INTERPRETIVE CHOICE

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How should judges choose doctrines of statutory interpretation? Judges explicitly or implicitly choose interpretive doctrines—canons of construction, rules governing the admissibility and weight of extrinsic sources, and rules about the force of statutory precedent. Interpretive choice presupposes both a theory of statutes' political authority and an empirical assessment of the competence of interpreters, the benefits of rules and standards, and the interaction of lawmaking institutions. In this Article, Professor Adrian Vermeule notes that all this is widely accepted, but argues that scholarship to date has overlooked the central dilemma of interpretive choice: the empirical assessments needed to translate theories of statutes' authority into operative doctrine frequently exceed the judiciary's capacity. Many of the relevant questions are empirical but unanswerable, at least at acceptable cost; moreover, judges can neither conduct necessary experiments nor successfully assimilate information provided by outside institutions. Judges faced with problems of interpretive choice must therefore apply standard decisionmaking strategies of choice under irreducible empirical uncertainty, strategies derived from decision theory, rhetoric, and other disciplines. This Article applies these strategies to three standard doctrinal problems—the admissibility of legislative history, the choice of interpretive canons, and the force of statutory stare decisis. It concludes that judges should exclude legislative history, should pick between canons rather than debating their relative merits, and should observe an absolute rule of statutory stare decisis. In short, judges should embrace a formalist approach to statutory interpretation, one that uses a minimalist set of cheap and inflexible interpretive sources.

Here are some examples of a recurring problem in statutory interpretation:

• Suppose that judges should interpret statutes so as to capture the “intention” or preferences of the median legislator.1 Should the judges read the statutory text alone, consult legislative history in addition to text, or use some more complex rule? Perhaps legislative history will often contain reliable evidence of the median legislator's intent, and the judges will read the legislative history accurately. If so, then plausibly the history should be used. Yet it is also possible that the history will often be unreliable and the judges will misread it quite frequently. If so, then plausibly the judges will obtain a better approx-
imation of the median legislator's intent by relying principally upon
the statute's text, while eschewing legislative history.

These questions are empirical, but also exceedingly difficult to
answer: The data needed to settle them currently do not exist, and
judges have neither the time nor the competence to generate those
data. Nonetheless, there is no escaping the question which approach
will best achieve the posited goal.2

- Should courts use the interpretive canon expressio unius est ex-
clusio alterius ("to state the one is to exclude the other"), which
assumes that a statutory list is exhaustive unless the legislature has
clearly provided that the list is merely illustrative?3 The courts could
also use the opposite presumption. Suppose the courts decide upon
the following test: They will adopt whichever presumption will less
frequently be overridden by future legislative drafters (because it is a
good thing to save the drafters' time). But which presumption does
this simple test pick out? The test asks for a prediction, but the past is
not a reliable source of information to make that prediction, because
courts have often used the two opposite presumptions inconsistently,
even opportunistically.4 The judges lack a clear record of the effects
of the two polar positions on legislative behavior.5

- Should courts adhere to an absolute rule of stare decisis for
statutory precedents?6 Suppose it is agreed that courts should choose
whichever stare decisis rule will most strongly encourage the legisla-
ture to assume responsibility for questions of statutory policy. Per-
haps an absolute rule will do that: The legislature will have sole
authority to overrule precedents, thus preventing it from shifting re-
ponsibility for modifying statutory policy onto the courts.7 Organ-
ized interest groups, in turn, will anticipate that pursuing their
interests in the courts will produce fewer gains. But it is also possible
that a weaker rule of stare decisis will in fact provoke greater legisla-
tive responsibility than the absolute rule. Legislators and interest
groups will anticipate that the precedents they favor will be vulnerable
to judicial overruling in the future unless they expend the effort to

2 For discussion of the legislative history problem and some possible resolutions, see
infra text accompanying notes 211-57.
expressio unius inference).
4 Compare id. (employing expressio unius inference), with Burns v. United States, 501
Dynamic Statutory Interpretation 283 (1994) (stating that "canons can be invoked or ig-
nored at will").
5 For discussion of the canons, see infra Part IV.B.
6 The leading references in this debate are collected infra notes 49-50.
7 See infra notes 49-52 and accompanying text.
have those precedents codified, in express language, through a new statutory amendment. Because it is unclear which of these countervailing incentives will dominate, it is also unclear whether an absolute rule or a weaker rule will best serve the specified end of promoting legislative responsibility.

These three problems share certain defining features. In each case, the goal to be attained is specified and the difficult question is how interpreters who lack full information can choose the best path to that goal. In what follows, I will attempt to make some progress on the normative theory of statutory interpretation by suggesting that many debates over interpretive doctrine are of this character, and should be reframed as problems of choosing optimal interpretive doctrine under conditions of severe empirical uncertainty. More briefly, the problem is one of "interpretive choice"—the selection of one interpretive doctrine, from a group of candidate doctrines, in the service of a goal specified by a higher-level theory of interpretation.

Interpretive choice is a choice among possible means to attain stipulated ends.\(^8\) Across a range of contexts, specifying some end or goal to be pursued in statutory interpretation (for example, that interpreters should capture the median legislator's intent) often says little about the choice of interpretive doctrine. The interpreter faces a number of candidate doctrines that might promote the specified end and must decide which doctrine does so most effectively. Accordingly, as recently emphasized in debates over interpretive formalism, the choice of interpretive rules is inevitably an empirical and predictive enterprise.\(^9\) Interpreters who hold some high-level conception of the aims of interpretation will often be unable to choose interpretive doctrines without making empirical and predictive claims (whether explicit or implicit) about the consequences of the choice.\(^{10}\) The difficult questions are instrumental questions about means.

Although interpretive choice is inescapable, it also poses a daunting problem. The focus upon means, rather than ends, puts a pre-

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\(^{10}\) See infra Part I.A.
mium upon detailed information and sophisticated predictions. But it is a premium that courts cannot afford to pay. The empirical questions relevant to interpretive choice frequently strain the limits of judicial information and predictive capacities. The critical questions are in many instances trans-scientific (meaning that they are empirical but intractable), and even where the questions are tractable courts lack the capacity to answer them. Moreover, courts usually cannot adopt the common decisionmaking technique of postponing a decision indefinitely until new information about the relevant empirical questions becomes available or until crucial experiments can be conducted. Such suspension of judicial choice imposes collateral costs in legal uncertainty, and there is no guarantee that courts will gain new information in the interim. The interaction of these conditions creates a dilemma for the normative theory of statutory interpretation. Courts must choose interpretive doctrines on largely empirical grounds, under conditions of severe empirical uncertainty, often without the luxury of postponing their decisions.

It is difficult to say how courts should proceed under these conditions. The scholarly literature has sketched the instrumental considerations that interpretive doctrine must take into account, but the problem for interpretive choice is that the information necessary to implement those considerations is usually absent and often unobtainable. The relevant variables are understood, but their values in particular settings can rarely be filled in. One example is the enormous literature on rules and standards, which specifies considerations that should push decisionmakers to embody a legal directive in the form of rules rather than standards, or vice-versa. As many debates over interpretation are debates over rules and standards, this literature helps specify when, in principle, interpretive doctrine should take a relatively rule-bound (formalist) or relatively fluid (antiformalist) cast. Yet because the choice between rules and standards requires copious information and complex predictive judgments, it is often dif-

11 See infra Part II.
12 For an explanation of trans-scientific questions, see infra Part II.A.
13 See infra text accompanying notes 139-42 (discussing high collateral costs and limited informational benefits of idea that Supreme Court should allow conflicts over interpretive doctrine to "percolate" in lower federal courts).
14 See infra notes 71-82 (describing scholarship about dimensions over which interpretive choice occurs).
15 For references to the literature on rules and standards, see infra notes 68-72.
16 "Formalism" is a slippery word. It is most often used to denote rule-based interpretation or decisionmaking. See Frederick Schauer, Formalism, 97 Yale L.J. 509, 510 (1988) ("At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to rule."). This Article is also concerned with the broader connotations of the word, which include relatively rigid decisionmaking with a relatively small
ficult to say when the conditions that favor one form or the other actu-
ally hold and when they do not.\textsuperscript{17}

Perhaps for these reasons, scholarship to date has conspicuously
failed to address, with any specificity, the problems endemic to the
instrumental choice of interpretive doctrines under conditions of em-
pirical uncertainty. In an analogous debate on the subject of “institu-
tional choice,” scholars have rightly insisted that the selection of a
public policy aim must be accompanied by a comparative empirical
evaluation of the institutions that might be charged with pursuing that
aim.\textsuperscript{18} Yet the empirical difficulties of institutional analysis are notori-
ous,\textsuperscript{19} and consequently little concrete counsel has been offered to in-
stitutional designers who must actually conduct institutional choice
under conditions of uncertainty. So too with debates over interpreta-
tion proper. Little discussion has been devoted to the critical ques-
tion: When pervasive uncertainty makes the relevant empirical
questions difficult or even unanswerable, at least within the time
frame in which a decision must be made, how are courts to make the
necessary instrumental choices?\textsuperscript{20}

My project here is to sketch concrete and feasible methods of
interpretive choice under conditions of severe empirical uncertainty.
Various techniques and strategies for reasoning under uncertainty,
strategies that are well known in decision theory, political science, phi-
losophy, and rhetoric,\textsuperscript{21} can fruitfully be applied to the judicial choice
of statutory interpretation doctrine. While these strategies are weakly
determinate and thus provide only imperfect guidance, the alterna-
tives are worse. One alternative is to ignore the problem of interpre-
tive choice, but I shall argue that interpretive choice is unavoidable, at
least across a broad range of doctrinal debates.\textsuperscript{22} Another alternative
is to suggest that, in the face of severe uncertainty, judges must choose
interpretive doctrines based on their “intuitions” or “gut reactions.”\textsuperscript{23}

\textsuperscript{17} See infra notes 68-72.
\textsuperscript{18} See infra text accompanying notes 66-67 (discussing problems of institutional
choice).
\textsuperscript{19} See infra text accompanying notes 98-99 (discussing critiques of project of institu-
tional choice).
\textsuperscript{20} See infra Part IV.
\textsuperscript{21} See infra Part IV (drawing upon these disciplines to outline techniques of reasoning
under empirical uncertainty).
\textsuperscript{22} See infra text accompanying notes 30-65.
\textsuperscript{23} This seems to be the view taken in Richard A. Posner, Pragmatic Adjudication, in
The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture 235, 242
(Morris Dickstein ed., 1998), although Posner is addressing adjudication in general as well
as interpretation in particular.
But such intuitions will often lack any roots in, or connection to, the questions they are used to resolve, and will thus prove less trustworthy than other strategies of reasoning under uncertainty. Moreover, those strategies help us give some shape to our intuitions and to reason about them.

Two qualifications to the project should be stated at the outset. The first qualification is that the project is normative, not positive. Judges and other actors will fashion interpretive doctrines in light of their preferences, beliefs, and opportunities; their decisions may not correspond to any particular normative account of interpretive choice. The second qualification is that the scope of the project, which focuses on statutory interpretation, is artificially truncated in the interests of manageability. The strategies of choice under empirical uncertainty sketched here might be adapted, with appropriate modifications, to nonstatutory domains of interpretive choice such as constitutional and contractual interpretation, and also to the choice of substantive doctrines in other areas.

My conclusions run contrary to the current academic consensus in favor of flexible, dynamic, and policy-saturated statutory interpretation. The most plausible responses to the uncertain conditions of interpretive choice suggest that courts' foremost concern should be to minimize the costs of judicial decisionmaking and of legal uncertainty. That concern pushes interpretive doctrine in the direction of formalism: toward rules rather than standards; toward a relatively small, tractable, and cheap set of interpretive sources rather than a relatively large, complex, and expensive set; and toward an absolute rule of statutory stare decisis. These conclusions, however, are simply byproducts of the central project, which aims to describe the background conditions of interpretive choice and to think about how courts should reason under those conditions.

Part I, building on recent work in interpretive theory and institutional choice, explains the concept and characteristics of interpretive

24 See infra text accompanying notes 158-59 (articulating this critique of subjectivist approaches to probability theory).
26 See infra Part IV; see also William N. Eskridge, Jr., Textualism, the Unknown Ideal?, 96 Mich. L. Rev. 1509, 1513 (1998) (reviewing Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997)) (noting that “the new textualism” approach to statutory interpretation “has relatively few defenders in academe (a haven for the contextually inclined)

27 See infra Part IV.
28 See infra Part IV.
choice and argues that it is inescapable. High-level theories of interpretive authority—for example, the view that "legislative intent" is the touchstone of statutory interpretation—will rarely determine the choice of interpretive doctrines. Rather, that choice will most often, and in the most important contexts, turn critically upon empirical and predictive questions. This is a wholly contingent claim about our legal system. The claim is not that high-level theories can never entail interpretive doctrines, but that in our constitutional order they do not do so very often, or in the contexts that matter.

Part II outlines the difficulties of interpretive choice. If courts must ask empirical and predictive questions in order to formulate interpretive doctrine, a natural response is to seek empirical and predictive answers. But things are not so simple. While calling for more data is rarely controversial, acquiring and processing information is always costly, and some information may not be obtainable at any price. The empirical questions that determine the choice of interpretive rules turn out to be daunting in the extreme. Will judges who consult legislative history, for example, commit more or fewer errors (suitably defined) than judges who do not? Will judicial refusal to correct legislative mistakes improve the quality of legislative output, or simply leave many such mistakes uncorrected? These and more complicated questions are properly formulated as empirical questions, yet they will often turn out to be unanswerable by standard empirical methods—or at least unanswerable at reasonable cost within the short or medium term.

Another difficulty is that judges cannot usefully postpone the choice of interpretive doctrine in order to await new information or to generate more information by "experiments" (such as adopting provisional and tentative interpretive doctrines, or decentralizing interpretive doctrine within the judicial hierarchy). Such experiments will often fail to generate the very information they are supposed to produce, and postponing decision will often inflict unacceptable collateral costs in disuniformity and legal uncertainty. In general, the experimentation analogy is misleading. Scientists faced with severe empirical uncertainty can suspend judgment until further information can be generated and considered. By contrast, judges more closely resemble engineers with a deadline and a fixed budget: Perfect information about critical choices will not be affordable even if it could be ob-

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29 See Michael C. Dorf, The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation, 112 Harv. L. Rev. 4, 59-66 (1998) (discussing "experimentalism" and "experimentation" as techniques by which Supreme Court may generate useful information). Dorf's argument is nuanced and carefully qualified, as discussed below. See infra text accompanying notes 139-41.
tained, and yet the project must be built with the highly imperfect information at hand.

Taken together, the conditions sketched in Parts I and II define the dilemma of interpretive choice. Interpretive doctrine depends upon empirical and predictive judgments, yet those judgments must be made by judges and other interpreters who lack critical information and cannot generate it themselves. Part III considers how judges should proceed with interpretive choice; it outlines and evaluates a series of strategies commonly used to make decisions under uncertainty. Some examples are: delegating the decision to (a community of) experts in the hope that the experts can better assess the empirical questions, or basing the decision on some group consensus in the hope that aggregating many people’s assessments of the uncertainties will improve accuracy; allocating the burden of overcoming uncertainty to one position or another (commonly by placing a burden of proof upon opponents of the status quo); reducing the scope of uncertainty by basing choices upon the known costs and benefits of the candidate doctrines, while assuming that the unknown costs and benefits of the candidates will prove roughly equal; and picking doctrines swiftly, rather than choosing them after protracted deliberation.

Part IV applies these techniques and strategies to some persistent debates in statutory interpretation, in particular the problems of legislative history, the canons of construction, and statutory stare decisis. This Part argues that courts should exclude legislative history as inadmissible, pick (rather than choose) between opposing canons of interpretation and then adhere to the picked canons in the future, and observe an absolute rule of statutory stare decisis. The route to these conclusions is similar in each instance. In application, the strategies of reasoning under empirical uncertainty, sketched in Part III, generally suggest that judges have far superior information about the costs of decisionmaking and legal uncertainty than they do about other empirical components of interpretive choice. The judges, then, should focus upon the variables they understand best, and should choose interpretive doctrines with a view to minimizing legal uncertainty, judicial vacillation, and the costs of litigation and judicial decisionmaking. These considerations suggest that interpretive doctrine should move in the direction of a minimalist set of simple, cheap, and manageable interpretive sources and doctrines—that is, in the direction of interpretive formalism.
I

Defining Interpretive Choice

This Part defines the concept of interpretive choice more precisely, illustrates its application to doctrinal problems in statutory interpretation, and responds to some high-level objections.

A. Interpretive Doctrine and the Aims of Interpretation

Interpretive doctrine gives answers to the ordinary methodological questions of statutory interpretation. What sources are admissible? Should those sources be arranged in some hierarchy and consulted sequentially (as in the “plain meaning” rule, which instructs courts to consult legislative history if and only if the statutory text is ambiguous)30)? If so, what should the hierarchy be? Which canons of construction should be used? When may statutory precedents be overruled? These relatively low-level questions of doctrine are the meat of statutory interpretation in judicial and administrative proceedings.

Interpretive choice is the process by which interpreters holding various high-level theories of interpretive authority arrive at conclusions about these kinds of doctrinal questions. Interpreters must hold some conception, stated or implied, of the ends, aims, or goals of statutory interpretation. That conception will follow from some account of the political authority of statutes.31 An interpreter who believes on grounds of democratic theory that the legislature’s will is the authoritative source of law will describe statutory interpretation as a search for legislative intent.32 That interpreter can be called an “intentional-
An interpreter who believes that legislatures have authority only to pass statutes, not to form abstract "intentions," will describe statutory interpretation as a search for the meaning of statutory text. That interpreter can be called a "textualist." There are other theories as well. The importance of interpretive choice is that the choice of an interpretive aim (such as capturing legislative intent) tells the interpreter surprisingly little about the proper contours of interpretive doctrine. Which of the plausible candidate doctrines would best promote the specified interpretive aim will often prove to be a difficult question: The selection of one candidate will depend upon empirical and predictive premises about the sources used in statutory interpretation, the competence and capacities of the judges and other

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33 For an overview of intentionalism, see Adrian Vermeule, Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, 50 Stan. L. Rev. 1833, 1834-35 (1998).

34 The classic discussion is Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 872 (1930) ("legislative intent is "undiscoverable in fact, [and] irrelevant if it were discovered"); see also Easterbrook, supra note 31, at 1119 ("[T]he project of textualism is to deny that intent should matter ... and to affirm the primacy of text, the joint product of a group in a constrained political system."); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").


36 The underlying account of the political authority of statutes, which yields the interpreter's conception of the ends or goals of statutory interpretation, need not be a positivist account or even a unitary or foundationalist one. See William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 324-35 (1990) (defining interpretive theory as "foundationalist" if it "seeks an objective ground ... that will reliably guide the interpretation of all statutes in all situations"). Pragmatists, such as Posner, think that statutes should be interpreted with a view to securing the best future consequences, with the important caveat that maintaining the consistency of statutory texts and the certainty of legal obligations is a weighty consequentialist consideration, one of a systemic character. See Posner, supra note 23, at 238. On this view, statutes are authoritative to the extent that treating them as such will have beneficial future consequences. So the pragmatist faces a range of empirical, predictive, and institutional questions about which interpretive sources, canons, rules of stare decisis, and other tools judges should use to achieve their forward-looking goals, including the systemic ones.

