2004

Pyrrhic Political Penalties: Why the Public Would Lose Under the "Penalty Default Canon"

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Introduction

In *The Penalty Default Canon*,[1] Kim Krawiec and Scott Baker borrow principles from contract law that are designed to resolve issues arising out of incomplete agreements to propose a provocative solution for resolving ambiguity in some statutes. They analogize an ambiguous statute to a contract in which parties fail to specify certain fundamental terms, thereby imposing on the courts the cost of determining the agreement reached. When parties leave a contract unspecified intentionally to transfer the costs of resolving the uncertainty, they note, the courts void the contract, refusing to recognize that an agreement was reached as a penalty for the parties attempting to impose these costs on the courts. By analogy, Professors Krawiec and Baker propose that courts declare a statutory provision unconstitutional when Congress has purposely left the provision ambiguous to avoid political responsibility that might attach to resolving the ambiguity. Such congressional action, they reason, is analogous to parties to a contract leaving the agreement unspecified in order to transfer the costs of resolving the uncertainty. Because the resulting ambiguity is left for either the judiciary or the executive branch to resolve, Krawiec and Baker suggest that the legislation should be held to violate the nondelegation doctrine, which the Supreme Court used on two occasions in 1935 to declare provisions of the National Industrial Recovery Act unconstitutional for giving the executive branch too little guidance for implementing these provisions.[2]

The "Penalty Default Canon" is not just some harebrained scheme that two legal academics have concocted by borrowing from a discipline they know well to suggest remedies in an area of law that is less familiar to them. The article provides a very clear description of the literature on the pathologies of the federal legislative process that may cause Congress to delegate responsibility for completing legislative deals in order to avoid accountability for the ultimate deal struck. Krawiec and Baker demonstrate that they fully understand not only the contract law literature from which they borrow, but also the legal and political science literature about how the legislative process works. The article also evidences that the authors thought long and hard

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1 Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663 (2004).

2 *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 433 (1935).

about the ramifications of their proposal, and they have crafted it to minimize its use in situations where they believe statutory invalidation is not warranted and to avoid strategic use of their proposal by the legislative and judicial actors who ultimately determine what statutes will meet their criteria for invalidation. It is because their article is so well done that I think it warrants a response to point out some fundamental normative assumptions about our political system that the authors make along the way and with which I disagree.

There are many controversial aspects to the proposal in *The Penalty Default Canon*. For example, the article not only proposes reviving the moribund nondelegation doctrine, but it also would extend that doctrine in an unprecedented manner by utilizing it where Congress has essentially delegated to the courts the responsibility for filling in statutory gaps or resolving ambiguities. In addition, any analysis that depends on reading legislative history to find the motive of a multibody group like Congress is going to raise difficult questions about what it means for a group to have a motive[3] and precisely how the courts are to determine what that motive is.[4] Yet, I think that objections on these grounds are answered by the authors who recognize that their proposal goes beyond advocating application of constitutional doctrines as they currently exist and who painstakingly take care to avoid the worst pitfalls of having the judiciary use legislative history to determine Congress's motive. They recognize that such a proposal has the potential to empower the Court to impose its own policy preferences in striking down legislation as strategically motivated delegations.[5] They point out, however, that they propose a precise and rigorous test for when a statute should be struck down, and that their test replaces doctrines that would allow the courts less guided and monitorable criteria for resolving legislative ambiguities.[6] In short, they argue that it will be more difficult for the Court to abuse its role as interpreter and applier of law by substituting its policy preferences for

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3 *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994); Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 284 (1992); Frank H. Easterbrook, *Ways of Criticizing the Court*, 17 HARV. L. REV. 802, 828 n.57 (1982); John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1340–41 (1998); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

4 Assuming that there is a meaningful legislative intent to be discerned, there are two remaining thorny questions posed by the use of legislative history. First, is it appropriate to rely on language that was never enacted into law? *See* Manning, *supra* note 3, at 1345 (stating that "[f]or textualists, legislative history is uniquely problematic because it permits *legislators* to create their own context, and thus to influence the details of meaning outside the process of bicameralism and presentment" (emphasis added)). Second, is legislative history a reliable source for discerning congressional intent? *See* Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29–37 (Amy Gutmann ed., 1997).

5 *See* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 775 (1999); Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 17–18 (2000).

6 Baker & Krawiec, *supra* note 1, at 667–69.

those of the legislature under their proposal than under existing law.[7] This response does not focus on these most obvious potential criticisms, against which I think Krawiec and Baker have defended their proposal well.

