard to this type of delegation is mixed. Second, it is difficult to craft a test that accounts for the theory. There is no bright-line test, for example, that can distinguish concentrated benefits from diffuse ones.

if all three steps are satisfied should the court hold that the statute amounts to an unconstitutional delegation of legislative authority.

1. *Step One: Uncovering Inadvertent Incompleteness*

To determine whether Congress has inadvertently left a provision incomplete, courts should ask three questions.[108] As with the other steps of the Penalty Default Canon, we begin with the presumption of constitutionality. Accordingly, only if the answer to all three questions is "yes," should the Court move on to step two of the test. First, the court should ask whether lawmakers were aware of and drew attention to the precise statutory incompleteness that the court is now being asked to review.[109] Second, the court should ask whether lawmakers rejected competing proposals that were offered to clarify the incomplete statutory language. Finally, the court should ask whether lawmakers specifically anticipated a future role for courts or agencies in resolving the incompleteness in question. These three inquiries into legislative history allow the court to determine whether lawmakers were aware of the incompleteness but passed the law anyway. If so, the resulting incompleteness is deliberate, not inadvertent.

2. *Step Two: Ruling Out a Desire to Utilize Judicial or Agency Expertise or Reduce Transaction Costs*

As previously discussed in Part II.B of this Article, a purposely incomplete statute is not necessarily bad. Incompleteness may allow lawmakers to harness the expertise of courts and agencies or reduce the transaction costs associated with lawmaking. Accordingly, in step two of the Penalty Default Test, courts should seek to determine whether Congress's primary motivation was to achieve either of these two benefits. As always, the court should begin with a presumption that Congress's primary motivation was *not* responsibility shifting. This presumption can be overcome only through the analysis described below.

Congress, of course, is filled with many different lawmakers, each of whom may agree to statutory language for different reasons. The court's task under step two is thus to ascribe a primary motivation to a group (the enacting coalition) that may possess many motivations—in other words, to determine which motivations carry the most weight in calculating whether electoral accountability has been impaired.[110]

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108 *See* LOVELL, *supra* note 63, at 41 (outlining these three factors).

109 This does not require that all lawmakers were actually aware of the ambiguity and the statements referencing it. Instead, unless the statements were made in a context that did not allow contradiction, we impute knowledge to the legislature as a whole. *See infra* note 112 and accompanying text (discussing statements offered in contexts that did not permit contradiction).

110 When statutory interpretation turns on the underlying reason for statutory incompleteness, courts must devise methods for ascribing motivation to an enacting coalition whose members may possess different reasons for agreeing to incomplete statutory language. For example, suppose that one member of the enacting coalition agrees to incomplete language out of a desire to avoid responsibility, whereas every other member agrees to the language out of a desire to harness judicial expertise. In this circumstance, it seems sensible to ascribe to the enacting coalition a desire to capture judicial expertise as the group's primary motivation for incompleteness,

This determination involves an evidentiary question. In resolving this question, lawmaker statements referencing the special expertise of courts or agencies in filling the type of gaps or resolving the type of ambiguities contained in the incomplete statute in question provide one source of evidence. The court, however, must evaluate how much weight to give any such statements. Put differently, courts must address two separate issues: (1) whether such statements are false statements that do not reflect the speaker's true motivations or beliefs ("strategic statements"); and (2) how much weight to accord such statements, in recognition of the fact that other lawmakers may have had alternative motivations in agreeing to the incomplete statutory language.

There are two basic types of strategic statements. First, courts must recognize that a lawmaker might make statements about judicial or agency expertise to conceal her "true" responsibility-shifting motivation, thereby avoiding the Penalty Default Canon. Second, a lawmaker lacking the votes to defeat a statutory provision to which she is opposed might employ strategic statements that question the genuineness of the enacting coalition's references to court or agency expertise, in an attempt to cause a reviewing court to invoke the Penalty Default Canon, thus constitutionally defeating the legislation.

The first category of possibly strategic statements—false invocations of court or agency expertise—presents courts with the task of weighing the credibility of such statements.[111] In testing the credibility of these statements, courts should consider a variety of factors, including (1) the number of lawmakers who made such statements; (2) whether statements regarding the relative expertise of courts or agencies in connection with the incomplete provision were contradicted by other lawmakers; (3) whether the statements were offered under circumstances that did not permit contradiction by other lawmakers;[112] and (4) whether the referenced expertise is one traditionally

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because it motivated the overwhelming majority of lawmakers. Put another way, the concept of "primary motivation" allows courts to pinpoint one reason for incompleteness when all lawmakers do not share the same motivation for agreeing to incomplete statutory language. As discussed *infra* notes 113–15 and accompanying text, courts can derive primary motivation in different ways. The court might, for instance, look at the motivations of the majority of enacting lawmakers. Alternatively, the court might examine the motivations of certain key players in the legislative process. Finally, the court might engage in some combination of these inquiries.

111 The question of what weight, if any, to accord statements made by contracting parties that are not contained in the contract is one that judges frequently address. *See* E. ALLAN FARNSWORTH, CONTRACTS §§ 7.2–7.3, at 427–39 (3d ed. 1999) (discussing the parol evidence rule). Similarly, the admissibility and weight that should be accorded to out-of-court statements is an issue regularly confronted by judges making admissibility rulings. In these cases, judges weigh such statements and make determinations of credibility. In short, we are not proposing an inquiry that is foreign to most district court judges; although, the Penalty Default Canon presents those issues in a different context.

In applying the Penalty Default Canon, the judge might also look outside the legislative record to test the veracity of lawmaker statements. For example, statements made to interest groups about the reasons for incompleteness could be used to impeach contrary statements in the legislative record.

112 Courts should be skeptical of statements offered too late in the deliberative process to be contradicted by other lawmakers. Such statements include presidential signing statements made after Congress passed the legislation; statements made in one house too late for considera-

attributed to the court or agency and which the court or agency has employed with some success in the past.[113]

As to the second category of possibly strategic statements—statements that question the enacting coalition's references to agency or court expertise—courts must recognize that the possibility for strategic statements in this context is high. Lawmakers dissatisfied with any legislation that commands a majority of votes have an incentive to make such strategic statements, in the hopes of triggering a constitutional challenge to legislation that they oppose. Accordingly, courts should begin with a presumption that such statements are strategic. That presumption may be overcome only if the court concludes, after an analysis of the same factors used to evaluate false invocations of court or agency expertise, that such statements are not strategic.[114]

Once the court has concluded that a lawmaker statement is not strategic, it still must decide how much weight to accord that statement in recognition of the fact that other lawmakers may have had different motivations. Recall that the court's task here is to ascribe to the enacting coalition some primary motivation, despite the fact that individual coalition members likely had differing reasons for agreeing to incomplete statutory language. In some circumstances, the enacting coalition's primary motivation may be the motivation of a majority of the coalition. At other times, the court may give special weight to the motivations of key "veto players," or lawmakers whose preferences otherwise have special persuasive power, such as the Senate Majority Leader, Speaker of the House, or a member of a committee or subcommittee that acted as a "gatekeeper" to the legislation.[115] Again, this is an evidentiary issue that the court must decide by weighing a variety of factors, including the number of lawmakers who referenced court or agency expertise, the identity of the speaker, and the circumstances under which the statements were made.

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tion by members of the other house; and statements inserted into the Congressional Record that were never actually made in Congress. Elhauge, *supra* note 104, at 2068.

113 For example, courts are typically granted wide discretion in deciding evidentiary issues, such as burdens of proof and production, and are considered to have a relative expertise at these tasks. Accordingly, if legislators enact an incomplete statutory provision relating to burdens of proof or production, and, in doing so, specifically reference the incompleteness and the need to harness judicial expertise to fill the incomplete provision with gap-filling terms, a court might reasonably infer that lawmakers consciously left the provision in question incomplete, not for strategic reasons, but out of a desire to utilize judicial expertise.

Along similar lines, many agencies are designed to process, compile, and analyze technical data. As a consequence, when the proper resolution of statutory incompleteness turns on inferences from technical data, and legislators specifically called attention to the incomplete provision and the need to invoke agency expertise to fill gaps or resolve ambiguities, then a court might infer that any incompleteness represents an effort by lawmakers to utilize agency expertise, rather than to shift responsibility.

114 We believe that under some circumstances these statements may have probative value. We recognize, however, that an argument could be made that such statements should be excluded because the danger of strategic behavior outweighs the probative value.

115 McNollgast, *supra* note 28, at 707 n.5 ("A veto player is an individual (such as a committee chair or the President) or group of individuals (such as a committee of the House of Representatives) whose consent is needed for legislation to pass.").

Finally, Congress may sometimes enact incomplete provisions out of a desire to reduce the transaction costs associated with lawmaking. For example, as discussed at length by Professor Louis Kaplow in his analysis of the virtues of standards over rules in some circumstances, there may be some future contingencies that have such a small probability of occurrence that it makes little sense to expend the resources to fully define *ex ante* the law relating to that occurrence.[116] Instead, transaction costs may be reduced and substantively better law may result if courts or agencies are left to fully define *ex post* the legal terms relating to such conduct. In these cases, the transaction costs of lawmaking may be usefully reduced through the use of incomplete laws that leave substantial discretion to courts or agencies.

To rule out delegations of this sort, courts should perform the same analysis outlined above in connection with delegations based on court or agency expertise. In other words, courts should look for credible statements demonstrating awareness on the part of legislators that drafting a complete law in the case at issue presents prohibitively high transaction costs and that decisions on certain items could be made more effectively *ex post* by courts or agencies. This is especially likely to be true if the provision relates to a subject in which the court or agency also has a relative expertise.

3. *Step Three: Uncovering Responsibility Shifting*

A purposely incomplete statute that cannot be justified on the basis of judicial or agency expertise or a desire to reduce transaction costs is an attractive candidate for the application of the Penalty Default Canon. Nonetheless, we begin again with a presumption of constitutionality. At this step, we build on the responsibility-shifting theories outlined in Part II.B and derive conditions under which lawmakers are apt to shift responsibility. Only if those conditions are satisfied is the presumption of constitutionality overcome.

Recall that the empirical evidence and theoretical models regarding the reasons for statutory incompleteness indicate that lawmakers are especially prone to shifting responsibility in two distinct circumstances. First, incomplete statutes are attractive when two or more well-organized interest groups stand on opposite sides of an issue, or when interest groups are pitted against the general public with regard to particular statutory language. In this circumstance, lawmakers may employ statutory incompleteness to avoid fully alienating any interest group or the electorate. Second, incomplete statutes are attractive if (1) the beneficiaries of the policy choice are poorly organized and the benefits are not salient; and (2) the policy choice presents large and public costs if events do not go well.[117]

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116 Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 579–80 (1992).

117 To further illustrate this second circumstance, consider wide-scale tax cuts and government-funded medical care. Although these statutes each benefit a diffuse group, they are highly salient and hence less likely to be delegated for strategic reasons. Similarly, although statutes regulating false claims against the government (i.e., the False Claims Act), and employee retirement funds (i.e., the Employee Retirement Income Security Act ("ERISA")) provide diffuse and largely nonsalient benefits, they do not present the possibility of a large political downside if

To summarize, at this step in the test the court has ruled out inadvertent incompleteness, agency or judicial expertise, and an attempt to reduce transaction costs as possible reasons for statutory incompleteness. Evidence of strategic incompleteness can then be derived from the type of regulation embodied in the statutory provision and the nature of the interest group dynamics. Once the court has established through the application of the three-part Penalty Default Test that Congress has left a statutory provision incomplete for responsibility-shifting reasons, it must invalidate the provision as an unconstitutional delegation of legislative power.

IV. Examples and Applications

In this Part, we illustrate the application of the Penalty Default Canon through two specific examples: the "strong inference" provision of the Private Securities Litigation Reform Act of 1995 and section 6 of the Clayton Act. As will be shown, there is substantial evidence that both provisions were left intentionally incomplete for responsibility-shifting reasons.[118] Accordingly, we argue that courts reviewing interpretive controversies regarding either provision should refuse to resolve the controversy and, instead, should hold the provision in question an unconstitutional delegation of legislative power.

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events turn out unexpectedly poorly. *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2000); False Claims Act, 31 U.S.C. §§ 3729–3733 (2000). As a result, these statutes do not meet both criteria and, as such, probably were not delegated for responsibility-shifting reasons. These categories are not airtight. Certainly, one can envision a series of false claims that sparks public debate and represents a catastrophic future outcome. The goal is to predict tendencies, not absolutes.

118 For an example of an incomplete statute that would be upheld under the Penalty Default Canon, see the discussion *infra* notes 265–75 and accompanying text of the stationary-source provisions of the 1977 Amendments to the Clean Air Act, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685, 747 (codified as amended at 42 U.S.C. § 7502(b)(6) (2000)). Although the provision was unquestionably incomplete, our review of the legislative history revealed no insights into the reasons for the incompleteness in the term "stationary source." But, there is evidence of strategic incompleteness in connection with other provisions of the Clean Air Act and the 1977 Amendments, in particular. *See, e.g.*, BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 37–38 (1981) (providing evidence that certain provisions of the Clean Air Act were left intentionally vague for political reasons); *id.* at 47–48 (arguing that certain other provisions of the 1977 Amendments to the Clean Air Act were left intentionally vague); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 73 (1993) (arguing that Congress intentionally left the Clean Air Act vague, then exploited that ambiguity to convey different messages to different constituencies). Accordingly, the Penalty Default Canon would not apply, and the Court's ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), was correct, even though (because the Court failed to even consider the reasons for statutory incompleteness) its reasoning was not.

