The Proper Treatment of "Interpretative Choice" in Statutory Decision-Making

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"Interpretive choice" is the neologism introduced by Professor Adrian Vermeule for the decision a judge must make about how to apply a statute. "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." The problem plagues not only judges, but anyone who faces a less than clear application of statute, be she professional legal advisor, government worker, or denizen trying to do right under the law. It is not about how this statute applies to these facts, but about how one goes about making that decision: Does one resort to legislative history? Should one use canons of construction and if so which? Should one apply stare decisis more or less rigidly than in common law? In Vermeule's analysis, the product of this decision is interpretive doctrine, general as to all statutory application.

Professor Cass Sunstein introduced the idea of defending interpretive doctrine on empirical grounds in a 1999 symposium on formalism. His thesis was "that formalism must be defended empirically." He set out the empirical grounds of defense thus:

To know whether formalism is good, we need to know three principal things:

- whether a formalist or nonformalist judiciary will produce more mistakes and injustices;

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2. Id. at 82. Similar definitions 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" id. at 76; "interpretive choice can be described as an exercise in the choice of efficient doctrine" (and he footnotes "I use the term 'efficient' here to mean, very loosely, that no alternative accomplishes a stipulated end at lower social cost.") id. at 88, note 53.
4. Id. at 642.
whether the legislature will anticipate possible mistakes or injustices . . . and whether it will correct them after they occur, and do so at relatively low cost; and

• whether a formalist or nonformalist judiciary will greatly increase the costs of decision, for courts, litigants, and those seeking legal advice, in the process increasing the costs associated with unpredictability.\(^5\)

At the end of the article he runs through these "whether" questions in declarative mood concluding that their favoring the formalist judiciary would show its superiority. The argument amounts to saying that if a formalist approach to statutory interpretation makes fewer mistakes and injustices, causes legislatures to anticipate and avoid mistakes and injustices and to cure those that occur, and reduces aggregate decision costs, then it is better. Who could doubt that? But the antecedent is both undetermined and undeterminable. Even assigning probabilities to the success of the formalist and nonformalist positions would be groundless speculation.

Vermeule picks up Sunstein's thesis, arguing that these and other empirical questions must be answered before one can decide "some fundamentally important empirical determinants of interpretive choice."\(^6\) As he frames them, the questions are:

Will judges who consult legislative history . . . 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?\(^7\) . . . 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? . . . [W]ill judges of limited competence do better at identifying legislative intent with legislative history or without it?\(^8\) . . . How do legislative drafters typically use

\(^5\) Id. at 641.

\(^6\) Vermeule, supra note 1, at 105; see also Adrian Vermeule, Interpretation, Empiricism, and the Closure Problem, 66 U.CHI.L.REv. 698, 698 (1999): "This type of empirical question intervenes decisively between the controlling theory of legitimate authority and the choice of interpretive doctrines."

\(^7\) Vermeule, supra note 1, at 80.

\(^8\) Id. at 84
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? Which of the candidate doctrines will produce the best mix of error costs and decision costs? and more in this vein. These questions may be empirical, but they are, he says, undecidable. Undeterred, he uses theories of decision-making with incomplete data to argue that this undecidability is in itself a basis for deciding, quite generally, how to resolve the doctrinal issues, how to make the interpretive choice. His conclusions? "[J]udges . . . 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." One should never use legislative history. Canons are good but are to be picked rather than chosen, that is arbitrarily, not with reason but with certainty. The strongest, least flexible stare decisis is best.

These conclusions are hardly surprising. Vermeule is an unabashed supporter of textualism —"the new textualism" as Professor Eskridge has dubbed it—consistently hostile to legislative history and those who would ever use it as an aid to statutory interpretation. What counts is his argument and the novel strategy with which he approaches the currently popular issues. It is an interesting strategy, useful and enlightening in its exercise. The conclusions, if well founded, would provide impressively solid guidance to all who live in legislative regimes. But the conclusions are not well founded; at each step, Vermeule seems to go awry.

9. Id. at 85.
10. Id. at 88.
11. Id. at 81. Similarly: "[C]ourts' 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 stare decisis." Id. at 79.
12. Id. at 134.
13. Id. at 140-41.
14. Id. at 144.
16. Eskridge wittily defines the new textualism as "consider the text, the whole text, and nothing but the text." William N. Eskridge, Jr., Textualism, the Unknown Ideal? 96 Mich. L. Rev. 1509, 1514 (1998).
Vermeule’s strategy itself rests on invalid presuppositions, and his empirical questions are not only unanswerable but also irrelevant to the statutory decision-maker. There is a pervasive problem with the criterion of accuracy (and commensurately of error) in interpretation: it is not empirically determinable, yet it determines the answers to Sunstein’s and Vermeule’s empirical questions. But worse, even if we were to have a criterion of accuracy independently determinable, this would still be only a spectator’s theory. We in the academic bleachers could throw our accolades to the judges and claim our victories or lament our defeats, but the judicial players themselves would still have to decide interpretive problems as best and fairly as possible within their courts, and doing that does not include bending to statistical norms from epidemiological studies.

Nevertheless, “interpretive choice” is a good neologism for a range of problems facing interpreters, and it is one about which we can, indeed must be able to say something systematic and supportable. This essay is a critique of Vermeule’s article, and an attempt to explain what a proper theory of interpretive choice should look like. I shall argue that there are quasi-empirical questions the statutory decision-maker should answer: What is the nature of the control the legislature sought to exercise in this statute? How did it allocate decisional power? How do those in the behavioral domain governed use the statute? The answers to such questions may not be fully determined by available data, but usually they can be narrowed satisfactorily enough. How one should properly go about interpretation will, on this account, vary from statute to statute, but in an intelligible and systematic fashion. As Professor Peter Tiersma says, “Where textualists go astray . . . is in assuming that one type of interpretation fits all.” My analysis does not generate the determinacy and rhetorical security of Vermeule’s conclusions; but then, the social worlds governed by statutes are such a

17. Sunstein recognizes this as problematic. Sunstein, supra note 3, at 666-69. He offers a subsection “E. Defining Errors” in which he claims that “Textualism offers a theory by which to tell whether there have been errors.” Id. at 667. No it doesn’t. It amounts merely to “the court is right,” see infra note 60 —so there would be no errors in Supreme Court decisions. Yet textualism is not a determinate method; textualists can differ on the application of a text. That’s why interpretation is difficult. For a clear demonstration of this in his fine review of Justice Scalia’s book, A MATTER OF INTERPRETATION (1997), see Eskridge, supra note 15, at 1535. In 2 1/2 pages on the subject Sunstein doesn’t approach an answer. The question is critical and remains dangling: what counts as correct and thus what counts as an error for the purpose of these empirical questions?

variegated lot we ought not expect strict and universal rules of interpretation to be appropriate.

In Part 1, I shall review some preliminary and quite general issues: the characterization of legislative intent, the criterion of accuracy in interpretive decision-making, and the nature of interpretive doctrine. In Part 2, I shall examine Vermeule’s argument, piece by piece. In Part 3, I shall construct another account of interpretive choice, one that differs fundamentally in approach from Vermeule’s, an approach that rests on “some substantive account rooted in first principles,”19 namely, legislative supremacy and the requirement of notice to the governed.

PART 1: GENERAL ASSUMPTIONS OF VERMEULE’S ARGUMENT

There are some general points that are presupposed by Sunstein’s and the main part of Vermeule’s argument. Not surprisingly, Vermeule does not deal with them in detail, but because they are so pervasive, it is worth clearing this ground a little before pushing into the main argument.