37 See Vermeule, supra note 9, at 698-99.
officials who must implement interpretive doctrine, and the behavior and anticipated reactions of legislatures and agencies.\(^3\)

The three doctrinal problems previously discussed—legislative history, canons of statutory interpretation, and statutory stare decisis—each illustrate the unavoidable character of interpretive choice, its frequent neglect by judges and commentators, and the empirical difficulties it entails.

1. Legislative History

A statutory interpreter who subscribes to an intentionalist theory of authority believes that statutes are authoritative to the extent that they embody the legislature's intention, and should be interpreted to reflect that intention. But the interpreter cannot reasonably decide, on that basis alone, to consult legislative history as evidence of legislative intent. Rather, the interpreter must first answer, even if only implicitly, a series of empirical questions: Does legislative history in fact supply evidence about some suitably specified notion of legislative intent (for example, the understanding of the median legislator) in a broad range of cases? Even if it does, will judges of limited competence do better at identifying legislative intent with legislative history or without it? The answers to these questions will determine whether to adopt rules or standards governing the use of legislative history and what the content of the rules or standards should be.

In this light, the Supreme Court blundered badly in its famous 1892 opinion in *Church of the Holy Trinity v. United States*\(^3\)\(^9\)—the first, or at least the most famous, majority opinion to use a committee report to trump contrary statutory text—by incautiously equating the contents of a Senate committee report with Congress's intention. In fact, the committee report proved highly misleading, and the federal circuit court, which limited itself to the statutory text and a few canons of interpretation, achieved a far better approximation of the legislative intent than the Supreme Court did.\(^4\)\(^0\) As a matter of interpretive choice, *Holy Trinity* suggests the possibility that courts of limited interpretive competence might do better, even on intentionalist grounds, by eschewing legislative history than by consulting it.\(^4\)\(^1\)

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\(^3\) See infra notes 71-82 and accompanying text.

\(^9\) 143 U.S. 457 (1892).

\(^0\) These claims are detailed in Vermeule, supra note 33, at 1839-57 (arguing that plain meaning provided better guide to legislative intent than did committee report). For a contrary view, see Eskridge, supra note 26, at 1535-42.

\(^1\) See Vermeule, supra note 33, at 1857-77.
2. The Canons of Statutory Interpretation

Here too the questions of interpretive choice are transparent. The canons come in two broad groups: the so-called “textual” or “linguistic” canons, which are default rules that govern questions of grammar and syntax, and the “substantive” canons, which are default rules that implement substantive interpretive, institutional, and distributive policies. An example of a linguistic canon is the principle that a general word in a list will be read as limited to the same class of objects as more specific words in the list (ejusdem generis), so that “cats, dogs, and other animals” will probably not be read to include elephants. Examples of substantive canons include the presumption that federal statutes do not apply extraterritorially and the rule that Congress must speak with great textual clarity to subject states to suit in federal court. Some canons are conceived as majoritarian default rules— Attempts to capture what Congress would have said had it spoken to the question. Canons may also be analogized to information-eliciting default rules in contract law—rules that assign to the party with superior information the risks of interpretive uncertainty, in order to encourage the revelation of information. The analogy is that courts use some substantive canons to force congressional coalitions to reveal their policy preferences, either by clear statutory command or by statutory silence in circumstances where it is clear that silence will be assigned a particular meaning.

Both the majoritarian justification and the information-eliciting justification provoke questions about the content and the strength of

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42 See Eskridge & Frickey, supra note 36, at 634 (distinguishing textual from substantive canons).  
44 See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256-57 (1991) (“It is also reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures.”).  
the relevant default rule. In principle, the content of the canonical default rule ought to turn on a large set of empirical factors: How do legislative drafters typically use the relevant language? How do legislators voting on a bill typically read it? Will legislative actors be aware of the default rules set by the courts? The proper strength, or weight, of a default rule is a separate question. Should courts use strong presumptions, rebuttable only by a specific textual statement, or should they use weaker standards or balancing factors? Here the empirical questions concern the comparative costs to legislatures of overriding a weak or strong default rule and the relative stability and manipulability, in the adjudicative process, of rule-like presumptions, standards, and balancing factors.

The *expressio unius* canon, which instructs courts to understand lists as exhaustive rather than illustrative, exemplifies the complexities of the linguistic canons. Why is *expressio unius* the correct default rule? Ordinary speakers often use illustrative rather than exhaustive lists—should legislators and statutory drafters be precluded from doing the same? No amount of debate about first principles of constitutional law or statutory interpretation will answer these questions. The intentionalist interpreter may or may not, upon full investigation, come to conclude that *expressio unius* usually captures the median legislator's understanding. The same uncertainty will afflict the text-oriented interpreter, who will view the canon not as a guide to legislative understanding but rather as an indicator of statutory meaning.

For an example of a substantive canon, consider the relatively strong and rule-like presumption that statutes will not be applied extraterritorially. If justified as an accurate gauge of legislators' usual intention, and thus as a majoritarian default, the canon will misfire when the majority coalition does (implicitly) desire extraterritorial application but fails to make its wishes sufficiently clear. Yet that risk, the justification goes, will be outweighed by the potential for judicial error and wasted time inherent in a case-by-case assessment of extraterritoriality. The empirical character of these questions is obvious; the more important point is that they cannot be avoided merely by specifying some interpretive aim, such as replicating what the majority coalition would have done had it addressed the issue. Either a default

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48 See Goldsmith, supra note 47, at 1431-32 ("The [Supreme] Court has justified its use of a rule-like presumption against extraterritoriality rather than a case-by-case inquiry on the basis of its judgment that 'Congress generally legislates with domestic concerns in mind.'").
rule of extraterritoriality or its opposite might achieve that aim, and the choice between the two possibilities cannot be made a priori.

3. *Statutory Stare Decisis*

The debate over the strength of statutory precedents exemplifies not only the problem of interpretive choice but also the impasse that threatens interpretive theory when courts are faced with empirical questions that are irresolvable in any helpful time frame or at acceptable cost. On one view, statutory stare decisis should be an absolute rule: Courts should never overrule statutory precedents. The principal argument for this view is a democracy-forcing argument. Refusal to overrule statutory precedents will force Congress to attend to its lawmaking responsibilities and, conversely, prevent Congress from sloughing off its responsibilities onto the courts.\(^4^9\)

The empirical and predictive components of this view are obvious, as is the interpretive choice problem. Assuming the validity of the end specified by this argument—that courts should adopt rules to maximize legislative decision of statutory questions—is the absolute rule of statutory stare decisis the right means? One criticism argues that it is empirically speculative, and that, on an equally plausible empirical story, an absolute rule would either fail to increase, or would even decrease, legislative decision of statutory questions.\(^5^0\) Perhaps legislators already have sufficient incentives to respond to judicial interpretations, and heightening the strength of statutory stare decisis will add little to those incentives.\(^5^1\) Perhaps a weaker rule of stare decisis would increase legislative activity if legislators and interest groups enact explicit statutes to confirm statutory precedents that are vulnerable to judicial overruling. It is even possible that an absolute rule would maximize legislative attention to statutory *precedents* while

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49 See Edward H. Levi, An Introduction to Legal Reasoning 57 (1948) ("To say that the matter must be one which involves the Constitution before the Court may reverse the interpretation of legislation places the responsibility where it belongs."); Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 177 (1989) (discussing treatment of stare decisis principle by legal community). Marshall argues that statutory stare decisis should be absolute because:

[It] is critical to reinvolve Congress as an active participant in [the] ongoing process of statutory lawmaker. One way to do this is to let Congress know that it, and only it, is responsible for reviewing the Court's statutory decisions, and that it, and only it, has the power to overrule the Court's interpretations of federal statutes.

Id. at 183.

50 See William N. Eskridge, Jr., The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases, 88 Mich. L. Rev. 2450, 2453 (1990) (arguing that absolute stare decisis "may exacerbate countermajoritarian features of our system").

51 See id. at 2455.
reducing legislative attention to other issues of statutory policy; the latter would be forced off the legislature’s constrained agenda by the need to overrule obsolete interpretations that the courts would refuse to disturb under the absolute rule. None of these possibilities can be dismissed in the abstract; all require a great deal of supplemental information to be adequately assessed.

These three examples illuminate the critical features of an interpretive choice problem. Most generally, interpretive choice can be described as an exercise in the choice of efficient doctrine. If the interpreter’s theory of authority specifies some appropriate end (ascertaining the intention of the median legislator, for example), then that end supplies a benchmark against which various doctrinal options can be measured. One doctrine (that legislative history is admissible, for example) might help judges divine the median legislator’s intent more frequently, and might require less time and effort from the judges, than would any competing doctrines. The first advantage, getting more cases right, means that the doctrine minimizes error costs; the second advantage, requiring less time and effort, means that the doctrine minimizes judicial decision costs. Which of the candidate doctrines will produce the best mix of error costs and decision costs is, in principle, an empirical question once the underlying theory of statutes’ political authority has specified the relevant aim of interpretation. “Best” here just means that the chosen option achieves the same goal more cheaply than do the other options. In this way, the resolution of the relevant empirical questions allows each interpreter’s theory of authority to be implemented efficiently.

On this account, the concept of “error” has meaning only in relation to some interpretive goal given by the underlying theory of statutes’ authority. On one view, it is erroneous to speak of a statutory meaning that is independent of legislative intention because text without intention lacks a democratic pedigree. On another view, any at-

52 See id. at 2458.
53 I use the term “efficient” here to mean, very loosely, that no alternative accomplishes a stipulated end at lower social cost.
54 I will use the term “decision costs” to encompass all the effort that interpreters (usually judges, agency officials, and lawyers) must expend in the course of decisionmaking; “decision costs” thus includes the costs to parties of litigation and the costs to lower courts of deciphering interpretive doctrines established by higher courts. See infra text accompanying note 144 (discussing components of decision costs). But I will not use the term to include the “decision” costs of legislators; those costs I will term “drafting costs” or “promulgation costs.”
55 See Sunstein, supra note 9, at 642 (observing that “without normative claims of some kind, it is impossible to know what counts as a ‘mistake’ or an ‘injustice’ in interpretation”).
tempt to capture legislative intention is itself erroneous, because that intention lacks political authority apart from its embodiment in statutory text. The underlying theory of authority will also specify the relation between error costs, decision costs, and other relevant costs. Although a standard view holds that interpreters should seek to minimize the sum of error costs and decision costs, many other combinations are possible. Perhaps, for example, the relevant theory of authority will specify a minimum of accuracy that permissible interpretive doctrines must achieve, even if the doctrines that satisfy the minimum have much higher decision costs (and thus higher total costs) than their competitors. It seems clear, however, that as between two doctrines of equal accuracy, the one that imposes fewer decision costs would be selected by any plausible theory of authority.

Note that interpreters need not agree upon any particular theory of authority in order to agree upon interpretive doctrines. One use of interpretive choice might resemble the idea of incompletely theorized agreements: Resolution of questions of interpretive choice might enable interpreters holding different theories of authority to reach agreement on doctrinal questions. Given certain empirical and institutional assumptions, for example, both the intentionalist and the textualist might agree upon a rule excluding legislative history. The intentionalist would agree because, on particular empirical premises, the rule would minimize both erroneous determinations of legislative intent and the costs of litigation. The textualist would agree because, on the same premises, the rule would minimize erroneous determinations of ordinary textual meaning and litigation costs. Indeed, empirical agreement might even enable interpreters to choose particular doctrines before, or in place of, choosing a theory of author-

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If the statute is understood not as the expression of a collective decision by the established political authority but rather as a kind of thing-in-itself, a free-floating text, then why is its right to command any greater than that of, say, the political treatise or the science fiction novel?

57 See supra text accompanying note 34.


59 Cf. Epstein, supra note 58, at 33 (“A universal manifesto is thus reduced to a simple rule of thumb: When in doubt, choose the simpler of two alternatives.”).


61 See Vermeule, supra note 33, at 1862-77 (advancing this claim).

62 See id. at 1863-64.

63 See id. at 1886 n.180.
ity. If, on certain empirical findings, it turned out that legislative history should be excluded on any theory of the proper aims of interpretation, then it would be unnecessary to choose a fundamental theory in order to decide how legislative history should be treated. Of course the set of doctrines that could be the subject of such incompletely theorized agreements might be quite small.

To be sure, the possibility of using interpretive choice to generate overlapping consensus, in a manner that preempts debate over first principles, is paradoxically more ambitious than the exercise of interpretive choice by interpreters who have committed to some highly theorized account of interpretive authority. The critical point is that interpretive choice is inescapable even for interpreters who do champion some substantive account, rooted in first principles, of the aims of interpretation. Those principles do not reach down to the ground of interpretive doctrine. Rather, the interpreter must choose between alternative implementing doctrines to complete the transition from the theory of authority to some normative account of how statutory interpretation should be conducted.

In this respect, interpretive choice is inspired by Neil Komesar's analogous account of institutional choice. Komesar's work hammers away at one central theme of tremendous power: that the choice of a general criterion for judging policy outcomes tells us little about whether any particular institution should be charged with implementing that criterion. Every candidate institution, realistically viewed, has structural features that make it more or less capable of attaining the relevant policy goals; the allocation of institutional responsibilities always turns upon a judgment about which of the candidate institutions is, when compared to the other candidates, best suited to the job. To commit the fallacy that Komesar dubs "single-institutionalism" is to allocate a social task to one institution based solely on the judgment that other institutions will carry out the task imperfectly, without the necessary comparative judgments.

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64 See id.

65 Cf. Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 56-57 (1997) ("Even when general agreement exists that the Constitution reflects a particular value or protective purpose, questions of implementation often remain . . . [E]ffective implementation [of constitutional norms] requires the crafting of doctrine by courts.").


67 See Komesar, supra note 66, at 6.
Interpretive choice is the intra-institutional parallel to Komesar's conception of the allocation of responsibilities among institutions. Just as the choice of a social goal says little about the allocation of institutional jurisdiction, so too the first principles of interpretation do not dictate the selection of possible doctrines. The overarching theory of authority will frequently prove compatible with a range of implementing doctrines; the choice between those doctrines will turn upon empirical data and predictions of institutional performance. Here the correlate of Komesar's fallacy of single-institutionalism is the noncomparative defense of some interpretive doctrine or other. Few interpretive doctrines can simply be assumed to follow directly from the specification of a high-level theory of authority and no doctrine can be adopted to the service of some theory of authority without consideration of possible competitors.

B. The Dimensions of Interpretive Choice

Interpretive choice problems frequently pose questions similar to those seen in the previous examples: Should a certain source always be consulted, never be consulted, or be consulted only in certain circumstances? What effects will a particular interpretive doctrine have on legislative or administrative behavior? It is helpful to sort these questions into broad categories. Interpretive doctrines must typically be compared, in light of the aims given by the underlying theory of statutes' political authority, along at least some of the following dimensions.

1. Rules and Standards

The anatomy and behavior of rules and standards are fairly well understood, at least in the abstract, as are the connections and distinctions that link these concepts to other concepts such as error costs, decision costs, and the allocation of institutional authority between principals and agents.68

Rules economize on information and thus often reduce legal uncertainty and judicial decision costs, at least in the short term. Yet by barring direct recourse to an all-things-considered determination about the applicability of the legal norm to particular facts, rules inevitably prove both over- and underinclusive. Rules may thus raise er-

68 There is a massive literature on rules and standards. Some of the most important contributions include the following: Epstein, supra note 58; Frederick Schauer, Playing By the Rules (1991); Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65 (1983); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992); Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22 (1992); Sunstein, supra note 58.
ror costs relative to the performance of a fully informed and fully competent decisionmaker using a standard, even though in some circumstances a mediocre decisionmaker using a rule may prove more accurate than a mediocre decisionmaker using a standard, as when some of the information excluded by a rule has inflammatory or distortive effects on the decisionmaking process. Implementing an interpretive goal thus requires a choice among a whole menagerie of forms (rule, standard, presumption, rule-with-exceptions, etc.) in which the legal norm or directive suggested by that aim may be embodied. That choice itself will require empirical assessments of the competence of the judges or decisionmakers who will apply the chosen legal doctrine; the relative decision costs of rules, standards, and their variants; and the effects of the choice of form on the legislative and administrative institutions who create law and on the private firms and individuals who live under it.

A critical problem that pervades interpretive choice is how empirically determined choices between rules and standards can be made intelligently in the face of serious, and often irresolvable, uncertainty about these embedded empirical questions. For example, creating a relatively strong, rule-like presumption against reading statutes to have extraterritorial effect, as the Supreme Court has, rests on several subtle judgments about legislative behavior, judicial competence, and their relationship to rules and standards. One such judgment is that the Court is more competent to decide in the aggregate (that is, by rule) whether the political branches generally prefer statutes to have extraterritorial effect than the Court is to decide, case-by-case, whether interpreting a statute to have extraterritorial effect would frustrate political branch interests in foreign policy. If this is true, then a rule might be superior to a standard.

2. Decisionmaking Authority

The choice of legal form also has important effects on the allocation of decisionmaking authority. Rules and standards allocate decisionmaking authority in different ways within an institution over time, between different levels of a hierarchical institution, and between institutions. Standards, in effect, delegate decisionmaking authority to the decisionmaker at the point of application, as when a standard in-

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69 See Sunstein, supra note 9, at 655.
70 See Goldsmith, supra note 47, at 1431-32 (discussing this question).
71 See Schauer, supra note 68, at 159 ("[A]ny argument for rule-based decision-making can be seen to view rules as essentially jurisdictional, as devices for determining who should be considering what. Rules therefore operate as tools for the allocation of power.").
structs a judge to decide whether a driver was proceeding at a "reasonable speed." Rules vest authority in the rule formulators rather than in those who apply the rule in particular cases at a later time. Rules thus require more information and decisional competence ex ante, at the time the rule formulators decide what the content of the rule should be. Standards require more information and decisional competence ex post, at the time of application. It follows that one important consideration in the choice between rules and standards is whether the rule-creators, or instead the rule-appliers, have better information and superior competence to translate information into sound legal policy.

The institution that applies a legal directive (rule, standard, or variant) may be the same institution that created it (as when the Supreme Court creates a standard to govern its own certiorari jurisdiction), may be a subordinate official within that institution (as when the lower federal courts apply a directive announced by the Supreme Court), or may be a different institution altogether (as when legislators enact a rule or standard for subsequent administrative or judicial application). Each possibility introduces further complexities, heavily empirical in character, into the choice of legal form. One problem involves the trustworthiness of agents and delegates: Even if creating a standard usefully vests discretion in competent, well-informed agents at the point of application, will those agents act to promote the principal’s interests or their own? Another problem involves the proper scope of a rule or standard. Both rules and standards can be broad or narrow; “do the good” is a broad standard, while “trucks may stand in loading zones for fifteen minutes except between 7 a.m. and 9 a.m.” is a narrow rule. The scope of a rule or standard will increase or diminish the effects of the choice of legal form. A broad rule reduces decision costs dramatically at the point of application by bringing more cases within its scope and reduces the discretion of the possibly incompetent or untrustworthy agents who apply it; yet for precisely those reasons, a broad rule formulated by an ill-informed or incompetent principal will prove more damaging than a narrow rule would have been.  

3. Legislative, Administrative, and Private Reactions

Another important theme involves an extraordinarily difficult set of predictive questions about the likely reaction of other institutions to the rules or standards chosen by a decisionmaker engaged in inter-

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pretive choice. Those institutions may stand in the relationship of either principal or agent to the institution that chooses an interpretive rule. Positive political theory emphasizes that judges choose doctrines in the context of anticipated reaction from other lawmaking institutions. Whether the models suggested by positive political theory accurately describe the interactions between courts, legislatures, and agencies involves a morass of empirical questions of great complexity.