A. The Private Securities Litigation Reform Act of 1995[119]

1. Background

In response to growing concerns over frivolous securities-fraud suits, Congress passed the PSLRA over President Clinton's veto.[120] Among other things, the PSLRA requires plaintiffs in securities-fraud actions to not only satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b),[121] but to "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind."[122] Unfortunately, however, Congress failed to define either the requisite state of mind or the type of facts necessary to establish a strong inference that the defendant acted with that state of mind, despite congressional awareness that those provisions were not only politically contested, but had been given inconsistent and conflicting interpretations by federal courts for many years prior to passage of the PSLRA.

A full understanding of the PSLRA and the legislative history surrounding it requires some knowledge of Supreme Court and circuit court precedent regarding securities fraud in the years prior to 1995. In fact, the stage for the disputed provisions of the PSLRA was first set in the Supreme Court's 1976 decision of *Ernst & Ernst v. Hochfelder*,[123] which held that "scienter," rather than mere negligence, is required to find liability for fraud in connection with the purchase or sale of a security under section 10(b) of the Securities Exchange Act of 1934.[124] Although the Court indicated that knowing or intentional conduct is sufficient to satisfy the scienter requirement, it expressly left open the question whether recklessness would satisfy the standard,[125] and four years later again declined to decide the issue of whether reckless conduct would suffice to establish Rule 10b-5 liability.[126] Although, at the time of the PSLRA's passage, every appellate court to consider the recklessness standard since *Hochfelder* had held that recklessness satisfies the scienter requirement, lower federal courts defined recklessness with such variation that nothing approaching a single standard had been developed within the courts.[127]

Similarly, as Professors Joseph Grundfest and Adam Pritchard point out, federal courts were sharply divided on the question of what level of specific-

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119 Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2000). This Section largely builds upon Professors Joseph A. Grundfest and A.C. Pritchard's article, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, *supra* note 98, and its section detailing the legislative history of the PSLRA.

120 141 CONG. REC. S19,180 (daily ed. Dec. 22, 1995); 141 CONG. REC. H15,214–15, H15,223–24 (daily ed. Dec. 20, 1995).

121 FED. R. CIV. P. 9(b).

122 15 U.S.C. § 78u-4(b)(2).

123 Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

124 *Id.* at 201; Grundfest & Pritchard, *supra* note 98, at 650; *see also* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2000).

125 *Hochfelder*, 425 U.S. at 193 n.12; Grundfest & Pritchard, *supra* note 98, at 650.

126 Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980); Grundfest & Pritchard, *supra* note 98, at 650–51.

127 2 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 12.8 (4th ed. 2002); Grundfest & Pritchard, *supra* note 98, at 651–52.

ity was required to survive a motion to dismiss when pleading fraud, with the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Ninth Circuit, in particular, deeply at odds on the issue.[128] As noted by Grundfest and Pritchard, "the Second Circuit held that pleading scienter under the Rule requires 'plaintiffs to allege facts that give rise to a strong inference of fraudulent intent.' The Ninth Circuit disagreed, . . . [holding] that plaintiffs could adequately plead a complaint simply by 'saying that scienter existed.'"[129] The 1995 congressional debate over pleading requirements thus necessarily implicated the unresolved state-of-mind issue, making the battle for passage of the PSLRA even more heated.[130]

2. *Legislative History*

The initial House version of the bill that would eventually become the PSLRA abolished recklessness as a basis for Rule 10b-5 liability and instead required intentional conduct to establish fraud.[131] The version ultimately passed by the House, however, reinserted the recklessness standard, defining recklessness, in pertinent part, as "[d]eliberately refraining from taking steps to discover whether one's statements are false or misleading."[132] The Senate version of the bill that eventually became the PSLRA, by contrast, adopted the "strong inference" standard for pleading scienter, yet failed to define either scienter or the necessary means for establishing a strong inference of scienter.[133] Although the report of the Senate Banking Committee indicates that the PSLRA pleading requirement was modeled on the Second Circuit standard,[134] the situation is complicated by two facts: (1) the lack of a single uniform standard within the Second Circuit; and (2) subsequent legislative

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128 Grundfest & Pritchard, *supra* note 98, at 652. The confusion on this point arose from Federal Rule of Civil Procedure 9(b), which requires plaintiffs to plead fraud "with particularity" but allows state of mind to be "averred generally." FED. R. CIV. P. 9(b); *see* Grundfest & Pritchard, *supra* note 98, at 652.

129 Grundfest & Pritchard, *supra* note 98, at 652 (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994); *In re* Glenfeld, Inc. Sec. Litig., 42 F.3d 1541, 1547 (9th Cir. 1994)). According to the *Shields* court, absent direct evidence of the defendant's fraudulent intent, the strong inference standard is met by either (1) "strong circumstantial evidence" of intentional or reckless misconduct, or (2) facts showing "both motive and opportunity to commit fraud." *Shields*, 25 F.3d at 1128.

130 *See* Grundfest & Pritchard, *supra* note 98, at 633.

131 Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong. § 204 (1995); Grundfest & Pritchard, *supra* note 98, at 652.

132 Securities Litigation Reform Act, H.R. 1058, 104th Cong. § 4 (1995); Grundfest & Pritchard, *supra* note 98, at 652–53.

133 Private Securities Litigation Reform Act of 1995, S. 240, 104th Cong. § 104(b) (1995); Grundfest & Pritchard, *supra* note 98, at 653.

134 S. REP. NO. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 693; Grundfest & Pritchard, *supra* note 98, at 653. The Report states that:

> [T]he committee chose a uniform standard modeled upon the pleading standard of the Second Circuit. Regarded as the most stringent pleading standard, the Second Circuit requires that the plaintiff plead facts that give rise to a "strong inference" of defendant's fraudulent intent. The Committee does not intend to codify the Second Circuit's caselaw interpreting this pleading standard, although courts may find this body of law instructive.

history contradicting the congressional intention to adopt the Second Circuit standard.

First, even if Congress intended to codify the Second Circuit pleading standard, no single standard existed within the circuit.[135] The new PSLRA pleading provisions were thus inevitably incomplete, even assuming congressional agreement on the intent to adopt the Second Circuit standard. Second, it is unclear whether Congress intended to adopt the Second Circuit standard. Indeed, as argued by Professors Joseph Grundfest and Adam Pritchard, this incompleteness may have been essential to garnering the supermajority necessary to pass the PSLRA over President Clinton's veto.[136]

For example, Senator Arlen Specter attempted to clarify the pleading requirement of the PSLRA with a floor amendment ("Specter Amendment") defining the strong inference standard in a manner that tracked prior Second Circuit precedent.[137] The Specter amendment provided that:

> (2) STRONG INFERENCE OF FRAUDULENT INTENT—
> . . . a strong inference that the defendant acted with the required state of mind may be established either—
> (A) by alleging facts to show that the defendant had both motive and opportunity to commit fraud; or
> (B) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior *or recklessness* by the defendant.[138]

Although the Senate approved the amendment, the Conference Committee deleted it.[139] Interestingly, the Specter Amendment would have not only clarified the pleading requirement, but would have codified recklessness as the necessary state of mind under Rule 10b-5.[140]

The Conference Committee did little to clarify the intended meaning of the strong inference standard adopted in the PSLRA. Instead, in its Statement of Managers, the Conference Committee substantially confused the issue by stating:

> The Conference Committee language is based in part on the pleading standard of the Second Circuit. . . .

S. REP. NO. 104-98, at 15, *reprinted in* 1995 U.S.C.C.A.N. at 693 (footnotes omitted); Grundfest & Pritchard, *supra* note 98, at 653.

135 Grundfest & Pritchard, *supra* note 98, at 653 (stating that, at the time of the PSLRA's passage, "there was reason to believe that the [strong inference] standard had at least three different articulations" within the Second Circuit).

136 *Id.* at 659.

137 141 CONG. REC. S9200–01, S9222 (daily ed. June 28, 1995); Grundfest & Pritchard, *supra* note 98, at 654.

138 141 CONG. REC. S9222 (daily ed. June 28, 1995) (emphasis added); Grundfest & Pritchard, *supra* note 98, at 654.

139 *See* 141 CONG. REC. S19,038 (daily ed. Dec. 21, 1995); Grundfest & Pritchard, *supra* note 98, at 654.

140 *See* 141 CONG. REC. S9222 (daily ed. June 28, 1995); *cf.* Grundfest & Pritchard, *supra* note 98, at 658 (suggesting that "the Specter Amendment . . . could have been construed as implicitly codifying 'recklessness' as the liability standard under Section 10(b)").

Regarded as the most stringent pleading standard, the Second Circuit requirement is that the plaintiff state facts with particularity, and that these facts, in turn, must give rise to a "strong inference" of the defendant's fraudulent intent. Because the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit's case law interpreting this pleading standard.[141]

Rather than clarifying the legislative intent, this language actually makes that intent even more ambiguous. If the Statement of Managers is meant to signify a legislative intent to codify the Second Circuit test, but not the case law applying that test, then "it is not clear how the [PSLRA's] standard is 'based,' even 'in part,' on the [Second Circuit's] 'strong inference' standard."[142] After all, the Second Circuit cases applying the "strong inference" standard "are simply the more particular application of the general standard, not a different rule of law."[143]

In addition, the entire Statement of Managers is rendered more confusing by a controversial footnote stating that "[f]or this reason, the Conference Report chose not to include in the pleading standard certain language relating to motive, opportunity, or recklessness"—language present in most articulations of the Second Circuit standard.[144] In later debates over another piece of securities reform legislation—the Uniform Standards Act—Representative John Dingell claimed that this language had been "slipped into a footnote by a staffer at the last minute without our knowledge or concurrence."[145]

The floor debate over the conference committee bill is also telling. During that debate, critics of the bill charged that, by going beyond the pleading standard required in the Second Circuit, the committee had established an impossibly high pleading standard that no plaintiff could meet.[146] In response, the bill's supporters rejected these criticisms in a manner that, as Grundfest and Pritchard have pointed out, seems to retreat from statements in the Conference Committee report that imply the adoption of a tougher

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141 H.R. CONF. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740 (Statement of Managers); Grundfest & Pritchard, *supra* note 98, at 655.

142 Grundfest & Pritchard, *supra* note 98, at 656.

143 *Id.*

144 H.R. CONF. REP. NO. 104-369, at 49 n.23, *reprinted in* 1995 U.S.C.C.A.N. at 749 n.23; Grundfest & Pritchard, *supra* note 98, at 656.

145 144 CONG. REC. E2246 (daily ed. Oct. 20, 1998) (statement of Rep. Dingell); *see also* Grundfest & Pritchard, *supra* note 98, at 657.

146 *See* 141 CONG. REC. S17,937–38 (daily ed. Dec. 5, 1995) (statement of Sen. Sarbanes) (criticizing the bill for not adequately protecting investors by providing a lessor pleading standard); 141 CONG. REC. S17,941 (daily ed. Dec. 5, 1995) (Letter from Coalition of State and Local Government Officials to Arthur Levitt, Chairman of the SEC, and Steve Wallman, Commissioner of the SEC (undated)) (arguing that the bill's pleading standard is more difficult than that employed by the Second Circuit); 141 CONG. REC. S17,959–61 (daily ed. Dec. 5, 1995) (statement of Sen. Specter) (arguing that the bill establishes "an impossible pleading standard"); 141 CONG. REC. S17,976 (daily ed. Dec. 5, 1995) (statement of Sen. Boxer) (arguing that the bill is worse than previous versions because it heightens the pleading standard); 141 CONG. REC. 17,984 (daily ed. Dec. 5, 1995) (statement of Senator Moseley-Braun) (evincing concern that the bill would result in a pleading standard "significantly higher" than that of the Second Circuit).

standard than that employed in the Second Circuit.[147] For example, Senator Pete Domenici, one of the committee managers, stated, "the conference report adopts the pleading standard utilized in the [S]econd [C]ircuit."[148] Similarly, Senator Chris Dodd, another committee manager, emphasized throughout the debate that the committee had adopted the pleading standard established by the Second Circuit.[149] Finally, Senator Moseley-Braun remarked that the pleading standard from the Second Circuit was the "position that prevailed at conference."[150]

3. Passage and Veto

The PSLRA passed the House by a vote of 320 to 102[151] and the Senate with a vote of 65 to 30.[152] It was promptly vetoed by President Clinton, who emphasized the "strong inference" controversy in his veto message, stating:

> I believe that the pleading requirements of the Conference Report with regard to a defendant's state of mind impose an unacceptable procedural hurdle to meritorious claims being heard in Federal courts. I am prepared to support the high pleading standard of the U.S. Court of Appeals for the Second Circuit—the highest pleading standard of any Federal circuit court. But the conferees make crystal clear in the Statement of Managers their intent to raise the standard even beyond that level. I am not prepared to accept that.