A. Legislative Intent

As examples of doctrines of interpretation, Vermeule uses his favored textualism and other “[h]igh-level theories of interpretive authority—for example, the view that “legislative intent” is the touchstone of statutory interpretation . . . .”20 “Intentionalist interpretation” is not merely an example; it is a primary target of Vermeule’s argument.21

There is a long history of hostility to the notion of legislative intent. Critics argue that there is no such thing for reasons such as that a collective body can have no intent, and even if it could we could not ascertain it. The argument is not new. It was raised (and disposed of)

19. Vermeule, supra note 1, at 90.
20. Vermeule, supra note 1, at 80.
21. He pejoratively describes it as depending on “the legislature’s will as the authoritative source of law.” Id. at 82. This is ignoratio elenchi: it would exclude pretty near all intentionalists, few among whom doubt that the source of statutory law and its authority is legislation according to the rules set out for it in constitutions and statutes. In contrast the textualist is defined thus: “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.’” Id. at 82-83. That would make most intentionalists textualists too, in my case perhaps saving only my discomfort with the adjective “abstract.”
in the first known treatise on statutory interpretation, and by Alexander Hamilton (who saw it a reductio ad absurdem conclusion). But over the last 70 years, and especially in the 1990s, it has been revived with a new vigor. Much of the recent criticism has stemmed from a failure to recognize the difference between the intent of a collective body and of an individual person, a category mistake that leads to skepticism. Many philosophers have addressed this point, explaining the intention of a collective body as fundamental, at least as and perhaps more fundamental than individual intent.

22. The sixteenth century Discourse upon the Exposicion & Understandinge of Statutes: SAMUEL E. THORNE, A DISCOU RSE ON THE STATUTES, 103 ff (1942). The Discourse is anonymous, as Professor Thorne says, by “an unknown author of independent mind”, “...prior to 1571, and probably prior to 1567”. Id. at 10-11. It raised the argument thus: the “mente legislatorum ... varie in so muche that in maner so manie heades as there were, so many wittes; so many statute makers, so many myndes”. Id. at 151 ff, but, unlike some twentieth century critics, the Discourse author did not buy the argument; he continued “yet, notwithstandinge, certen notes there are by which a man maie knowe what it was . . .”, id. at 151, and proceeded to elaborate.

23. THE FEDERALIST No. 78 (Alexander Hamilton).

24. See, e.g., Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 869-70 (1930); Harry Jones, Statutory Doubts and Legislative Intention, 40 COLUM. L. REV. 957 (1940); Warren Lehman, How to Interpret a Difficult Statute, 1979 WIS. L. REV. 489, 500 (1979); Frank Easterbrook, Statutes' Domains, 50 U. CHI. L. REV. 533 (1983), RONALD DWORKIN, LAW'S EMPIRE, 313 et seq. (1986); Kenneth A. Shepsle (with the wonderfully citable caption), Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron, 12 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 239, 239 (1992); Frank Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 HARV.J.L. & PUB.POL'Y 61 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”) Id. at 68 (a clear statement of the mistake!); and WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (Chapter 1 of Professor Eskridge's book is a clear and comprehensive marshaling of attacks on the idea of legislative intent).


26. See, e.g., MARGARET GILBERT, ON SOCIAL FACTS 435-36 (1988) (the notion of a plural subject of intentions is not reducible); Raimo Tuomela & Kaabir Miller, We-Intentions, 53 PHILOSOPHICAL STUDIES 367 (1988) (collective intentions may not be primitive, but rely on jointly intended goals); John R. Searle, Collective Intentions and Actions, INTEN TIONS IN COMMUNICATION 401 (Philip R. Cohen, et al. eds., 1990) (arguing that "Collective intentional behavior is a primitive phenomenon that cannot be analyzed as just the summation of individual intentional behavior" Id. at 401); Michael E. Bratman, Shared Cooperative Activity, 101 THE PHILOSOPHICAL REVIEW 327 (1992) (analyzing the content of collective intent); JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 20ff (1995) (for example, at 24-25: “[E]fforts to reduce collective intentionality to individual
Although Vermeule has some generalized "intentionalism" in mind as his reductio hypothesis,\textsuperscript{27} he specifically recurs to the notion of the intention of "the median legislator."\textsuperscript{28} The "median legislator" is a rhetorically nifty expression designed to finesse the objections of the skeptics. However it is not only unintelligible,\textsuperscript{29} once we recognize the skeptics' mistake, it is unnecessary. The intent of a public, recorded institution like a legislature is more objectively determinable than that of an individual person.\textsuperscript{30}

But we should, in grappling with these questions, strive to be more realistic, to come closer to the actual problems of the interpreter who must make a decision about the application of a statute to a set of facts. The statute alone is less than determinative; were that not so there would be no problem. The interpreter, whatever her role, wants to know whether a certain set of words from an historical record might fairly and appropriately be used to resolve the problem. Suppose for example a lawyer's client had copied an architect's plans without authorization; a little research reveals that the federal copyright statute coverage section does not mention architectural drawings;\textsuperscript{31} the client is off the hook, \textit{expressio unius est exclusio alterius}, right? Wrong. The legislative history includes "An architect's plans and drawings would, of

\begin{itemize}
\item \textsuperscript{27} He writes: "I shall use "legislative intent" or "intentionalism" as a capacious term that encompasses the many varieties of intent-based interpretation. From the most specific to the most general, the commonly identified varieties are specific intent, imaginative reconstruction (which asks what the legislature would have done, had it considered the problem at hand), and legal process purposivism." Vermeule, \textit{supra} note 1, at 82, n.32, at 83.
\item \textsuperscript{28} "Suppose that judges should interpret statutes so as to capture the "intention" or preferences of the median legislator." Vermeule, \textit{supra} note 1, at 74. He attributes this to Daniel A. Farber & Philip K. Frickey, \textit{Legislative Intent and Public Choice}, 74 VA. L. Rev. 423, 436 (1988) (arguing that "[p]ublic choice theory suggests that legislation represents the outcome most preferred by the median legislator").
\item \textsuperscript{29} It is another category mistake: there might be a legislator of median income, or median height, for example, but "median" is simply not applicable to a domain without the property of countability, like the set of individual intentions of a set of legislators. Nor would there be a "mean" or "modal" legislator.
\item \textsuperscript{30} Sinclair, \textit{Legislative Intent: Fact or Fabrication}, 41 N.Y.L. SCH. L. Rev. 1329, 1351-1358 (1997).
\item \textsuperscript{31} 17 U.S.C. §102 (1976):
\begin{itemize}
\item \textsuperscript{(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . Works of authorship include the following categories:}
\end{itemize}
\end{itemize}
course, be protected by copyright...." Even the most devout textualist, the devotee of Vermeule's universal proscription, would be wrong to eschew such language. But notice what has happened: Intent has dropped out of the picture, and with it the irrelevant qualms of the skeptic. The point is that talk of legislative intent usually devolves into questions of the helpfulness of certain language in the legislative history. Is that language a reliable aid? A determinative guide to the application of the under-determinative statute? And this simple reality renders Vermeule's scathing criticisms irrelevant.

B. The Criterion of Accuracy in Interpretation

"The primary rule for the interpretation of a statute... is to ascertain, if possible, and enforce, the intention of the legislative body that enacted the law." This is a fairly typical statement of the objective of statutory interpretation; the focus is on legislative intent, or its functional synonyms "legislative will" and "legislative purpose." Judge Wald, as always, says it well: "When a statute comes before me to be interpreted, I want first and foremost to get the interpretation right. By that, I mean simply this: I want to advance rather than impede or frustrate the will of Congress." When one talks of errors in interpretation, or accuracy, or consistency, one depends on a concept of correctness

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.


34. Some writers draw a distinction between intent, purpose, and will: purpose has been said to be more general, more abstract, than intent. See, e.g., William N. Eskridge, Jr., The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell, 61 GEO. WASH. L. REV. 1731, 1745 (1993). Perhaps, but the common usage does not yet indicate such a difference, and it is difficult to see how it could matter much.

that is independent of the actual interpreter herself. To reject the concept of legislative intent, but still talk of accuracy, error, the cost of error, and the like creates a serious conceptual problem.

Many of Vermeule’s empirical questions depend upon a criterion of accuracy. For example: “Will judges who consult legislative history . . . 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? Which of the candidate doctrines will produce the best mix of error costs and decision costs[?]” Answers to such questions require not only surveying the universe of decisions but also evaluating each decision for correctness or error. (We might call the data produced by such a study “demographic” or, when it is of something’s going awry, “epidemiological”.) Such data cannot be gathered without a criterion of correctness and its converse, error.