One example is the question whether a rule excluding legislative history would have significant effects on legislative output. The nineteenth-century commentator Francis Lieber suggested that English statutes became absurdly complex and detailed because the judges pursued a literalist approach to interpretation, which included a refusal to consult parliamentary instructions found in the recorded debates. At the federal level, it is possible that some such effect would take place if the courts excluded all legislative history. A different view, pressed by textualist judges and commentators, argues that flexible statutory interpretation and frequent judicial recourse to legislative history give legislators incentives to enact ambiguous, vague, or excessively general statutes. On this view, excluding legislative history will cause majority coalitions to legislate more clearly, thus providing a beneficial increase in authoritative information about legislative intent. There is a third possibility: Both Lieber's view and the textualist view may overestimate the effects of judicially developed interpretive doctrine on legislators' behavior, specifically on legislators' production of statutory text and legislative history. Perhaps

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74 See John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 728-29 (1997) (examining, but rejecting, position that rule restricting permissible uses of legislative history would produce unhealthy level of statutory detail); Sidney A. Shapiro & Robert L. Glicksman, Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1988 Duke L.J. 819, 841-42 (arguing that “new textualism” has produced excessive level of statutory detail).

75 See Francis Lieber, Legal and Political Hermeneutics 19 (St. Louis, Thomas & Co. 1880) (“The British spirit of civil liberty induced the English judges to adhere strictly to the law, to its exact expressions. This again induced the law-makers to be, in their phraseology, as explicit and minute as possible . . . .”).


77 See infra text accompanying notes 114-16 (describing arguments that interpretive textualism will have democracy-forcing effects).
islators create both text and legislative history primarily for other audiences, such as interest groups, constituents, and the press.\textsuperscript{78}

The currently available empirical evidence on these questions is indeterminate. Statutes have generally become longer and more detailed in this century,\textsuperscript{79} after the courts began to consult legislative history on a large scale, which suggests that consulting legislative history increases, rather than diminishes, statutory specificity. But, of course, the growing complexity of statutes quite possibly reflects nothing more than the increasing regulatory ambitions of the welfare state. Similar questions about agency reaction to a rule excluding legislative history have been ventilated, with similarly plausible, but indeterminate, speculations advanced to support differing predictions.\textsuperscript{80}

These dimensions of interpretive choice have been much studied. Recent scholarship has produced sophisticated and detailed examinations of the conditions under which rules will outperform standards and vice-versa, and (to a lesser extent) of the other dimensions of interpretive choice as well.\textsuperscript{81} But the scholarship has devoted essentially no attention to the question of how those who must choose interpretive doctrines should proceed when the empirical determinants of the choice are shrouded in severe, perhaps irreducible, uncertainty. It is important to know, for example, the conditions under which a rule will outperform a standard. But that knowledge is of little value unless the framers of a legal directive know whether those conditions hold or fail to hold with respect to the directive at issue—knowledge that requires a great deal of information.\textsuperscript{82} The resulting conun-

\textsuperscript{78} See Vermeule, supra note 33, at 1892 & n.201 (discussing this possibility).
\textsuperscript{80} Compare Ira C. Lupu, Time, The Supreme Court, and The Federalist, 66 Geo. Wash. L. Rev. 1324, 1326 (1998) (arguing that judicial exclusion of legislative history will not abate agency interest in legislative history), with William N. Eskridge, Jr., Should the Supreme Court Read The Federalist but Not Statutory Legislative History?, 66 Geo. Wash. L. Rev. 1301, 1322 n.102 (1998) (arguing contrary). See also Peter L. Strauss, When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 Chi.-Kent L. Rev. 321, 339 (1990) (suggesting that “a retreat from legislative history would weaken the controls over agency action that would be thought to continue to work on behalf of the enacting Congress”).
\textsuperscript{81} See supra notes 71-72 and accompanying text.
\textsuperscript{82} Professor Sunstein, in analyzing this problem, made the following observation:
To decide between rules and rulelessness, we need to know a great deal about the context—the likelihood of bias, the extent of current information, the location and nature of social disagreement, the stakes, the risk of over-inclusive-
drum—how to make progress on interpretive problems saturated with empirical components, in the face of severe empirical uncertainty—poses the problem of interpretive choice.

C. Some Objections

There is a pair of illuminating objections to the project of interpretive choice. The first objection states that interpretive choice is unnecessary, because judges do not "choose doctrines," they decide individual cases. The converse objection states that interpretive choice is illegitimate, because the Constitution, correctly read, frequently dictates, or at least constrains, the choice among particular doctrines of statutory interpretation.83

The first objection rests on an excessively simplistic view of interpretation. It captures the atmosphere of some judicial opinions about statutory interpretation, especially those from the heyday of legal process purposivism. These opinions are not self-conscious about interpretive doctrine.84 Their authors seem to understand interpretation in a case-specific, wholly untheorized way: Interpreters should look at all the sources and exercise the craft-judgment of the good lawyer.85 But today's judges are increasingly self-aware about interpretive doctrine. They debate various doctrinal options in an explicit, reasoned fashion, making empirical and predictive assertions as they go.86 That self-awareness seems laudable, for the claim that statutory interpreters should just "do what comes naturally" is an untenable position.


84 See, e.g., United States v. Universal Credit Corp., 344 U.S. 218, 221 (1952) ("Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique.").

85 See, e.g., Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 544 (1947) ("In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment.").

86 For a few recent examples, see United States v. Estate of Romani, 523 U.S. 517, 535-37 (1998) (Scalia, J., concurring) (advancing both formal and empirical criticisms of rejected proposal doctrine, under which statute will not be interpreted to duplicate proposed bill that was rejected during course of legislative process); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (discussing proper role of legislative history in statutory interpretation); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring) (discussing proper scope of "absurd results" exception to plain meaning).
after legal realism (although the realists were themselves excessively skeptical about the constraining force of rules).\textsuperscript{87} The idea that judges should take each case as it comes, interpreting statutes sensibly in light of the materials at hand, itself constitutes an implicit choice of interpretive method and an implicit allocation of interpretive authority.\textsuperscript{88} It is a choice to commit interpretation to the case-specific discretion of the judges on the spot, as opposed to the discretion of judges who at other times and places might formulate general interpretive doctrine to govern the adjudicative process. That choice is a contestable one and must be defended, not simply proclaimed.

The second objection has more bite. It is certainly true that "before testing whether a default rule promotes any particular interpretive value, we must first ascertain whether the Constitution either enjoins or permits the judiciary to recognize such a value as worthy of promotion."\textsuperscript{89} The Constitution may specify the theory of statutory authority that, in turn, supplies interpreters with the aims towards which interpretive choice is directed; that is a question of constitutional interpretation logically antecedent to the problems of interpretive choice.\textsuperscript{90} But it is a distinct question of constitutional interpretation whether the Constitution directly dictates much or little about interpretive doctrine itself—whether the Constitution speaks directly to means as well as ends.\textsuperscript{91}

\textsuperscript{87} See Schauer, supra note 68, at 192 ("The Realist picture of decision-making may seem an implausible account of a wide variety of decision-making situations. Our daily encounters with rules, legal and otherwise, belie the claim that we can do whatever we wish and find some legal rule to support our actions.").

\textsuperscript{88} Richard H. Fallon observes that questions of methodology inevitably arise whenever judges interpret statutes:

For a judge as much as for anyone else, it is impossible to engage in constitutional argument without making at least implicit assumptions about appropriate methodology. For example, to adopt an argument based on precedent is to presuppose the validity of a theory that makes precedent at least relevant and possibly controlling.


\textsuperscript{89} Manning, supra note 83, at 686.

\textsuperscript{90} See supra notes 31-36 and accompanying text.

\textsuperscript{91} Statutes, of course, might also restrict interpretive choice by prescribing interpretive rules for courts to use. But in the federal system it so happens that Congress very rarely prescribes general interpretive rules, or even rules applicable to particular statutes. See 1 U.S.C. §§ 1-6 (prescribing handful of largely insignificant interpretive rules for federal statutes); Manning, supra note 83, at 690 n.24 ("Congress has prescribed only a few rules of interpretation, and none is terribly monumental."). There are many complex issues here; for one thing, the scope of legislative authority to prescribe interpretive rules is not clear in a system of separated powers. See id. ("Of course, even the proposition that Congress can legitimately prescribe rules of construction entails a conclusion of constitutional dimension.").
On the merits of that question, it so happens that the Constitution cannot plausibly be read to say a great deal about statutory interpretation doctrine, and even what it does say is often so minimal and so abstract as to leave open all the contested questions of interpretive choice. Because Article I of the Constitution specifies the conditions for the enactment of valid statutes, and the Supremacy Clause mandates that constitutionally valid statutes are supreme law, all major interpretive approaches agree that judges should pay attention to the statutory text. But no provision sets out explicit instructions to judges about what other sources or considerations are relevant to statutory interpretation. At the level of express commands, the Constitution simply does not speak to the subject.

Furthermore, any constitutional instructions that structural and historical analysis can elicit prove compatible with most plausible positions on the contested doctrinal problems of statutory interpretation. An illustration involves one of the most developed and persuasive attempts to ground statutory interpretation doctrine in structural constitutional analysis. The argument suggests that the Constitution, particularly Article I's procedure of statutory enactment, should be read to embody an implicit norm against legislative self-delegation. That norm forbids courts to afford authoritative weight to legislative history in statutory interpretation but allows consultation of legislative history as a persuasive or confirmatory source. Assuming the validity of that analysis, however, the most important doctrinal questions remain open. That courts should not afford legislative history authoritative weight does not tell us whether courts should use legislative history at all. If an empirical assessment of judicial incentives and behavior suggests that courts will frequently pay lip service to the pro-

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92 Manning explicitly disavows any suggestion that "inferences from constitutional structure will always provide clear answers to questions of interpretive design," and notes that "when they do not, the judiciary may have room to make choices among particular interpretive strategies." Manning, supra note 83, at 692-93.

93 See U.S. Const. art. I, § 7 (detailing procedures of bicameral approval and present-ment to President and requiring that "bill" must undergo those procedures to become "law").

94 See U.S. Const. art. VI, cl. 2 ("Laws of the United States which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land . . .").

95 See David A. Strauss, Why Plain Meaning?, 72 Notre Dame L. Rev. 1565, 1573 (1997) ("Article I, Section 7 does not say anything explicit about what to do when a dispute arises about what a duly-enacted statute requires or permits.").


97 See Manning, supra note 74, at 728 (distinguishing authoritative from persuasive uses of legislative history).
hibition while in fact affording dispositive weight to legislative history, an absolute prohibition on legislative history could be seen as a necessary corollary doctrine to secure enforcement of the prohibition. Finally, even if judges could implement the prohibition successfully, the analysis does not suggest that the Constitution requires the judges to consult legislative history for its persuasive (that is, nonauthoritative) value. The judges presumably retain constitutional discretion to eschew its use on other grounds; whether they should do so is a function of the interpretive goals they pursue and of the consequences of candidate doctrines available to implement those goals—in short, of interpretive choice.

The more telling objection to interpretive choice is that it demands too much of the choosers. One critique of Komesar pins the problem that institutional choice under conditions of empirical uncertainty lacks traction; it is usually too difficult to assess the society-wide variables that affect the relative performance of complex institutions. Like institutional choice, although on a smaller scale, interpretive choice requires detailed information and sophisticated predictions about institutional performance under the candidate interpretive rules. Part II will discuss the challenges of interpretive choice under conditions of severe empirical uncertainty, and Part III will suggest strategies for choosing interpretive rules under those conditions. The point of emphasis here is simply that, for all its difficulties, interpretive choice is unavoidable with respect to a broad range of doctrinal questions. As Komesar insists, the difficulties of institutional choice do not justify a relapse into single-institutionalism. So too, the difficulties of interpretive choice cannot be sidestepped either by a relapse into naturalistic statutory interpretation or by reducing questions of statutory interpretation to questions of constitutional interpretation.

98 Professor Thomas Merrill has written such a critique:

As a theory of social action, Komesar's approach to institutional choice spins around at a very high level of generality but seems to have difficulty getting a bite or grip on the here-and-now problems that must be resolved by decision makers in actual institutional settings. . . . The approach requires the collection and processing of enormous quantities of information before valid judgments can be made about institutional choice.


99 See Neil K. Komesar, The Perils of Pandora: Further Reflections on Institutional Choice, 22 L. & Soc. Inquiry 999, 1009 (1997) (“Any analyst of law and public policy who fails to take institutional choice seriously runs the significant risk that their work will be labeled not only wrong but irrelevant.”).
II

INTERPRETIVE CHOICE AND THE DIFFICULTIES
OF EMPIRICISM

Part I argued that courts must make empirical and predictive claims—explicit or implicit—about interpretive sources and institutional performance in order to settle upon interpretive doctrine over the range of interpretive questions. If courts had full information about the relevant empirical issues and unbounded ability to process that information accurately, the empirical character of institutional choice would pose few difficulties. But neither the condition of full information nor the condition of full comprehension plausibly describes the actual setting of interpretive choice. Rather, as this Part argues, judges must make interpretive choices in the face of impoverished information, with only a limited capacity to generate the needed information by postponing interpretive choices or by conducting experiments. These conditions make interpretive choice an exercise in decisionmaking under conditions of severe empirical uncertainty.100

A. Trans-Science in Interpretive Choice

Perhaps the most obvious obstacle to the resolution of empirical questions relevant to interpretive choice stems from the character of the questions themselves. Those questions are “trans-scientific,” meaning that although they are empirical they are also (in many instances) unresolvable at acceptable cost within any reasonable time frame.101 It may be that the costs of acquiring the data needed to answer the empirical questions are prohibitive, or at least predictably excessive in comparison to the benefits to be gained from choosing the best interpretive doctrine. It may also be, more simply, that the needed data cannot be obtained (or at least cannot be obtained in full) at any cost.102


101 See Alvin M. Weinberg, Nuclear Reactions: Science and Trans-Science 4 (1992) (explaining that trans-scientific questions are those that “can be asked of science and yet cannot be answered by science . . . though they are, epistemologically speaking, questions of fact and can be stated in the language of science”).

102 See Robert E. Goodin, Institutions and Their Design, in The Theory of Institutional Design 1, 42 (Robert E. Goodin ed., 1996) (noting that, with respect to critical institutional questions such as frequency of different types of actors in population, “[t]his is a matter of fact, in some sense; but it is in practice usually an empirically undecidable question (we cannot, or cannot afford to, undertake the crucial experiments)”).
Trans-scientific questions abound not only in the natural sciences but also, or especially, in the social sciences, where the number of variables and difficulty of collecting data often mean that empirical questions never achieve closure, despite seemingly endless study.\textsuperscript{103} A familiar example is the superficially simple question whether the death penalty deters crime: "No issue of criminal justice has been subjected to greater empirical study than whether the death penalty is an effective deterrent, and on none is the evidence more ambiguous and conflicting."\textsuperscript{104} Many of the empirical questions integral to interpretive choice appear to share this feature.

One example is a critical empirical question from the stare decisis debate: In jurisdictions where the courts adopt an absolute rule of statutory stare decisis, will legislatures more frequently modify or override statutory precedents through new legislation than they will in jurisdictions with a softer rule of stare decisis? The question is empirical but difficult to resolve. The problem is not that the question is poorly formulated in the sense that it is only a pseudo-empirical question. Rather, the problem involves relative rates of legislative response under different stare decisis doctrines. But it proves extremely difficult to fill in the values of the relevant variables.\textsuperscript{105}

The best way to get at the problem would be a direct experiment.\textsuperscript{106} I will say more about experimentation later; it suffices to note here that no experiment in a form acceptable to the standards of social science research could possibly be conducted. Such an experiment would require that several lawmaking systems, identical except for their rules of stare decisis, be created—an absurd prospect. The alternative to direct experimentation is to fall back upon comparative and historical empiricism. A comparative project could attempt to estimate the relative rates of legislative override in states or nations that use different rules of statutory stare decisis. A historical project could compare legislative performance in a given jurisdiction as stare decisis rules have changed through time.

\textsuperscript{103} See, e.g., Edward E. Leamer, Let’s Take the Con out of Econometrics, 73 Am. Econ. Rev. 31, 34-40 (1983) (discussing pervasive difficulty in controlling for hidden variables in econometrics).

\textsuperscript{104} Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 413, 436 (1999); see also Franklin M. Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 730 (1980) (noting that in death penalty studies “the problem of measurement turns out to be very severe”); Leamer, supra note 103, at 42 (concluding that “any inference from these data about the deterrent effect of capital punishment is too fragile to be believed”).

\textsuperscript{105} For a similar point in the context of bankruptcy law, see Douglas G. Baird, Bankruptcy’s Uncontested Axioms, 108 Yale L.J. 573, 574-75 & n.7 (1998).

\textsuperscript{106} See Fisher, supra note 104, at 703 (“If we could make controlled experiments, it would be relatively easy to quantify the relationship being investigated.”).
Yet in all likelihood neither inquiry will prove tractable. Although empirical, the question has soft predicates; what counts as a legislative override is itself a question of legal evaluation on which observers will differ. More importantly, it will prove too difficult to control for the myriad of potential variables that might account for observed differences in rates of legislative overrides across jurisdictions—or over time within jurisdictions—and thus too difficult to trace effects to their proper causes, or even to decide what is cause and what is effect.

Suppose that two otherwise similar states with different rules of statutory stare decisis—one absolute, one not—display different rates of override. It is possible that the causation runs from legislative activity to the stare decisis rule, rather than the reverse. Courts in one state might have adopted an absolute stare decisis rule precisely because the greater activity of the state legislature, produced by unrelated factors, gave the judiciary confidence that obsolete statutory precedents would not linger forever without legislative correction. But suppose that in another state the change from an absolute rule to a softer rule coincided with a diminished rate of legislative activity. No conclusion whatsoever follows, certainly not the conclusion that weakening the stare decisis rule enervates legislatures. Both changes might well have been independent products of some external event, such as the rise of a new political party that independently influenced the behavior both of the legislature and of the elected judiciary.

The stare decisis example is hypothetical, principally because so little work has been done to assess the empirical consequences of interpretive choice. But similar problems afflict even the small body of...
of work that has been done. Undoubtedly the best study by a lawyer of the empirical effects of interpretive method is William Eskridge's examination of congressional "overrides" of the Supreme Court's statutory decisions in the period from 1967 to 1990. The study is wide ranging, but for present purposes its most interesting component is Eskridge's attempt to determine whether Congress is relatively more likely to override decisions that rely primarily on statutory text, or to override decisions that rely primarily on legislative history or judicial beliefs about legislative purposes. The study examines the "primary reasoning" of Supreme Court statutory decisions overridden by Congress, and finds that decisions primarily based upon the "plain meaning" of statutory text were more likely to be overridden than decisions primarily based upon statutory purpose or policy, or upon precedent.

The study poses the right questions. A central argument for textualism is that it has a democracy-forcing effect: Judicial refusal to remake enacted text forces Congress to legislate more responsibly ex ante. The argument can also be put in the language of information-eliciting default rules: Adherence to text will prod legislative coal-

the House of Representatives and the United States Court of Appeals for the District of Columbia Circuit, see infra note 291.