My critique focuses instead on the implicit assumptions Krawiec and Baker make about the benefits of forcing the legislature to make the impact of its legislative decisions more transparent to the polity and the costs of surreptitiously delegating the ultimate political choices to administrative agencies or the courts. Let me first clarify that it is unclear why Krawiec and Baker attribute benefits to a more transparent legislative process, but I can postulate two possibilities. First, they may believe that making the process more transparent will make the ultimate outcome better in the sense of being more in accord with the preferences of the polity as a whole. If this is their belief, they are essentially optimistic that their suggested legal prerequisites for legislation to be valid can force Congress to adopt statutes that reflect some notion of the public interest. In essence, such a belief would, at least in certain circumstances, comport with the position of the pluralists. Pluralists liken the legislative process to a competitive market that leads to an equilibrium outcome that maximizes some version of political wealth, taking into account that each individual has one vote and reflects both the preferences of each voter and the strengths of those preferences.[8] The authors, however, explicitly disavow that they adopt an interest group version of law-making and hence suggest that they do not ascribe to the pluralists' optimism that the legislative process will reach a welfare-enhancing equilibrium.[9] Therefore, I am left with the alternative that they do not care about outcomes of the process, but value transparency for its own sake, perhaps because our constitutional system envisions that the legislature will be accountable to a fully informed citizenry. To put another perhaps more sympathetic spin on this alternative, the authors may take the position that there is no way to evaluate whether one outcome is better than another, or whether one is closer to some notion of the public interest than another, because we have no measure of goodness—no definition of the public interest. For them, by definition, the optimal outcome is that which results from a legislative process that is accountable to an informed electorate. It is thus not surprising that they pay no attention to the relative ability of the courts and agencies compared to Con-

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7 *Id.*

8 *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 36–38 (1957); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? 5–6 (1988). This optimistic view of politics corresponds to the political science conception of pluralism espoused by Robert Dahl and David Truman. *See, e.g.*, ROBERT A. DAHL, PLURALISTIC DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 23–24 (1967); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS 512–16 (1951). It also loosely corresponds with the pluralism of Gary Becker, who posits that interest groups invest actual dollars until the marginal return on their investment is zero, and therefore concludes that the resulting economic equilibrium is actually wealth maximizing. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 394–96 (1983).

9 Baker & Krawiec, *supra* note 1, at 668, 669–71; William C. Mitchell & Michael C. Munger, *Economic Models of Interest Groups: An Introductory Survey*, 35 AM. J. POL. SCI. 512, 532–35 (1991) (describing Becker's model as concluding that the legislative process will be welfare enhancing, but criticizing the model for assuming that all interest groups participate on all issues on an equal footing).

gress to fill statutory gaps in a manner that best accords with the desires of the polity. It also follows from the authors' lack of concern about outcomes that just as they are inherently or perhaps tautologically optimistic about Congress's ability to fulfill the desires of the public, they are implicitly pessimistic about the abilities of the courts and agencies to do so. This response will attempt to show that, regardless of which belief underlies Krawiec and Baker's proposal, in most cases, the invalidation of statutes that they propose will ultimately lead to outcomes that are less in accord with the desires of the polity—farther from the "public interest"—even if one cannot precisely define or measure that concept.

My position thus assumes it is sensible to talk about the public interest.[10] I do not define the public interest precisely, although ultimately I conceive the public interest as deriving from the fulfillment of the preferences of a fully informed polity in a context that encourages consideration of the experiences and interests of others.[11] Although that fuzzy definition provides no operational measure by which to determine which of several outcomes better serves the public interest, as the remainder of this response makes clear, I believe one can argue that certain outcomes clearly fall far outside the public interest even without providing a precise operational measure.

Why Delegation of Policy Disputes Will Lead to Better Outcomes than Congressional Resolution

Professors Krawiec and Baker describe three mechanisms that explain why Congress might delegate to avoid responsibility for choosing statutory prescriptions. The first, attributable to Aronson, Gellhorn, and Robinson, focuses on legislators' motives to take credit for providing regulatory benefits to a diffuse class of stakeholders—in short, the public—without having to accept blame for imposing regulations on more focused interest groups—usually groups representing regulated industries.[12] Congress can achieve this "best of both worlds" by delegating the responsibility for adopting implementing regulations and by using language that suggests that the putative

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10 Contrary to my good friend and colleague Rob Atkinson, who claims to know me better than I know myself, I am thus a "little p," not a "big P," proceduralist. *See* Rob Atkinson, *The Reformed Welfare State as the Radical Humanist Republic: An Enthusiastic (if Qualified) Endorsement of Matthew Adler's* Beyond Efficiency and Procedure, 28 FLA. ST. U.L. REV. 339, 341–42 (2000).