The conferees deleted an amendment offered by Senator Specter and adopted by the Senate that specifically incorporated Second Circuit case law with respect to pleading a claim of fraud. Then they specifically indicated that they were not adopting Second Circuit case law but instead intended to "strengthen" the existing pleading requirements of the Second Circuit. All this shows that the conferees meant to erect a higher barrier to bringing suit than any now existing.[153]

Although Congress overrode the Clinton veto by a vote of 68 to 30 in the Senate[154] and 319 to 100 in the House,[155] the close override vote in the Senate (the loss of only two votes would have been sufficient to derail the override attempt), meant that substantial strategic maneuvering was required to preserve the supermajority necessary to pass the legislation.[156] In other words, to preserve the coalition that had been formed in favor of the legisla-

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147 Grundfest & Pritchard, *supra* note 98, at 657.

148 141 CONG. REC. S17,969 (daily ed. Dec. 5, 1995) (statement of Sen. Domenici).

149 141 CONG. REC. S17,957, S17,959–S17,960 (daily ed. Dec. 5, 1995) (statement of Sen. Dodd).

150 141 CONG. REC. S17,984 (daily ed. Dec. 5, 1995) (statement of Sen. Moseley-Braun).

151 141 CONG. REC. H14,055 (daily ed. Dec. 6, 1995).

152 141 CONG. REC. S17,997 (daily ed. Dec. 5, 1995).

153 141 CONG. REC. H15,215 (daily ed. Dec 20, 1995) (veto message from President William J. Clinton); Grundfest & Pritchard, *supra* note 98, at 659.

154 141 CONG. REC. S19,180 (daily ed. Dec 22, 1995) (rollcall vote); Grundfest & Pritchard, *supra* note 98, at 659.

155 141 CONG. REC. H15,223–24 (daily ed. Dec 20, 1995) (rollcall vote); Grundfest & Pritchard, *supra* note 98, at 659.

156 Grundfest & Pritchard, *supra* note 98, at 659.

tion, Clinton's interpretation of the statute—that it strengthened pleading standards beyond those of the Second Circuit—had to be refuted, as an insufficient number of legislators seemed willing to sign on to legislation that strengthened existing pleading standards.[157] At the same time, however, the incomplete statutory language could not be clarified to indicate that Congress was adopting the Second Circuit standard without causing the defection of those legislators intent on enacting a statute that could at least be interpreted by future courts as strengthening existing pleading standards.[158]

Accordingly, Senator Dodd and other conference managers criticized President Clinton's interpretation of the strong inference provision during floor debates on the veto override. Senator Dodd stated, for example, that "[Clinton and his administration are] hanging their hat on the wrong issue here," for the Specter Amendment had been rejected, not because it codified the Second Circuit standard, but because it "did not really follow the guidance of the [S]econd [C]ircuit."[159] The PSLRA, by contrast, "met the [S]econd [C]ircuit standard . . . . We have left out the guidance. That does not mean you disregard it."[160]

In addition to Senator Dodd's remarks, two other conference committee members, Senator Domenici and Representative Tauzin, also dismissed President Clinton's interpretation of the strong inference pleading standard and his reliance on the Statement of Managers in interpreting the PSLRA.[161] For example, Senator Domenici argued that "the Reform Act's pleading standard 'is the Second Circuit's pleading standard' and was 'a codification of the Second Circuit rule.'"[162] Furthermore, both Senator Domenici and Representative Tauzin criticized President Clinton for focusing on the Statement of Managers.[163]

Interestingly, the legislative debate and strategic maneuvering over the meaning of the PSLRA's strong inference standard (and its impact, if any, on the issue of recklessness as a basis for Rule 10b-5 liability) did not end with passage of the PSLRA, but resurfaced years later in connection with other securities legislation.[164] Perhaps most importantly for purposes of this Arti-

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157 *See id.* at 658–59.

158 *Id.*

159 141 CONG. REC. S19,068 (daily ed. Dec. 21, 1995) (statement of Sen. Dodd); Grundfest & Pritchard, *supra* note 98, at 660.

160 141 CONG. REC. S19,068 (daily ed. Dec. 21, 1995) (statement of Sen. Dodd); Grundfest & Pritchard, *supra* note 98, at 660. Senator Dodd also introduced a memo, written by Professor Joseph A. Grundfest, stating that the PSLRA pleading standard was "faithful to the Second Circuit test." 141 CONG. REC. S19,067 (daily ed. Dec. 21, 1995) (Letter from Joseph A. Grundfest to President William J. Clinton (Dec. 15, 1995)); Grundfest & Pritchard, *supra* note 98, at 660 n.127.

161 Grundfest and Pritchard, *supra* note 98, at 660 n.128.

162 *Id.* (quoting 141 CONG. REC. S19,150 (daily ed. Dec. 22, 1995) (statement of Sen. Domenici)).

163 141 CONG. REC. S19,045 (daily ed. Dec. 22, 1995) (statement of Sen. Domenici) ("A statement of managers is not law, everyone knows that."); 141 CONG. REC. H15,214 (daily ed. Dec. 20, 1995) (statement of Rep. Tauzin) (criticizing President Clinton for focusing on "[n]ot the bill, [but] the statement of the managers"); Grundfest & Pritchard, *supra* note 98, at 660.

164 For example, the controversy over the PSLRA's pleading standard arose in connection with the debate over passage of the Uniform Standards Act ("Standards Act"), with several

cle, however, if Congress did indeed intend to enact incomplete, confusing language regarding federal pleading standards, they succeeded spectacularly. As noted by Professors Grundfest and Pritchard in their recent study of appellate and district court cases interpreting the strong inference provision of the PSLRA, courts diverge wildly in their interpretation of congressional intent in enacting the strong inference requirement, with a three-way split among the circuits and a pattern of district court decisions that "are, to a remarkable degree, statistically indistinguishable from a 'coin-toss' model of judicial behavior."[165]

4. Application of the Penalty Default Canon

Based on the foregoing, we believe that the strong inference provision of the PSLRA is an attractive candidate for application of the Penalty Default Canon. Applying the Penalty Default Test to the legislative history of the PSLRA indicates that all three steps are met. When faced with interpretive controversies regarding the strong inference provision of the PSLRA, therefore, courts should declare the strong inference provision an unconstitutional delegation of legislative authority.

First, it is easy to rule out inadvertent incompleteness in the strong inference pleading requirement of the PSLRA. Applying the three steps for uncovering inadvertent incompleteness outlined in Part III.B.1 shows that legislators were aware of and drew attention to the precise ambiguities that courts would have to decide. Indeed, the debate during the vote overriding President Clinton's veto demonstrates not only that Congress was aware that

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legislators and witnesses expressing concern that the PSLRA could be read by courts as eliminating recklessness as a basis for securities-fraud liability. *See, e.g.*, *The Securities Litigation Uniform Standards Act of 1997: Hearing on S. 1260 Before the Securities Subcomm. of the Comm. on Banking, Hous., and Urban Affairs*, 105th Cong. 14 (1997) (statement of Arthur Levitt, Jr., Chairman, SEC) ("Should the courts of appeals conclude that the Reform Act has somehow eliminated recklessness as a basis for antifraud liability, the preservation of state remedies that allow recovery for reckless conduct would be critical."); Grundfest & Pritchard, *supra* note 98, at 662. In addition, the Senate report accompanying the Standards Act references the PSLRA controversy, "stat[ing] that 'the PSLRA establish[ed] a uniform federal standard on pleading requirements by adopting the pleading standard applied by the Second Circuit Court of Appeals.'" *Id.* (quoting S. REP. NO. 105-182, at 5–6 (1998)). In contrast, the Statement of Managers seemed to back away from this interpretation of the PSLRA, stating, "the Reform Act establish[ed] a heightened uniform Federal standard on pleading requirements based upon the pleading standard applied by the Second Circuit Court of Appeals." 144 CONG. REC. H11,021 (daily ed. Oct. 15, 1998) (Statement of Managers). Needless to say, an intent to establish heightened standards based on the Second Circuit test could be interpreted as very different from an intent to adopt the Second Circuit test. Grundfest & Pritchard, *supra* note 98, at 663.

165 Grundfest & Pritchard, *supra* note 98, at 670, 678. According to Grundfest and Pritchard, the Second, Third, and Eighth Circuits have ruled that Congress's "strong inference" language was intended to adopt the Second Circuit standard. *Id.* at 678. The First, Fifth, Sixth, Tenth, and Eleventh Circuits conclude, by contrast, that Congress intended to adopt a stronger, "intermediate" standard than that employed in the Second Circuit. *Id.* Finally, the Ninth Circuit employs the even more demanding *Silicon Graphics* standard. *Id.* at 670 & n.150, 678 (citing *In re* Silicon Graphics, Inc. Sec. Litig., No. C96-0393, 1997 WL 337580 (N.D. Cal. June 5, 1997), *aff'd*, 183 F.3d 970 (9th Cir. 1999); *In re* Silicon Graphics, Inc. Sec. Litig., 970 F. Supp. 746 (N.D. Cal. 1997); *In re* Silicon Graphics, Inc. Sec. Litig., No. C96-0393, 1996 WL 664639 (N.D. Cal. Sept. 25, 1996)).

the language was subject to differing interpretations, but that at least one reader—the President—had interpreted the language in a manner inconsistent with what members of the conference committee claimed had been the intended congressional meaning.[166]

Second, legislators associated those ambiguities with a future role for the courts, explicitly referencing the past performance by the judiciary on this issue.[167] Finally, legislators specifically rejected alternative proposals that were offered to clarify the language. The original House bill (which eliminated liability for recklessness), the bill passed by the House (which imposed liability for recklessness and defined recklessness), and the Specter Amendment (which imposed liability for recklessness and specified the means for establishing a strong inference of fraudulent conduct) were all superior to the PSLRA in terms of clarity. In sum, there is much evidence that lawmakers made a deliberate choice to leave this provision of the PSLRA incomplete.

Moving to the second step of the Penalty Default Test, the question becomes whether the incompleteness in this provision can reasonably be explained as a desire to harness judicial expertise or reduce transaction costs. Neither of these possibilities seems plausible.

Although one might argue that setting pleading standards and defining fraud are matters of judicial expertise, it is telling that legislators never referenced that expertise during their debates on the PSLRA. Furthermore, the judicial-expertise argument is undermined by the prior case law on the issues of recklessness and pleading standards. Before the debate over the PSLRA, the courts had tackled the issue of scienter and the pleading requirements. The Supreme Court had twice refused to determine whether recklessness constituted scienter.[168] Although the appellate courts had all ruled that recklessness sufficed to establish fraud, they defined recklessness with such variation that no standard had ever really developed. Finally, no consensus on pleading standards emerged in the case law, with the Second and Ninth Circuits adopting radically different positions. In light of this history, it seems implausible that the statutory incompleteness was an outgrowth of a desire by lawmakers to rely on judicial expertise to fill any gaps in the PSLRA. The judiciary had already failed at this task on numerous occasions.

The transaction cost savings argument appears equally implausible. First, legislators made no mention of a desire to reduce transaction costs by leaving decisions regarding scienter and pleading standards to the courts. Furthermore, this omission is not surprising. Given the failure of the Supreme Court to define scienter and the repeatedly inconsistent decisions of the lower courts, it is difficult to see how the development of common law standards in this case could be said to be a transaction cost reducing mechanism.

Finally, at the third step, the PSLRA meets the requirements of a likely candidate for strategic delegations, as two extremely powerful interest

166 *See supra* notes 153–63 and accompanying text (discussing the veto override).

167 *See* 141 CONG. REC. 19,150 (1995).

168 *See* Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

groups—trial lawyers and issuers of securities—were on competing sides of the issue. If possible, rational legislators might go to great lengths (including delegating responsibility to the courts) to avoid fully alienating either group.

B. Section 6 of the Clayton Act[169]

1. Background

The Clayton Act, when passed in 1914, was celebrated by the labor movement as the most important legislative victory for organized labor in the history of the United States.[170] The failure of the Clayton Act to live up to these high aspirations has been the subject of intense debate among legal and political-science scholars, with most commentators criticizing the Supreme Court's "*Lochner* Era" decisions as derailing the expectations of labor and Congress that the Clayton Act would protect organized labor's activities from intrusion by hostile courts.[171]

A close analysis of the history of the Clayton Act and the events surrounding its passage, however, suggests a different story. Aware of judicial hostility toward the nascent labor movement and under pressure from business interests to limit labor's power, Congress intentionally left key provisions of the Clayton Act undefined, knowing that a hostile judiciary was likely to construe the statutes in a probusiness manner. Furthermore, contrary to the public statements of labor-movement leaders such as American Federation of Labor ("AFL") President Samuel Gompers, labor leaders were cognizant of the fact that the enacted legislation was not the labor victory they had desired.[172] As such, the public statements of labor leaders like Gompers in the wake of the Clayton Act's passage should be viewed—like

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169 Clayton Act § 6, 15 U.S.C. § 17 (2000). This section builds largely upon George I. Lovell's exhaustive analysis of the legislative history of section 6 of the Clayton Act. *See* LOVELL, *supra* note 63.

170 LOVELL, *supra* note 63, at 99; Dallas I. Jones, *The Enigma of the Clayton Act*, 10 INDUS. & LAB. REL. REV. 201, 212–13 (1957) (quoting Samuel Gompers as stating that the bill secured "for America's workmen the freedom of self-protection").