Vermeule is aware of this, but he never comes to grips with it. To the contrary, he studiously avoids it, only once that I can find coming close to an argument. “[C]hoice of interpretive aim,” he writes, “tells the interpreter surprisingly little about the proper contours of interpretive doctrine.” This is because “[t]he selection of one candidate will depend upon empirical and predictive premises about the sources used in statutory interpretation, the competence and capaci-

36. Vermeule is on point: “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.” Vermeule, supra note 1, at 82.

37. Id. at 80.

38. Id. at 88.

39. For example, after a paragraph about decision costs and error costs he writes: “On this account, the concept of ‘error’ has meaning only in relation to some interpretive goal given by the underlying theory of statutes’ authority.” Id. at 88. One of the empirical questions facing a judge is “the number and gravity of errors under the candidate rules (measured against some specified end, say the median legislator’s intent).” Id. at 112.

ties of judges and other officials who must implement interpretive doctrine, and the behavior and anticipated reactions of legislatures and agencies.” But of course evaluating “the competence and capacities” of official interpreters requires measuring their output against some independent standard; this only takes us back to the beginning of the circle.

The problem is inescapable, so at various points Vermeule introduces apparent surrogates for legislative intent. For example the “democracy forcing” argument for an absolute rule of stare decisis is “that courts should adopt rules to maximize legislative decision of statutory questions.” To “maximize legislative decision”: isn’t that a careful way around mentioning “intent”? Perhaps not: Perhaps it is an expression of legislative supremacy.

This dilemma does not depart; as we shall see in Part 3, it cuts in a direction quite opposite to the textualist formalism Vermeule favors. Much more interesting is an expression that occurs in Vermeule’s discussion of trans-scientific empirical questions: We are asked to consider which of two interpretations more accurately “captures majoritarian preferences”? It looks like “legislative intent”; but it occurs in a series of arguments worth examining in their own right, as they highlight this perplexity.

One of the crucial kinds of datum is the response of legislatures to judicial decisions. At first glance this may appear to be a useful surrogate for “correctly/incorrectly decided”: if a decision fails to capture majoritarian preferences, legislative reaction may be expected; conversely, legislative reaction to an interpretive decision looks like an indicator of error with respect to majoritarian preference. But it isn’t. Take, for example, the Supreme Court decisions United Airlines, Inc. v. McMann and its successor Public Employees Retirement System of Ohio v. Betts. Both decisions claim to follow the text of the statute. The first probably does, but then the statute in the critical respects was poorly expressed, or anomalous with respect to the particular issue.

41. Vermeule, supra note 1, at 83-84.
42. Vermeule, supra note 1, at 87.
43. Id. at 105.
46. Note that for a statement like this to be intelligible—plausibly right or wrong—requires there to be some independent grounds for determining what Congress really wanted to say.
gress revised the statute. Does that mean the decision was in error? Hardly. On the other hand, the Betts decision required considerable determination and ingenuity by Justice Kennedy to subvert the obvious intent of the legislative response to McMann.47 Betts elicited a further response from congress,48 which may or may not indicate it was incorrectly decided.49 More generally, legislatures change. What may be a correct/incorrect interpretation in terms of the majoritarian preference of the enacting legislature may be uncongenial/congenial to the present one. Should the legislature respond in the first case or not in the second will tell nothing for the purposes of epidemiological data on the accuracy of the decision.50 We are again left with determining, or disputing, majoritarian preference (legislative intent) as we have always done: from the statute and its legislative history.

As good an example as we have of epidemiological data is Eskridge's study attempting to determine whether federal overrides were more or less frequent according as the Supreme Court decisions were based on statutory text alone or used extrinsic indicia of purpose or policy.51 Vermeule acknowledges the quality of the study,52 but, finding Eskridge's conclusion that "textualism is 'countermajoritarian'"53 not to his liking, produces a most curious argument. As any empirical study must, Eskridge drew upon the "world in which there are both textualist and nontextualist decisions."54 To conclude from that how things might be in a world of pure and doctrinaire textualism is an "extrapolation [that] need not hold.... a consistently textualist regime might capture majoritarian preferences far more accurately than

47. Justice Marshall's dissent seems clearly to get the better of this one.
49. Certainly it was annoyingly decided, and probably unnecessarily so.
50. This argument presumes that the relevant majority for the "majoritarian preference" is that of the enacting legislature. However when a subsequent legislature has acted with respect to the statute, "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 380-381 (1969) (per White, J., citing five Supreme Court cases from 1809 through 1962).
52. He calls it "[u]ndoubtedly the best study by a lawyer of the empirical effects of interpretive method...." Vermeule, supra note 1, at 103.
53. Eskridge, supra note 51, at 408.
54. Vermeule, supra note 1, at 105 (emphasis added).
do either textualist or nontextualist techniques in the mixed regime."\footnote{55} This is not simply a denial of empirical method, nor the postmodernist's trick of producing a logically possible counter example, no matter how far fetched, and claiming thereby to have demolished an empirical thesis. Vermeule says that being accustomed to a non-textualist interpretive regime our legislatures signal preferences through legislative history. [Comment: Do they? Of course we all believe they do sometimes, but how often? And we believe they do sometimes because it is detectable, and thus discounted, not to be valued as "normal" legislative history.\footnote{56} One would like to see some demographic data on this claim before it counts against a serious and sophisticated empirical study.] In a textualist regime, they would have to give up this practice. [Comment: Would they? We know that in the supposedly textualist British regime prior to 1993,\footnote{57} judges and lawyers studied Hansard.\footnote{58} Could we doubt, so long as legislative supremacy remains a democratic ideal, that they would do so in a United States textualist regime, merely omitting to cite it in their arguments?] He acknowledges that the argument "is speculative, of course"\footnote{59} but it looks worse than that.

Suppose we were in a purely textualist interpretive regime (judges and lawyers may not go beyond the text of the statute): how could you tell whether judicial decisions captured the majoritarian preference or

\footnote{55} Id. (emphasis added).
\footnote{56} Judge Easterbrook demonstrated, by rejecting legislative history despite its being by the bill's sponsor: "Continental Can's position has been rejected everywhere it has been presented; even coming from a Senator, the assertion that "substantially all" means only "50.1% or more" raises eyebrows." Continental Can Co. v. Chicago Truck Drivers, 921 F.2d 126, 127 (7th Cir. 1990) (per Easterbrook, J.). Sometimes the infelicity of the legislators' arguments is very public. For example even the conservative news magazine \textit{The Economist}, under the caption "Chicanery, but a boon to Bush", called the tax bill signed by the President on June 7, 2001, H.R. 1836, 107\textsuperscript{th} Cong. (2001) — "patently dishonest." \textit{The Economist}, June 2\textsuperscript{nd}-8\textsuperscript{th}, 2001, 27, 28 c.1. The dishonesty is not in the bill itself, but in the disparity between the virtues, purpose, and effects claimed for it by its proponents and reality. But a judge just as easily as a journalist or academic commentator could see through that. Notice in passing that 'dishonesty', just like 'rationality', is not properly predicated of a statute \textit{on its own}. Statutes " are communications, and neither logic nor policy is the key to decoding them . . . ." Richard Posner, \textit{Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution}, 37 CASE W. RES. L. REV. 179, 181 (1986). ‘Dishonesty’, ‘rationality’, ‘effective’ and their kin are properly about the relationship of the statute to its professed purpose.\footnote{57} See Pepper v. Hart, [1993] A.C. 593, 1 All E.R. 42.

\footnote{58} Id. at 618.
\footnote{59} Vermeule, \textit{supra} note 1, at 105.
not? Take any interpretive decision. There is some doubt as to the meaning of the statute in the case at hand (ex hypothesi); there is a decision with a majority and a dissent. Which more accurately "captures majoritarian preferences"? One answer gives textualism a perfect score, but by a perfect circle: the court's majority captures the (legislative) majoritarian preference because the court's majority says it does. What else can we say\(^60\) So that answer won't do. If there is any other answer, won't it have to rest on independent grounds for determining majoritarian preference? That is, on legislative history? If the majority has gone awry, if an interpretive error ever occurs in such a regime, then it has been produced by ignoring the legislative history by which the error was diagnosed. If this occurs even once in a thousand decisions, then the textualist court has created a greater possibility of error by its refusal to look beyond the statute. Thus, in order to state his argument, Vermeule has presupposed either a vacuous circle or the contrary of his possible reductio conclusion ("a consistently textualist regime might capture majoritarian preferences far more accurately... ") It is a nice pragmatic paradox.