11 *See* Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 32 (1986) (defining the common ground necessary for the development of a conception of the public good); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1528 (1992). Although I do not provide an operational measure for determining what outcomes are in the public interest, I suspect that such a measure may well be some variant on wealth maximization that takes into account distributional and moral concerns. *Cf.* Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEGAL STUD. 1105, 1111 (2000) (arguing that cost-benefit analysis adjusted to take care of distorted preferences, together with "deontological [and] egalitarian considerations," should determine whether the government should act or maintain the status quo).

12 Peter H. Aronson, Ernest Gellhorn & Glen Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 61 (1982).

beneficiaries have gained a legislative victory. At the same time, the focused nature of the regulated entities' interest and the fact that these entities are repeat players who retain control over much information on which regulation depends renders them better able to monitor and influence the agency implementation and enforcement of the statutory scheme than the public. As a result, the apparent victory for the diffuse stakeholders is illusory. The regulated entities, being savvy, understand this, while the public, being more naive, does not. By some accounts, this is the story of major environmental statutes such as the Clean Water and Clean Air Acts.[13]

Krawiec and Baker next describe an alternative mechanism, recently proposed by Epstein and O'Halloran, according to which Congress seeks to avoid public blame for regulatory failures in contexts where there is little political gain that accrues from successful implementation of a regulatory scheme and great political loss from failed implementation.[14] By delegating, Congress transfers the potential for blame to an agency or the courts, but foregoes little political benefit. Epstein and O'Halloran support their theory with numerous examples, including regulation of airline safety.[15] If there are several plane crashes after the regulatory scheme is implemented, the institution that adopted the regulatory provisions stands to take significant political heat.[16] If there are no crashes, however, the public is unlikely to attribute this to the success of any statute or regulation.[17] The industry will blame Congress for any costs that regulation imposes on it.[18] Hence, Congress can avoid potential criticism by delegating to an agency the responsibility for adopting regulation, again in a context where the agency is unlikely to impose undue costs on the industry.

Krawiec and Baker add to the existing theories of responsibility-avoiding delegations by positing a third mechanism—really a variant on the other two—in which the interest of diffuse stakeholders coincides with the interests of some focused and therefore sophisticated interest group.[19] In other words, under this alternative, there are sophisticated interest groups on either side of the underlying policy debate. An example of a delegation that might result from such a dynamic is workplace health and safety regulation. On one side is industry, which will oppose having to bear the costs of regulation. On the other side are workers and unions, the latter of which are focused interest groups capable of accurately assessing the likely impact of the legislative delegation. Labor union leaders, however, may have an incentive not to report accurately to the rank and file their assessment of the true impact of regulation—that it will do little for workers—because they might be better able to

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13 *See, e.g.*, Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 313–14, 323–30 (1991) (noting that while Congress has often called for far-reaching environmental regulation through legislation such as the Clean Water and Clean Air Acts, it has also consistently failed to provide the Environmental Protection Agency with the funding necessary to achieve the goals set out by these laws).

14 DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 9–13 (1999).

15 *Id.* at 8.

16 *Id.*

17 *Id.*

18 *See id.*

19 Baker & Krawiec, *supra* note 1, at 674.

maintain interest in unions, and in turn support for their own leadership, by characterizing the resulting delegation as a victory for workers.[20] Additionally, labor leaders might support the delegation because it maintains their role in resolving the statutory ambiguity, thus creating a need for labor to keep them as leaders.[21]