171 *See* VICTORIA HATTAM, LABOR VISIONS AND STATE POWER 163–64 (1993) ("Clayton Act also was eviscerated by the courts. . . . Whatever the specific grounds for particular rulings, the outcome was much the same; labor received little or no protection under the new law."); Richard Michael Fischl, *Self, Other, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 844 (1989) (stating that "[t]he Supreme Court soon gutted the Clayton Act's would-be labor exemption in *Duplex Printing Press Co. v. Deering*"); Stanley Kutler, *Labor, the Clayton Act, and the Supreme Court*, 3 LAB. HIS. 19, 38 (1962) ("The responsibility for the fate of the Clayton Act did lie with the Supreme Court, and attempts to absolve it from responsibility for the impotency of the statute are idle. . . . The Clayton Act decisions were thus a paradigm for the settled anti-labor bias of the Supreme Court. The fulfillment of labor's aspirations required a less timid Congress but, more importantly, a Court which would recognize the changes in social and economic relationships, and discard the outworn shibboleths of the past."); Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 469 (1981) ("Congress evinced an intention [in the Clayton Act], if not to exempt labor union combinations entirely, at least to limit substantially the application of antitrust to union practices."); *id.* at 471 (stating that the Clayton Act was "intended to discourage judicial activism in labor disputes"); *see also* LOVELL, *supra* note 63, at 99.

172 *See* LOVELL, *supra* note 63, at 117.

those of the many congressional leaders who spoke publicly or on the legislative record on the issue—as strategic posturing rather than interest group naivete in the face of congressional duplicity.[173]

Section 6 of the Clayton Act provides:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[174]

Labor supporters argued that section 6 granted labor organizations and their activities the full exemption from antitrust laws (and thus relief from court injunctions for boycotts, strikes, and pickets) that they had long sought.[175] In *Duplex Printing Press Co. v. Deering*,[176] however, Justice Pitney held that section 6 protected only the existence and operation of labor unions from the reach of antitrust laws.[177] The activities of individual members of the organization, by contrast, were entitled to less protection; boycotts, such as the one challenged in *Duplex*, would be immune from injunctions based on antitrust challenges only if they were "lawful[ ]" and "legitimate."[178]

Because Congress had failed to define "lawfully" and "legitimate," however, the Supreme Court was left to interpret on its own what those phrases meant.[179] Prior to the Clayton Act, cases had already established that boycotts such as the one at issue in *Duplex* were unlawful.[180] Absent a new definition in the statute, therefore, a majority of the Court concluded that Congress intended judges to apply the standards in existence prior to the Act's passage,[181] meaning that the boycott at issue was unlawful and thus not exempt from the antitrust laws.[182] As a result, a court could grant injunctive relief to Duplex.[183]

Numerous commentators have criticized the *Duplex* decision.[184] Despite the fact that Justice Pitney's interpretation is consistent with the incomplete congressional language in section 6, the decision seems nonetheless to ascribe an absurd legislative intent to the Clayton Act. Under Justice Pitney's interpretation, Congress enacted a statute that failed to make any changes in existing law, a result that seems especially absurd when one considers the

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173 *Id.* at 47.

174 Clayton Act § 6, 15 U.S.C. § 17.

175 *See* LOVELL, *supra* note 63, at 104; Jones, *supra* note 170, at 212–13.

176 Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

177 *Id.* at 469; LOVELL, *supra* note 63, at 104.

178 *Duplex*, 254 U.S. at 469; LOVELL, *supra* note 63, at 104–06.

179 LOVELL, *supra* note 63, at 105.

180 LOVELL, *supra* note 63, at 100; *see also Duplex*, 254 U.S. at 466–67; .

181 *Duplex*, 254 U.S. at 470; LOVELL, *supra* note 63, at 105.

182 *Duplex*, 254 U.S. at 478; LOVELL, *supra* note 63, at 105.

183 *See Duplex*, 254 U.S. at 478.

184 LOVELL, *supra* note 63, at 106.

fanfare—from organized labor and lawmakers alike—that greeted the passage of the Clayton Act.

At the same time, however, scholars must question why Congress chose to include qualifiers such as "lawfully" and "legitimate" that gave courts an opening to reach an interpretation like Pitney's in *Duplex*.[185] An examination of the legislative record indicates that Congress not only realized that the inclusion of qualifiers such as "lawfully" and "legitimate" created an incompleteness that left room for judges to restrict organized labor's activities, but that legislators were fully aware that courts were likely to adopt exactly the interpretation chosen by Pitney in *Duplex*.[186]

2. *Pre-Clayton Act History*

Contrary to popular assumption, the issue of whether language like that contained in section 6 of the Clayton Act would apply to protect only the existence, and not the activities, of labor organizations did not arise for the first time with *Duplex*, but instead had been debated by legislators throughout the fourteen year period prior to the passage of the Clayton Act.[187] The genesis of the AFL quest for an antitrust exemption for organized labor actually predates the Sherman Act's passage in 1890.[188] During the Sherman Act debates, AFL leaders lobbied for the addition of a provision that would exempt labor organizations from the Sherman Act's scope.[189] The Senate voted to add such a provision, which provided that:

> [T]his act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of their labor or of increasing of their wages. . . .[190]

A Senate committee, however, later removed the provision.[191]

The AFL again pushed for an antitrust exemption for organized labor during debates on the Littlefield bill of 1900.[192] At one point during the debates, the House added an amendment exempting labor organizations from the application of the Littlefield bill: "Nothing in this act shall be so construed as to apply to trade unions or other labor organizations, organized for the purpose of regulating wages, hours of labor, or other conditions under

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185 *Id.*

186 *Id.* at 107.

187 *Id.*

188 *Id.*

189 *Id.* at 107–08.

190 21 CONG. REC. 2612 (1890); LOVELL, *supra* note 63, at 108.

191 LOVELL, *supra* note 63, at 108; 2 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES: PART I, THE ANTITRUST LAWS 20 (Earl W. Kintner ed., 1978) [hereinafter 2 HISTORY OF THE FEDERAL ANTITRUST LAWS]. Apparently, Senate leaders reassured AFL President Samuel Gompers that the Sherman Act could never be used against labor organizations. LOVELL, *supra* note 63, at 108. In 1908, however, the Supreme Court disagreed. *See* Loewe v. Lawlor, 208 U.S. 274, 292–93 (1908) (holding that "interference with trade" resulting from boycotts to secure union recognition constituted a "restraint of trade" within the meaning of the Sherman Act); LOVELL, *supra* note 63, at 108.

192 LOVELL, *supra* note 63, at 108 (citing H.R. 10539, 56th Cong. § 7 (1900)).

which labor is to be performed."[193] Although the bill passed the House with the amendment intact,[194] the entire bill died in the Senate and never became law.[195]

The pre–Clayton Act events most directly relevant to the section 6 controversy's implications for the Penalty Default Canon, however, are those related to the 1900 Ridgley bill.[196] The Ridgley bill originally contained a provision exempting labor organizations from conspiracy prosecutions that provided:

> [N]o agreement, combination, or contract by or between two or more persons to do, or to procure to be done, or not to do, or procure not to be done, any act in contemplation or furtherance of any trade dispute . . . shall be deemed criminal . . . nor shall any restraining order or injunction be issued with relation thereto . . . .[197]

The debate over whether this language would protect the activities, such as strikes and boycotts, of labor organizations (as opposed to merely the existence of labor organizations) first arose when the House Judiciary Committee recommended amending the bill to strike out the "restraint of trade" provision because it exempted both labor organizations and their activities from the Sherman Act.[198] The committee minority report opposed deletion of the provision, arguing that "[t]here is no sufficient reason for striking out these words" because they applied only to the "agreement, combination, or contract," and did not exempt actions carried out pursuant to that agreement or contract.[199] Thus, under the minority's reasoning, courts were unlikely to ever interpret the provision in the broad manner feared by the committee majority.[200]

Although the provision was removed and the Ridgley bill defeated,[201] the issue of whether similar language exempted only labor organizations or included organized labor activities reappeared the following Congress when a

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193 33 CONG. REC. 6483 (1900); LOVELL, *supra* note 63, at 108.

194 33 CONG. REC. 6502 (1900); LOVELL, *supra* note 63, at 108.

195 34 CONG. REC. 3438–39 (1901); LOVELL, *supra* note 63, at 108; 2 HISTORY OF THE FEDERAL ANTITRUST LAWS, *supra* note 191, at 996–97. When the House and Senate conducted hearings on antitrust reform in 1908, the issue of a labor-union exemption arose again. LOVELL, *supra* note 63, at 108. No new antitrust legislation was passed in that year, however. *Id.*

196 H.R. 8917, 56th Cong. (1900); *see* LOVELL, *supra* note 63, at 110 (citing H.R. 8917, but labeling it the "Hoar" bill).

197 H.R. 8917, 56th Cong. (1900); LOVELL, *supra* note 63, at 110.

198 H.R. REP. NO. 2007, at 4212 (1900); LOVELL, *supra* note 63, at 111.

199 H.R. REP. NO. 2007, pt. 2 (1900); LOVELL, *supra* note 63, at 111.

200 LOVELL, *supra* note 63, at 111. The minority report stated, "It is clear to our minds that it was never the legislative intent that the Sherman antitrust law . . . should apply to cooperative efforts of workingmen in contemplation or furtherance of a trade dispute, especially when such efforts, if put forth by a single individual, would not constitute a crime." H.R. REP. NO. 2007, pt. 2 (1900).

> The AFL, at least initially, supported the bill, but argued for the interpretation favored by the committee majority (who wanted to remove the provision), as opposed to the committee minority's interpretation. LOVELL, *supra* note 63, at 112. Interestingly then, it was the group acting on behalf of labor (the committee minority) who advocated an interpretation of the bill to which labor was opposed. *Id.*

201 LOVELL, *supra* note 63, at 111.

nearly identical bill, the Grosvenor bill ("Grosvenor I"), was introduced in 1902.[202] Grosvenor I restored the contested provision that had been eliminated from the Ridgley bill.[203] Although the 1902 House Judiciary Committee left the provision intact, it also could not agree on the meaning of the provision.[204] The bill passed the House, but was defeated in the Senate.[205] Although the same bill was reintroduced in the next two Congresses, and hearings were held on both occasions,[206] the bill never made it out of the House committee.[207]

In 1906, AFL supporters introduced a more comprehensive reform bill, known as the Pearre bill.[208] The Pearre bill provided that:

> [N]o agreement between two or more persons concerning the terms or conditions of employment of labor, or the assumption or creation or termination of any relation between employer and employee, or concerning any act or thing to be done or not to be done with reference to or involving or growing out of a labor dispute *shall constitute a conspiracy or other criminal offense* or be punished or prosecuted as such unless the act or thing agreed to be done or not to be done would be unlawful if done by a single individual . . . .[209]

One of the bill's authors clarified that this provision was aimed at the antitrust laws, stating that the bill "'would . . . repeal the antitrust law, at least in so far as it applies to boycotts affecting interstate commerce.'"[210]

Notably, the labor exemption in the Pearre bill, unlike those in the Ridgley and Grosvenor bills, explicitly covered both organized labor groups and the activities of those groups. Unfortunately for labor, none of the various versions of the Pearre bill that the AFL supported between 1906 and 1914 reached the floor of either the House or Senate.[211]

3. The Clayton Act

As Congress began consideration of the Clayton Act, legislators discarded the clear language of the labor exemption contained in the Pearre bill,

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202 H.R. 11060, 57th Cong. (1902) (hereinafter Grosvenor I); *see* LOVELL, *supra* note 63, at 113.

203 *See* Grosvenor I; LOVELL, *supra* note 63, at 113.

204 LOVELL, *supra* note 63, at 113.

205 *Id.*

206 *Id.* at 113–14. These bills were the Grosvenor bill, H.R. 89, 58th Cong. (1903) ("Grosvenor II") and the Littlefield bill, H.R. 9328, 59th Cong. (1905). LOVELL, *supra* note 63, at 113–14 & n.16.

207 LOVELL, *supra* note 63, at 113–14 & n.16. The concern over the provision's incomplete language continued in both Congresses, as evidenced by the testimony of James Beck of the American Anti-Boycott Association and the Contractors League of Chicago who argued that "'the bill is ambiguous and will give rise to a flood of evils.'" *Id.* at 114, n.16 (quoting *Anti-Injunction Bill, Complete Hearings Before the Committee on the Judiciary of the House of Representatives*, 58th Cong. 67 (1904) (statement of Hon. James M. Beck)).

208 H.R. 18752, 59th Cong. (1906); LOVELL, *supra* note 63, at 114.

209 H.R. 18752, 59th Cong. § 2 (1906) (emphasis added); LOVELL, *supra* note 63, at 114.

210 LOVELL, *supra* note 63, at 114 (quoting *House Comm. on the Judiciary, Hearings on the So-Called Anti-Injunction Bills and All Other Labor Bills*, 60th Cong. 29 (1908)).