Of course the reversion to legislative history in Vermeule's hypothetical textualist interpretive regime would be by the spectators not the judiciary. We can have faith in the spectators—presumably the grand-stand academics—to determine legislative intent (majoritarian preferences) from legislative history, but not the judiciary? I would not like to make such an argument in court, would you? "Your honor, the learned professors are wise enough to sift through the wheat and chaff of legislative history, but you are not." Humble deference to the wisdom of scholars does not seem rampant among the ex-academics or others on our present benches.

One might pull all these points together; thus whether the analyst favors textualism or interpretivism (or whatever) will determine whether the decision has been overridden by the legislature although correct —thus changing the point of the statute —or overridden as incorrect —thus restoring the point of the statute, the majoritarian preference. To the extent that interpretive doctrinal positions are significant, the answers will differ. In other words, in collecting, classifying, and analyzing this sort of data, there is no independent position:

\(^{60}\) Well, I suppose one could cite Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803): "It is emphatically the province of the judicial department to say what the law is."
the researcher and writer controls the outcomes.\textsuperscript{61} Vermeule suggests as much when he writes that "what counts as legislative override is itself a question of legal evaluation on which observers differ."\textsuperscript{62} Given his refusal to acknowledge an independently ascertainable legislative intent, it is not surprising that he believes it difficult or impossible to collect and analyze data.

But what we are left with is that for any of Vermeule's empirical questions to make sense we must have legislative intent, majoritarian preference, or whatever you may call it, determined from legislative history independently of any particular interpretive decision. If we who might conduct the empirical research —spectators of the judiciary—can resort to legislative history to see if a decision is correct, why ought not the court do likewise? If we are permitted thus to diagnose an error \textit{ex post}, why may not the judge similarly avoid the error \textit{ex ante}?

\textbf{C. Interpretive Doctrine and Authority Over It}

"Courts must choose interpretive doctrines . . ."\textsuperscript{63} Vermeule's argument is that an empirical generalization is needed for a doctrinal choice, but he conceives of it as being made by each judge facing a decision. For example, "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. . . . [The] questions are empirical . . .[but] unresolvable at acceptable cost within any reasonable time frame."\textsuperscript{64} But the kind of data that would provide answers are not specific facts, statutes, and legal theories such as are before judges. To the contrary, the data are general as to judges, courts, and interpretive decisions. So if these empirical data really are necessary to each judge's interpretive choice, then the sooner we determine them the better for all. Then all judges can get into line and there will be no further need for further study. Thus, if Vermeule is correct, the legal system—the federal government?—should immediately start the research project that could generate this once-and-for-all-and-all-time data.

\textsuperscript{61} This is a similar problem to reasoning about stare decisis: one cannot test a theory against cases as data because the theory is itself going to be a significant causal determinant of the next datum. \textit{See} Michael Sinclair, \textit{The Semantics of Common Law Predicates}, 61 Ind. L. J. 373, 385 (1985-86).

\textsuperscript{62} Vermeule, \textit{supra} note 1, at 102.

\textsuperscript{63} \textit{Id.} at 77.

\textsuperscript{64} Vermeule, \textit{supra} note 1, at 100.
Interpretive doctrine answers "... the ordinary methodological questions of statutory interpretation. What sources are admissible? Should those sources be arranged in some hierarchy and consulted sequentially? If so, what should the hierarchy be? What canons of construction should be used? When may statutory precedents be overruled?" In Vermeule's usage, intentionalism and textualism are relatively high-level doctrines. And he contemplates their being established with authority, binding on judges and other authoritative interpreters. The selection and promulgation of such doctrine could be by a legislature—as, for example, in the Uniform Commercial Code—but Vermeule contemplates courts as authors and authorities. For example, he talks of lower courts "deciphering interpretive doctrines established by higher courts."

There is already a mistake here. One ought not to quibble about meanings of commonly used words; rather, on the principle of charity, one ought to give them the meaning yielding the best possible reading of the text at hand. Nevertheless it is difficult to avoid the thought that a doctrine is a formulable rule of some stability over both time and examples within its domain. If so, there is no interpretive doctrine. The answers to the questions listed must vary from case to case, as I shall argue in Part 3. It is a mistake to believe that a "rule" or "doctrine" of interpretation can bind a judge at any level of our judicial systems to a particular answer to any of these questions. Yet such doctrine is exactly the objective of, and the possibility of success is presupposed by Vermeule's exercise.

This ought not be contentious. But somehow one gets the feeling that many people believe that somewhere there is an authority that can set what Vermeule calls "interpretive doctrine" for all interpreters. Otherwise why the argument? Who or what would there be to convince? (Doesn't making an argument presuppose belief in someone to convince?)

If there were interpretive doctrine, who would have the power to set it? Not the United States Supreme Court. Certain justices on the

65. *Id.* at 82. Note that these are "relatively low-level questions of doctrine." *Id.*

66. "This Act shall be liberally construed and applied to promote its underlying purposes and policies." U.C.C. §1-102(1). New Zealand has an Acts Interpretation Act (1924) containing quite detailed instructions on how to go about statutory interpretation.

67. Vermeule, *supra* note 1, at 88, n.54. Similarly, rules of interpretation are established by "judges who at other times and places might formulate general interpretive doctrine to govern the adjudicative process." *Id.* at 97.
Supreme Court may lead fashions in statutory interpretation — in admissibility of extrinsic resources, textualism and the like — but for the present the Court is too divided internally to adopt any uniform stance, or doctrine. Suppose it weren’t; suppose all justices followed the textualism of Justice Scalia. Would that textualism therefor be imposed on lower court judges or state court judges? Vertical stare decisis gets much of its force from the hierarchical structure of the court systems and the preference of judges not to have their legal decisions overruled; to that extent a Supreme Court of unified interpretive attitude would exert some power over lower courts. But it would generate no horizontal stare decisis and vertically no power other than the socio-psychological. That is, even a uniform and dogmatic Supreme Court adoption of textualism would not have precedential power in the same sense as has, say, an interpretation and application of a statute or constitution on a particular set of facts. This has always been understood. In *Caminetti v. United States*, you will not find an overruling of *Holy Trinity Church*; two decades later in *American Trucking*, one does not see an argument or even a claim to distinguish or overrule *Caminetti*. In fighting his rearguard action against the use of extrinsic resources, Justice Jackson did not argue for overruling or distinguishing *American Trucking* nor does Justice Scalia see a need

68. But that may be very powerful. Fred Schauer has argued that the nature of stare decisis and the elements of a case relevant to it change as the decision is used at lower levels in the judicial hierarchy: rigor in reasoning, coherence with other opinions, and the distinction between holding and *dicta* are all less important; “indeed, the very question of what the Court held at all becomes increasingly less important as we follow an opinion down the hierarchy”; what is *said* compared with what is *held* becomes more important, because of “the way the language of the opinion operates like a statute”; “one good quote is worth a hundred clever analyses of the holding.” Frederick Schauer, *Opinions as Rules*, 53 U. Chi. L. Rev. 682, 683 (1986).

69. 242 U.S. 470 (1917) (the high-water mark of the plain meaning rule).

70. 143 U.S. 457 (1892) (low tide for textualists and the plain meaning rule).