My critique of Krawiec and Baker's proposal does not depend on which of these mechanisms is responsible for a given delegation. What is crucial to my critique, however, is that under any of these mechanisms, Congress delegates in reaction to the political influence of competing stakeholders who would like to push the regulatory outcome to opposite extremes. Environmentalists lobby Congress to force industry to maximize the resources it spends on cleaning and maintaining the environment, while industry lobbies Congress to allow it to devote minimal resources to environmental efforts. The airline industry wants to be free from regulation it considers burdensome and unnecessary to protect the safety of air traffic, while Congress will feel pressured to impose maximal safety regulations by the likely public reaction to any crash that occurs after Congress determines a safety standard. Industry seeks to avoid having to spend money on workplace safety, while unions desire that Congress mandate such spending. By delegating, Congress can avoid the seemingly necessary political costs that would result from disappointing one or both of the relevant stakeholders by resolving the battle between them. In any of the three situations described above, the outcome that best accords with the public interest most likely falls somewhere in between the positions of the competing stakeholders. There are benefits to be gained by regulation, but beyond some point—even taking distribution and morality into account—those benefits will not justify the costs of more onerous regulation.[22] Unfortunately, there are several reasons to believe that if Congress is forced to resolve the conflict itself, it will not mandate an outcome that comes anywhere close to the optimal compromise. Instead, agencies and courts are more apt to do so if Congress delegates the resolution of the conflict to them.

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20 *See* Daniel J. Gifford, *Redefining the Antitrust Labor Exemption*, 72 MINN. L. REV. 1379, 1413 (1988) ("Union managers may have incentives of their own, which conflict with the interests of the majority: to maintain large membership rolls to enhance their own power and prestige as leaders of a large organization and maintain or increase union revenues from dues-paying members."); Bruce A. Herzfelder & Elizabeth E. Schriever, *The Union Judgment Rule*, 54 U. CHI. L. REV. 980, 980 (1987) ("[U]nion leaders might advance interests of their own rather than interests of the union's rank and file.").

21 For a description of how the structure and dynamics of interest groups allow leaders' interests to deviate from those of the membership, see Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 429–39 (2000).

22 For example, it is generally agreed that at some point the value of environmental protection is outweighed by its cost, although there is great debate about whether our current regulatory scheme is close to that point. *See, e.g.*, DANIEL A. FARBER, ECO-PRAGMATISM 3–4, 6–8 (1999); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE J. ON REG. 23, 65 (1996) (stating that zero pollution is an invalid goal); James L. Huffman, *Either You're With Us or Against Us: No Room for the Skeptical Environmentalist*, 53 CASE W. RES. L. REV. 391, 399 (2002) (stating that the traditional environmentalist call for zero pollution is not defensible).

One reason to distrust the ability of Congress to reach optimal legislative compromise is the irrationality of voters. As evidenced by some of the referenda that have passed in various states, voters do not seem to take into account the costs of regulation.[23] In other words, voters are not satisfied with the explanation that they only get part of what they desire because total implementation would be too expensive. If such referenda are any indication, it is likely that members of the general public would blame Congress for any unsatisfactory statutory outcome.

Focused interest groups can also act irrationally in their demands for legislative outcomes, albeit for different reasons. Psychologists have identified heuristics by which individuals make decisions that are biased in the sense that they can lead to decision-making that deviates from an individual's outcome preferences in predictable ways. One such problematic heuristic is the confirmation bias.[24] According to the psychology of decision-making, once a decision-maker commits to an outcome, she will look for confirming evidence and tend to ignore evidence that undercuts the wisdom of that outcome.[25] Even if presented with undermining evidence, the decision maker will discount its importance to the choices she faces.[26] A group leader is thus apt to conclude that the optimal outcome of any legislative debate will be closer to her group's desired outcome than it actually is. It may be that the confirmation bias can be overcome by the presentation of undermining evidence in a context that requires the decision-maker to reflect on the disconfirming information, but the legislative process is not geared toward such deliberative reflection.[27] In addition, even if a group leader accurately assesses the optimal outcome, she may still object to a legislative choice of that outcome because of another heuristic bias—overconfidence. Individuals tend to be overly optimistic about their abilities.[28] If a group leader considers litigation or the administrative process as an alternative to a legislative reso-

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23 Those with which I am most familiar come from Florida, where voters have amended the state constitution to require the state to provide for a bullet train in the state, which will cost at least $2 billion. *See* Scott Powers, *Track Cost Could Sack Greeneway Route Expressway; Agency's Demands Complicate Train's Bumpy Path*, ORLANDO SENTINEL, Dec. 18, 2003, at B1, 2003 WL 70492478. In addition, Florida voters have placed caps on the size of classes in elementary, middle, and high schools, that may cost the state as much as $27 billion. Bill Cotterell, *Bush Takes Aim at Initiatives: Governor Warns of Costs of Class Size, Bullet Train Amendments*, TALLAHASSEE DEMOCRAT, Mar. 5, 2003, at 8, 2003 WL 2562733. Governor Jeb Bush has begun a process to repeal this initiative. *Id.* Because of these voter initiatives, the Governor has also begun seeking to amend the state constitution to make initiatives harder to adopt and to require that initiatives on the ballot be accompanied by a statement of their costs. *Id.*

24 Stefan Schulz-Hardt et al., *Biased Information Search in Group Decision Making*, 78 J. PERSONALITY & SOC. PSYCHOL. 655, 655 (2000).