111 See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991). Other works of similar character include Carol F. Lee, The Political Safeguards of Federalism?: Congressional Responses to Supreme Court Decisions on State and Local Liability, 20 Urb. Law. 301 (1988) (testing theory that states are intertwined in federal legislative process); Michael E. Solimine & James L. Walker, The Next Word: Congressional Response to Supreme Court Statutory Decisions, 65 Temp. L. Rev. 425 (1992) (studying congressional overrides of Supreme Court statutory decisions). There is also a body of political science studies on these questions; for Eskridge's persuasive criticisms of those studies, see Eskridge, supra, at 335 & n.5. Eskridge's study, the most comprehensive and sophisticated of these works, has been justifiably praised as a corrective to the nonempirical or even antiempirical cast of most scholarship on interpretation. See also Tracey E. George, Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals, 58 Ohio St. L.J. 1635, 1637 n.7 (1998) (noting that "few scholars have tested empirically their formal [interpretive] theories").

112 See Eskridge, supra note 111, at 347-48.

113 If accurate, that finding might, of course, provide evidence that textualist democracy-forcing operates exactly as textualists hope it will, rather than providing an objection to textualism. But the question here concerns the study's methodology, not the normative import of the study's conclusions.

114 See, e.g., United States v. Taylor, 487 U.S. 326, 346 (1988) (Scalia, J., concurring) ("I think we have an obligation to conduct our exegesis in a fashion which fosters the democratic process [specified in Article I's bicameralism and presentment requirements]."); Garrett, supra note 46, at 7 ("[M]ethods like textualism and rules of clear statement are best understood as efforts to improve the quality of the decisionmaking in the politically accountable branches."); W. David Slawson, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 Stan. L. Rev. 383, 407-10 (1992) (arguing that judicial recourse to legislative history results in irresponsible and incoherent congressional lawmaking).
tions into revealing their preferences explicitly. Critics of textualism respond, in part, that Congress simply cannot assume the degree of responsibility that democracy-forcing arguments assign to it. Legislation will inevitably have effects that are unforeseeable even to the most conscientious legislators, and the need to secure political compromise ensures that legislation will often consist of vague generalities or artful ambiguities. Eskridge's study thus attempts to examine the actual effects of interpretive method on legislative response.

The study's conclusions on that score, however, suffer from the twin problems of soft predicates and proliferating variables that generally afflict the empirical study of complex legal questions. First, the criteria used to determine the "primary reasoning" of the case are remarkably ill-defined: Consider such predicates as "the placement and length of the Court's analysis," "the persuasiveness of the Court's analysis," and "the Court's own apparent confidence in its opinion." And there are equally slushy supplemental principles. For example, "if the Court's legislative history argument was subordinate to, but more convincing than, what appeared to be a makeweight textual argument, the study identified the primary reasoning as legislative history."

Second, even supposing those criteria to have been consistently applied in every instance, the study fails to account for important variables and thus fails to establish its conclusions. Eskridge suggests, for example, that decisions by textualist or formalist interpreters are more likely to be overridden, and that textualist interpretation captures the enduring or aggregate preferences of Congress over time less

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115 See supra note 46 and accompanying text (describing analogies between contracts scholarship on information-eliciting default rules and canons of construction).

116 Professor Eskridge views with skepticism the assertion that "new textualism" will have a significant effect on the way that congressional legislation is drafted:

The vast majority of the Court's difficult statutory interpretation cases involve statutes whose ambiguity is either the result of deliberate legislative choice to leave conflictual decisions to agencies or the courts, or the result of social or legal developments the most clairvoyant legislators could not have foreseen.

Eskridge, supra note 35, at 677.

117 Eskridge, supra note 111, at 347 n.38.

118 Id.

119 Although Eskridge seems to understand textualist as a species of formalist, he does not parse the distinctions between formalists and textualists. See id. at 405-06 (defining both textualist and formalist interpreters as inclined to focus on "the statutory language as understood by both Congress and the President at the time of enactment").

120 See id. at 347-52, 406 ("Not surprisingly, Congress is more likely to override Supreme Court statutory decisions following such a formalist approach.").
accurately than nontextualist approaches. The dramatic charge is that textualism is "countermajoritarian." But all this is just an extended example of the fallacy of composition—the assumption that a feature true of a subset of cases will hold true when generalized to all cases. Eskridge is using data about rates of congressional override of textualist decisions in a world in which there are both textualist and nontextualist decisions. He then extrapolates from those data to evaluate the textualist proposal that judges ought to move to a world in which all decisions are textualist. That extrapolation need not hold; indeed, it is exceedingly difficult to know whether it would. The nub of the democracy-forcing argument is that in a largely nontextualist interpretive regime congressional coalitions usually signal their preferences through legislative history and other sources so that the occasional textualist opinions will often be focusing upon the wrong sources. Yet those same coalitions, when faced with a consistently textualist judiciary, will consistently express their preferences in statutory text, rather than in legislative history or in other sources that a textualist approach disfavors. Such a consistently textualist regime might capture majoritarian preferences far more accurately than do either textualist or nontextualist techniques in the mixed regime Eskridge has studied. The textualist argument is speculative, of course, but it is just the sort of predictive argument for interpretive choice that, although empirical rather than jurisprudential, is nigh impossible to resolve through standard empirical techniques.

Eskridge’s study is the best available work about some fundamentally important empirical determinants of interpretive choice. Yet even that study’s foundations are infirm in critical respects, and the infirmities illustrate the structural problems that afflict empirical work on interpretation. The first problem is that questions about the empirical determinants of interpretive choice, such as rates of legislative response under different candidate rules of stare decisis or the democracy-forcing effects of textualism, lie at one extreme of the spectrum of complexity. These are questions that implicate many actors and institutions (legislators, agencies, lawyers, judges), many jurisdictions, and many different types of legal sources. Accordingly, problems of interpretive choice will often prove strongly resistant to

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121 See id. at 408-09.
122 See id. at 408.
123 See Jon Elster, Political Psychology 105-06 (1993) (defining “fallacy of composition” as “the belief that whatever is true at the margin will remain true when generalized to all cases”).
124 See supra text accompanying notes 71-80.
empirical resolution, in a manner akin to the deterrent effect of the death penalty. Another problem is that interpretation scholarship must begin its empirical work from a starting point that is very far from the goal. Only recently has interpretation scholarship taken an empirical turn; there is a startling lack of serious empirical studies. This means that the returns from investment in empirical work on interpretation lie well into the future.

It is tempting to sidestep the problems of interpretive empiricism with the observations that some data is always better than no data, and that empiricism can supply helpful or suggestive data even if it cannot supply dispositive answers. This view, which overlooks the costs of gathering data, is also excessively optimistic in assuming that the gains from empiricism are continuous, so that incremental additions of empirical work produce incremental gains. There is no particular reason to think that empirical problems usually display that sort of continuity. The benefit of gathering data may just as easily prove to be nil until the amount of data reaches some discontinuous threshold, perhaps a very high threshold. Just as knowing only the first digit of a phone number is essentially useless, so too it is essentially useless to know only 5% of the information necessary to choose between alternative rules of statutory stare decisis. In that instance, increasing our knowledge tenfold still provides only 50% of the data required to make an informed decision. Investments in empiricism are investments in long-term basic research that will pay few short-term dividends for interpretive practice.

All told, the trans-science problem considerably dilutes the promise of empiricism for the normative theory of statutory interpretation. Courts would like to choose the doctrines that best implement their interpretive aims, or (in the absence of consensus about interpretive aims), choose doctrines on which judges would reach an incompletely theorized agreement. But empirical uncertainty makes interpretive instrumentalism difficult to execute. Not only is critical information lacking, but, as discussed more fully below, courts can do little to gen-

125 See supra note 104 (discussing indeterminacy of empirical studies on deterrent effect of death penalty).
126 See supra note 110 and accompanying text.
127 Cf. Eskridge, supra note 108, at 676 n.11 (“To have a cash-value, evidence does not have to dispel all doubt; a story that changes my probability assessment from 35 percent to 40 percent has a significant cash-value.”).
128 See infra Part II.B (discussing collateral costs of mechanisms by which judges could generate empirical information about interpretive doctrine).
erate new information. Accordingly, many of the relevant empirical questions are unanswerable in the short or medium term, and courts must choose between plausible candidate doctrines under conditions of severe empirical uncertainty.

B. Generating Information: Judges, Scientists, Engineers, and Experimentation

On the picture sketched in the preceding section, judges are often faced with empirical and predictive questions that would, if answered, determine the choice of interpretive doctrines. But those answers will often be absent. In such a situation, the straightforward reaction is to delay the moment of choice until the needed information arrives or can be generated. The analogy would be to the process by which scientific controversies are resolved. The norms that govern the process of scientific research instruct contestants in these controversies to suspend judgment until the needed experiments have been performed and data collected.

Yet this seems an unrealistic analogy by which to orient interpretive choice. In trial litigation, scientific criteria of accuracy are often subordinated to practical concerns about the legal system, such as the swift resolution of controversies or skepticism about juries’ judgment. So too, social and institutional considerations will often make it impossible for courts either to suspend judgment until the facts are in, or to generate needed information themselves. It follows that judges engaged in interpretive choice should be wary of scientific analogies and of calls for experimentation.

A more plausible analogy would compare judges constructing a system of interpretive doctrine to engineers. The engineer cannot

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130 See infra notes 131-48 and accompanying text.
131 See H. Tristram Engelhardt, Jr. & Arthur L. Caplan, Scientific Controversies: Case Studies in the Resolution and Closure of Disputes in Science and Technology 8-16 (1987) (noting that “sound argument closure” of controversies, based on rational evaluation of ongoing experiments, is prescriptive ideal of science, in place of closure on grounds such as force and negotiation). A different analogy addresses the economic theory of investment under uncertainty. One important account says that rational investors enjoy “option value” from the ability to delay irreversible investments until new information has come to light. See Avinash K. Dixit & Robert S. Pindyck, Investment Under Uncertainty 6-9 (1994). In those terms, this section suggests that the option value of the ability to choose interpretive doctrines later, rather than now, is probably low, because waiting is itself costly and because little information will emerge in the interim.
133 Cf. Dorf, supra note 29, at 51-79 (describing variety of techniques by which Supreme Court could “experiment” in order to obtain information relevant to both interpretation and policymaking).
often experiment, unless experimentation is so broadly defined as to become equivalent simply to learning from observation and experience. The engineer would, in principle, like to build a full-scale prototype of the project and observe its performance under the conditions that will affect the project.134 Yet the size and costliness of the project will usually forbid such an effort and condemn the engineer to uncertain estimates and extrapolations. Analogous criticisms beset the idea that judicial experiments with candidate doctrines of interpretation can generate the information needed for the informed exercise of interpretive choice. The collateral costs of judicial experimentation will often prove prohibitive.

Two principal forms of experimentation should be distinguished. First, judges might engage in provisional interpretive choice, by choosing an interpretive doctrine in a tentative fashion with an explicit proviso that the doctrine may be revised in the future. The hope is that the application of the doctrine to a stream of future cases will provide information enabling the original choice to be updated, either by confirming that choice or by switching to a new doctrine. Second, judges might adopt a decentralization strategy. The Supreme Court, for example, might explicitly permit the circuit courts of appeals to adopt divergent interpretive doctrines in the hope that a comparison of cases arising from different circuits will illuminate the effects of candidate doctrines.135

1. Provisional Interpretive Choice

Under provisional interpretive choice, judges might choose a doctrine and then hope that deciding a stream of future cases under that doctrine will provide them with information that will enable them to update their original choice. But updating will by no means prove a cure-all. The stream of future cases will provide information only about the doctrine chosen. The question of interpretive choice is comparative, however, and there will be no new information about the doctrine not chosen. Switching to the originally rejected doctrine in order to generate information about that alternative is possible, but highly destabilizing. Whether the information gained justifies the attendant costs in legal uncertainty will itself prove to be a contestable

134 See Weinberg, supra note 101, at 6 ("Uncertainty is, in a sense, inherent in engineering: unless one is willing to build a full-scale prototype and to test it under the precise conditions that will be encountered in practice, there is always the uncertainty of extrapolating to new and untried circumstances.").

135 These terms, provisional interpretive choice and decentralization, are adapted from Dorf, who uses the terms "provisional adjudication" and "decentralization." See Dorf, supra note 29, at 60-62 (analyzing doctrinal experimentation by Supreme Court).
question with empirical components, a question on which the experi-
ment will provide no guidance.

A related problem is that the institution that provisionally
chooses the interpretive doctrine may not itself receive the updated
information. The Supreme Court, for example, may choose between
possible doctrines based on the justices' empirical hunches, but the
lower courts will handle the bulk of the subsequent cases.\textsuperscript{136} If the
doctrine chosen is applied by the lower courts in a (nominally) uni-
form fashion, the Supreme Court will probably not revisit it even if it
proves suboptimal, for the Court's certiorari policy rarely provides
grounds for review in the absence of a conflict between the lower
courts.\textsuperscript{137} The uncertain transmission of information within the multi-
tiered structure of the judicial hierarchy makes the idea of updating,
derived from a Bayesian model of \textit{individual} decisionmaking, largely
inapposite.\textsuperscript{138}

2. Decentralization

The Supreme Court could initiate a different type of experiment
by decentralizing statutory interpretation doctrine. For example, the
Court could allow the various federal courts of appeals to experiment
with different doctrines of interpretation; or the Court could refrain
from granting certiorari in order to allow the beneficial "percolation"
of interpretive ideas to proceed (but only for a time, so this idea over-
laps with provisional interpretive choice).\textsuperscript{139}

But it is hardly clear that much useful information could be
gained by such an experiment. The analogy between percolation and
federalism is quite remote.\textsuperscript{140} The judicial circuits are not indepen-
dent "states"; rather, they are subject to a common legislative body
and executive authority, a factor that complicates the interpretation of
the experiment. If two states adopt two different interpretive doc-
trines, empiricists can, in principle, isolate the policies' comparative

\textsuperscript{136} Accordingly, justices occasionally note that the Court's interpretive doctrines will
affect the lower courts as much as the Court itself. See, e.g., Bank of Am. Nat'l Trust &
Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1426 (1999) (Thomas, J.,
concurring) ("The methodological confusion created by \textit{Dewsnup} [\textit{v. Timm}] has en-
shrouded both the Courts of Appeals and, even more tellingly, Bankruptcy Courts, which
(Scalia, J., dissenting) (expressing "the greatest sympathy for the Courts of Appeals who
must predict which manner of statutory construction we shall use for the next Bankruptcy
Code case").

\textsuperscript{137} See Sup. Ct. R. 10 (listing grounds for granting certiorari).

\textsuperscript{138} See infra note 153 (describing Bayesian approach to estimation of probabilities).

\textsuperscript{139} See Dorf, supra note 29, at 65-66 (discussing "percolation").

\textsuperscript{140} See id. (discussing "temporary disuniformity" in system of federalism and "percola-
tion" in federal judicial system as kindred strategies).
effects (although, as the death penalty example shows, controlling for all of the important variables may prove impossible in practice). But if the Fifth Circuit adopts a presumption in favor of extraterritoriality and the Eleventh Circuit adopts a presumption against it, Congress must react to both regimes simultaneously—or, rather, to one regime of disuniform interpretive doctrine. The experiment will not yield comparative information about congressional reaction to one (uniform) default rule or the other. If the aim of the decentralizing experiment is to supply the Supreme Court with the data necessary to choose a default rule, then that missing information is precisely what is needed.

Indeed, it is unclear whether it is even possible for the Court to decentralize statutory interpretation doctrine. For example, the political branches could not possibly accept a situation in which the extraterritorial application of federal statutes, and thus American relations with the affected nations, turned upon the fortuity of which internal judicial district happened to have jurisdiction. The problem might be less severe for other doctrines of solely domestic significance, but it might prove equally severe. The costs of disuniformity (and the perceived injustice and arbitrariness that accompany disuniformity) would probably prove intolerable if the relevant interpretive doctrines happened to find application in civil rights cases, in cases affecting other interests of constitutional stature, in cases affecting interstate commerce, and in environmental cases—which is to say most of the statutory interpretation cases that matter in the federal system.141

Thus, neither provisional adjudication nor decentralization will prove of much help. In general, the idea behind provisional adjudication and decentralization is salutary. It is to lower the risks, and the stakes, of interpretive choice by gathering information before choices are made and by confining, either temporally or jurisdictionally, the effects of the necessary experiments. But whether the costs of instability, disuniformity, repeated decision, and reevaluation imposed by such policies are worth the information obtained is itself an empirical question and indirectly one of interpretive choice. Moreover, the experimental results will not, in fact, provide the information needed (eventually) to choose uniform interpretive rules.142 In general, judges, like engineers, are subject to cost constraints that sharply limit

141 Dorf is fully aware of the collateral, systemic costs of experimentation. See id. at 66 (observing that “balanced against the learning facilitated in each case by temporary disuniformity are the costs that may accompany legal uncertainty, including unprotected reliance, inability to plan, and excessive litigation”).

142 See supra notes 139-41 and accompanying text.
their ability to generate full information before making crucial decisions under uncertainty.\textsuperscript{143}

\textbf{C. Informational Advantage and Judicial Capacities}

This picture of the empirical posture of interpretive choice is bleak. But it would be misleading to make the picture \textit{uniformly} bleak. Courts have relatively better information, or the capacity to generate and assimilate information, about some of the questions pertinent to interpretive choice than they have about others.

The elements of interpretive choice for which the judges' informational advantage seems most pronounced are the costs of adjudication and the effects of various interpretive rules on the judges' caseloads—two critical components of decision costs. "Decision costs" is a broad rubric that might encompass direct (out-of-pocket) costs of litigation to litigants and the judicial bureaucracy, including the costs of supplying judges with information needed to decide the case at hand and formulate doctrines to govern future cases; the opportunity costs of litigation to litigants and judges (that is, the time spent on a case that could be spent on other cases); and the costs to lower courts of implementing and applying doctrines developed at higher levels.\textsuperscript{144}

The hypothesis of informational advantage seems strongest with respect to direct judicial decision costs under various interpretive and substantive rules; presumably judges know how they spend their own time. Moreover, as most judges have practiced law, and all judges observe litigation frequently, they also understand the direct costs of litigation to parties, or at least understand those costs better than the wholly external costs of judicial decisionmaking. Judges also observe the relative costs and benefits of rules and standards, but only insofar as the choice of legal form bears on their own decisionmaking. The time spent to develop a rule in the present case reduces decision costs in future cases and vice-versa for standards. Judges at any particular level of the judicial hierarchy will probably know less about the decision costs incurred by judges at other levels than they do about their own, but will probably have a decent sense of decision costs at lower levels in the hierarchy, at least if decision costs do differ significantly between the appealed and unappealed cases. And the Supreme Court should have a decent sense of the overall caseload in the system, and

\textsuperscript{143} See Weinberg, supra note 101, at 6 (noting that time constraints and limited resources often require decisions based on incomplete data).

\textsuperscript{144} Cf. Richard A. Posner, Economic Analysis of Law 599 (5th ed. 1998) (referring to "the cost of operating the procedural system").
perhaps even some sense of the direction in which changes in judicial doctrine push the caseload.

None of these factors are perfectly known to judges. The proper comparison, however, is not to perfect knowledge, but to judges' understanding of other empirical components of interpretive choice that predictably lie far beyond their realm of competence. The reaction of legislative coalitions and agencies to changes in interpretive doctrine, for example, is in principle a critical question for interpretive choice. But generalist judges in many cases have neither background expertise concerning internal congressional and administrative mechanics, nor the time to acquire it, engrossed as they are in the details of particular cases.