71. United States v. American Trucking Ass’n, 310 U.S. 534 (1940) (Scalia, J., dissenting) (“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’”) Id. at 543. That same year, without distinguishing or overruling prior decisions, “It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of words. Legislative materials . . . can scarcely be deemed to be incompetent or irrelevant.” United States v. Dickerson, 310 U.S. 554, 562 (1940).

for arguing about precedent when he disagrees with a majority's interpretive procedure.\textsuperscript{75}

Why is this? The Supreme Court may be our ultimate authority on the interpretation and application of federal statutes; it may even be seen as laying down rules by its decisions; but there are laws, rules, and standards—even laws and rules and standards affecting the outcomes of decisions—over which it has no power. Obviously, the Supreme Court cannot change the law of gravity. In \textit{McKleskey v. Kemp},\textsuperscript{74} the Court rejected modern social science epistemology: did that affect social scientists and their accepted methods? Not one whit. Closer to the bone of statutory interpretation, in the \textit{X-Citement Video} case,\textsuperscript{75} Chief Justice Rhenquist's majority opinion gave the adverb "knowingly" in a statute\textsuperscript{76} a scope quite in violation of the rules of English grammar.\textsuperscript{77} Did that affect the scope rules for adverbs in English grammar? Not one whit.

Courts have the task of applying statutes to particular sets of facts, and that often requires careful use of syntax and semantics. But syntax and semantics belong to the world outside law, and are beyond legal

\textsuperscript{73} See, \textit{e.g.}, Blanchard v. Bergeron, 489 U.S. 87 (1989) (Scalia, J., concurring in part and concurring in the judgment, in a justifiably famous opinion).

\textsuperscript{74} McKleskey v. Kemp, 481 U.S. 279 (1987) (rejecting clear demographic data showing racial bias in death penalty imposition).

\textsuperscript{75} United States v. X-Citement Video, 513 U.S. 64 (1994).


\begin{enumerate}
\item[(a)] Any person who—
\begin{enumerate}
\item[(1)] knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
\begin{enumerate}
\item[(A)] the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
\item[(B)] such visual depiction is of such conduct;
\end{enumerate}
\item[(2)] knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—
\begin{enumerate}
\item[(A)] the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
\item[(B)] such visual depiction is of such conduct;
\end{enumerate}
\end{enumerate}
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shall be punished as provided in subsection (b) of this section.

\textsuperscript{77} As Justice Scalia wrote in dissent, "The Ninth Circuit's interpretation is in fact and quite obviously the only grammatical reading." \textit{X-Citement Video}, 513 U.S. at 81.
control. Perhaps they are not as far beyond legal control as the law of gravity: Decisions are precedents under statutes no matter how fast and loose they may play with common language, but for outcomes under those statutes only, and not otherwise. Just as legislatures have no power to define words beyond their statutes, so courts are confined by the meanings and grammar of the extra-legal world. That is exactly as it should be: Statutes are communicative instruments, conveying control data from the governors to the denizens. Their increasingly overt resort to dictionaries—quasi-empirical reports of common usage—demonstrates courts’ recognition of this limitation.

Against this reasoning, Vermeule argues only that it "rests on an excessively simplistic view of interpretation;" it might have been adequate back in the days of "legal process purposivism" when judges were not "self-conscious about interpretive doctrine," but not in enlightened and sophisticated times when "judges are increasingly self-aware about interpretive doctrine." But he seems to have too Manichean a view of interpretation and the principles that might govern it:

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78. Indiana’s infamous—but unsuccessful—attempt to legislate that B = 3 comes to mind. See Bill No.246, Ind. State Legis. (Ind. 1897).


80. See Note, Looking it up: Dictionaries and Statutory Interpretation, 107 HARV. L. REV. 1437 (1994). (An excellent note, including quantified data on the number of times the Supreme Court and its members use dictionaries; the recent increase has been dramatic.) Id. at 1438.

81. Vermeule, supra note 1, at 96.

82. Id. In support here he footnotes, at note 84: "See, e.g., United States v. Universal C. I. T. 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."). It may come from the Supreme Court, but this passage is hardly support for anything. It comes in four sentences; let's look at each. First sentence: that depends on the generalities and their justifications. Second sentence: yes, they are not rules of law, but they are not axioms of experience either, although they do have to be grounded in extra-legal material. Third sentence: not in a determinative, talismanic fashion, but they can help. Fourth sentence: every problem of any kind is unique if you choose to state it with sufficient particularity; that is analytic; otherwise this is a non sequitur, similar to denying the possibility of stare decisis except in cases of res judicata. So this is not a very good quote.

83. He gives as examples opinions by Justices Scalia and Kennedy—Vermeule, supra note 1, at note 86, at 96—"That self-awareness seems laudable" in contrast to "doing what comes naturally." Id. at 96.
either *ad hoc* case-by-case with unprincipled discretion in the decision-maker, or determinate doctrine from above: "It is a choice to commit interpretation to the case-specific discretion of 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. The choice is a contestable one and must be defended, not simply proclaimed." As we shall see in Part 3, principles properly govern case-by-case interpretive decision-making; it is not unfettered. The rest of this is *ad hominem* whiggery.

Vermeule might also raise, as a counter-example, the British experience of over two hundred years of interpretation under an exclusionary rule arising out of dicta in the speech of Justice Willes in *Millar v. Taylor*, supra (1769): "The sense and meaning of an Act of Parliament must be collected from what it says when passed into law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house or to the sovereign." Notice the grounds: not that the history would be unavailable to the governed or costly to find, but that it is not available to the "other house" or to the sovereign who must add his/her signature (as must a president or governor). This, as Professor Jones pointed out, does not obtain here in the United States, and no longer obtains in En-

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84. *Id.* at 97.


87. This concern for the ignorance of voting legislators has been remarked by Justice Scalia: "I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote . . . ." Blanchard v. Bergeron, 489 U.S. 87, 89 (1989) (Scalia, J., concurring in part and concurring in the judgment.) See also, *e.g.*, *People v. Tibbitts*, 56 Ill.2d 56, 305 N.E.2d 152 (1973) (one subject and caption requirements are so that legislators will not be deceived).

88. Harry Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 Wash. U. L.Q. 2, 22 (1952) ("The argument that the President approves the statutory words standing alone seems equally invalid. As leader of a major political party and an active participant in the legislative process, the chief executive does not read the words as of first impression; he is usually familiar with the kind of situation at which the statute is aimed").
England's textualist interpretation fashion was formally changed in 1993 in *Pepper v. Hart*, but with careful limitations.

Despite Britain's exclusionary rule, their judges used to read Hansard (England's parliamentary record), regarding the rule as one against explicit use in an opinion rather than against use in a decision. Lord Griffiths wrote as much: "I have to confess that on many occasions I have had recourse to Hansard, of course only to check if my representation had conflicted with an express Parliamentary intention . . . "90 We can see a similar phenomenon here, where many judges follow the Plain Meaning Rule, eschewing legislative history if the language of the statute is clear, and with the best of intentions. Judge Randolph:

> When the reading [of briefs] is done and the case has been analyzed and argued, how can it be said that the judge turned to the legislative history only after finding the statutory language ambiguous? The judge himself often cannot identify exactly when his perception of the words jelled.91

Thus a purported doctrine laid down by the Supreme Court might at most achieve only superficial compliance. Lacking precedential power, it would depend on the Court's (albeit considerable) social leadership.

But if Vermeule is mistaken in thinking there are or could be authoritative general doctrines of interpretive choice, he is still absolutely right that there is a decision to made in each particular case. Perhaps judges do not always grapple openly with the problems inherent in such a decision, but in deciding the application of statutes on whatever grounds, they do make interpretive choices. Thus we can pursue Vermeule's arguments as they apply to particular interpretive decisions, legally localized interpretive choices, if not globally, for all interpretive choices.

89. See *Pepper v. Hart*, [1993] A.C. 593, 1 All E.R. 42. There are other relevant distinctions between the British system and ours. For example, Britain has an integrated legislature and administration, parliament controlling the latter. Thus willfully secretive grounds for legislation could place voters in peril in a manner not possible here. Although it was of concern, Lord Browne-Wilkinson's opinion in *Pepper v. Hart* was least convincing on this point.

90. *Id.* at 618.