211 LOVELL, *supra* note 63, at 114–15.

and reverted to incomplete language similar to that employed in the Ridgley and Grosvenor bills.[212] The portion that eventually became section 6 of the Clayton Act stated:

> That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . labor, . . . agricultural or horticultural organizations . . . or to forbid or restrain individual members of such organizations, from *lawfully* carrying out the legitimate objects thereof . . . .[213]

Both the AFL and legislators criticized this change, finding the exemption too ambiguous to supply much relief to labor organizations.[214] The statements of Rep. Dick Morgan are typical:

> It would hardly seem necessary in this day and age of the world to enact a law which merely permits the existence of labor organizations. If labor and farmer organizations are not to be given some substantial recognition by the statutory enactment, it would seem unwise to place a new provision in the law, which can be of no material benefit to labor organizations, but which is bound to bring doubt and uncertainty as to what, if any, additional rights labor and farmers' organizations and members thereof have under the new statute. If the provisions of our antitrust laws should not apply to labor organizations Congress should in plain and clear language so declare. We should not speak in the doubtful, uncertain, indefinite terms which characterize the provisions of [section 6].[215]

Some legislators even explicitly attributed the incompleteness to duplicity. As stated by one representative, "'[i]t looks as though it has been drawn to deceive somebody.'"[216] Neither the AFL nor its supporters in Congress were deceived, however. Although the AFL initially supported the provision, Gompers changed course after consultation with federal Judge Alton B. Parker, the 1904 democratic presidential candidate, who advised that the statute could be read to apply only to the existence of labor organizations and not their activities.[217] Gompers then withdrew support of the bill, requesting that the language be changed to say that no antitrust laws shall apply to labor unions, rather than stating that no antitrust laws "shall . . . be construed to forbid the existence and of" labor unions.[218]

A lengthy stalemate ensued and the bill was delayed for several weeks.[219] Eventually, the AFL and the administration reached a compromise in the Webb Amendment, which added to the section the following language: "Nor shall such organizations, orders, or associations, or members thereof, be

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212 *Id.* at 114.

213 H.R. 15657, 63d Cong. § 7 (1914); *see also* Jones, *supra* note 170, at 209.

214 LOVELL, *supra* note 63, at 115.

215 H.R. REP. NO. 627, pt. 4, at 3–4 (1914).; LOVELL, *supra* note 63, at 115–16.

216 LOVELL, *supra* note 63, at 116 (quoting 51 CONG. REC. 9564 (1914) (statement of Rep. Volstead)).

217 LOVELL, *supra* note 63, at 117 & n.21; Jones, *supra* note 170, at 209 n.58.

218 LOVELL, *supra* note 63, at 116–17; Jones, *supra* note 170, at 209.

219 LOVELL, *supra* note 63, at 117; Jones, *supra* note 170, at 209.

held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws."[220] The Act went to the House floor with support from both sides, but with no agreement as to the meaning of the provision.[221] AFL supporters, despite their failure to procure the amendment desired by Gompers, argued that section 6 provided labor unions a complete exemption from the antitrust laws.[222] Wilson administration supporters, by contrast, argued for the interpretation eventually adopted by the Supreme Court in *Duplex*.[223]

Numerous legislators noted the differing interpretations favored by the administration and the AFL and claimed that the legislature's language was so vague that it inevitably left ultimate resolution of the issue to the courts. As stated by Representative Volstead, section 6 must "'of necessity go into the courts after it becomes a law before anybody will know definitely just what it means.'"[224]

In the House, several amendments were offered to clarify the language of section 6. The most important of these was an amendment offered by Representative Thomas, which stated, "'The provisions of the antitrust laws shall not apply to agricultural, labor, consumers, fraternal, or horticultural organizations, orders, or associations.'"[225] The Thomas amendment, which Labor did not support, was defeated, however.[226]

Legislators in the Senate were as sharply divided as their House counterparts over the meaning and likely impact of section 6. Labor opponents in the Senate argued, for example, that section 6 accomplished little that had not already been decided in the courts—that is, that the mere formation of a

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220 51 CONG. REC. 9538 (1914); LOVELL, *supra* note 63, at 117.

221 Jones, *supra* note 170, at 210; *see* LOVELL, *supra* note 63, at 117.

222 LOVELL, *supra* note 63, at 117–18; *see also* Jones, *supra* note 170, at 212–13 ("Gompers would not admit to any doubt that the measure fulfilled labor's objectives.").

223 LOVELL, *supra* note 63, at 117–18; Jones, *supra* note 170, at 213–14; *see also* 51 CONG. REC. 9564 (1914) (statement of Rep. Volstead) ("This morning I read in one of the newspapers that labor claims for this proposed amendment one meaning while the administration claims an entirely different meaning.").

224 LOVELL, *supra* note 63, at 118 (quoting 51 CONG. REC. 9564 (1914) (statement of Rep. Volstead)). Similarly, Representative Victor Murdock argued that "[s]ome of the friends of labor say that the amendment does exempt organized labor from the provisions of the Sherman antitrust law, but its enemies say that it does not exempt organized labor. Who knows? No man on the floor of this House. Who will determine? The courts." *Id.* (quoting 51 CONG. REC. 9542 (1914) (statement of Rep. Murdock)).

225 LOVELL, *supra* note 63, at 119 (quoting 51 CONG. REC. 9538 (1914) (statement of Rep. Thomas)).

226 51 CONG. REC. 9569 (1914); LOVELL, *supra* note 63, at 119. As discussed by Lovell, it may seem surprising that the AFL did not support the Thomas amendment, but instead continued to support the ambiguous language of section 6 (which Gompers had originally opposed) that had bipartisan support. LOVELL, *supra* note 63, at 120. According to Thomas, this was because the AFL feared—probably correctly—that clearer language would cause the bill's defeat in the House, as it had the earlier Pearre bill. *Id.*; *see also* 51 CONG. REC. 9569 (1914) (statement of Rep. Thomas) ("Is it not a fact that the Webb amendment was accepted by organized labor only after they came to the conclusion that they could not get the amendment that I submitted?"). Events in the Senate suggest that Thomas was correct. LOVELL, *supra* note 63, at 120–21. As soon as the bill moved to the Senate for consideration, the AFL began agitating for amendments to the bill that would clarify the language. *Id.* at 121.

labor organization did not violate the antitrust laws.[227] Even labor supporters in the Senate seemed to concede that courts were likely to construe section 6 narrowly, chastising Congress for its lack of courage,[228] but complimenting the "humble and suppliant" labor groups who were willing to compromise and "'take what they could get.'"[229] As summarized by Senator William Hughes, labor organizations were "'afraid to jeopardize their chances of getting any legislation by insisting upon getting more than there is in the bill as it came from the House.'"[230]

4. Application of the Penalty Default Canon

The forgoing discussion illustrates that section 6 of the Clayton Act provides an example of a strategically incomplete statute. As such, the *Duplex* court should have applied the Penalty Default Canon, holding section 6 an unconstitutional delegation of legislative authority. Specifically, the legislative history and events surrounding the passage of the Clayton Act indicate that all three steps of the Penalty Default Test are met.

First, the delegation of decision-making power to the courts in section 6 was not inadvertent. Not only were legislators aware of the precise incompleteness at issue in *Duplex*, they had debated it for over a decade and many had explicitly asserted that the interpretation adopted by Pitney was the one most likely to prevail in the courts. In addition, legislators made specific reference to the fact that courts would be forced to decide whether section 6 exempted both labor activities and the formation of labor organizations from the antitrust laws. Finally, legislators rejected alternative provisions offered to clarify the language of section 6 and reduce judicial discretion.

Second, the decision delegated in section 6—whether federal law should provide an antitrust exemption only for the existence of labor organizations or whether the exemption should include organized labor activities—does not plausibly draw on some special judicial expertise. When discussing the necessity for courts to interpret section 6, legislators never implied that this was due to special judicial expertise or a desire to reduce transaction costs. In addition, elected officials are at least as qualified as courts to make important policy decisions such as the extent to which organized labor is protected under U.S. law, and this is not a policy decision traditionally within the purview of the judiciary, or for which we expect the judiciary to have special skills.

Finally, section 6 falls into the category of statutes for which strategic delegations by the legislature hold some benefit and are most likely to occur.

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227 *See, e.g.*, 51 CONG. REC. 13,918 (1914) (statement of Sen. Borah) ("I read this section 7 [now section 6] as in no wise changing the law as it now exists from what I contemplate and conceive the law to be."); 51 CONG. REC. 14,588 (1914) (statement of Sen. Cummins) ("Section 7 [now section 6] still leaves every act of a labor union or any member of a labor union to be tested by the antitrust law, and its lawfulness must be determined by the provisions of the antitrust law."); *see also* LOVELL, *supra* note 63, at 123; Jones, *supra* note 170, at 214.

228 LOVELL, *supra* note 63, at 123 (citing 51 CONG. REC. 13,971 (1914) (statement of Sen. Hughes)).

229 *Id.* (quoting 51 CONG. REC. 13,972 (1914) (statement of Sen. Hughes)).

230 *Id.* (quoting 51 CONG. REC. 13,974 (1914) (statement of Sen. Hughes)).

Like the PSLRA, section 6 of the Clayton Act is a statutory provision over which two powerful, politically active interest groups (in this case, labor organizations and business interests) were sharply divided. Under the Penalty Default Test, section 6 is thus an unconstitutional delegation of legislative power and should have been struck down, rather than interpreted, by Pitney.

V. The Penalty Default Canon and the Delegation Debate

The Penalty Default Canon requires courts to declare that responsibility-shifting incomplete statutes are unconstitutional delegations of legislative authority. As such, it modifies the nondelegation and *Chevron* doctrines under which courts currently judge delegations. This Part thus compares and contrasts the Penalty Default Canon with the nondelegation and *Chevron* doctrines. We argue that, because the Penalty Default Canon discourages responsibility-shifting delegations while permitting all others, it is a more practical approach to judging the constitutionality of delegations, given the complexity of modern government, and a superior method of enhancing electoral accountability.

Section A addresses the nondelegation doctrine and the policy debate surrounding it. Section B tackles the *Chevron* doctrine. Finally, Section C briefly addresses a central theme in both the nondelegation doctrine and *Chevron* debates—the question of institutional choice.

A. The Nondelegation Doctrine

As a matter of black-letter law, the nondelegation doctrine holds that the Constitution requires Congress to provide an "intelligible principle" to guide other actors to whom Congress has delegated lawmaking authority.[231] As a result, statutes that are overly incomplete may represent impermissible delegations of legislative authority. Most often discussed in the context of delegations to agencies, the Supreme Court has struck down just two statutes on nondelegation grounds.[232] Despite its infrequent use, the nondelegation

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231 *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (stating that Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform"). There is some debate as to whether the constitutional text and history support such a requirement. *Compare* Posner & Vermeule, *supra* note 74, at 1722 (arguing that "there just is no constitutional nondelegation rule, nor has there ever been"), *with* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002) (contending that the text of the Constitution supports the nondelegation doctrine). Most commentators seem to agree, however, that the weight of authority is with those who defend the constitutionality of some version of the nondelegation doctrine. As Cass Sunstein has stated, "the best inference from Article I, Section 1 is that some sort of nondelegation doctrine does have constitutional status." Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 323 (2000). Accordingly, this section addresses only the policy arguments regarding the nondelegation doctrine, not the constitutional ones.

232 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (striking down a statute delegating to private groups the authority to develop "codes of fair competition"); Panama Ref. Co. v. Ryan, 293 U.S. 388, 414 (1935) (striking down a statute delegating to the president the power to prohibit the transportation of petroleum or petroleum products "produced in excess of the state's permission").

doctrine has drawn substantial scholarly interest and is often mentioned in the case law, including recent Supreme Court and circuit court opinions.[233]

Critics of the nondelegation doctrine typically raise two policy arguments. First, nondelegation critics argue that, given the size and complexity of modern government, efficient regulation would be impossible without broad delegations of authority to courts and agencies.[234] Perhaps for this reason, defenders of the nondelegation doctrine are often accused of cloaking a general hostility toward government intervention in the language of nondelegation. In other words, if government cannot operate at its current size and scope without delegations from the legislature to the other governmental branches and if such delegations are restricted, then government will have to contract and become less invasive. It has been argued, for example, that the premise of the leading nondelegation proponents, AGR, is that much, if not all, legislation is welfare reducing.[235] Underlying this premise is an implicit assumption that the only reason for legislative delegations is the furtherance of interest group transfers.

The Penalty Default Canon does not make this heroic assumption and, as a result, is far less blunt than the nondelegation doctrine. Rather than invalidating all broad delegations, the Penalty Default Canon invalidates only delegations undertaken for responsibility-shifting reasons. By invalidating such provisions, the Penalty Default Canon increases the costs of enacting a subset of problematic statutes, not all statutes. By forcing courts to analyze the underlying reasons for statutory incompleteness, the Penalty Default Canon thus avoids one of the most common criticisms of the nondelegation doctrine: hostility towards government intervention. This is because the Canon discourages responsibility-shifting delegations while granting Congress the flexibility to delegate whenever doing so furthers the public interest.[236]

The second policy argument leveled against the nondelegation doctrine, and presumably one reason that the Court does not often invoke it to strike down incomplete statutes, is the difficulty in drawing a line between permissible and impermissible delegations. Because it is recognized that some delegation and some statutory incompleteness are necessary in the administration of the modern state, a line must be drawn between permitted and prohibited

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233 *See, e.g.*, Lawson, *supra* note 231; Posner & Vermeule, *supra* note 74; Sunstein, *supra* note 231. For symposia devoted to the nondelegation doctrine, see Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. 731 (1999); *A Symposium on Administrative Law, "The Uneasy Constitutional Status of the Adminstrative Agencies,"* 36 AM. U. L. REV. 277 (1987). For cases referencing the nondelegation doctrine, see, for example, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 671–89 (1980) (Rehnquist, J., concurring); UAW v. OSHA, 938 F.2d 1310, 1313 (D.C. Cir. 1991).