25 *See* Dieter Frey, *Recent Research on Selective Exposure to Information*, *in* ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 41, 42 (Leonard Berkowitz ed., 1986); Schulz-Hardt et al., *supra* note 24, at 658.

26 *See* Frey, *supra* note 25, at 44; David M. Sanbonmatsu et al., *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERSONALITY & SOC. PSYCHOL. 892, 893 (1993).

27 *See* Seidenfeld, *supra* note 11, at 1544–45.

28 *See* Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 146–47 (1981) (reporting that drivers tend to view themselves as more skillful than their records actually reflect).

lution, she is more likely to be dissatisfied with the resolution that the legislature reaches. This is true even though the resolution may represent what she believes to be the socially optimal outcome because she believes that she could convince the court or agency to reach a more satisfactory outcome than the outcome that they probably would reach.[29] Therefore, even when interest groups are on both sides of a legislative issue, they may be dissatisfied with a compromise outcome that comes close to the socially optimal resolution.

Under the Penalty Default Canon, Congress thus faces a situation in which it must anger one side or the other, and in which a compromise that imposes an outcome close to that which is socially optimal is likely to incur the wrath of both sides. Faced with such a choice, legislators are likely just to determine which side can most help or hurt their political careers—which group is more likely to raise the probability that they may not be elected—and will resolve the ambiguity in favor of that group.[30] If courts and agencies were not likely to produce a better resolution, the propensity of Congress not to work out the optimal resolution would not matter. But both courts and agencies are more shielded from direct political pressures.

Federal judges and the heads of independent agencies do not have to worry that they will lose their jobs if they upset a powerful interest group.[31] Heads of executive branch agencies may worry about the prospect of losing their jobs based on decisions they make, but the risks of such losses are significantly decreased because firing an agency head is a politically salient

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29 *See* Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (reporting that almost all newlyweds expect that they will not get divorced despite knowing that the divorce rate is fifty percent); Jeffrey J. Rachlinsky, *The Uncertain Psychological Case for Paternalism*, 97 Nw. U. L. REV. 1165, 1172–73 (2003) (describing the overoptimism bias and distinguishing it from other self-serving biases); Svenson, *supra* note 28, at 145–46 (finding that eighty-six percent of drivers report that they are safer than average behind the wheel). The overconfidence bias has been used to explain why litigants proceed to trial rather than settling a case despite the fact that trials are extremely expensive. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 111–12 (1990). The same dynamic would explain why an interest group leader might prefer to take a chance on having a court or agency interpret an ambiguous statutory provision rather than agree to a certain legislative resolution of the ambiguity.

30 Legislative compromise becomes more probable when there are several issues on the table and legislators can engage in the practice of "logrolling" or trading votes. Logrolling allows legislators to reveal their relative preferences for various outcomes and reach a Pareto-optimal legislative outcome. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 82–86 (1989). If, however, interest groups pressure legislators only on issues about which they have a strong interest, essentially ignoring the small costs imposed on their members by the multitude of other interests that the legislator considers, logrolling will merely facilitate legislators granting the most influential group with respect to an issue its desired outcome on that issue in return for allowing their opponents a victory on a different issue. This may avoid delegations, but leads to focused interest groups gaining desired outcomes on most matters, to the detriment of the general public.

31 *See* U.S. CONST. art. III, § 1 (stating that judges "shall hold their Offices during good Behaviour" and their compensation "shall not be diminished during their Continuance in Office"); Morrison v. Olson, 487 U.S. 654, 691 (1988) (allowing Congress to limit the president's power to remove an officer of the United States when doing so will not "impede the President's ability to perform his constitutional duty").

event that usually imposes costs on the president.[32] In addition, courts and agencies must explain their decisions based on factors other than pure politics—courts must do so to maintain their institutional legitimacy and agencies must do so to pass judicial review.[33] At least with respect to agencies, this helps insulate the agency from being unduly influenced by partisan politics because explanations require that the agency staff develop data and analyses to support any agency decision, and the staff responsible for doing so are protected against being fired by the civil service system.[34] The requirement of explanation also tends to induce deliberation among staff members with different perspectives on the controversy,[35] which in turn militates a preference-maximizing determination.[36]