PART 2: VERMEULE'S ARGUMENT

Vermeule’s argument comes in three stages. First, show that to make the requisite interpretive choice, the judge must answer certain empirical questions. Second, show that these questions are unanswerable within the temporal and budgetary constraints of judicial decision-making. Third, show that because the essential questions are unanswerable, a determinate set of doctrines emerges as optimal. One perhaps ought to take on this overall structure: How can unanswerable questions be necessary to a decision? If they are, how have judges been managing to make interpretive decisions these last few hundred years? But the steps internal to the argument are rather more interesting; ergo, seriatum:

A. The Essential Empirical Questions

Vermeule summarizes: “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 a range of interpretive questions.” The procedure is to look at the three central questions of interpretive choice around which the strategy revolves: using legislative history, choice of canons, and the strength of stare decisis. For each of these he lists the empirical questions required for making the interpretive choice. Getting through the first stage of the argument requires that each choice “will depend upon empirical and predictive premises about the sources used in statutory interpretation, the competence and capacities of judges and other officials who must implement interpretive doctrine, and the behavior and anticipated reactions of legislatures and agencies.”

Legislative History

Curiously, this sub-section begins about intentionalism: “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.” This is paradigmatic ignoratio elenchi.

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92. This is covered in Part I of Vermeule, supra note 1, at 82-99.
93. Id. at 100. It depends on what you mean by ‘argue’; but, on the principle of charity, one ought not quibble, just keep alert.
94. Id. at 83-84.
95. Id. at 84.
96. Id. at 84.
Even as Vermeule defines intentionalism,97 no intentionalist interpreter subscribes to this limitation on a statute's authority; statutes are authoritative because our federal and state constitutions say they are. Intentionalism differs from textualism — again, accepting Vermeule's definitions98 — in its acknowledgment of legislative intention and its relevance to determining the meaning and application of less than transparent statutes, not in the strange belief that the validity of a statute depended somehow on its relationship to that intent.99 But what has this to do with the empirical questions? It serves to introduce a paragraph on Holy Trinity100 as an illustration of the Court's "blunder[ing] badly" in using legislative history,101 but his (and most of our) disapproval of that decision in no way supports the need for general, empirical data on judicial success.

What are The Questions? First: “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?”102 The existence of legislative intent and the sources of indicia of it have been sufficiently dealt with already.103 The answer here is easy: legislative history does indeed “supply evidence” about it — all the evidence there is after the statute itself (and ancillary parts of legislation such as definitions, interpretation provisions, and preambles.) The modifier to Vermeule’s question, “in a broad range of

97. Whether defined — if unintelligibly — by the “median legislator” or in the “capacious” sense “encompass[ing] the many varieties of intent-based interpretation” (Vermeule, supra note 1, at 82, n.32 at 83).

98. He defines ‘textualism': “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.’” Id. at 83. As I've noted above, on this definition many of us “intentionalists” count also as textualists.

99. On the principle of charity (again!?). But you have to notice, otherwise a verbal argument of no relevance outside its pages could be made, and validly, by stipulation. I shall in the following treat Vermeule’s argument as if it were about plausible positions.

100. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

101. But see Carol Chomsky, Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation, 100 COLUM. L. REV. 901 (2000) as fine a piece of historical sleuthing as Vermeule’s own Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, 50 STAN. L. REV. 1833 (1998) and to the opposite conclusion, viz, that the Court reached the appropriate decision under the statute.

102. Vermeule, supra note 1, at 84.

103. See supra text accompanying notes 22-26.
cases," is, as I shall elaborate in Part 3, wrongly applied. Simply put, the judge faces this case and has no decisional power beyond it.

The next question is more interesting: "[W]ill judges of limited competence do better at identifying legislative intent with legislative history or without it?"\textsuperscript{104} The answer, says Vermeule, will determine the judge's interpretive choice, the position she will adopt with respect to interpreting this statute and its application to these facts. No it won't. It will not be of any relevance to her. The judge -- or other interpreter -- does not have to answer a generalized question about the success rate of other judges at interpreting other statutes, even if she could specify what it meant to "do better" -- a question which must continually hang over this entire enterprise. The judge has to determine as best she can the appropriate meaning of the statute in this case (and reasonable people may differ as to criteria of propriety, otherwise there would be no disputes of this kind and no dissent in their resolution at the appellate level.) Only legal academics and perhaps legislatures and draftsmen are interested in demographic data on judicial behavior.\textsuperscript{105}

There are empirical questions that should interest a judge in deciding on the relevance of legislative history to the application of a statute, as I shall argue in Part 3, but not these ones. These questions might interest a legislature in deciding how to draft a statute, or whether to incorporate an interpretation section or more definitions in an act; and they are surely of interest to the academic spectator; but they do not and ought not intrude into a judge's decision of a dispute before her.\textsuperscript{106}

Canons of Statutory Interpretation\textsuperscript{107}

The Questions: "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? . . . Should courts use strong presumptions, rebuttable only by a specific

\textsuperscript{104} Vermeule, infra note 1, at 84. Remember, on the principle of charity, we are looking at an interpreter's questions about a particular case, there being no authority that can bind her interpretive choice over all cases or judges, not even herself.

\textsuperscript{105} Legislatures' and drafters' interest may prompt, for example, statutory interpretation provisions, like Uniform Commercial Code §1-102(1) (1998).

\textsuperscript{106} "ought not"?? See supra text accompanying notes 240-245.

\textsuperscript{107} Vermeule, supra note 1, at 85-87.
textual statement, or should they use weaker standards or balancing factors?"\textsuperscript{108}

The first question is special, out of the usual pattern. Our constitutions do not typically provide for drafters to determine outcomes, although in the uniform codes their "Official Comments" are highly influential. Nevertheless drafters have a great deal of power in setting the style and choosing the language of legislation, so can influence subsequent decisions about content not anticipated by legislators. But why should the judge look to \textit{typical} drafting usage? Surely what the interpreter is concerned with is \textit{this} statute, be it typical or not.

Again we should remove the generalizations and ask the remaining questions as if in the position of a particular judge looking at a particular (less than transparently determinate) statute and a particular set of facts. In that light, they look like straightforward questions about legislative intent the answers to which might, in some cases, be found in legislative history. They certainly do not call for demographic studies.

Vermeule's reasoning in this subsection proceeds by example. Of the (favorite exemplar) canon \textit{expressio unius est exclusio alterius}, Vermeule asks "Why is \textit{expressio unius} the correct default rule?" It isn't the default rule. It applies in some cases and not in others. One has to establish its foundation,\textsuperscript{109} generally by pragmatic reasoning.\textsuperscript{110} Vermeule asks: "Ordinary speakers often use illustrative rather than exhaustive lists—should legislators and statutory drafters be precluded from doing the same?" The question is rhetorical not empirical. On the previous page Vermeule has introduced \textit{noscitur a sociis} and \textit{ejusdem generis}, thus himself exemplifying the answer. Both canons deal with lists, the former with determining the meaning of words within legisla-

\textsuperscript{108} \textit{Id.} at 86.

\textsuperscript{109} \textit{See generally Sinclair, supra note 25, at 148-50.}

tively enacted lists, the latter with extending lists under an introductory "such as" or concluding "and other . . .".

The empirical problem Vermeule has in mind, though, is shown by his statement that investigation might reveal whether "expressio unius usually captures the median legislator's understanding." To the judge, this "usual capture" is not in question; she wants to determine whether the words in this statute exhaust the scope of its control or not. That is an altogether different question, answering which in some cases might be facilitated by legislative history. But at the least it requires determining the social and legal background against which the statute was enacted.

Saying that questions about how ordinary speakers and ordinary legislators use words are empirical comes close to an interesting but perilous distinction. Word meanings are — of course — matters of fact; the sound or sign sequence for a particular meaning could have been otherwise, and the categorization of the world of which the meaning is part could have been otherwise. The dictionary is in a sense an empirical report of usages, but it is empirical only in a very special sense. As a native speaker of English, I do not consult such empirical reports before each word I say, write or type. That is not simply because I've read lots of dictionary reports; rather, as one of the noses to be counted in the usage nose-count, I have a kind of privileged access. We all do. The stability and commonality of meanings are conditions on the possibility of communication, and thus of governance by

111. As Vermeule puts it, "a general word in a list will be read as limited to the same class of objects as more specific words in the list. . ." Vermeule, supra note 1, at 85. See Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961).