In general, the judges will have a weak grasp of the institutional understanding and positive political analysis needed to predict or observe the reactions of other institutions to interpretive choice. Even arguments like Lieber's, which focus solely on observable legislative outputs, describe large-scale changes in the pattern of lawmaking activity over long periods; yet only a fraction of statutory changes ever come to the judges' attention. So claims about the effects of interpretive doctrine on legislative behavior and output will prove extremely difficult for individual judges to assess and there is no reason to think that the judges collectively will do much better.

A further complication is that, even if the judges do possess informational advantage with respect to certain components of interpretive choice, the usefulness of the advantage is unclear. Many interpretive choices rest on a mixture of components, about some of which judges plausibly have better information than others. Whether the judges should consult legislative history, for example, encompasses at least the following factors: the judicial decision costs of the candidate legislative-history rules; the number and gravity of errors under the candidate rules (measured against some specified end, say the median legislator's intent); and the costs to legislators of transferring instruc-

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145 See supra Part I.B.3.
146 See International Bhd. of Elec. Workers v. NLRB, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring) (suggesting that "judges . . . have neither the time to review the entire history of a particular bill nor the experience to filter out the political overtones"); Reed Dickerson, Statutory Interpretation: Dipping into Legislative History, 11 Hofstra L. Rev. 1125, 1142 (1983) (arguing that "[m]ost courts simply have no realistic grasp of how legislation is put together"); Kenneth A. Shepsle, Congress Is a "They," Not an "It": Legislative Intent as Oxymoron, 12 Int'l Rev. L. & Econ. 239, 254 n.27 (1992) ("[C]ourts as currently constituted possess neither the resources nor the intellectual inclination to do the kind of systematic legislative history that is sensitive to supply-side institutional intricacies.").
147 See supra text accompanying note 75.
tions from legislative history to text (or vice-versa) under the candidate rules. The first factor is probably more susceptible to judicial estimation than the second, and both of those determinations are probably far easier for judges to assess than the third.

Most problems of interpretive choice, then, will display a mixture of two kinds of empirical variables, some that are subject to judicial experience and (therefore) informational advantage, and some that are largely mysterious to generalist judges. The resulting question is obvious: What can be done if the empirical components of interpretive choice on which the judges lack informational advantage are as important to the overall decision as are the more tractable components? That question is taken up in the next Part.

III
INTERPRETIVE CHOICE UNDER EMPIRICAL UNCERTAINTY

Parts I and II sketched the conditions under which judges must choose interpretive doctrines in order to attain the ends given by some higher order account of statutes' political authority. Those conditions require interpretive choice, yet threaten to make its exercise intractable. This Part surveys strategies or techniques of practical reasoning under conditions of empirical uncertainty that promise to resolve questions of interpretive choice even in the absence of full information, and even under conditions of limited judicial capacity to evaluate the information that exists. Not all of those strategies prove sound. Accordingly, the aims of this Part are both descriptive—to catalogue techniques invoked, explicitly or implicitly, in debates over interpretation—and normative—to indicate which of those techniques appear particularly cogent, manageable, or fruitful.

A. Decision Theory

Economists address decisionmaking under severe empirical uncertainty using decision theory, a branch of rational choice. A brief overview of the methods of decision theory frames the specific strategies discussed in subsequent sections and illuminates the conditions

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148 For a similar list, see Cass R. Sunstein, Justice Scalia's Democratic Formalism, 107 Yale L.J. 529, 548 (1997) (reviewing Scalia, supra note 26):
Whether it makes sense to use legislative history depends on such issues as the simple costs of using the history, the likelihood that it will increase rather than decrease errors, the availability of other more reliable sources of meaning, and the consequences for the legislature itself of using legislative history or not using it.

under which those strategies aid the project of interpretive choice, although decision theory by no means exhausts the category of relevant strategies.

In decision theory, "uncertainty" has a precise meaning. Decisions under risk refer to decisions in which the decisionmaker knows both the payoffs of various outcomes and the probabilities attached to those outcomes. In those cases, the decisionmaker can choose so as to maximize expected utility. The term uncertainty is reserved for the class of situations in which the decisionmaker knows the payoffs associated with various outcomes but not the probability that the possible outcomes will come to pass.

Decisions under uncertainty can be reduced to decisions under risk, and thus made tractable, by assigning probabilities to outcomes. Probabilities may be assigned in two ways. One method is the frequentist approach, in which the probabilities are derived from the frequency with which the various possible outcomes have occurred in similar choice situations in the past. Where the relevant decision is one in a repetitive series of similar decisions, the decisionmaker can acquire information about the objective frequency of the occurrence of possible outcomes across the whole series. A different way to assign probabilities to outcomes is subjectivist. On this model, decisionmakers assign subjective probabilities to possible outcomes through a poorly understood process of judgment and intuitive hunch.

In many cases, however, neither frequentist nor subjective methods of reducing uncertainty to risk seem wholly rational. Many decisions do not fit within a series of similar decisions from which frequencies can be derived, because unusual or even unique features

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150 See Daniel M. Hausman & Michael S. McPherson, Economic Analysis and Moral Philosophy 30 (1996) (defining uncertainty as circumstances in which "some of the probabilities are unknown"); see also R. Duncan Luce & Howard Raiffa, Games and Decisions 277-78 (1957) (describing uncertainty as situation in which "the decision maker is 'completely ignorant' as to which state of nature prevails").


152 See id.

153 For explanation of the frequentist and subjectivist (or Bayesian) approaches to probability, see Hausman & McPherson, supra note 150, at 30-31; see also D.S. Clarke, Jr., Practical Inferences 125-26 (1985) (noting that decisions under uncertainty arise when people lack information necessary to assert objective probabilities of outcomes and can only express "varying degrees of belief in the outcomes, or their subjective probabilities").


155 See id. (explaining subjectivist account of probability).

of the decision dominate the features it has in common with past situations of choice.\textsuperscript{157} Moreover, even where the decision situation is repetitive, the particular decisionmaker may participate in only one or a few such decisions. Jurors, for example, may sit on only one of many similar cases.

Subjectivism, in turn, is plagued by two particularly serious problems. First, there is some experimental evidence that subjective probability assignments turn on the procedure used to elicit them.\textsuperscript{158} If so, those assignments are an artifact of the framing and presentation of the choice situation, rather than the product of elements in the world external to the decisionmaker. Second, and more generally, decisionmakers will sometimes simply lack the background information or sources of judgment necessary to form a probability estimate that is more accurate than a random assignment.\textsuperscript{159} Often the only reasonable answer to a question of probabilities is, “who knows?”

When uncertainty cannot be reduced to risk because probabilities cannot sensibly be assigned to outcomes, decision theory loses some, but not all, of its determinacy. Some choices may be dismissed because they will produce worse outcomes than any other possible choice, no matter what the probabilities of those outcomes are.\textsuperscript{160} Even where that happy contingency fails to determine a single best choice among the set of possible choices, decisionmakers can adopt several possible approaches. They may, for example, adopt a “maximin” strategy by choosing the option whose worst possible outcome is better than the worst possible outcomes of the competing options (that is, maximize the minimum payoff from the option chosen).\textsuperscript{161} Nothing internal to decision theory, however, can tell the decisionmaker whether or not maximin is preferable to alternative approaches, such as making the choice whose best possible outcome is

\begin{footnotesize}
\begin{enumerate}
\item See Hausman & McPherson, supra note 150, at 31 ("[P]eople may have degrees of belief about events for which relative frequencies cannot be defined, such as the outcome of a particular World Cup soccer competition.").
\item See Jon Elster, Nuts and Bolts for the Social Sciences 34-35 (1989) (observing that "value depends heavily on the procedure used for eliciting it").
\item See Elster, supra note 156, at 11 (observing that actors with "little information or poor judgement" would behave irrationally if they form[ed] and act[ed] upon [probability] estimates").
\item See id. ("When the situation is recognized as one of uncertainty, rational-choice theory is limited, but not powerless. Sometimes we are able to dismiss an option in the presence of another that, regardless of which state of the world obtains, has better consequences."); Edward L. Rubin, The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions, 109 Harv. L. Rev. 1393, 1431 (1996) (arguing that when choosing public programs under uncertainty, "[c]ertain programs will be better than others; they will provide greater benefits for the same cost, the same benefits at lower cost, or perhaps even greater benefits at lower cost").
\item See Luce & Raiffa, supra note 150.
\end{enumerate}
\end{footnotesize}
better than the best possible outcome of any competing option ("maximax").

In the end, decision theory provides insufficient insight into choice of interpretive rules. Few interpretive choices (and component sub-choices) fall within the category of decisionmaking under risk. There is some chance that switching to a presumption in favor of extraterritoriality will increase legislative drafting costs, but that probability cannot be quantified, because no series of similar trials exists from which to generate a frequency or a nonrandom subjective probability assignment. Indeed, many interpretive choices cannot even be described as decisionmaking under uncertainty in the technical sense. Such decisionmaking requires that the payoffs of the various possibilities be known. But that condition frequently will go unmet in matters of interpretive choice. If switching to a presumption of extraterritoriality did increase drafting costs, by how much would it do so? The current state of empirical research about legislatures is too poorly developed to provide an answer. So the uncertainty that afflicts interpretive choice is even more daunting than uncertainty in the economists' sense.

There is an even more serious problem. Decision theory supposes that the possible outcomes are just states of the world, chosen by nature but not by another strategic actor. Interdependent decisions of the latter sort are the province of game theory and bargaining theory, both of which quickly become indeterminate as the number of players grows and the complexity of the game increases. Some of the decisions necessitated by interpretive choice might be understood as decisions under possible states of the world, but some, perhaps many or most, are better seen as interactive decisions. The responses of legislatures, agencies, lower courts, and the bar will feed back into the interpretive rules chosen by the Supreme Court, undermining or confirming their premises. Recall Lieber's view that literal-

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162 See Elster, supra note 156, at 12 (where maximin and maximax yield different choices, "[p]sychological theories may be able to explain which choice will be made, but rational-choice theory, by itself, is indeterminate").


164 Statutory interpretation can thus be modeled, in positive terms, as a sequential game between Congress, the President, and the Supreme Court. See, e.g., William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523 (1992) (providing positive model of lawmaking process).
Interpretive choice might change legislative output in ways that would make literalist interpretation less attractive. The theory of decisionmaking under uncertainty does provide some guidance, but only of an informal sort. Decision theory describes strategies or approaches that can help decisionmakers even if the conditions that limit those strategies are not satisfied, for the strategies will often have informal analogues. The maximin strategy, for example, is well-defined only if the payoffs of various outcomes are known. Even if this premise is incorrect—perhaps especially then—the looser idea that decisionmakers should attempt to stave off disaster is fully coherent. Other strategies also have analogues in practical reason, but the most formal versions of decision theory will prove too confined for this task.

B. Consensus and Expertise

Another popular strategy (or family of related strategies) for making decisions under severe empirical uncertainty is to adopt the consensus of some reference group, perhaps a group of experts. Both rational choice and Burkean approaches suggest that deference to a developed consensus is often a sensible move for actors who themselves lack the information necessary for decisionmaking. One impetus for the strategy derives from the idea that many speculative assessments of unmeasurable costs and benefits might prove better than one or a few. Scholars have proved, under certain conditions, that the cumulative vote of a group of independent decisionmakers, each of whom is more likely than not to get a decision right, will approach greater and greater accuracy as the number in the group increases. More heads are better than fewer, so long as each head is probably right. A related point is that consensus reduces the variance of opinions and thus dampens the effect of extreme views. The typical structure of hierarchical judicial systems illustrates these institutional principles: The number of judges hearing a given case usually increases as the case ascends through the judicial hierarchy, which emphasizes that the most controversial decisions will tend to be made by a larger group of judges.

165 See supra text accompanying note 75-76.
166 See Luce & Raiffa, supra note 150, at 278.
168 This is a theorem first demonstrated by the Marquis de Condorcet. See Waldron, supra note 32, at 344-46.
Another idea suggests that the consensus of a group of *experts*, in particular, might reach salutary decisions. A decisionmaker who is aware that he lacks crucial information might sensibly defer to the views of some reference group of experts who have sought to acquire that information. Experts can conduct the requisite rigorous large-scale empirical studies without the pressure of immediate decision that complicates the task of interpretive choice for judges. Even where empirical studies in keeping with social science standards are impossible or too costly to conduct (rendering the empirical questions trans-scientific), long exposure to similar problems might develop the experts’ intuition and judgment in ways that compensate for the lack of specific, articulable information. One reference group of experts particularly popular with academics is the reference group of academics. Eskridge, for example, has critiqued textualist approaches to statutory interpretation by pointing out that the great bulk of academic studies have concluded that textualism performs rather poorly. The dangers of basing decisions on purported expertise or on the consensus of a reference group are well known. Even putting aside the cognitive biases that afflict experts, such as overconfidence, decisionmakers should rely upon consensus or purported expertise only when the expert or reference group has formed its opinions by sustained empirical study of, or by practical experience with, the rele-

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169 This is the impetus behind the common strategy of formal delegation of a decision to an expert group, institution, or specialized agency; from this point of view, judicial reliance on expert consensus is a form of delegation. See generally Arthur Lupia & Matthew D. McCubbins, The Democratic Dilemma: Can Citizens Learn What They Need to Know? 79-93 (1998). The expertise justification also underpins some approaches to the interpretation of enacted commands. See, e.g., Andrei Marmor, Interpretation and Legal Theory 176-80 (1992) (defending intentionalism on ground that lawmakers’ greater expertise makes their intentions proper object of interpretation). For a helpful introduction to the political science and rational choice models that illuminate decisionmakers’ responses to unverifiable claims by experts, see generally David Austen-Smith, Strategic Models of Talk in Political Decision Making, 13 Int’l. Pol. Sci. Rev. 45 (1992).

170 This hope, however, is undermined by the studies of improper linear models in a range of decisional settings, such as clinical diagnosis and the admission of students to colleges and graduate programs. In these settings, simple formulas—“admit students with a combined G.P.A. and SAT score of X”—have been shown consistently to outperform the case-specific judgment of “experts” using “professional judgment” and other tools of nonlinear decisionmaking. See Robyn M. Dawes, The Robust Beauty of Improper Linear Models in Decision Making, in Judgment Under Uncertainty: Heuristics and Biases 391, 396-97 (Daniel Kahneman et al. eds., 1982).

171 See Eskridge, supra note 26, at 1551-52 & nn.51-52 (citing articles supporting this assertion).

vant choices. If that condition fails, the decisionmaker does no better by adopting the expert consensus than by relying upon his own judgement. Deference to a consensus also requires the experts to have formed their views by independent assessment (which need not, of course, entail isolation or the absence of discussion). If they have not—if, in the worst case, the group is influenced by some selection bias, professional norm, or opinion cascade that herds the whole group towards one policy option without independent consideration by (most of) the group’s members—then some of the principal advantages of having multiple decisionmakers will be lost. 173

Even where the needed information can be provided by expert institutions, courts will often be poorly situated to absorb that information and to deploy it in situations of interpretive choice. The question is about the assimilative capacity of the courts. One view supposes that judges can draw successfully upon empirical studies of the consequences of interpretive decisions. 174 A different view emphasizes that federal judges are generalists untrained in the skills needed to sort out good social science from bad, 175 that the judicial bureaucracy is small (both on an absolute scale and relative to the massive scale of the political branches), 176 and that the judiciary lacks the capacity to assimilate complicated empirical information generated by various social sciences about various areas of law.

Perhaps each of these views simply addresses a different time frame. In the sufficiently long run, judges will absorb information about the consequences of alternative interpretive doctrines if those consequences are studied, and they will do so without any formal training in social science methodology. People who are not doctors understand that vaccination immunizes the subject from a disease, something not even the most erudite of experts understood until the turn of this century. So too, over a sufficient period, new data and understandings will be incorporated into the judges’ understanding through a complex social process of explanation, translation, and interpretation by academics, lawyers, and law clerks, and by the genera-

173 See David Schkade et al., Deliberating About Dollars: The Severity Shift, 100 Colum. L. Rev. (forthcoming May 2000) (noting psychological mechanisms that cause groups to reach erratic judgments).
175 See Dorf, supra note 29, at 4, 53 (arguing that the judiciary lacks the institutional capacity to gather and digest social science data); see also Easterbrook, supra note 34, at 69 ("Judges are overburdened generalists, not philosophers or social scientists. Methods of interpretation that would be good for experts are not suitable for generalists.")
176 See Komesar, supra note 66, at 123 (contrasting relative scale of political and judicial branches).
tional turnover (and thus changing educational profile) of the judges themselves.

The hard question, though, is what to do in the short and medium term. In that time frame, judicial institutions probably do lack the expertise, and administrative structures for managing expertise, needed to assimilate emerging social science research on the consequences of interpretive rules across time or across jurisdictions (assuming for argument's sake that such information could be obtained). In addition to the limitations imposed by judicial amateurism and the small scale of the judicial bureaucracy, the resolution of social science disputes is rarely as definitive as the resolution of disagreement in the natural sciences, so the judges will often face some level of expert dissent on the important empirical questions. And the lawyers, often the court's most helpful source of information, will want to supply the information most beneficial to their particular case. That interest will not necessarily lead them to provide accurate or helpful information about the choice of general doctrines, especially to the extent that those doctrines have a rule-utilitarian cast. The trans-scientific character of the empirical questions relevant to interpretive choice is thus compounded by institutional deficiencies. Not only is information hard to obtain, it is hard for judicial institutions and the adversary system (judges, the judicial bureaucracy, lawyers, and parties) to use expert judgment successfully.

C. The Allocation of Burdens

One strategy of enduring popularity across areas of doctrinal controversy and institutional design is to allocate the burden of overcoming empirical uncertainty on particular questions to one side or the other. Burden allocation takes many forms.\(^{177}\) A common variant is to allocate the burden of empirical proof\(^ {178}\) to those advocating a change in the legal status quo: Unless the existing rule is demonstrably inferior to the proposed substitute, the existing rule will prevail.\(^ {179}\) In this version, the allocation of the burden, in essence, puts into the scales the costs of transition from one legal regime to another and weighs those costs against the party proposing the transition.

\(^{177}\) For helpful discussion of burdens of persuasion and proof in rhetoric, law, and legal economics, see Richard H. Gaskins, Burdens of Proof in Modern Discourse 21-37 (1992) (examining rhetorical use of burden shifting); Posner, supra note 154, at 203-19 (discussing burden of proof as mechanism by which law sidesteps factual uncertainty); Bruce L. Hay, Allocating the Burden of Proof, 72 Ind. L.J. 651 (1997) (providing economic model of burdens).

\(^{178}\) I shall use the phrase "burden of proof" as shorthand that elides technical distinctions among burdens of proof, burdens of production, burdens of persuasion, and so on.

\(^{179}\) See infra text accompanying notes 180-83.
Two examples from statutory interpretation illustrate this strategy:

1. *Legislative History*

One response to textualist critiques of legislative history illustrates the use of burden allocation to resolve issues of interpretive choice under conditions of severe empirical uncertainty. After noting that the choice between formalist and antiformalist approaches to legislative history turns upon a range of uncertain empirical and predictive judgments, the response argues that “in light of our longstanding traditions [that endorse the use of legislative history], a dramatic shift of the sort proposed by Justice Scalia [who would have the courts ignore legislative history most of the time] bears a heavy burden of justification, and he has not met that burden here.”