In fact, agency outcomes are capable of resisting even strong political pressure if the agency has the data and analysis to support its decision. For example, the Reagan White House, in response to pressure from the petroleum industry, demanded that the Environmental Protection Agency ("EPA") repeal a rule phasing out lead in gasoline, but the White House had to back down from this demand and even allow the EPA to strengthen the rule in the face of evidence demonstrating that the benefits of the rule significantly outweighed the costs.[37] In most cases, smart agency heads recognize that their decision must accommodate strong preferences of the White House and the congressional majority, but data and analyses still provide a springboard for the agency to avoid the extreme outcomes to which the political process is likely to lead. David Kessler, head of the Food and Drug Administration ("FDA"), was thus able to regulate cigarettes as drug delivery devices

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32 *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 666–67 & n.402 (1984).

33 *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865 (1992) (stating the Supreme Court's legitimacy depends on public perceptions of its fitness to determine the meaning of the nation's laws); Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 610 (2002) (asserting that "[p]ublic confidence is essential to upholding the legitimacy of the judiciary").

34 *Cf.* David B. Spence, *Managing Delegation Ex-Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 413 (1999) (reporting that in the Federal Energy Regulatory Commission's ("FERC") hydroelectric licensing decisions, the agency "appears to have resisted political control, sometimes successfully," but not giving reasons for FERC's ability to resist). The ability of agency staff to restrict the outcomes of an agency's decision is sufficiently great that the White House even has, on occasion, feared agency head "capture" by staff. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 50 (1989) (noting Nixon's fears that bureaucrats hired by democratic administrations would undermine his policies); J. Clarence Davies, *Environmental Institutions and the Reagan Administration*, *in* ENVIRONMENTAL POLICY IN THE 1980S: REAGAN'S NEW AGENDA 144 (Norman J. Vig & Michael E. Kraft eds., 1984) (reporting on Reagan's mistrust of agency career civil servants); Maureen Dowd, *Who's Environment Czar, E.P.A.'s Chief or Sununu?*, N.Y. TIMES, Feb. 15, 1990, at A1, B16 (describing the George H. W. Bush administration's "distrust of the E.P.A. bureaucrats").

35 *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 528 (2002).

36 *Cf.* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 110 (2000) (arguing that agencies are more likely than the legislature to be able to discern the preferences of the fully informed median voter).

37 *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 31–44 (1991).

despite no initial support from the White House and strong opposition from a Congress fearful of incurring the wrath of the tobacco industry by carefully developing a record showing that cigarette manufacturers purposely manipulated nicotine levels to hook new smokers.[38]

There is also a good chance that by attempting to force Congress to resolve conflicts rather than delegate, the Penalty Default Canon would simply induce inaction by Congress. As already noted, any action by Congress is likely to engender blame.[39] Inaction has the benefit of not attracting attention, thereby avoiding blame.[40] Alternatively, Congress might delegate nonetheless, knowing that the courts will strike its deal under the Penalty Default Canon, because that would allow Congress to transfer the blame for the lack of resolution of the conflict to the courts. In most situations, maintaining the status quo will be farther from the outcome that best satisfies voter preferences than a resolution that gives a victory to one side or the other. To understand why, note that even when Congress enacts a statute that leaves significant policy issues unresolved, the statute typically demands a change in the status quo.[41] In other words, even if Congress leaves a huge range from which an agency or court can choose the meaning of the statute, that range usually will not include the state of the law that existed prior to passage of the statute. This demand essentially reflects a consensus for a change in the status quo in the direction in which the statute points, although consensus may not exist as to the extent of the change. If the Court strikes the ambiguous provision in that context, then the resulting outcome will not reflect this consensus and hence will most likely fall farther from the optimal outcome than will most choices in the range that Congress had made available to the court or agency. Moreover, because of legislative inertia[42] and the ability of

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38 DAVID KESSLER, A MATTER OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 254–57 (2001). The FDA's regulation of cigarettes ultimately was struck down by the Supreme Court, which found the regulations were beyond the FDA's power under its authorizing statute. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000). But the tobacco industry's reputation was severely tarnished and it no longer enjoys the political influence it once did in large part because of the information the agency uncovered while preparing to adopt the regulations.

39 *See supra* notes 12–29 and accompanying text.

40 *See supra* notes 12–29 and accompanying text.