113. Vermeule, supra note 1, at 86 (underlining added).


115. Schauer argued that the language reflects the weltenschaung, the law reflects it too, and is imposed onto it. But the location of a law "in a linguistic and categorical world" is contingent, so changeable over time. Frederick Schauer, Exceptions, 58 U. CHI. L. REV. 871, 872-73 (1991).

116. When we are treating words as part of the world — the extra-linguistic world, that is — we have the useful "use-mention" distinction of putting them in quotation marks.
We can go wrong—and often do, deliberately or mistakenly, and we are socialized into the usual conventions (“felicity conditions”) about when to say something and how much to say, and know how to exploit those conventions. But we do not usually regard questions of linguistic practice as empirical in the same sense as preferences among tooth paste brands or the precise measurement of gravity in downtown Ann Arbor are empirical. So it is with statutes, the only official and authoritative speech of which a legislature is capable. Thus Vermeule’s claim that “The empirical character of these questions is obvious” is highly suspect, to say the least.

**Statutory Stare Decisis**

Stare decisis can be strict—meaning a court must never overrule a prior decision—or relatively free, or somewhere along that spectrum. Whether decisions under statutes are to be distinguished from constitutional and common law decisions in this respect is a topic—

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118. If we did, then all questions of fact would become questions of meaning! A line worth more exploration here is that ‘empirical’ (contrast ‘moral’? or ‘theoretical’?) draws the wrong or an irrelevant distinction; meanings and usage are contingent—because they could be otherwise. But being an intrinsic part of a form of life, language—word usage—is conceptually prior to the possibility of empiricism. The allusion here is to Ludwig Wittgenstein, *Philosophical Investigations* (1953) (E.g., at §241: “It is what human beings say that is true and false; and they agree in the language they use. That is not agreement in opinions but in form of life.”) Equally, and more fashionably, one could cite Thomas Kuhn, *The Structure Of Scientific Revolutions* (1962), and note that linguistic usage is intrinsic to a paradigm; meanings are what is incommensurable between paradigms but stable within. That talk of linguistic usage as simply empirical is conceptually awry was suggested by Steve Fuller, *Thomas Kuhn: A Philosophical History For Our Times* 339 (1999).

119. Vermeule, *supra* note 1, at 86.

120. *Id.* at 87-88.

121. The British judiciary followed a rule of strict stare decisis originating in dicta in London Tramways Co. v. London City Council, 1898 A.C. 375 (where the House of Lords declared that it was bound by its own decisions). From 1898 until 1966 when in a “Practice Statement” the Law Lords declared that they might “depart from a previous decision when it appears right to do so.” [1966] 1 W.L.R. 1234 (H.L.). As Professor Paterson points out, this was more a recognition of what had in fact become the practice rather than a real change. A. Paterson, *The Law Lords* 143-153 (1982). The United States has never adopted a rule like London Tramways Co.: The “[S]upreme Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction.” Helvering v. Hallock, 309 U.S. 106, 121 (1940) (footnote omitted).
Justice Brandeis approached the question from the point of view of damage control: "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, th[e] court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." As the only alternative correction of error is by Constitutional amendment, stare decisis should be weaker, the Court ready to correct an interpretation that has proven maladaptive. Contrast decisions under statutes, which can be revised by Congress; Justice Kennedy: "One reason that we give great weight to stare decisis in the area of statutory construction is that Congress is free to change this Court's interpretation of its legislation." Vermeule calls this a "democracy forcing argument."

Given "that courts should adopt rules to maximize legislative decision of statutory questions[,] . . . is the absolute rule of statutory stare decisis the right means?" To answer requires us to find out whether and how much legislatures correct court interpretations, and that is empirical. As I have argued above, this simply won’t do; any such epidemiological study would hinge on the researcher’s classification of decisions as correct or in error, and correspondingly on the legislative response or lack thereof as supporting or negating the thesis.

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122. Lawrence C. Marshall, 'Let Congress Do It': The Case For an Absolute Rule of Stare Decisis, 88 MICH. L. REV. 177 (1989) (very strict stare decisis should be and has been the Supreme Court's practice in statutory interpretation.); William N. Eskridge, Jr., The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases, 88 MICH. L. REV. 2450 (1990); Lawrence C. Marshall, Contempt of Congress: A Reply to the Critics of an Absolute Rule of Stare Decisis, 88 MICH. L. REV. 2467 (1990).


124. But see Planned Parenthood v. Casey, 505 U.S. 833, 866-7 (1992) (in which Justices O'Connor, Kennedy and Souter argued that where a Constitutional issue is socially disruptive, a very rule-like decision with enhanced precedential power was necessary).


126. Vermeule, supra note 1, at 87. Justice Scalia has adopted this as a justification for eschewing legislative history, preferring "to apply the statute as written, and to let Congress make the needed repairs." United States v. Granderson, 511 U.S. 39, 60 (1994) (Scalia, J., concurring).

127. Vermeule, supra note 1, at 87.

128. See supra text accompanying notes 33-62.
But Vermeule has another ground for choosing: "[I]nterpretive choice can be described as an exercise in the choice of efficient doctrine,"\(^{129}\) where 'efficient' means "very loosely, that no alternative accomplishes a stipulated end at lower social cost."\(^{130}\) There are two parts to social cost: judicial decision costs and error costs. Generally then the question is: "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."\(^{131}\) This is empirical only if it is to be answered generally, for all judges and all statutory interpretation questions, \textit{i.e.} as a demographic or epidemiological question. For a judge faced with an underdeterminate yet controlling statute, what other judges generally do in other cases is not what is relevant. What matters is how to get it right in this case. Stare decisis requires attention be given to prior similar cases, not to dissimilar ones, and the criteria of similarity scan facts and outcomes, not interpretive choices.\(^{132}\)

There is another line of reasoning which raises serious doubts about Vermeule's empirical questions. Recall that those questions are for the most part about the accuracy of interpretive decisions by judges.\(^{133}\) The answers would require survey or census data on all decisions of all judges. For such empirical data to be significant we must contemplate a judge's reasoning that, although \(x\)-and-\(y\) is the correct/just/optimal solution to this interpretive problem, because most judges in most cases will do better reasoning to \(k\)-and-\(l\), that is the choice I must make. In other words, a judge must choose a second (or third) best decision because on some overall survey of all similar cases, that decision will turn out a better average justice. Were that not so, the empirical answers would be irrelevant, and the judge would seek the

\(^{129}\) Vermeule, \textit{supra} note 1, at 88.

\(^{130}\) \textit{Id.} at 7, note 53.

\(^{131}\) \textit{Id.} at 88. Note in passing that we should be very suspicious of taking judicial decision costs into account. Judge Bridlegoose's technique of rolling dice minimized them to perfection. \textit{FRANCOIS RABELAIS, GARGANTUA AND PANTAGRUEL} Bk.3, Ch.39 (1546). That means that we have to put bounds on our minimand, but how, in principled fashion, is one to do that?

\(^{132}\) \textit{See supra} text accompanying notes 63-84.

\(^{133}\) "Will judges who consult legislative history . . . commit more or fewer errors (suitably defined) than judges who do not?" Vermeule, \textit{supra} note 1, at 80; "[W]ill judges of limited competence do better at identifying legislative intent with legislative history or without it?" \textit{Id.} at 84; "Which of the candidate doctrines will produce the best mix of error costs and decision costs[?]" \textit{Id.} at 88.
optimal decision in all its particularity, regardless of the demographics of judicial behavior.