234 Jim Rossi & Mark Seidenfeld, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 5 (2000).

235 *See* MASHAW, *supra* note 29, at 142.

236 By "public interest," we mean delegations that are, at least arguably, welfare-enhancing. This category includes delegations resulting from (1) a lack of foresight, (2) a desire to reduce transaction costs, or (3) an attempt to harness judicial or agency expertise.

delegations.[237] Justice John Marshall recognized this difficulty early on,[238] and modern commentators continue to argue that no reasoned line can be drawn.[239] Although courts and commentators today take the position that the "intelligible principle" test constitutes the dividing line, it is generally recognized that this standard is too vague to provide meaningful guidance and is, perhaps, unworkable in practice.[240] Perhaps not surprisingly, therefore, the nondelegation doctrine has rarely been used to invalidate a statute.

The Penalty Default Canon effectively addresses this problem. The dividing line between permissible and impermissible delegations lies in the reasons for statutory incompleteness, discernable by the court through the application of the three-part Penalty Default Test outlined in Part III.B. Delegations for responsibility-shifting reasons are impermissible. Delegations for other reasons are permitted.

This Section so far has demonstrated that the nondelegation doctrine is overly broad because it fails to account for the reasons for statutory incompleteness. It is worth noting, however, that proponents and opponents of the nondelegation doctrine tend to view that doctrine far too narrowly. For example, few nondelegation debates address the issue of delegations to the judiciary, as opposed to the executive branch.[241] Instead, debates about the permissible scope of "delegation" to the judiciary tend to be framed in terms of canons of statutory construction for the interpretation of incomplete statutes.[242]

In addition, as a practical matter, delegations to the judiciary are treated differently than delegations to agencies. According to one set of scholars, "[i]t looks very much as though Congress may delegate legislative authority 'with virtually no legislative standards at all,' . . . so long as the delegation runs to the courts."[243] It is rare for the Supreme Court to strike down a delegation to the judiciary, despite the fact that an incomplete statute essentially empowers courts to make substantive law.[244] Nonetheless, the Court

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237 Rossi & Seidenfeld, *supra* note 234, at 5–6; Sunstein, *supra* note 231, at 321.

238 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.").

239 Rossi & Seidenfeld, *supra* note 234, at 5–6 ("Once the reality that officials must be allowed to exercise such discretion is recognized, there is no principled way for the judiciary to draw a line between allowed and prohibited delegations of rulemaking authority."); Sunstein, *supra* note 231, at 321 (arguing that, "the nondelegation doctrine could not be administered in anything like a rule-bound way").

240 Sunstein, *supra* note 231, at 318–21.

241 DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888–1986, at 218 n.63 (1990); Posner & Vermeule, *supra* note 74, at 1731.

242 See *infra* notes 280–333 and accompanying text (discussing these canons and other theories of statutory construction).

243 Posner & Vermule, *supra* note 74, at 1731 (quoting CURRIE, *supra* note 241, at 218 n.63)

244 *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (stating that, the "legislative history [of section 1 of the Sherman Act] makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition"); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 450–51 (1957) (holding

continues to assert, and most commentators agree, that there are constitutional limits on Congress's ability to delegate to the judiciary.[245]

Because the Penalty Default Canon recognizes that delegations to the judiciary present similar policy issues as do delegations to the executive, it provides a unifying mechanism for addressing the limits of both types of delegation.[246] Like many of the explicit provisions in Article I, the nondelegation doctrine is designed, at least in part, to enhance electoral accountability.[247] Because the Penalty Default Canon applies only when electoral accountability is compromised and nothing is gained by incomplete statutory language, the Canon is narrowly tailored to accomplish the goals of the nondelegation doctrine, whether the delegation runs to an agency or the judiciary.[248]

A concern about the manipulation of electoral accountability is not foreign to constitutional law.[249] In a trio of federalism cases, the Court identified the potential for legislative responsibility shifting as a relevant factor in its constitutional analysis.

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that broad language of section 301 of the Labor Management Relations Act of 1947 empowered courts to make federal common law to govern collective-bargaining agreements).

245 *See, e.g.*, Loving v. United States, 517 U.S. 748, 758 (1996) ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress and may not be conveyed to another branch or entity." (citation omitted)); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2441 (2003) ("To be sure, the Court starts from the presumption that the constitutional structure forbids the delegation of legislative power to *courts* or agencies." (emphasis added)); Michael P. Van Alstine, *The Judicial Power and Treaty Delegations*, 90 CAL. L. REV. 1263, 1285–86 (2002) ("In parallel with the restrictions of the nondelegation doctrine for other institutions, a purported statutory delegation [to the courts] must both reflect a congressional intent to confer developmental authority and reasonably mark out the boundaries within which the courts may exercise their discretion." (footnotes omitted)); *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 21, 41 n.182 (1985) (advocating a weaker test for delegations when the statute delegates lawmaking to an agency rather than the judiciary).

246 This is not to imply that the constitutional limits on delegations to the judiciary and the executive are identical. Due to the judiciary's traditional common-law lawmaking power, it is possible that a delegation that would be prohibited if made to the executive would be constitutionally permitted if made to the judiciary.

247 *See* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (noting that the nondelegation doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"); *see also* Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 Nw. U. L. REV. 1413, 1429 (2002) (stating that "bicameralism and presentment ensure that duly elected Members of Congress create federal law, thereby furthering the constitutional ideal and theoretically appealing goal of electoral accountability").

248 Tom Merrill advances a similar argument. Merrill contends that a delegation of lawmaking power to the judiciary is constitutionally permissible only if (1) intended by Congress, and (2) "reasonably circumscribed." Merrill, *supra* note 245, at 41. The second requirement is designed "to put the members of the enacting body and the *public* on notice as to the scope or extent of the delegation of legislative authority." *Id.* at 41 n.182 (emphasis added). Notably, Merrill's test for permissible delegations flows, in part, from a desire to enhance electoral accountability. *Id.* at 41.

249 For further support for this proposition, see *id.* at 11 ("Three general constitutional principles—federalism, separation of powers, and electoral accountability—together with the Rules of Decision Act, can be said to allocate lawmaking powers among the federal courts and other branches of government.").

In *New York v. United States*,[250] the Court reviewed a federal statute regulating low-level hazardous waste. Among other things, the statute required states to comply with federal regulations or take possession of waste.[251] In striking down this part of the statute, Justice O'Connor reasoned:

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.[252]

The Court echoed this same accountability argument in *Printz v. New York*.[253] The Court in *Printz* held unconstitutional a federal law that required state executive officials to enforce interim provisions of the Brady Handgun Violence Protection Act.[254] Justice Scalia explained that the potential for responsibility shifting was one reason why Congress could not use state officials to implement regulatory programs. He opined that:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.[255]

Finally, in *Alden v. Maine*,[256] the Court again mentioned political accountability as a constitutional concern. The issue in *Alden* was whether Congress had the power to subject nonconsenting states to private suits for money damages in state court.[257] In concluding that Congress did not have this power, the Court stated:

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250 New York v. United States, 505 U.S. 144 (1992).

251 *Id.* at 153–54.

252 *Id.* at 169.

253 Printz v. New York, 521 U.S. 898 (1997).

254 *Id.* at 933; *see also* Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(2) (2000).

255 *Printz*, 521 U.S. at 930.

256 Alden v. Maine, 527 U.S. 706 (1999).

257 *Id.* at 712. *Alden* is related to the Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In *Seminole Tribe*, the Court held that Congress could not subject nonconsenting states to private suits under federal law in federal court. *Id.* at 72–73; *see also Alden*, 527 U.S. at 712 ("*Seminole Tribe* made it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts." (citation omitted)). *Seminole Tribe* does not, however, represent an absolute rule. It appears that Congress can still subject nonconsenting states to private suits in federal courts if it enacts the law pursuant to section 5 of the Fourteenth Amendment. *See* William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and* Alden v. Maine, 75 NOTRE DAME L. REV. 1069, 1069 n.3 (2000).

> A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take Care that the Laws be faithfully executed," differs in kind from the suit of an individual . . . . *Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.*[258]

In each of these cases, the Court's worry about congressional responsibility shifting is obvious. In discussing *Alden*, one set of scholars made the point clear: "[I]f the federal government authorizes private citizens to sue the states to enforce federal law, it avoids accountability to the national electorate for the way the law is enforced."[259]

Of course, *New York v. United States*, *Printz*, and *Alden* all involve the relationship between the state and federal government, rather than the nondelegation doctrine and the relationship among the branches of the federal government.[260] Nonetheless, the political-accountability concern expressed in those cases is also the driving force behind the Penalty Default Canon.[261]

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258 *Alden*, 527 U.S. at 755–56 (emphasis added) (citations omitted).

259 Marshall & Cowart, *supra* note 257, at 1085.

260 In addition, these cases deal, in part, with the accountability of state officials to the state electorate—an issue not presented when considering the relationship between branches of the federal government.

261 Arguably, the nondelegation doctrine is only one of several constitutional bases for the Penalty Default Canon. Alternative sources of authority include an expanded void-for-vagueness doctrine and traditional rational-basis review.

The void-for-vagueness doctrine, derived from the Due Process Clauses of the Fifth and Fourteenth Amendments, applies to criminal statutes and statutes that implicate First Amendment concerns. Courts will strike down these kinds of statutes on vagueness grounds if a reasonable person cannot tell what conduct the statute permits and what conduct it prohibits. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (declaring a vagrancy statute unconstitutional on incompleteness grounds); NAACP v. Button, 371 U.S. 415, 432 (1983) (stating that, "standards of permissible statutory vagueness are strict in the area of free expression"). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.2 (1997). The Penalty Default Canon applies to all statutes, not just criminal statutes and statutes implicating the First Amendment. Nonetheless, one could argue that the void-for-vagueness doctrine should be expanded to cover an incomplete statute designed to shift responsibility onto other political branches because such a statute fails to provide voters with notice about lawmaker policy preferences and offers no offsetting benefits in terms of transaction cost savings or the capture of agency or judicial expertise.

Under the rational-basis test, a law fails to satisfy the requirements of substantive due process unless it (1) "serve[s] a legitimate government purpose," and (2) "seem[s] a reasonable way of attaining the end." CHEMERINSKY, *supra*, § 8.2, at 491. Although the rational-basis test is very deferential to legislative choices, it could be argued that responsibility-shifting delegations fail the test. First, one could argue that a law enacted for the purpose of avoiding electoral accountability does not advance a legitimate government purpose. The purpose of the incomplete law, as written, is only to fool voters—a purpose that is antithetical to representative democracy and therefore arguably illegitimate. Second, it could be argued that lawmakers used an unreasonable means—namely, deliberately incomplete statutory language designed to avoid electoral responsibility—to achieve the legitimate government purpose.

B. The Chevron *Doctrine*

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[262] the Supreme Court sets out the two-step framework for judicial review of agency rulemaking. First, a court must decide whether Congress has spoken directly on the issue; that is, whether the statute in question is incomplete.[263] Second, if the statute is incomplete, the court must uphold the agency's interpretation if that interpretation is reasonable.[264]

To see the impact of the Penalty Default Canon on the *Chevron* analysis, it is useful to consider the case and its rationale in some detail. *Chevron* involved the interpretation of the 1977 Amendments to the Clean Air Act.[265] Among other things, these amendments required states that had not met the national air-quality standards to implement a permit program regulating "new or modified major stationary sources."[266] During the Reagan administration, the Environmental Protection Agency ("EPA") promulgated a regulation that allowed for a plant-wide definition of "stationary source."[267] Under this definition, a plant with several pollution-emitting devices did not have to go through the permit process if it modified only one device, so long as the total emissions from the plant remained unchanged.[268]

The respondents filed for review of the EPA's regulation in the United States Court of Appeals for the D.C. Circuit, which set aside the regulations.[269] The Supreme Court reversed.[270] The Court first concluded that the statutory term, "major stationary source," was incomplete.[271] Next, the Court found reasonable the EPA's plant-wide interpretation of the term.[272]

The rationale behind the Court's decision is interesting. The Court recognized the competing interests at stake in the permit process, noting that "Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality."[273] Writing for the Court, Justice Stevens opined about the possible reasons for the incompleteness of the statutory term:

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

263 *Id.* at 842–43.

264 *Id.* In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court clarified the scope of the *Chevron* doctrine. In *Mead*, the Court made clear that *Chevron* deference only applies if "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." *Id.* at 226–27. The Penalty Default Canon, however, would impose limits on agency delegations (at least when those delegations are accomplished through incomplete statutes designed to shift responsibility) beyond those endorsed in *Mead*.

265 *Chevron*, 467 U.S. at 839–40; *see also* 1977 Amendments to the Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

266 *Chevron*, 467 U.S. at 840.

267 This regulation—promoting the so-called bubble concept—broke with a Carter-era EPA regulation defining "stationary source." *Id.* at 857–58.

268 *Id.*

269 *Id.* at 841.

270 *Id.*

271 *See id.* at 845.

272 *Id.*

273 *Id.* at 851.