41 In both examples for which Krawiec and Baker conclude that the Penalty Default Canon justifies invalidating a statutory provision, they indicate that the provision added uncertainty but that the legal status quo was within the range that Congress left open to the courts. Baker & Krawiec, *supra* note 1, at 670–71 (demonstrating that the Private Securities Litigation Reform Act left open the possibility of applying the pleading standard used in the United States Court of Appeals for the Second Circuit, which itself was uncertain); *id.* at 698–705 (showing that Congress believed that section 6 of the Clayton Act would not change the prevailing judicial interpretation). In such cases, striking the provision does not lead to alarming outcomes because the results are the same as if it were construed as Congress intended. As I describe below, the alarming nature of the remedy Krawiec and Baker suggest becomes apparent when the ambiguous provision nonetheless was clearly intended to alter the status quo. *See infra* text accompanying notes 44–49.

42 *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 482 (1999) ("Legislative inertia and the gatekeeping function of congressional committees can prevent Congress from responding even when there is a general consensus on the need for legislative action.").

Congress to blame the Court for any problems that ensue from striking the statute, Congress may never enact a new provision reflecting the desire to alter the status quo.[43]

For example, the provisions of the Occupational Safety and Health Act ("OSHA") requiring promulgation of workplace exposure limits to toxic and harmful substances instruct that "[t]he Secretary [of Labor] . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health."[44] The statute was ambiguous because it did not define the meaning of "feasible" or the effect of the language "on the best available evidence."[45] The American Petroleum Institute argued that Congress had intended that the Secretary use cost-benefit criteria in setting standards; conversely, the AFL-CIO asserted that Congress had intended that standards for substances with no known safe levels of exposure be set at the lowest exposure limits that industry could afford and remain viable.[46] In determining the meaning of this statute, a majority of the Supreme Court characterized the discretion inherent in the language as giving the Secretary unprecedented power over American industry and, but for a saving construction by reference to another section of the Act, would have found that the language governing the criteria for personal exposure limits violated the nondelegation doctrine.[47] Justice Rehnquist even voted to declare the statute unconstitutional because Congress intentionally avoided deciding the issue of whether the Secretary could set exposure limits that would bring industry to the brink of solvency.[48] Krawiec and Baker found insufficient evidence to conclude that Congress was motivated to punt on this issue by the desire to avoid political responsibility,[49] but their conclusion may merely reflect a lack of sufficient evidence of this motive in the legislative history. With a slightly different set of statements in that history, Krawiec and Baker could well have concluded that OSHA's provisions governing exposure limits to toxic substances should have been found an unconstitutional delegation under the Penalty Default Canon. Had the Court struck the provision, the result would have been that industry would not have had to comply with any toxic substance exposure limits, even those limits that were cost justified. This choice

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43 *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 605 (1995) (arguing that Congress is apt to leave in place resolutions of issues by the courts with which most legislators disagree rather than risk the political costs and spend the time to reverse them); Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 134 (2003) (noting that congressional inertia is likely to leave in place forever judicial determinations under the dormant commerce clause).

44 Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 655(b)(5) (2000).

45 *Id.*

46 Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 639 (1980).

47 *Id.* at 646.

48 *Id.* at 682, 687–88 (Rehnquist, J., concurring).

49 Apparently, Krawiec and Baker sought to apply their canon to this case, but were unable to conclude that Congress's delegation of how burdensome on industry occupational safety and health standards should be was motivated by a desire to avoid responsibility for the choice. Interview with Kimberly D. Krawiec, Visiting Professor, The Florida State University College of Law, in Tallahassee, Fla. (Jan. 22, 2004).

was one that the statute would preclude no matter how it was interpreted and, therefore, seems presumptively to fall farther from the outcome that maximizes voter preferences than any of the outcomes within the range from which Congress left the agency to choose.

My final argument against striking delegations that avoid accountability is that such delegations, at least to agencies, may provide benefits that make the delegation valuable.[50] As Krawiec and Baker recognize, agencies often enjoy advantages over the legislature in resolving policy debates.[51] Agencies often have greater expertise about a policy issue than legislative staff.[52] Agencies may enjoy lower transaction costs in resolving a debate because they can generate necessary information and perform the evaluation needed to reach a resolution more cheaply than can the legislature.[53] Agencies also enjoy greater flexibility in how to implement any resolution of the debate, which can allow the agency to react more quickly and easily to new information or changes in circumstances that warrant reconsideration of an initial resolution.[54] To these I would add the potential for preference shaping via the administrative process that allows for greater satisfaction than the pluralist legislative process, which does not provide meaningful mechanisms for