2. *Statutory Stare Decisis*

Critics of proposals for an absolute rule of statutory stare decisis suggest that the proposal faces a “heavy burden of demonstrating that [the] rule would stimulate the legislature to greater involvement in its constitutional responsibility for updating statutes.” This is, in part, a status quo version of the burden allocation technique; the suggestion is that “[t]he evidence is insufficient to reject the Court’s longstanding willingness to overrule its statutory precedents in compelling circumstances.”

Often the range, and therefore the usefulness, of the burden-allocation strategy will be limited. The idea that the proponent of legal change should bear the burden of empirical uncertainty is particularly vulnerable to this charge. The character of the status quo will often be highly contestable, and the more energy that courts and commentators must invest in deciding what it is, the sillier the enterprise be-

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180 See, e.g., Scalia, supra note 26, at 29-37; infra note 225 (citing other textualist scholars).
181 Sunstein, supra note 148, at 548.
182 Eskridge, supra note 50, at 2453.
183 Id.
184 Moreover, placing the burden of empirical uncertainty on the proponent of change often functions as a subtle attempt to defeat change by definitional fiat. As the proponent of change cannot demonstrate with certainty that the proposal will prove beneficial (it is, after all, a change), there will always be a residual uncertainty that can be used to defeat the proposal if the burden is set sufficiently high. Yet this sort of bad faith use of decision-making strategies is the proper study not of the normative theory of decisionmaking but of rhetoric. See Gaskins, supra note 177, at 30-37 (examining rhetorical functions of burdens of proof).
comes; why not just spend that time figuring out the best rule?\textsuperscript{185} The limiting case of this problem occurs when none of the alternative rules is currently in place, because a novel issue of interpretive doctrine has come to the Court's attention. In recent memory, for example, the weight to be afforded presidential signing statements, which explain the executive's interpretation of a statute, became a significant issue only during the Reagan Administration.\textsuperscript{186} These situations are not infrequent and the burden allocation strategy supplies little help in their solution.

It is sometimes possible to extend the scope of the burden allocation strategy by analogical reasoning. The role of presidential signing statements in statutory interpretation, for example, might be determined by analogy to their prominent role in treaty interpretation.\textsuperscript{187} But whether the analogy is apposite will often be subject to legal and factual debate—the president's role in treaty formation differs importantly from his role in the legislative process—and the proper allocation of the burden will once again become as contestable as the underlying question.

A different use of burdens of proof in situations of empirical uncertainty is to allocate the risk of decisionmaker error to one side or another.\textsuperscript{188} The presumption of innocence in criminal procedure supposes that decisionmakers will sometimes err and that the harms from an erroneous conviction are much greater than the harms of an erroneous acquittal.\textsuperscript{189} That example is fairly uncontroversial, but often the consequences of the alternative errors will be sufficiently unclear, and the normative evaluation of those consequences sufficiently contestable, that the assignment of a burden will prove as controversial and time-consuming as a full examination of the underlying cases would have been. An example is James Bradley Thayer's idea that statutes should be presumed constitutional unless they are clearly unconstitutional.\textsuperscript{190} Even if one sees nothing strange about "proving the

\begin{footnotes}
\footnote{185}{For an argument to this effect regarding legislative history, see infra text accompanying notes 217-23.}
\footnote{186}{See William D. Popkin, Judicial Use of Presidential Legislative History: A Critique, 66 Ind. L.J. 699, 702-09 (1991) (discussing increased use of signing statements in the Reagan Administration).}
\footnote{188}{See Posner, supra note 144, at 603-04.}
\footnote{189}{See id. at 604-05.}
\footnote{190}{See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 139-44 (1893) (proposing this rule).}
\end{footnotes}
law" in this way. Thayer’s implicit assessment of the relative gravity of the risks of error—that an erroneous judicial invalidation of a constitutional statute is more harmful than an erroneous judicial approval of an unconstitutional one—is eminently contestable.

Burdens of proof are perhaps most successful when used to generate information, as when, for example, an adjudicator can elicit information from the party who possesses it by placing the burdens of production and (perhaps) ultimate persuasion on that party. In situations of interpretive choice, however, the central problem is not that the information necessary for the choice must be elicited from some other actor, but that the information either is costly to generate or simply unavailable. In that context, burden shifting will often have the largely rhetorical function of saddling one view or another with the weight of irresolvable uncertainty.

D. All-Else-Equal

When a proposal to depart from the doctrinal status quo is rejected as overly speculative, because its proponents have failed to carry their burden of proof, the rejection also exemplifies another approach that might be called the *ceteris paribus* or "all-else-equal" strategy. Opponents of the proposal reason that the costs of transition from the status quo to the proposed alternative are clearly positive. Since the comparison of other costs and benefits between the two alternatives is so speculative as to wash out in a tie, the transition cost breaks the tie in favor of the status quo. This calculus implicitly assigns equal values to the other components of the total expected costs of the status quo and the proposed alternative. And the same

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191 See Gary Lawson, Proving the Law, 86 Nw. U. L. Rev. 859, 894-904 (1992) (arguing that questions of law deserve, and would benefit from, appropriate standards of proof).
193 See Bruce L. Hay & Kathryn E. Spier, Burdens of Proof in Civil Litigation: An Economic Perspective, 26 J. Legal Stud. 413, 413-14 (1997) (arguing that "[o]ptimally used, the burden of proof may minimize the expenditures devoted to gathering, presenting and processing information in litigation").
194 See supra Part II.
195 See infra text accompanying notes 196-02.
196 It is thus a relative of the principle of insufficient reason (also called the equal assignment rule), which instructs decisionmakers under uncertainty to assume that unknown probabilities are equal, and thereby transforms situations of uncertainty into situations of risk. See David M. Kreps, Notes on the Theory of Choice 146 (1988) (explaining that "the principle of insufficient reason... says that if I have no reason to suspect that one outcome is more likely than another, then by reason of symmetry the outcomes are equally likely, and equally likely probabilities may be ascribed to them"); Luce & Raiffa, supra note 150, at 284-85 (explaining criterion of insufficient reason). The equal assignment rule is, however, a technical concept which assumes that the full range of possible outcomes is known.
reasoning can be applied to other sorts of costs. Consider the following possible claim by way of example: Decision costs (especially litigation costs) will clearly be lower if the interpretive regime always excludes legislative history than if the interpretive regime ever admits legislative history. The comparison of other decision costs, error costs, and so forth between the two alternative regimes is indeterminate. If these are the only two alternatives, then, courts should exclude all legislative history. Under the all-else-equal theory, then, courts are pushed a long way towards interpretive formalism.197

Does this sort of reasoning make sense? Perhaps the all-else-equal strategy is nonrational or even irrational. The values of the other variables are unknown in the alternative regimes, but that does not mean they are equal; indeed, the unknown costs of one regime may well dwarf the unknown costs of the other. The all-else-equal strategy might be akin to trying to pick the larger of two numbers by choosing the one with the larger digit in the second decimal place when one knows nothing about the digit in the first decimal place.198 Indeed, a trite response to a ceteris paribus argument in any context is to point out that the ceteris are rarely paribus.199

But the all-else-equal strategy retains a nagging force and cannot be too easily dismissed. If the decisionmaker knows that one component of cost is higher in one regime than the other, but has little other information, on what other basis could the decision be made? More generally, the strategy is a natural response to the frequent impossibility of a fully maximizing decision under uncertainty. The possible effects of various courses of action, and the probabilities that particular effects (rather than other possible ones) will indeed come to pass, often lie well beyond the limits of human calculation, either because it is too expensive and time consuming to obtain the needed information, or simply because the needed information does not exist. Yet in such situations decisionmakers do not retreat into paralysis; rather,

Of course this is quite often not true; the decisionmaker often does not even know what the possible outcomes are. See Heap et al., supra note 151, at 349. So by the "all-else-equal" strategy I mean to indicate a looser approach of the kind suggested by Jon Elster. See Elster, supra note 158, at 32-36. The idea is that the decisionmaker assumes that unknowable factors cancel out and concentrates instead on those that are knowable or (especially) already known.

197 For an expanded version of this argument, see infra Part IV.A.4.
198 See Elster, supra note 158, at 32-36 (discussing decisionmaking when information is incomplete).
199 See, e.g., Robert Jervis, System Effects: Complexity in Political and Social Life 73 (1997) ("It is common to test the validity of propositions by making comparisons between two situations that are identical except for one variable. When we are dealing with systems, however, things cannot change one at a time—everything else cannot be held constant.").
they eliminate imponderables from both sides of the scales and focus instead on the variables that can be grasped. Jon Elster puts the point this way:

In many, indeed most, decision problems there are associated with each of the options a number of unknown and essentially unknowable possibilities whose materialization depends on the future development of the universe. When trying to make up one's mind, one has to assume that those and other unknowable factors on each side cancel out, so that one can concentrate on the knowable ones. Even among the latter, one has to focus mainly on the known ones, because of the direct costs and opportunity costs of collecting and processing information. The ensuing decision, although not ideally rational from the point of view of an omniscient observer, will at least be as rational as can be expected.

The all-else-equal argument thus animates positions on a range of legal issues, usually in the particular form of a status quo argument that predictable transition costs outweigh the indeterminate calculus of costs and benefits with regard to some proposal for legal change. An important defense of judicial review, for example, turns on this sort of practical reasoning under uncertainty:

Judicial review might be the best system for our society, but our acceptance of it outruns our belief that it is theoretically best . . . . One reason is that it works well enough, and it would be too costly and risky to reopen the question whether, abstractly considered, it is the best possible arrangement.

Sometimes, though, the all-else-equal argument is employed not to support the status quo, but to aid the assessment of the future consequences of doctrinal options. An argument against the proposal for an absolute rule of statutory stare decisis has been that, while other consequences are speculative, perhaps indeterminate, one certain and substantial consequence will be that bad precedents remain on the books. All else equal, then, the proposal should be rejected.

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200 See Elster, supra note 156, at 135.
201 Id.
203 That is how I understand the following passage:

It is hard to say that such a rule would actually have much effect, due to the difficulty in focusing Congress's attention on old and stale policy issues. But it is equally hard to say that the . . . proposed rule would not have some benefit along these lines. The issue then is whether there are costs of the proposed rule which would outweigh this quite modest potential benefit. The obvious cost of the proposal is that no one will overrule a number of stupid decisions which never generate sufficient legislative attention over the long haul. This is a substantial cost . . . .

Eskridge, supra note 50, at 2456.
The all-else-equal strategy seems most plausible under two conditions. First, the decisionmaker ought to have a pronounced informational advantage with respect to the consideration that is given dispositive weight, as compared to the considerations pronounced imponderable and, therefore, dropped from the decision. Otherwise there is no reason to think that a decision made on the basis of that consideration will prove more successful than one made on some other, equally speculative basis. Second, the decisionmaker should be able to discern that the consideration given dispositive weight is, in some loose sense, of the same order of importance as the discarded imponderables. If the dispositive consideration can be seen to be of trivial weight when compared to other possible consequences of the choice, the decision will display the irrationality of picking the larger of two numbers by focusing on the second decimal. It would, for example, be strange to propose the exclusion of legislative history on the all-else-equal ground that exclusion will at least (all-else-equal) save the federal judiciary the costs of buying copies of the United States Code Congressional and Administrative News. The greatest possible benefit attainable from that consideration seems predictably trivial in relation to the overall costs and benefits of legislative history.

An interesting and troublesome feature of all-else-equal arguments is that they can appear on both sides of a question of interpretive choice. The decisionmaker may possess an informational advantage with respect to more than one consideration relevant to the decision at hand, and those considerations may cut in opposite directions. Suppose it were clear that, whatever the other imponderable consequences of the decision, a switch from the expressio unius canon to the principle that lists are merely illustrative would provide a better majoritarian default and would therefore reduce the long-term costs of legislative drafting and statutory enactment. Suppose also that the switch would require courts to overrule precedents that announced the previous default rule, a course of action that would impose some

Interestingly, proponents of absolute statutory stare decisis respond in similar terms, with a different weighting of the variables:

[The focus should turn to the costs side of the equation. If the costs of the absolute rule are nonexistent or minimal, then a theoretically plausible marginal increase in congressional reaction ought to be welcomed. On the other hand, if the costs are significant, then incurring them for the sake of an unproved theoretical hypothesis would probably be a mistake . . . .] It is Congress's job—not the Court's—to decide whether a statute ought to be updated. Far from counting as a cost of the absolute rule, diverting courts from this legislative task is one of the primary goals of the thesis I have advanced.

Marshall, supra note 107, at 2472.

204 See supra note 198 and accompanying text.
short-term transition costs as the legislature, agencies, and the bar accommodated their activities to the new default rule. The decision whether or not to make the switch itself requires some second-order comparison of the magnitudes of the two knowable considerations. The decisionmaker then falls back into a new problem of choice under empirical uncertainty, one that can, in principle, be treated with the same techniques of reasoning under uncertainty as any other such problem.

E. Picking

A final response to the indeterminacy of rational choice, particularly in the presence of extremely high decision costs, is simply to pick a course of action rather than to choose one.205 Shoppers faced with a selection between different brands of similar goods will often pick indiscriminately rather than invest a great deal of time and energy comparing the goods’ particular features, because the investment necessary to make a fully informed choice dwarfs any possible gains from picking the slightly superior brand. Picking might take the form of random selection (flipping a coin), or perhaps the deliberate use of an irrelevant characteristic (perhaps the shopper always chooses the toothpaste in the blue tube). This is a low stakes situation, but decisionmakers also pick when high stakes are involved, especially if there is no reason to think that even a great deal of further information gathering and deliberation will make the problem significantly more tractable.206 A traveler lost at a crossroads might pick one path or the other, even if the decision is very important, simply because no amount of deliberation will reveal which path is the right one.

Overt picking is rare in law generally and in the formulation of interpretive doctrine in particular. Judges do not often say that they are simply picking between candidate doctrines, perhaps because the ordinary rhetoric of opinion writing often tries to suggest that every judicial decision is fully reasoned in a way that picking cannot be.207 Justice Scalia, however, has said about the canons of construction that “[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules,”208 which suggests that any clearly established canonical default rule is better than

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205 This discussion of picking draws on Sunstein & Ullmann-Margalit, supra note 72, at 7, 31-33 (distinguishing picking from choosing).
206 See id.
207 See Posner, supra note 154, at 190 (“[M]uch of what judges say about their jobs in speeches and opinions partakes of the same falsity that characterizes other political discourse.”).
judicial vacillation between the possible rules. Moreover, picking is closely related to the justifications for stare decisis, such as Holmes' claim that "one of the first things for a court to remember is that people care more to know that the rules of the game will be stuck to, than to have the best possible rules."\textsuperscript{209} The connection is that both picking and stare decisis attempt to conserve on the costs of deciding (for picking) and redeciding (for stare decisis) when there is little reason to think that the uncertain gains of making the very best decision will be worth the actual costs of the process itself. So picking is not alien to interpretive choice, although the political constraints on judicial resort to picking, especially resort to random selection, are likely to be formidable in many cases.

IV
Applications

This Part applies the preceding techniques of interpretive choice to the interpretive debates used as running examples in Parts I-III: the debates over legislative history, the canons, and statutory stare decisis. The analysis is illustrative rather than comprehensive, in several senses. First, there are many other doctrinal debates that might be examined in this way. Second, interpretive choice is always conducted relative to some theory of statutes' political authority, and the content of that theory will define the ends to be attained. The discussion here does not canvass every known or imaginable theory of authority; rather, it examines the doctrinal debates in light of a few leading positions, such as intentionalism (including its many variants) and textualism. Third, the discussion does not apply every technique to each doctrinal problem, but rather applies only the techniques that provide relevant arguments.

I conclude that interpretive doctrine should exclude legislative history altogether, should select canons and assign weights to canons by a process of picking rather than choosing, and should adopt an absolute rule of statutory stare decisis. It is no accident that these conclusions are largely formalist, in the sense that they entail a small, inflexible, and cheap set of interpretive sources. In many settings, the strategies of interpretive choice favor simple, straightforward doctrines that minimize judicial decision costs; minimizing decision costs is also the principal advantage of formalism.

\textsuperscript{209} Letter from Oliver Wendell Holmes, Jr., to Franklin Ford (Feb. 8, 1908), reprinted in Richard A. Posner, The Essential Holmes 201 (1992); see also Commissioner v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (stating that "in most matters it is more important that the applicable rule of law be settled than that it be settled right").
The all-else-equal strategy, in particular, tends to push interpretive choice towards formalism. Speaking very broadly, judges have far better information about the decision costs associated with various interpretive doctrines than they do about error costs, or about the dynamic reactions of legislatures and agencies to judicial rulings. In general, then, judges should assume away those latter, speculative considerations and focus instead on what they know, which means that judges should choose doctrines that minimize the costs of litigation and legal uncertainty.

A final caution is that the conclusions suggested here are necessarily tentative and contestable. Interpretive choice is conducted in a dense fog of empirical uncertainty, so it would be surprising if particular analyses of interpretive choice turned out to yield confident conclusions; the analysis can be only as robust as the subject matter. In any event, the point of the analysis is not to demonstrate conclusions, but to illustrate the process of conducting interpretive choice under uncertainty through a repertoire of decisionmaking strategies. In application to particular problems those strategies may often yield equivocal conclusions or no determinate conclusions at all. But something always beats nothing, and the alternatives—to choose doctrines on the basis of intuition, or (it is really the same thing) to avoid the problem of interpretive choice altogether—are no alternatives at all.

A. Legislative History

1. Decision Theory

Whatever the underlying theory of authority, it will prove nigh impossible to select the best legislative history doctrine (best in light of that theory) through a fully specified, fully informed choice. Take the example given at the outset: Should an intentionalist interpreter consult legislative history? In principle, that decision requires the comparison of at least the following candidate doctrines, all of which have variants and can be combined in several different ways to form more complex candidates:

a. Exclusion. Judges should not consider legislative history at all.

b. Exclusion as an authoritative source. Judges may not treat legislative history as an "authoritative" source, but they may treat it as a "persuasive" one.

c. The plain meaning rule. Judges may consider legislative history if, but only if, the statute is ambiguous or otherwise lacks a plain meaning.

See infra text accompanying notes 235-82.
d. The hierarchy of legislative history sources. Judges may always consult legislative history, but must observe a hierarchy among different legislative history sources: Committee reports usually trump sponsors' statements, sponsors' statements usually trump floor debate, and so forth.

Each of these candidate doctrines must be compared along many empirical dimensions, with the weight to be given to those dimensions specified by the underlying theory of statutory authority. Is the history a reliable indicator of the median legislator's intent (for the intentionalist), or of the ordinary use of statutory terms (for the textualist who admits "persuasive" legislative history)? Will judges of limited competence err more, and more seriously, under some of the candidates than others? Will adoption of one doctrine produce beneficial changes in legislative output, self-defeating changes in legislative output, or perhaps no appreciable change? What are the decision and litigation costs of the various regimes, both for judges and parties?

Many of these questions have intricate empirical interconnections. For example, to the extent that legislative history frequently supplies unreliable evidence relevant to some interpretive aim (or no evidence at all), then the litigation costs of legislative history become less justifiable—the judicial system gets less for its money. Reliability and costs interact with judicial error as well. The imperative to reduce spiraling costs of research and litigation may cause lawyers (and consequently judges who rely upon lawyers) to truncate their inquiries into expensive sources, thus increasing the rate of error if that is determined by reference to the baseline of the fully informed judge.