> [T]he decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body 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 a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.[274]

The Court simply did not care why Congress left the phrase "stationary source" incomplete. Thus, the *Chevron* doctrine is based on the assumption that the reasons for statutory incompleteness do not matter. However, the reasons matter from an accountability standpoint.[275] The Penalty Default Canon recognizes this and therefore proposes a third, intermediate step to the familiar two-step *Chevron* analysis. After finding incompleteness and before addressing whether the agency's interpretation is reasonable, a court should consider why Congress failed to address the question and then set the default rule appropriately.

C. Institutional Choice

Much of the debate considering the constitutionality and welfare effects of broad delegations through incomplete statutes centers around which governmental branch—executive, legislative, or judicial—produces substantively superior policy.[276] We believe that, not only is much of this attention mis-

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274 *Id.* at 865.

275 The Court did make one accountability argument to support the *Chevron* result. Justice Stevens argued that agencies, as part of the executive branch, were more politically accountable than courts. *Id.* at 865–66. It follows, then, that a court should favor the agency's reasonable interpretation over its own. Implicit in this accountability argument is that either the court or the agency must decide the issue. The Penalty Default Canon, in contrast, forces Congress to decide the issue. Here, we disagree with Cass Sunstein that "[i]f *Chevron* is rejected, ambiguous terms will be construed by judges rather than administrators, and in neither event will hard questions be decided legislatively." Sunstein, *supra* note 231, at 330.

276 For example, nondelegation debates often center on whether the legislature or executive agencies better perform the delegated powers. *Compare* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993), *with* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781 (1999); *see also supra* notes 231–61 and accompanying text (discussing the nondelegation doctrine). Similarly, debates over *Chevron* often entail long discussions of the relative virtues of courts and agencies. *See* Elhauge, *supra* note 104, at 2127–31; *see also supra* notes 262–75 and accompanying text (discussing *Chevron*). And, finally, arguments over the canons of statutory construction invite comparisons of the judiciary to the legislature. *See* Michael J. Dittoe, *Statutory Revision by Common Law Courts and the Nature of Legislative Decision Making—A Response to Professor Calabresi*, 28 ST. LOUIS U. L.J. 235, 254–55 (1984); *see also infra* notes 280–333 and accompanying text (discussing the canons of statutory construction); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 528–41 (2003) (discussing the influence of legal professionals and the regulated group in filling gaps within incomplete law).

placed, but proponents of the substantive superiority of one branch over another often subscribe to a nirvana fallacy in which the imperfect reality of one branch is contrasted with the theoretical perfection of another.

Our position, by contrast, is not that the legal doctrines that emerge from one institution are substantively better than those of another, or even that one institution makes policy more efficiently than the others. Instead, each institution has its benefits and costs and, in specific circumstances, one will be preferable to the others for a host of reasons. Our argument in this section is only that the legislature offers the public one overwhelming advantage over the other two branches in terms of policymaking: electoral accountability.

Therefore, we do not mean to imply in this Article that legislators are immune from interest group pressure or are more likely to enact substantively better laws. Nor do we suggest that the problem of interest group influence on the lawmaking process would conveniently vanish were Congress to legislate precisely rather than to delegate. In fact, as argued by some commentators, interest groups might wield even more influence when policy is made directly by Congress, rather than through delegations.[277] This is because, given the constraints on Congressional time and resources, the only way for Congress to precisely legislate in every area on its own would be to place more power in the hands of legislative committees and their leaders.[278] This would place legislative authority over any particular policy in the hands of just a few congressional members susceptible to interest group influence.[279] As previously discussed in Part II.C, however, direct policymaking by Congress will allow voters to observe legislators' actions and hold them accountable for their choices.

VI. Theories of Statutory Construction

This Part distinguishes the Penalty Default Canon from existing theories of statutory construction and defends the Penalty Default Canon's superiority as a mechanism for discouraging congressional responsibility shifting. A few points are worth noting at the outset. First, some of these theories—for example, Cass Sunstein's theory of nondelegation canons and Einer Elhauge's theories of default rules—are primarily descriptive, in that they attempt to provide a rationalizing theory for the canons of statutory interpretation that courts already employ. Others are normative, providing suggested canons for courts to follow. Like this second set of theories, the Penalty Default Canon is purely normative, making no attempt to describe the actual means currently used by courts to interpret incomplete statutes.

Second, many of the theories discussed in this Part employ statutory construction as a means of furthering policy goals other than or in addition to electoral accountability (or, in the case of the descriptive theories, argue that courts further those policy goals through the interpretive canons that they already employ). Because the Penalty Default Canon is concerned only with

277 EPSTEIN & O'HALLORAN, *supra* note 28, at 237.

278 *Id.*

279 *Id.* at 237–38.

enhancing electoral accountability, our argument is simply that the canon is a superior means of discouraging responsibility-shifting delegations. We take no position on how the Penalty Default Canon may impact these other goals of statutory interpretation.

This Part proceeds by breaking the major theories of statutory interpretation into five categories: (1) Cass Sunstein's theory of nondelegation canons; (2) Frank Easterbrook's theory of "statute's domain"; (3) Frank Easterbrook's and Jonathan Macey's theories of "the interest group deal"; (4) William Eskridge's interpretive theory based on statutory design; and (5) Einer Elhauge's theory of canons designed to estimate or elicit Congressional preferences.

A. The Nondelegation Canons

Cass Sunstein's recent work links the *Chevron* and nondelegation doctrines to various canons of statutory construction by arguing that, rather than invoking the nondelegation doctrine to invalidate broad delegations to the executive branch, courts instead apply a variety of canons of statutory construction that operate to curtail agency discretion.[280] As such, far from being a dead tenet invoked by the Court only twice in United States history, the nondelegation doctrine is actively used by courts to limit agency power, but it has been "renamed and relocated" in a set of "specific and smaller" nondelegation canons.[281] Sunstein's argument is that for certain issues courts consider it important—either for reasons of constitutionality, sovereignty, or public policy—that Congress address the matter through a clear, explicit statement.[282] The canons achieve this goal by constraining the permissible constructions of the statute. The canons are thus said to check *Chevron* deference in cases when it seems particularly important that Congress, rather than agencies, make the policy choice.

The nondelegation canons that bear the most relevance to the Penalty Default Canon are the canons designed to limit agency discretion based on constitutional and public-policy reasons. Consider, for example, the canon that prohibits courts from deferring to an agency interpretation that applies law retroactively.[283] Under this canon, if Congress wants to make a law retroactive, it must do so through an explicit statement.[284] As a result, the canon forces Congress to take the political heat for passing such a statute.[285] The analog to the Penalty Default Canon is striking. Similarly, another nondelegation canon requires agencies to narrowly construe exemptions

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280 Sunstein, *supra* note 231, at 315.

281 *Id.* at 315–16.

282 For example, Sunstein argues that one of the most familiar canons of statutory construction—the canon that agencies may not construe statutes in a manner that raises doubts about the constitutional validity of the statute—is actually a nondelegation canon. *Id.* at 331. Similarly, he argues that the canon holding that agencies cannot apply a law extraterritorially reflects the sovereignty-inspired notion that decisions involving international law should be made explicitly by Congress with the appropriate check by the president. *See id.* at 333–35.

283 *See id.* at 332.

284 *Id.*

285 *Id.*

from federal taxation. The rationale is that, because exemptions from federal taxation are often a result of interest group lobbying, "if Congress wants to exempt a group from federal taxation, it must express its will clearly."[286]

Like the nondelegation and *Chevron* doctrines, an assumption underscores these nondelegation canons. The canons assume that in the areas of law in which the canons apply (and those areas only), there exists a need to force a clear statement by Congress. This assumption renders the canons both too broad and too narrow.

These canons are too broad because they assume that within any given category of law, incompleteness is always problematic. As demonstrated in Part II.B, however, laws may be incomplete for a variety of reasons, including—but not limited to—responsibility shifting on the part of lawmakers. The nondelegation canons thus fail to distinguish among the numerous and varied reasons for statutory incompleteness.

To use the canon that dictates the narrow construction of federal tax exemptions as an example, incompleteness in a tax exemption might well be the result of efforts to mask interest group transfers, and, as such, canons of statutory interpretation should operate to force Congress to legislate more clearly.[287] Incompleteness in a tax exemption, however, also might result because lawmakers could not foresee all of the specific situations to which the exemption might be applied. The first reason for incompleteness is troubling; the second is not. Nonetheless, the nondelegation canon imposes an automatic penalty for the lack of a clear congressional statement in tax-exemption policy based on an erroneous assumption that incompleteness in such statutes is likely the result of Congressional responsibility shifting.

At the same time, the delegation canons are too narrow because they do not address many of the areas of law in which statutory incompleteness is potentially problematic. For instance, why force Congress to speak clearly with respect to tax exemptions, but not with respect to licensing statutes? After all, incompleteness in either type of statute might be the result of responsibility shifting on the part of lawmakers.[288]

In essence, the nondelegation canons represent rules of thumb, telling courts when incompleteness is undesirable. The Penalty Default Canon, by contrast, forces courts to confront, when possible, the underlying reason for statutory incompleteness.[289] The same rules of construction or invalidation

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286 *Id.* at 334.

287 Interestingly, as an empirical matter, the opposite appears to be true. In other words, because tax exemptions can be narrowly tailored to benefit specific constituencies, Congress generally legislates with specificity in this area in order to claim credit for providing those benefits. *See* EPSTEIN & O'HALLORAN, *supra* note 28, at 201–03; *supra* notes 42–73 and accompanying text (discussing the areas in which Congress typically delegates).

288 *See* Easterbrook, *Foreword*, *supra* note 27, at 45 (noting that the Atomic Energy Act is a licensing statute and "licensing statutes are the playgrounds of interest groups"). *But see* MASHAW, *supra* note 29, at 91 (noting controversy in the legal, public-policy, and political-science literature about whether licensing statutes truly serve the interest of the regulated parties).

289 To reiterate, this is not to imply that the Penalty Default Canon will necessarily replace canons of construction that exist for reasons other than concerns over congressional responsibility shifting. For example, some canons of statutory construction may operate to serve constitutional concerns, such as the Due Process Clause, or to favor interest groups considered

apply whether the statute in question is an exemption from taxation, a licensing statute, the Clean Air Act, or the 1996 Telecommunication Act.

B. *Statutes' Domain*

Judge Frank Easterbrook first approached the subject of statutory interpretation by considering the scope of a statute's domain.[290] When statutory gaps make it unclear whether a statute applies to a particular case, Easterbrook proposed a "meta-rule" of statutory construction that "would hold the matter in question outside the statute's domain," unless "the party relying on the statute could establish either express resolution or creation of the common law power of revision."[291] According to Easterbrook, courts should thus refuse to apply any incomplete statute that does not involve an explicit or implicit delegation to the judiciary to create new common law in response to changing circumstances.[292]

Like the Penalty Default Canon, Easterbrook's proposal would constrict the application of incomplete statutes. As a result, Easterbrook's proposal punishes lawmakers for leaving statutory gaps and ambiguities and forces more precise statutory language. Easterbrook's proposal is too broad, however, if the underlying concern is responsibility shifting by lawmakers.[293] To see the point, consider the distinction Easterbrook draws between a statute containing a code of rules and a statute creating an authorization for the judiciary to develop common law.[294] Easterbrook suggests that courts should refuse to fill statutory gaps in the code of rules.[295] In contrast, he advocates that courts fill gaps in the statute that provides for the development of common law, "[solving] new problems as they arise."[296]

Because this approach ignores the reasons for statutory incompleteness, it penalizes lawmakers even when a penalty is not needed to prevent responsibility shifting and would not impact the level of statutory specificity. Simi-

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politically weak, such as Native Americans. Sunstein, *supra* note 231, at 331–33. The Penalty Default Canon would have no impact on these canons because it is designed to address different concerns.

290 Easterbrook, *Statutes' Domain*, *supra* note 27.

291 *Id.* at 544.

292 Easterbrook cites the Sherman Act, 15 U.S.C. §§ 1–2 (2000), as an example of a statute charging the courts to create a new line of common law. Easterbrook, *Statutes' Domain*, *supra* note 27, at 544. It is unclear, however, how one decides whether a statute charges the court with a common-law function.

293 Easterbrook justifies his interpretative theory on other grounds as well, including (1) the "wild guesses" needed to discern how the legislature would have resolved issues it did not actually decide; (2) the fact that judicial gap-filling "has the same effect as extending the term of the legislature *and* allowing that legislature to avoid submitting its plan to the executive for veto"; (3) the preservation of private ordering; and (4) the difficult task faced by judges trying to fill in gaps in a statute. Easterbrook, *Statutes' Domain*, *supra* note 27, at 547–51. We do not tackle these justifications. Instead, our goal is to demonstrate that the Penalty Default Canon supersedes Easterbrook's approach with respect to discouraging Congressional responsibility shifting.

294 *See id.* at 545.

295 *Id.*

296 *Id.*

larly, Easterbrook's approach fails to penalize lawmakers in many instances when such a penalty could effectively promote democratic accountability.

For example, lawmakers might enact an incomplete code of rules because of bounded rationality. Easterbrook's proposal would punish lawmakers for this cognitive defect. Furthermore, in this instance, the penalty would merely increase the costs of enacting new laws without obvious offsetting benefits because the penalty would not prevent responsibility shifting by lawmakers, reveal interest group transfers to voters, or induce lawmakers *ex ante* to produce more precise statutory language.