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50 I refrain from applying this argument to delegations to courts because (1) judges do not, as a general matter, have expertise on matters of policy; (2) the judicial process does not have efficient procedures for gathering legislative and transscientific facts—the kinds of information necessary to resolve policy disputes; (3) courts decide cases based on law, including precedent, and must wait for parties to bring a dispute to them and hence are reactive and do not have the flexibility to easily modify or reconsider prior determinations; and (4) the adversarial process by which parties participate in judicial determinations is not well suited to reflective consideration of an adversary's position and hence the judicial process is not conducive to preference shaping. *See* Seidenfeld, *supra* note 11, at 1543–44. Note that in both cases in which Krawiec and Baker find invocation of the Penalty Default Canon appropriate, the delegation was to the courts and not administrative agencies. *See* Baker & Krawiec, *supra* note 1, at 690–706.

51 *See* Baker & Krawiec, *supra* note 1, at 707 n.236 (characterizing delegations as welfare enhancing because of lack of congressional expertise, flexibility to respond to changing circumstances, and reduced transactions costs of legislating more precisely).

52 *See* Seidenfeld, *supra* note 11, at 1544–45, 1549.

53 *Id.* at 1544–48.

54 Agencies can choose to resolve the issue by a synoptic approach, characterized by rulemaking, *see* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396–97 (1981) (describing the synoptic mode of policy setting), by muddling through, *see* Charles E. Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79, 80–88 (1959) (describing an incremental mode of making policy he labeled "muddling through"), or by using case-by-case adjudication to flesh out the appropriate policy outcome, *see* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (holding that the decision whether to adopt policy via rulemaking or adjudication is left to an agency's discretion); NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (same, but also holding that the decision is reviewable for abuse of discretion). Agencies can even resolve policy debates by issuing guidance documents—interpretive rules or statements of general agency policy—that allow agencies to announce universally applicable outcomes that they can easily change if circumstances so warrant. *See* 5 U.S.C. § 553 (2000) (excepting interpretive rules from notice-and-comment procedures). The United States Court of Appeals for the District of Columbia Circuit, however, has construed what otherwise appeared to be guidance documents as legislative in nature, thereby restricting agencies' ability to rely on these highly flexible devices for implementing policy. *See* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 807 (2001) (criticizing the D.C. Circuit's doctrine with respect to guidance documents).

each side to try to understand the position of its rivals.[55] In short, delegating to an administrative agency may make it possible for the regulatory system to reach outcomes that simply could not be attained by any legislative resolution and thereby increases the likelihood that the ultimate outcome better reflects the interest of the public. Krawiec and Baker recognize this, and for this reason they explicitly structure their test to avoid striking statutes where Congress has delegated to take advantage of such benefits. The mere fact that Congress did not delegate because of such advantages, however, does not render the outcome any less valuable. In response, Krawiec and Baker might contend that if Congress wants a delegation that creates such advantages to pass muster under their test, all it has to do is rely on these advantages in explaining its delegation in the legislative history and avoid mentioning the concomitant benefit to legislators that the delegation will shield them from political responsibility. Like any doctrine that depends on legislative motive, however, Krawiec and Baker's test is not perfect. It goes so far as striking down delegations even where Congress does rely on agency advantages in resolving a policy debate if the legislative history seems to indicate that Congress was more motivated by avoiding political responsibility.[56]

Conclusion

Kim Krawiec and Scott Baker have proposed a provocative new formulation of the nondelegation doctrine that would have courts strike down statutory delegations motivated by Congress's desire to avoid responsibility for resolving policy disputes. Krawiec and Baker, skeptical of any method for evaluating the desirability of a policy outcome, posit that the outcome of the legislative process when Congress is not motivated by a desire to hide political responsibility is presumptively good. This response questions that presumption. Because of the insulation of courts and agencies from direct political pressure, and the deliberative capacity of those institutions, I conclude that they will reach outcomes preferable to those likely to come out of the legislature in those situations where Congress delegates to avoid political responsibility.

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55 *See* Seidenfeld, *supra* note 11, at 1545 & n.167.

56 Baker & Krawiec, supra note 1, at 685 n.110 (noting that in cases where individual legislators may have been motivated by both legitimate reasons for delegation and to avoid political responsibility, courts will have to determine which was the primary motivation of the majority of legislators in the enacting coalition or of key "veto players" in passage of the statute).