The number and complexity of the candidate doctrines, and the dimensions on which they must be compared, make a fully informed choice of legislative history doctrines impossible in practice. It is quite possible that, even from an intentionalist standpoint, judges will minimize error by excluding legislative history. But none of the relevant empirical assessments are demonstrable, measurable, or quantifiable, and many of them, such as the likelihood or nature of legislative response to a rule of exclusion, are not subject even to subjective

211 See In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) ("Legislative history may be invaluable in revealing . . . the assumptions [the enactment's] authors entertained about how their words would be understood . . . . [J]udges may learn from the legislative history even when the text is 'clear'. Clarity depends on context, which legislative history may illuminate.").

212 See supra text accompanying notes 71-82.

213 See Vermeule, supra note 33, at 1896 (arguing that "a rule that excludes legislative history displays the best mix of theoretical coherence and practical stability").

214 See id. at 1865 (noting that intentionalism's "implicit assumption" that reliance upon legislative history increases judicial accuracy depends upon "unprovable assessment").
probability assignments, at least if we favor assignments that have some foothold in experience. So there is little in the choice of legislative history doctrines for formal decision theory to grasp. The weaker techniques of interpretive choice must be called into service.

2. **Burden Allocation**

As previously mentioned, one critique of textualist attacks on legislative history emphasizes a burden allocation strategy, in the common form that places a burden on opponents of the (claimed) status quo. In light of the longstanding tradition of judicial resort to legislative history, the argument runs, the textualist has the burden of overcoming a presumption in favor of that tradition. But the textualist attack rests on dubious empirical premises, and thus fails to overcome the burden of opposing legislative history.

This burden allocation argument misfires for the usual reason: The character of the status quo is uncertain, even in flux. The most recent work suggests that the Court's use of legislative history rose slowly between 1892 (the date of *Church of the Holy Trinity v. United States*, the Court's first important use of legislative history) and the Second World War, reached an apogee during the Burger Court.

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215 See supra notes 158-59.
216 See Breyer, supra note 79, at 869 (referring to "legislative history status quo" and describing critiques of legislative history as proposals for "radical change"); Sunstein, supra note 148, at 540-41 (defending legislative history).
218 143 U.S. 457 (1892).
219 See Wald, Some Observations, supra note 217, at 195 (finding that Court used legislative history in virtually all of its cases in 1981 Term).
and declined sharply after Justice Scalia joined the Court. For example, in the 1992 Term, only 18% of the Court’s cases made substantive use of legislative history. The proportion is now rising slowly again, but the balance still weighs against legislative history: In the Court’s 1996 Term, 51% of the Court’s majority opinions in statutory cases did not use legislative history, and the figure was 54% for all opinions. The most that can be said about legislative history is that it was not used (or hardly ever used) before 1892—about half of our national history—that its use has periodically waxed and waned since then, and that nowadays it is eschewed a bit more often than it is used. In short, there simply is no settled tradition with respect to legislative history, and no settled status quo.

3. Consensus and Expertise

Until fairly recently, the academic consensus has been relatively hostile to textualism, including Justice Scalia’s critique of legislative history. Now, however, that consensus seems to be dissolving, and in any event it was never sufficiently well grounded to justify judicial reliance upon legislative history. Consensus-based arguments are most persuasive when the decisionmaker both lacks direct empirical information and knows that a reference group of experts has attempted to acquire that information. But the academic critiques of

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220 See Merrill, supra note 217, at 355.
221 See Schacter, supra note 217, at 18 (listing these figures).
222 See Vermeule, supra note 33, at 1836 & n.14 (discussing Court’s limited use of legislative history before Holy Trinity).
223 It is true that since Holy Trinity, the Court has never said that legislative history is off-limits and that it has always been used to some degree since then. So it might be said that there is a settled tradition in this century that legislative history may be used. But the observation is at too high a level of generality. If only 1% of the cases in the past century had used legislative history, similar reasoning would still identify a tradition of longstanding use. The more realistic approach is to ask how central legislative history has been to the Court’s interpretive practice. Given that as recently as the 1992 Term legislative history was used in only 18% of the cases, see supra text accompanying note 220, it is hard to see what settled practices would be upset by textualist proposals to eliminate legislative history altogether.
224 For a collection of references, see Eskridge, supra note 26, at 1513 n.10, 1551 n.151.
225 For favorable recent assessments of textualist positions on legislative history and other issues, see, e.g., Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. & Pub. Pol’y 401, 475-77 (1994) (praising Justice Scalia for advancing discussion of statutory interpretation but criticizing Scalia’s specific approach); Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 Sup. Ct. Rev. 231, 255 (arguing that textualism has positive value because it can bring “shared agreement among all of the Justices”); Slawson, supra note 114, at 383 (arguing that use of legislative history “reflects a crisis of confidence”); Vermeule, supra note 33, at 1896 (questioning whether courts can accurately interpret legislative history).
textualism (like interpretive theory generally) usually fail to address the empirical effects of textualism over a broad range of cases. Most of the studies are qualitative, analytical, and typically illustrate their points with a handful of difficult and frequently discussed cases. Although there are studies of the Supreme Court's use of legislative history and other sources in selected years, data that suffice to rebut some empirical claims, those data do not provide much constructive assistance, and there is even less information about other important variables, such as legislative response to interpretive rules. All in all, the consequences of textualism, as opposed to its jurisprudential underpinnings, have been so little studied (even considering only the consequences that might be knowable at all), that there is no available reference group of experts with better information than the judges themselves.

A different consensus-based argument for recourse to legislative history might point to the practice of other legal systems, in particular the House of Lords's decision in 1992 to abandon the traditional rule excluding parliamentary history (although under the new rules the history may be consulted only to resolve an ambiguity). While there are many differences between the United Kingdom's legal institutions and our own, some have recently argued that the differences suggest that American courts should adopt a less, not more, formalist stance.

226 See supra text accompanying note 110 (noting general dearth of empirical work on interpretive rules).

227 See, e.g., William D. Popkin, An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation, 76 Minn. L. Rev. 1133 (1992) (analyzing illustrative cases); Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" New Legal Process, 12 Cardozo L. Rev. 1597 (1991) (same). A partial exception is Eskridge, supra note 111, at 336-37, which examines a large number of cases to determine the effects of textualism on legislative overrides of Supreme Court statutory decisions. Two other studies that survey a large number of cases both express a qualified approval of textualism. See Robert K. Rasmussen, A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases, 71 Wash. U. L.Q. 535, 538 (1993) ("Textualism is . . . the best pragmatic strategy for the Court to employ when interpreting the Bankruptcy Code."); Schauer, supra note 225, at 232 ("The reliance on plain meaning . . . substitutes a second-best coordinating solution for a theoretically optimizing but likely self-defeating search for first-best solutions by multiple decisionmakers with different goals and different perspectives."). But see Nicholas S. Zeppos, The Use of Authority in Statutory Interpretation: An Empirical Analysis, 70 Tex. L. Rev. 1073, 1088, 1115 (1992) (examining legal sources used in 413 Supreme Court statutory interpretation decisions and concluding that Court frequently engages in "dynamic," nonformalist statutory interpretation).

228 See supra text accompanying notes 216-23 (noting that legislative history data undermine status quo arguments in favor of legislative history).

229 See supra text accompanying note 110 (noting dearth of empirical work on legislative behavior).

230 See infra note 285 and accompanying text.
in interpretation,\textsuperscript{231} As later discussed, however, that line of argument rests on unsupportable empirical assumptions.\textsuperscript{232} To be sure, if every other jurisdiction in the Anglo-American world consulted legislative history, the consensus-based argument for its use would cut more deeply, but that is not so; the Canadian courts, for example, adhere to the traditional rule.\textsuperscript{233} The comparative arguments regarding legislative history are unimpressive.

4. \textit{All-Else-Equal and Maximin}

A textualist prohibition on judicial resort to legislative history finds support in the all-else-equal idea that speculative costs and benefits should be assumed away in favor of attention to known variables, and in the maximin idea of avoiding the worst possible outcome. The argument posits that the costs of legislative history research and litigation to courts and parties, and therefore total judicial decision costs in a regime that uses legislative history, are exorbitant.\textsuperscript{234} But, as previously discussed, the external and collateral costs and benefits of legislative history—its relevance and reliability, its effects on the quantity and quality of congressional lawmaking, and so forth—are at best difficult to specify, and at worst wholly indeterminate. Those costs and benefits might be assumed to wash out. All-else-equal, then, decisionmakers should dispense with legislative history to minimize decision costs.

A prominent theme in judicial critiques of legislative history has been the practical point that legislative history research is, simply put, too costly and time-consuming.\textsuperscript{235} That legislative history is massively

\textsuperscript{231} See infra text accompanying notes 287-89.
\textsuperscript{232} See infra text accompanying notes 290-94.
\textsuperscript{233} See Attorney General of Canada v. Reader's Digest Ass'n, [1961] S.C.R. 775, 782 (holding that internal parliamentary debate is not admissible); The Queen v. Popovic, [1976] 2 S.C.R. 308, 318 (relying on \textit{Reader's Digest} to hold that explanatory notes, like all parliamentary legislative history, may not be considered in interpretation). Documents such as reports by royal commissions and boards may, however, be consulted to discern the mischief at which subsequent legislation was aimed. See Home Oil Distrib. Ltd. v. Attorney General for British Columbia, [1939] 1 W.W.R. 49, 51 (B.C. Ct. App.).
\textsuperscript{234} See infra notes 235-39 and accompanying text.
\textsuperscript{235} See, e.g., Schwengmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396-97 (1951) (Jackson, J., concurring) (arguing that researching legislative history is too costly and inaccessible for many lawyers); Scalia, supra note 26, at 36 ("The most immediate and tangible change the abandonment of legislative history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense."); Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371, 377 ("Substantial monetary costs are also imposed by the accumulated masses of legislative history produced by Congress on any given measure. Resort to legislative history forces lawyers not only to study the statute, but also to wade through formidable mounds of materials at federal depositories.").
voluminous and expensive to research is also widely, although not universally, believed by academic commentators, even by those otherwise critical of textualism 236—including Eskridge. 237 Legislators' incentives make it predictable that legislative history will be, over the run of statutes, far more voluminous and costly to research than text or other sources. 238 Legislators must, on average, spend far more political capital to insert material into statutory text than to insert the same material into legislative history, 239 so text will be produced in far less volume than legislative history.

Legislative history's contemporary defenders do not typically deny that researching legislative history is costly. Some say, rather, that the costs will diminish with changes in technology. 240 But technology makes other sources cheaper as well, so the relative costs of legislative history might remain stable or even increase. Moreover, cheaper technology makes it easier not only to research legislative history but also to generate it, 241 so the increase in volume might outstrip the increasing capacity for research. Other defenders of legislative history say, more simply, that the high decision costs are worth incur-

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236 For example, Professor Richard Pierce, a leading critic of textualism, has stated that "[t]he legislative history of any major statutory enactment is voluminous, difficult to compile, and difficult to research." Richard J. Pierce, Jr., The Role of the Judiciary in Implementing an Agency Theory of Government, 64 N.Y.U. L. Rev. 1239, 1258 (1989). For Pierce's criticisms of textualism, see Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 Colum. L. Rev. 749 (1995) (arguing that, at its extreme, textualism suffers flaws of intentionality, finding nonexistent linguistic precision, and by relying on abstract meanings of words contrary to Congress's intended result).

237 See Eskridge, supra note 26, at 1541 (noting that “net savings in research costs” of excluding legislative history from statutory interpretation would “involve[] a very large number of dollars”); Eskridge, supra note 80, at 1322 (noting, with some skepticism, that “the modern game of tracking down smoking guns in legislative history is both widespread and expensive”).

238 See Vermeule, supra note 33, at 1868-69.

239 See Manning, supra note 74, at 687-88 (“Actual statutory language is the dearest legislative commodity . . . . ’’); Daniel R. Ortiz, The Self-Limitation of Legislative History: An Intraintitutional Perspective, 12 Int'l Rev. L. & Econ. 232, 233 (1992) (“[I]t costs less to create legislative history than it does to change the words of the text or to change the courts' interpretive norms. A single legislator, for example, cannot change the words of a bill herself, but she can, by herself, add to the legislative history.”).

240 See, e.g., Wald, Some Observations, supra note 217, at 200 (“Legislative materials are now widely available through microfiche, hard-bound and softback compilations, and computerized services.”).

241 Congressional staff now engage in a practice called “scrubbing the record”: Remarks delivered by legislators on the floor are immediately transmitted to an electronic display system, where they can be edited or supplemented by staff. See Telephone Interview with Mark J. Brenner, former Counsel to the Senate Banking Committee (May 1, 1998).
ring for the informational value of legislative history. But that response is empirically far too ambitious. Whether the costs are worth it is deeply controversial and will remain so for a long time, precisely because most of the costs and benefits on either side are trans-scientific. There is far less uncertainty surrounding the question of decision costs; predictably, a regime that excludes legislative history will be cheaper, considering only the direct costs of litigation and decision, than any regime that admits legislative history. Canceling out other considerations suggests that legislative history should be excluded.

A maximin approach to decisionmaking, or at least an informal analogue of maximin, also supports exclusion of legislative history. Suppose the following situation: Consulting legislative history is very expensive, but might provide much valuable information about statutory meaning or legislative intent. It also might not; legislative history might actually increase the rate and gravity of judicial error. Moreover, the judges will be hard pressed to gauge the overall error costs of resort to legislative history, even after they have decided many statutory cases. In this situation, maximin supports the exclusion of legislative history. The worst possible outcome in this scenario is that the judges will frequently get statutory cases wrong. If legislative history is consulted, the worst possible outcome is that the judges get statutory cases wrong just as frequently, and the enormous expense of legislative history research will be incurred. Thus, choosing the rule that excludes legislative history improves the worst possible outcome.

To be sure, exclusion is not the only logically possible response to the extravagant decision costs and speculative collateral benefits of legislative history. Intermediate solutions are to admit only reports from congressional committees, or to consult legislative history only if the statute lacks a plain meaning. The promise of these solutions is to control decision costs while providing large benefits in interpretive accuracy; if those solutions are viable, the maximin argument will fail. But that promise is never fulfilled, because in practice such intermediate solutions prove highly unstable over any extended period, and inevitably collapse back into plenary consideration of legislative history. One cause of the instability is Eskridge’s insight that “once you open the door to consideration of legislative history, it is hard to

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242 See, e.g., Breyer, supra note 79, at 869 (observing that “the costs of using history are meaningful only when compared against the benefits of whatever clarity it may bring and with the costs of alternative ways of achieving the same objective”).
243 See supra notes 234-42 and accompanying text.
244 For documentation of these intermediate solutions, see Vermeule, supra note 33, at 1879-83.
245 See id. at 1880-81, 1883 (describing practical instability of intermediate solutions).
exclude any type of evidence without viewing it in the context of the whole story. Courts that prefer committee reports accordingly end up interpreting, or contradicting, the committee report with evidence from floor debate. Another cause of the instability is that the triggering conditions for these intermediate doctrines are highly malleable. Courts that profess adherence to the plain meaning rule, for example, often consider the legislative history even when they have found the text to be plain, because they must rebut arguments from dissenting judges or parties. The great virtue of the wholesale exclusion of legislative history, from the standpoint of judicial decision costs, is that it provides a comparatively (although not perfectly) stable and enforceable rule.

Perhaps the all-else-equal and maximin arguments against legislative history prove too much. Reading the whole text of the statute, for example, takes more time than reading just the section at issue in the case. Does that mean that judges should not read surrounding text? Even more absurdly, consulting no sources at all would incur far fewer decision costs than consulting any sources. Does that mean that judges should exclude all sources? Cheaper cannot always be better, because the judges and parties must spend some time and money to obtain information conducive to accomplishing their interpretive ends.

But this objection wrongly assumes that all interpretive sources are, like legislative history, optional. As previously mentioned, it so happens that the Constitution does not require judges to consult legislative history and none of the theories of statutory authority that compete in American law ever suggested such a requirement. By contrast, every known theory of authority requires the judges to read statutory text—it is not clear what it would mean to do "statutory interpretative exclusion would also prove unstable, as judges face pressure to use legislative history in cases of seeming scrivener's error or absurd result. Cf. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-29 (1989) (Scalia, J., concurring) (consulting legislative history in order to confirm apparent presence of absurd result). But, in fact, the historical evidence over the last few centuries suggests that the exclusionary rule is more stable than any of the intermediate solutions, such as the plain meaning rule. See Vermeule, supra note 33, at 1894-95 (discussing stability of various legislative history rules).
tion” without reading the text—and the Constitution says that duly enacted and constitutionally valid statutory text is the “supreme Law of the Land.” The optional interpretive sources, besides legislative history, are the canons of construction, statutes in pari materia, and perhaps precedent (in the sense that courts of last resort have the authority to overrule their own statutory precedents). Unsurprisingly, various proposals have recommended downplaying or discarding all of these sources at one time or another, and legislative history itself was largely unused during the first century of the federal courts’ existence.

There are additional valid concerns. Excluding legislative history might unduly impoverish the courts’ sources of information (about legislative intent, textual meaning, or any other end specified by the underlying theory), thereby increasing the risks of judicial error. If legislative history makes statutory cases more determinate by frequently clarifying ambiguous statutes or qualifying overly broad ones, then its exclusion might also impoverish the parties’ sources of information about how courts will rule, which might, in turn, increase legal uncertainty and the rate of litigation (as opposed to settlement). Exclusion might even raise the costs of litigation and adjudication in statutory cases if it caused parties to spend exorbitant amounts of time and money parsing statutory text, searching dictionary...

250 U.S. Const. art. VI, cl. 2.

251 For root-and-branch criticisms of the canons, see Richard A. Posner, The Federal Courts: Crisis and Reform 277 (1985) (“[W]ith a few exceptions, [the canons] have no value even as flexible guideposts or rebuttable presumptions, even when taken one by one, because they rest on wholly unrealistic conceptions of the legislative process.”); Scalia, supra note 26, at 28 (“To the honest textualist, all of these preferential rules and presumptions are a lot of trouble.”). For criticism of resort to statutes in pari materia, see West Virginia Univ. Hosp. v. Casey, 499 U.S. 83, 103 (1991) (Stevens, J., dissenting) (arguing that Court should seek guidance in legislative history and perceived purposes of statute under litigation, rather than in text of related statutes). For criticism of statutory precedent, see Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol’y 23, 24 (1994) (arguing that “the practice of following [constitutional] precedent is... affirmatively inconsistent with the federal Constitution” and stating belief that “the analysis is fully generalizable to cases involving statutory interpretation”).

252 See Vermeule, supra note 33, at 1836 (“Although... a few prior opinions had quietly breached the traditional rule, Holy Trinity was the first majority opinion of the Supreme Court to give legislative history sufficient weight to trump contrary statutory text.”). The discussion in the text does not argue that all or any of the optional sources besides legislative history should be excluded to conserve decision costs; each source must be evaluated separately, and then the net effect of different combinations of sources must be evaluated. As discussed below, a strong system of precedent itself conserves on decision costs, while a system of canons can simply be picked rather than debated at length. By contrast, resort to legislative history necessarily imposes large decision costs.

253 Cf. Merrill, supra note 217, at 368-70 (arguing that while legislative history sometimes broadens field of argument by impeaching clear statutory text, it more often narrows field of argument by resolving textual ambiguity).
ries and databases to find helpful usage, or even obtaining linguists to testify in support of their preferred readings.