At the other end of the spectrum, lawmakers can use language authorizing the judiciary to create new common law for the purpose of avoiding responsibility for difficult decisions or hiding interest group transfers. The latter effort is especially problematic given the (often hidden) control that interest groups wield over the development of case law.[297] Yet, Easterbrook would have courts fill gaps in such a statute, thereby assisting—rather than thwarting—lawmakers in their efforts to avoid democratic accountability. In contrast, a court applying the Penalty Default Canon would declare the provision an unconstitutional delegation of legislative powers, thus sending the statute back for a decision by Congress.

C. The Interest Group Deal

Easterbrook's second, related theory of statutory construction appeared a little less than a year after his article on the statute's domain.[298] This theory divides statutes into two types: general interest and private interest.[299] Easterbrook advocates different rules of construction based on the statute type.[300] If the statute is a private interest statute, courts should construe the statute narrowly, limiting it to give interest groups exactly what they bargained for.[301] In Easterbrook's words, courts should "look for and enforce the bargain, but . . . not elaborate."[302] On the other hand, if the statute is a general interest statute, courts should fill any statutory gaps.[303] Easterbrook urges courts to uncover the purpose of the statute—private or general—by examining (1) whether there are indications of rent-seeking legislation; (2)

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297 *See* Krawiec, *supra* note 276, at 522–37 (discussing the influence of certain interest groups on the renegotiation of incomplete law).

298 Easterbrook, *Foreword*, *supra* note 27.

299 *Id.* at 16–17.

300 *Id.*

301 *Id.* at 54.

302 *Id.* When Easterbrook first invokes the contractual metaphor, he appears to take a pluralist view, considering interest groups to be the relevant contractual parties, with lawmakers rubber-stamping the deal. *Id.* at 15 ("[The judge] may conclude that a statute regulating the price of fluid milk is a pact between milk producers and milk handlers designed to cut back output and raise price, to the benefit of both at the expense of consumers.").

Later in the article, Easterbrook refers to rent-seeking. *Id.* at 60. Rent-seeking involves the demand for government transfers by interest groups and the supply of those transfers by lawmakers. The relevant contractual parties are the lawmakers and the interest groups. This is the standard public choice model. *See infra* notes 29–41 and accompanying text.

303 By defining general interest statutes as ones that grant courts the power to develop new lines of common law, this approach can be harmonized with the statutory interpretation theory Easterbrook advanced in *Statutes' Domain*.

which groups lobbied for the bill and what deals were struck by interest groups behind closed doors; and (3) whether the statute is specific or general.[304]

Easterbrook's approach suffers from several flaws that have been well articulated by other scholars.[305] Jonathan Macey's response is of particular interest. He notes that private interest statutes are often cloaked in "public interest" language and incompleteness, making them less discernible to voters.[306] To make these statutes transparent, Macey argues that statutory incompleteness should be resolved in the public interest.[307] Macey seeks to eliminate the option (available under the Easterbrook approach) of burying interest group transfers in "public interest" language, with the hope that the courts would discover the true interest group bargain and construe the statute accordingly.[308]

Although Macey is correct in his critique of Easterbrook, we reject his interpretative solution for three reasons. First, "public interest" is a murky concept. As a result, a judge claiming to further the public interest might instead further her own policy preferences. Second, interest groups influence courts and agencies as well as lawmakers. The influence on courts, however, is more subtle and less transparent to voters. In contrast to the Penalty Default Canon, the Macey approach allows for responsibility shifting and interest group transfers through incomplete statutory language followed by interest group influence over the judiciary, agencies, or both.

Third, Macey advocates the same default rule—to construe in the public interest—regardless of the reasons for statutory incompleteness. As with most of the approaches to statutory interpretation discussed in this Article, we believe that a more nuanced approach is needed. To recap, if statutes are incomplete because Congress purposely delegated decision-making authority to courts or agencies because of their superior expertise in a particular matter, then a rule of statutory construction that permits the judicial and executive branches to perform this role is appropriate. If, however, a statute is incomplete due to the bounded rationality of lawmakers or the high transaction costs of legislating with specificity on a particular topic, then a different gap-filling default rule—perhaps one that seeks to account for the terms that Congress would have supplied if not faced with bounded rationality and prohibitively high transaction costs—may be warranted. Finally, if lawmakers employ statutory incompleteness strategically, then a Penalty Default Canon that promotes electoral accountability is in order.

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304 Easterbrook, *Foreword*, *supra* note 27, at 16–17.

305 *See, e.g.*, MASHAW, *supra* note 29, at 88–89; Macey, *supra* note 22, at 238–40.

306 Macey, *supra* note 22, at 222–23, 251.

307 *Id.* at 255 ("[U]nder the traditional approach to statutory interpretation espoused here, legislative subterfuge is less likely to be successful, and as a result, at the margin we will observe a higher percentage of open-explicit statutes relative to hidden-implicit statutes.").

308 *Id.* at 238.

D. Interpretations Based on Statutory Design

Following the work of several political scientists,[309] William Eskridge divides statutes into four classes: (1) distributed benefit/distributed cost; (2) distributed benefit/concentrated cost; (3) concentrated benefit/distributed cost; and (4) concentrated benefit/concentrated cost.[310] Eskridge then advances a different interpretative technique depending on the category into which the statute falls.[311]

Eskridge posits that we should only rarely see the first category of statute—distributed benefit/distributed cost—because there is weak interest group demand for such statutes.[312] For the same reasons, however, when such a statute is enacted, lawmakers are unlikely to take the time to update the statute.[313] As a result, Eskridge argues that courts should construe such statutes liberally, updating the statutes to reflect changing circumstances, because the legislature itself is unlikely to do so.[314]

Eskridge contends that the second class of statutes—concentrated benefits/distributed costs—pose the greatest threat of rent-seeking behavior.[315] To curb this threat, Eskridge argues that courts should apply Easterbrook's "exacting textualism" to such statutes, refusing to transfer the concentrated benefits unless the statutory language clearly calls for the transfer.[316]

With the third class of statutes—distributed benefits/concentrated costs—Eskridge asserts that lawmakers will delegate authority to agencies to avoid the political heat from the group bearing the concentrated costs.[317] Over time the regulated group will tend to capture the agency.[318] To stop this process, courts should construe the statute with a public purpose gloss.[319]

Finally, Eskridge asserts that, with respect to the statutes imposing concentrated benefits and concentrated costs, courts should "[i]nterpret to effectuate [the] original deal among interest groups."[320] Eskridge cautions, however, that these statutes may evolve to favor a particular group.[321] He urges courts to be wary of this possibility, especially if the nonfavored group lacks access to the legislative process.[322]

Unlike most other scholars who propose canons of statutory construction for incomplete statutes, Eskridge wisely attempts to uncover the source of statutory incompleteness—a move that we support. We reject, however, his mechanism for accomplishing this—the division of statutes into four clas-

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309 *See* MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS (1981); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); JAMES Q. WILSON, POLITICAL ORGANIZATIONS (1974).

310 Eskridge, *supra* note 27, at 296–301.

311 *Id.* at 323–25.

312 *Id.* at 323.

313 *Id.*

314 *Id.* at 298.

315 *Id.* at 324.

316 *Id.* at 296–97.

317 *Id.* at 289.

318 *Id.*

319 *Id.* at 325.

320 *Id.* at 299.

321 *Id.* at 325.

322 *Id.*

ses based on the distribution of costs and benefits—for two reasons. First, the placement of a statute into a bin represents a tricky first step. How does a court know, for example, whether a statute imposes distributed costs or concentrated costs?[323] Second, the classification schemes assume that incompleteness in one class of statutes inevitably raises public choice concerns whereas incompleteness in other classes does not. For example, Eskridge urges courts to liberally construe statutes that generate distributed benefits and impose distributed costs. Such a statute, however, could be incomplete for a variety of reasons. If, for instance, a distributed costs/distributed benefit statute has the potential for a large political downside, Congress may use incompleteness in certain provisions to avoid responsibility for the legislation. In this situation, a court following the Eskridge proposal to liberally construe the statute, filling any gaps and resolving ambiguities, facilitates, rather than checks, strategic legislative behavior.

E. Preference Elicitation

Finally, Einer Elhauge recently has argued that many canons of statutory construction have the effect—under certain conditions—of eliciting lawmaker preferences.[324] First, Elhauge notes that many canons of construction favor the politically powerless.[325] As examples, he identifies "the rule of lenity, presumptions against antitrust and tax exemptions, many applications of the constitutional doubts canon, and the canon favoring Indian tribes."[326] In explaining these canons, he posits that when a politically powerful group on one side of an issue is likely to have greater access to the legislature, any statutory ambiguities should be resolved against that politically powerful group.[327] The idea is that the politically powerful group—knowing that any ambiguities will be resolved against it—is more likely to have the political clout to induce the legislature either to reconsider the issue after judicial decision or to deliberate the issue with more care at the outset.[328] As a consequence, law will be clearer and will more accurately reflect legislative preferences. In short, Elhauge argues that the application of these canons will induce a legislative response—driven by the politically powerful group—either in the form of reconsideration *ex post* or more careful drafting of the statute *ex ante*. Elhauge looks for situations where the chance of legislative correction (or more accurate drafting) is large. Only in those situations is the imposition of a preference-eliciting rule desirable.[329]

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323 *See* MASHAW, *supra* note 29, at 94.

324 *See* Elhauge, *supra* note 23, at 2165. Elhauge fully develops his theory of default rules in *Preference-Eliciting* and its companion piece, *Preference-Estimating*. *See* Elhauge, *supra* note 23; Elhauge, *supra* note 104.

325 Elhauge, *supra* note 23, at 2192.

326 *Id.*

327 *Id.* at 2177–79.

328 *Id.* at 2177–78.

329 Elhauge sets forth six conditions that must be met before a preference-eliciting rule is desirable. Those conditions are (1) the preference-eliciting interpretation proposed is in the range of plausible meanings of the statute; (2) there exists uncertainty about the enactable preferences of the lawmakers; (3) the lawmakers must not have intended to delegate through incompleteness; (4) there must be a possibility of legislative correction, either *ex post* or *ex ante*; (5) the

The Penalty Default Canon differs from Elhauge's preference-eliciting approach in several important ways, rendering it a superior mechanism for enhancing electoral accountability. In particular, Elhauge's proposal does not account for the source of statutory incompleteness or the possibility of responsibility shifting.

According to Professor Elhauge, information-forcing rules (what he terms preference-eliciting rules) are unnecessary and unwarranted whenever the legislature has expressed an intention to delegate authority to courts or agencies to fill gaps or resolve ambiguities in a statute.[330] This, he argues, distinguishes statutory default rules from contractual and corporate default rules, which often are designed to elicit preferences in order to prevent the parties from shifting costs onto publicly subsidized courts.[331] Because the legislature is already publicly subsidized, he argues, such information forcing rules are unnecessary.[332]

Elhauge's argument assumes, however, that the only role of an information-forcing statutory default rule is to avoid cost shifting. The important role played by a legislative desire to responsibility shift as a cause of statutory incompleteness, however, is well documented in the political-science literature.[333] Elhauge's proposal to have courts or agencies fill gaps and resolve ambiguities in any statute with respect to which Congress has indicated an intention to delegate such authority, coupled with no inquiry into the reasons for such delegation, enables—rather than thwarts—congressional attempts to avoid electoral accountability through responsibility-shifting delegations. The Penalty Default Canon, by contrast, forces courts to consider the reasons for such a delegation. As a result, the Canon checks legislative attempts at responsibility shifting.

Conclusion

The literature on statutory interpretation has grown considerably over the past ten years. During that time, contract scholars and economists have developed a rich theory of incomplete contracts. This Article continues the conversation between these two literatures by urging courts to examine the underlying reasons for statutory incompleteness. The normative desirability of the Penalty Default Canon is rooted in electoral accountability. The Penalty Default Canon, properly applied, eliminates the congressional option of using statutory incompleteness to avoid responsibility for difficult political

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likelihood of correction is high because, for instance, "political forces on one side of the interpretative issue have greater ability to command time on the legislative agenda"; and (6) the preference-eliciting interpretation imposes an acceptable interim cost. *Id.* at 2170–81. In all other instances, Elhauge argues that a preference-estimating rule should be used.

330 *Id.* at 2172.

331 *Id.*

332 *Id.*

333 *See supra* notes 87–98 and accompanying text (discussing the evidence on legislative responsibility shifting). We do not mean to imply that Professor Elhauge is unfamiliar with this literature. Instead, his theory appears to be that, even if Congress engages in responsibility-shifting delegations, courts have no constitutional basis for refusing to carry out that legislative intent. As discussed *supra* Part V, we disagree that courts lack a constitutional justification for refusing to enforce responsibility-shifting delegations.

decisions. Without this option, it is easier and cheaper for the electorate to discern the policy preferences of lawmakers.

In addition, this Article has offered a more complete discussion of statutory incompleteness than previously offered in the academic literature. The reasons for statutory incompleteness vary greatly and, for those scholars concerned with statutory interpretation, greater attention to the underlying causes of statutory incompleteness is needed. Many legal doctrines can be seen as mechanisms for setting statutory default rules. Unfortunately, these doctrines often incorrectly assume a single reason for statutory incompleteness. By bringing this consideration to the forefront of the debates over the nondelegation doctrine, the implications of public choice theory for the appropriate roles of the three governmental branches and their relationship with each other, and canons of statutory interpretation, we hope to cast the consideration of these doctrines in a different light.