These points boil down to the speculative prediction that all else might not prove to be equal. Whether exclusion would produce informational impoverishment or countervailing increases in decision costs, however, is itself the sort of trans-scientific question that the all-else-equal technique assumes away in favor of more manageable considerations. The most manageable and useable considerations are those about which there is adequate current information, such as the high decision costs of legislative history in the existing regime. This is not at all to concede the truth of the predictions about exclusion. A priori there is little reason to think that excluding legislative history would deprive the courts or parties of too much information or cause exorbitant reliance on linguists and dictionaries. Statutory text is widely thought to provide the best evidence of legislative intent or purpose; the reliability and relevance of legislative history is often questioned; and the era before *Holy Trinity* licensed recourse to legislative history did not witness extravagant varieties of textualism. But these empirical claims and counterclaims are highly contestable. What is not reasonably contestable is that, in the current regime, the expense of legislative history is exorbitant. On all-else-equal and maximin grounds, such considerations make a strong case for the exclusion of legislative history.

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255 See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (No. 93-723), available in Lexis, Genfed Library, Briefs file (advancing linguistically grounded reading of criminal statute); *Eskridge*, supra note 26, at 1541 n.114 (referring to possibility that in regime of exclusion litigants would engage in “dictionary shopping and consulting professional linguists”).

256 See, e.g., *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982) (“‘There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.’” (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940))); *Redish & Chung*, supra note 32, at 864 (“[T]ext is, after all, the best evidence of congressional intent.”).

257 See *Vermeule*, supra note 33, at 1834 & n.4 (discussing textualist critiques of legislative history’s reliability).
B. The Canons of Construction

1. Picking Canons

Karl Llewellyn tried to debunk the canons by exposing their indeterminacy. Later scholars have, in turn, debunked Llewellyn by arguing that the opposed pairs of canons just list a presumption and its exceptions, so that there is no conflict after all. More generally, they argue that the canons supply prepackaged default rules designed to reduce the costs of legislation. But this view leaves open the critical questions of interpretive choice: Which of the competing default rules should be chosen? To recur to the earlier examples, should judges presume that Congress uses illustrative lists or exhaustive lists? When a statute's geographical scope is not specified, should the judges interpret it to apply extraterritorially?

The argument for picking canons suggests that choosing correctly between competing default rules probably would be counterproductive. It is more important that judges select one answer and apply it consistently over time than that they select the right answer. If the default rules are fixed, Congress can, over time, incorporate the content of the background rules into its anticipations of judicial behavior. This is the nub of Justice Scalia's idea that the clarity and stability of the background rules is of "paramount importance"; these virtues are more important than getting the content of the background rules exactly right. Moreover, once canons are picked, judges will conserve all the costs of argument over the content of the canons. While consistency in adhering to canons will not cure the endemic problems of competing canons (Llewellyn's point), or canons with vague triggering conditions, those problems would exist in any canonical regime.

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259 See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1191 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Of course there are pairs of maxims susceptible of being invoked for opposing conclusions. Once it is understood that meaning depends upon context and that contexts vary, how could it be otherwise?").

260 See infra note 261 and accompanying text.

261 This view is given a sophisticated defense, similar in spirit to the discussion here, in William N. Eskridge, Jr. & John Ferejohn, Politics, Interpretation, and the Rule of Law, in The Rule of Law 265, 282-85 (Ian Shapiro ed., 1994) (defending view of canons as interpretive regimes).

262 One example is the canon that judges should interpret so as to avoid "grave" or "serious" constitutional questions whenever possible. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (stating that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construc-
The idea that canons should be picked, not chosen, need not rest on the strong view that the content of canonical default rules does not matter at all, or that legislators have no preferences about the content of default rules. On that view, canons certainly should be picked, perhaps randomly—there could be no other basis for deciding what the content of the relevant default rules should be—but probably the content of the canons does matter. There is an empirical fact of the matter, albeit a fact that is extremely difficult to discover, about whether expressio unius or its opposite would better capture how legislators use and read language. The better argument for picking is that the gains from identifying the very best default rule, in any particular setting, will be overwhelmed by the costs of making the identification. For example, judges might vacillate for many more years about whether the same word should always be read the same way when it appears in several different sections of the statute. When the argument was done, the benefits of having arrived at the right rule would be far smaller than the costs (in legal uncertainty for legislators and litigants and in decision costs for judges), produced by the vacillation itself. All this suggests that fixing the system of canons with a minimum of fuss—by picking them—will provide benefits that endless judicial debate about the canons cannot provide.

2. Burden Allocation and All-Else-Equal

Other techniques of interpretive choice can elaborate and qualify the general approach to the canons sketched above. The burden allocation idea, in its usual form of a status quo presumption, helps to identify the limits of picking. Some canons have already been picked by precedent or tradition. The rule of lenity is a good example. Although judges tend to change its precise weight from time to time, the idea that penal statutes should be narrowly construed is an ancient one and courts have never applied (or at least have never stated) the opposite default rule—presumably a "rule of severity" that

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263 Compare Gustafson v. Alloy Co., 513 U.S. 561, 570 (1995) (relying heavily upon "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning"), with Dewsnup v. Timm, 502 U.S. 410, 417 & n.3 (1992) (dismissing argument that use of identical phrase in other statutory provisions could illuminate its use in provision at hand).

264 See Solan, supra note 217, at 102-08 (arguing that rule of lenity was narrowed by Supreme Court decisions of mid-twentieth century).

would construe penal statutes as broadly as possible. A more aggressive version of this burden allocation idea might even apply to less antiquated canons. Generally speaking, established canons should not be tampered with, whatever their current form. This principle suggests both that the Rehnquist Court erred by changing the strength of the presumption against extraterritoriality and that subsequent courts will err if they change it back again.

Still, picking will prove inescapable when, as with the problem of identical words in different statutory sections, the current stock of precedents contains opposed or inconsistent views that have produced, or resulted in, judicial vacillation. In that situation, picking is supported by an all-else-equal argument: The respective costs and benefits of the two opposed positions are speculative and (given the continuing disagreement) probably roughly equivalent. If they are assumed to cancel out, then the effort spent on choosing one or another cannot be justified and resort to picking will provide the certain benefit of eliminating the costs of decision and instability.

The difficulty, as always with burden allocation based on a presumption in favor of the status quo, is to identify what, exactly, the status quo is. For example, precisely which canons have the entrenched character of the rule of lenity is a matter of substantive legal controversy. If that controversy were too protracted, the burden-shifting mechanism would increase, rather than conserve, decision costs. Happily, however, it is at least clear that the set of arguably entrenched canons is surprisingly small. Some of those hotly debated within the current Court, such as the pro-federalism canons, are of fairly recent invention, while some of the oldest canons, such as the idea that statutes should be construed not to impose restraints upon the alienation of property, have fallen into abeyance in the post-New Deal state. In general, many of the canons are applied inconsistently, perhaps even opportunistically, so in most contexts courts

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266 See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 263-64 (1991) (Marshall, J., dissenting) (arguing that Court had increased weight of presumption against extraterritoriality).

267 See supra note 263 and accompanying text.

268 See Gregory v. Ashcroft, 501 U.S. 452, 467 (1991) (holding that ambiguous federal statutes will not be interpreted to encroach on traditional or essential state functions); see also Atascadero v. Scanlon, 473 U.S. 234, 243 (1985) (mandating plain statement requirement for subjecting states to suit in federal court).


270 See Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 189-91 (1995) (rejecting application of canon protecting right to alienate property); id. at 194-95 (Stevens, J., dissenting) (invoking “our time-honored practice of viewing restraints on the alienation of property with disfavor”).
may simply pick among them without fear of overturning an entrenched background rule.

C. Statutory Stare Decisis

The preceding discussion also captures important themes of the statutory stare decisis debate.\textsuperscript{271} In general, from the perspective of interpretive choice, the statutory stare decisis debate has proceeded on the wrong terrain. Proponents of an absolute rule of stare decisis have, as previously mentioned, generally advanced the claim that a bright-line rule of precedent will compel a legislative response; this is a democracy-forcing argument.\textsuperscript{272} But this prediction, empirically ambitious in the extreme, is unverifiable in practice. Proponents and critics agree that there is little empirical evidence to support either view, and that the comparative and historical empirical inquiries designed to examine these questions would be severely hampered by the number and complexity of the relevant factors.\textsuperscript{273}

But the criticisms of absolute statutory stare decisis are empirically overconfident in a different way. The principal criticism, for these purposes, is an all-else-equal argument: The democracy-forcing benefits of an absolute rule of statutory stare decisis are speculative, but such a rule does have the clear and substantial cost of perpetuating obsolete precedents. Thus, assuming away all other speculative effects, a strong stare decisis rule is too costly.\textsuperscript{274} This is a poorly reasoned all-else-equal argument because it ignores the limits of judicial competence and information. There is no reason to think that judges have better information about which precedents are "obsolete"—a complex question of social, economic, and technological change—than they have about legislative response to stare decisis rules.\textsuperscript{275} So a weakened stare decisis rule that allows judges to overrule precedents that they believe are obsolete might incur very high error costs, while conferring benefits that are as speculative as those of the democracy-

\textsuperscript{271} In particular, I shall address here only the question how much force or weight a concededly applicable statutory precedent should have. There is, of course, an entirely different question about when a precedent squarely applies or is instead distinguishable. Unless one is radically skeptical about the constraining force of precedent, however, there will be some cases in which the precedent cannot be distinguished and the question of the precedent's weight will come to the fore.

\textsuperscript{272} See supra note 49.

\textsuperscript{273} See supra text accompanying notes 50-52.

\textsuperscript{274} See supra text accompanying note 203.

forcing approach. Since the arguments about democracy-forcing and obsolescence are both empirically speculative, there is no basis for an all-else-equal argument, at least on the score of obsolescence.

There might be a more successful all-else-equal argument, one that could be combined with a burden allocation argument. The external consequences of any of the candidate stare decisis rules are speculative, in the sense that any such rule might have varying, unpredictable effects upon legislative response and upon the life span of statutory precedents. The effects of the various candidate doctrines on judicial decision costs, however, are not similarly speculative. The stronger the rule of statutory stare decisis, the less frequently litigants will request an overruling and the less time that must be spent on reconsidering previously decided questions. To be sure, parties, especially institutional litigants, will invest more in cases of first impression because the stakes are higher with a strong stare decisis rule. But that increased expenditure occurs in cases that ordinarily would be brought anyway and fully litigated (hard cases of first impression, in which the law favors neither side strongly), and the expenditure will be dwarfed by the subsequent reduction in decision costs resulting from many potential future cases that are never brought at all. The basic intuition is simple:

If like Holmes you lacked confidence that you or anyone else had any very clear idea of what the best decision on some particular issue would be, the pragmatic posture would be one of reluctance to overrule past decisions, since the effect of overruling would be to sacrifice certainty and stability for a merely conjectural gain.276

These considerations suggest an absolute rule of statutory stare decisis, but the current Court says merely that statutory precedents have “special force” and it overrules them regularly.277 A potential paradox emerges: A system of absolute statutory precedent is con-


In a famous speech, Justice Holmes stated that:

[W]e have a great body of law which has at least this sanction that it exists. If one does not affirm that it is intrinsically better than a different body of principles which one could imagine, one can see an advantage which, if not the greatest, at least, is very great—that we know what it is. For this reason I am slow to assent to overruling a decision. Precisely my skepticism . . . makes me very unwilling to increase the doubt as to what the court will do.

Oliver Wendell Holmes, Jr., Twenty Years in Retrospect, quoted in Posner, supra note 209, at 151.

This is a recurring puzzle of interpretive choice, one that illustrates the weak determinacy of the techniques for choosing doctrines under empirical uncertainty. Often, the doctrine indicated by considerations of interpretive choice will not be the doctrine currently in place, so that moving to the new doctrine will incur transition costs. The status quo presumption and related all-else-equal arguments discourage that move. Techniques of interpretive choice can cut both ways; when they do, the interpreter faces a second-order problem of interpretive choice.

The general issue of the determinacy of interpretive choice will be discussed below. The resolution of this sort of puzzle is not general, but contextual, addressed to the same doctrinal problem as the first-order considerations. In the context of competing doctrines of statutory stare decisis, a first cut at the problem asks about the direction of the doctrinal change. For an all-else-equal argument to succeed, the known or knowable considerations (here, transition costs) should be as important as the speculative considerations that are assumed to wash out (here, the comparative democracy-forcing effects of various regimes of precedent). But strengthening precedent, by raising the required threshold for overruling, will be considerably less destabilizing than a switch in the other direction. Raising the threshold confirms the validity of all previous precedents, while imposing transition costs only upon those litigants who have already committed resources to a request for overruling. Those costs are likely to be dwarfed by the great reduction in decision costs produced, in every future case, by the new stare decisis rule. But this resolution is certainly contestable, and it illustrates the irreducible uncertainty of interpretive choice.

D. Formalism, Indeterminacy, and Ignorance

The preceding section suggests that the maxims and techniques of interpretive choice should push judges toward applying a small, cheap, relatively stable, and inflexible set of interpretive sources and doctrines in a rule-bound (formalist) way. That conclusion is, however, exposed to a set of important questions and objections.

278 See Eskridge, supra note 50, at 2462 ("In a long line of precedents, [the Supreme] Court has held that statutory precedents can be overruled.").

279 Another example is the question whether the move to a rule excluding legislative history would be too destabilizing, even if that rule would bring other gains. This example probably does not work, however, because there is no real doctrinal status quo with respect to legislative history, so there is nothing to destabilize. See supra notes 217-23 and accompanying text.

280 See infra Part IV.D.

281 See supra notes 49-50 and accompanying text.
The most obvious, but least trenchant, critique is that the techniques of interpretive choice are only weakly determinate. As illustrated above, standard arguments for interpretive choice can appear on both sides of doctrinal arguments, albeit in different versions, and there may be no general procedure for choosing which version of the argument should prevail. An interpreter who puts great stock in the stability of interpretive doctrine itself might say that judges should continue to overrule statutory precedents because that is the current practice.282

As a critique of the instrumental enterprise of reasoning about interpretive doctrines under uncertainty, this argument is so abstract and noncomparative that it lacks any force. Concretely, judges confronted with uncertain and inescapable questions of interpretive choice must either rely upon some repertoire of weak strategies for reasoning under uncertainty, or else rely upon nothing at all besides ungrounded intuition. But certainly it is possible that the strategies of interpretive choice discussed here are the wrong ones, or at least not a complete list, and that considering a different set would yield more determinate (and perhaps less formalist) prescriptions. If that is what the critique means, then it is well taken.

A different objection is both concrete and comparative, and therefore more powerful: Formalist statutory interpretation ends up looking like the English system of statutory interpretation that prevailed well into this century, and persists more weakly today. Under that system, internal parliamentary debates were not consulted,283 the House of Lords never overruled its own precedents,284 and a great deal of emphasis was placed on statutory text and canons of construction. Some of these rules have been weakened or abandoned,285 but the English approach to interpretation is still more formalist than our own.286

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282 See supra notes 279-81.
283 See Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769) (announcing common law rule excluding parliamentary debates); Vermeule, supra note 33, at 1895.
The bite of the comparison is the suggestion, quite popular of late, that American courts cannot be equally formalist. On this view, institutional differences between the two systems condemn American courts, including federal courts, to assume the burdens of flexible, policy-saturated interpretation. Parliament is quite active in statutory arenas, enjoys party discipline that allows tight statutory drafting, and modifies statutory precedents frequently. Congress and the state legislatures, on the other hand, are less disciplined, professional, and attentive. American statutes consequently display a great deal of generality and ambiguity, while legislatures respond only infrequently to mistaken statutory precedents.

This comparative argument is as empirically ambitious as the democracy-forcing argument for strong statutory precedent—indeed it is the mirror-image of that argument—and it fails for the same reasons. One of the few bits of empirical evidence that we have suggests that Congress is surprisingly attentive to statutory precedents and modifies them regularly. But, even assuming that evidence away (and it is certainly contestable on the usual grounds that make most complex empirical work contestable), it is impossible to say whether the supposed flabbiness of American legislatures is the cause, or instead the effect, of the relatively independent, policy-oriented approach to interpretation taken by American courts. The comparative argument supposes that it is the cause, but it might be the effect. Perhaps the greater degree of legislative activity in Parliament, as opposed to Congress, is a historical product of the stronger English rules of stare decisis, which, according to the democracy-forcing argument, spur more active legislative oversight. Perhaps American legislatures opt for ambiguity and passivity because the activist stance of American courts ensures that underspecified or ill-considered legislation will in effect be supplemented or amended by judicial decisions. The presence of constitutional judicial review in America, until very recently not a fea-

287 See, e.g., Posner, supra note 192, at 247 (“American legislatures, in contrast to European parliaments, are so sluggish when it comes to correcting judicial mistakes that a heavy burden of legal creativity falls inescapably on the shoulders of the judges.”); Sunstein, supra note 9, at 658-60 (noting that British Parliament exerts more oversight of judicial interpretation than Congress does). The original source for these considerations is Atiyah & Summers, supra note 286, at 32.
288 See Posner, supra note 192, at 247.
289 See Sunstein, supra note 9, at 658-60.
290 See Eskridge, supra note 111, at 338.
291 See supra text accompanying notes 111-23 (critiquing methods and conclusions of Eskridge’s study); see also Robert A. Katzmann, Courts and Congress 69-76 (1997) (reporting that small-scale empirical study found that congressional staff was usually unaware of statutory decisions by United States Court of Appeals for District of Columbia Circuit).
292 See supra notes 287-89 and accompanying text.
ture of the English system, 293 might have reinforced this tendency, with a resulting spillover to nonconstitutional areas; Thayer thought that vigorous judicial review would make legislatures irresponsible. 294 We do not know which of these stories is true, nor do we know the effect on legislatures of judicial formalism (or antiformalism). As a result, we cannot rule out formalism as a strategy for American courts. The comparative critique of American formalism is too confident of its empirical premises.

Finally, there is the seeming paradox that a prescription in favor of rule-bound, inflexible interpretation would follow from the emphasis here on the empirical difficulties of interpretive choice, indeed on the courts' (and the academy's) current ignorance about the empirical determinants of interpretive doctrine. Rules are often thought to demand more information from the formulators—in this case the judges who choose interpretive doctrine—than do standards, for the latter allow information generated at the point of application to be taken into account. If information is what the courts lack, then a flexible approach to interpretation that allows judges to take available information (like legislative history) into account might be better than a rigid approach.

But the paradox is only apparent, not real. Inflexible, rule-bound behavior can be the best response to a decisionmaking problem, or to a setting for institutional design, in which the decisionmaker has very poor information or a very low capacity to process the information that is received. 295 The absence or unreliability of information, or the decisionmaker's poor processing capacity, makes a wide and flexible repertoire of behavior a bad bet. The chances that any additional action will improve the situation are slight, so the decisionmaker opts for a small set of relatively wooden behaviors. The posture of interpretive choice is similar, at least under the current state of empirical work. Only recently has it become clear that the real fight in interpretation is about means, not ends, and that the tremendous amount of information needed to compare interpretive choices is largely unavailable and will remain so for a long time to come. In that posture, the


294 See Thayer, supra note 190, at 155-56; see also Mark Tushnet, Taking the Constitution Away from the Courts 57-60 (1999) (discussing effects of judicial review on legislative responsibility).

295 See generally Ronald A. Heiner, The Origin of Predictable Behavior, 73 Am. Econ. Rev. 560, 561 (1983) (stating that uncertainty in "distinguishing preferred from less-preferred behavior . . . requires behavior to be governed by mechanisms that restrict the flexibility to choose potential actions").
best that courts can do is to eschew ambitions towards perfection and instead resolve that, in the face of severe uncertainty, interpretive doctrine should at least be manageable, stable, and cheap.