A very similar argument has been made by Professor Frederick Schauer about judicial decision-making of all kinds. He reasoned that in making a decision, a judge must acknowledge how in the future it will be interpreted and used, "the many directions in which it might be extended." For example, "... fear that allowing restrictions on Nazis because they are Nazis will establish a precedent for restrictions on socialists because they are socialists..." So the judge must take into account future cases that may be assimilated under the description of this one: "The decisionmaker must then decide on the basis of what is best for all of the cases falling within the appropriate category of assimilation." Taking account of all future decisions that are the potential progeny of this case can mean that "... in some cases we will make decisions that are worse than optimal for that case taken in isolation." Schauer makes this argument under a more limited conception of stare decisis than Vermeule’s, viz: "[Precedent] depends only on the results of those decisions, and not on the validity of the reasons supporting those results." If, following Vermeule, one hypothesizes a court’s interpretive choice having precedential power over subsequent decision-makers, then the argument is stronger because a decision will be binding in more aspects, and the class of the decision’s progeny thus will be larger.

The argument was wrong when Schauer made it and is wrong now in the hands of its new proponent. For a kick off, the judge doing less-than-justice would arguably be violating the code of judicial conduct. Judges may differ among themselves as to criteria of justice or fairness and as to what is most just in a particular case, but they may

134. Frederick Schauer, Precedent, 39 STAN. L. REV. 571, 574 (1987). Similarly: "the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand." Id. at 589.
135. Id. at 578.
136. Id. at 589.
137. Id.
138. Id. at 576.
139. Contra supra text accompanying notes 63-77.
140. This is, admittedly, a little strained. The ABA Model Code of Judicial Conduct, in the preliminary "Terminology" section, defines "law" thus: "'law' denotes court rules as well as statutes, constitutional provisions and decisional law." MODEL CODE OF JUDICIAL CONDUCT (1990). Canon 2 A: "A judge shall respect and comply with the law..."; Canon 3 B(2): "A judge shall be faithful to the law...". Id. Law, as defined, does
not, ethically, deliberately strive at less.\textsuperscript{141} How would the Schauer/Vermeule argument work in practice? First consider an initial decision, the one that will originate the line.\textsuperscript{142} The judge must think something like this: $x$-and-$y$ is the just outcome; but think of what those who follow me may do to such a decision! I'd better, therefore, decide $k$-and-$l$ to be easier for them to follow.\textsuperscript{143} What colossal arrogance! Suppose instead the judge properly decides $x$-and-$y$. In a subsequent case, if following that case would be less than just, it will be distinguishable on the very differential facts that make this so. If it is not distinguishable, then $x$-and-$y$ is the most just. Following the Schauer/Vermeule argument, to decide $k$-and-$l$, would require the first judge to believe that subsequent judges would be incapable of making that distinction; \textit{i.e.}, incapable of reasoning as well as she. If there is one thing stare decisis tells us, it is that no judge should have the power to decide differently from precedent simply because she thinks she is smarter, or more moral, than her predecessor. Were that allowed we should truly have a "government of men, not of laws." So it goes for the originator of the line: if she decides justly, subsequent judges, \textit{presumed to be as wise and moral as she}, will distinguish or reconcile her decision according as the facts are similar or different or as society dictates change in criteria of similarity. As Judge Jerome Frank wrote, "Present problems should be worked out with reference to present events. We cannot rule the future."\textsuperscript{144}

\begin{thebibliography}{9}
\bibitem{141} The ABA Model Code of Judicial Conduct doesn't mention "justice" in this context but it does include "fairness" in Canon 3 B (8): "A judge shall dispose of all judicial matters promptly, efficiently and \textit{fairly}." \textit{Id.} (Emphasis added.) In fairness one ought to concede that it does give equal time to "efficiency," Chicago's favorite concept.
\bibitem{142} Arguably, this already reverses horse and cart. Landmark decisions tend to be chosen as such only later. Legal society decided subsequently that McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) fit society's needs and should be followed; it's status was not prescribed \textit{a priori}. However supreme courts, and especially the United States' Supreme Court, do face critical decisions either of first impression or when the old case becomes so maladaptive as to put intolerable stress on the system. So we can go along with the idea of \textit{a priori} reasoning by the judge.
\bibitem{143} On Vermeule's rendition of the argument, the originator thinks: most judges will not be able to cope with this sophistication, the surveys tell me so; I'd better, therefore, use dumbed-down reasoning to a second best judgement.
\bibitem{144} Jerome Frank, \textit{Law and The Modern Mind}, 155 (1930).
\end{thebibliography}
Any given case may fit under an indefinitely large number of descriptions or, as Schauer calls them, "categories of assimilation." The key reasoning often lies in making and justifying the choice of "appropriate category of assimilation." Vermeule would apply this to interpretive choice, the choice of how to apply a statute. His empirical questions would have that decision and justification depend on an epidemiological assessment of how judges in general decided any and all interpretive cases, be they factually similar in respects other than interpretive method or not. If justified at all, this could only be on some hypothesis like: I am unlikely overall to achieve better than average justice, so why don’t I always opt for following the flock? One category of assimilation will do when it comes to interpretive choice. This is a very strange theory of legal authority and of interpretive choice. It would be an even more strange legal advisor who anticipated it in advising a client.

So far, then, Vermeule has not made the case for the relevance let alone the prior necessity to interpretive choice of answers to his empirical questions. As a matter of history that ought not be surprising. Our social and legal system has proven adequately workable and adaptive to a wide range of circumstances in the last two hundred and twenty five years with judges interpreting and applying statutes without giving a thought to these questions or their lack of answers to them. Could it be so bad? In the spirit of empiricism, we ought to try to capture the understandings of the wise and experienced judges and practitioners, the sort of understandings that have proven effective over a large range of cases and times. In the real world, traditional interpretive methods seem to be empirically adequate. Thus the claim that


146. Schauer, supra note 134, at 589.

147. Schauer came to recognize the harm of such rule-bound decisionmaking. Rules can function as "impediments to optimally sensitive decisionmaking . . . Rules doom decisionmaking to mediocrity by mandating the inaccessibility of excellence." Frederick Schauer, Formalism, 97 YALE L. J. 509, 539 (1988)

148. One can be quite technical about empirical adequacy. "[A] theory is empirically adequate if what it says about the observable things and events in this world is true—exactly if it 'saves the phenomena'. A little more precisely: such a theory has at least one model that all actual phenomena fit inside." BAS C. VAN FRAASSEN, THE SCIENTIFIC IMAGE 12 (1980); it "concerns actual phenomena: what does happen, and not, what
Judges are often faced with empirical and predictive questions that would, if answered, determine the choice of interpretive doctrines is historically as well as analytically misguided.

B. "Interpretive Choice and the Difficulties of Empiricism"

Suppose that Vermeule’s epidemiological questions about success rates in judicial interpretation were relevant to interpretive choice. Judicial life would then be even more difficult than it is already. Judges would be “faced with empirical and predictive questions” but would be unable to obtain answers. This is the second stage of the argument.

To make their interpretive choices, judges need the empirical data that would answer these questions but cannot have them, so the argument goes. They must “must make interpretive choices in the face of impoverished information, with only a limited capacity to generate the needed information . . . mak[ing] interpretive choice an exercise in decisionmaking under conditions of severe empirical uncertainty.” This is not because of the value-loading of any empirical studies that might generate answers; the questions themselves are “trans-scientific” meaning that they are “empirical . . . [but] unresolvable at acceptable cost within any reasonable time frame.”

We need not spend much time on this argument. It is entirely to be expected and unobjectionable. The questions though empirical are heavily theory loaded; any study attempting to answer them will “suffer from the twin problems of soft predicates and proliferating variables that generally afflict the empirical study of complex legal questions.” Different answers to the questions will thus be compatible with all the data obtained. In other words, this is an application to law of the well established principle of under-determination of any empirical theory by the aggregate available facts.

[Note references]
One argument is perhaps worthy of mention if only because it is not made in this part. Prima facie one would think Eskridge’s study of interpretive decisions and legislative response exactly the sort of work that would answer Vermeule’s empirical questions. Yet Vermeule argued that its conclusions had to be unjustified because it studied a system of mixed interpretive choice, whereas a pure textualist system might so change legislative behavior as to prove superior. In Part 1 B, above, I found fault with this line of reasoning; but on a “...sauce for the gander” basis it might be trotted out here. For the present, there is no adequate characterization of the empirical facts of judicial interpretive method. As Hart & Sacks wrote nearly fifty years ago, “no intelligible, generally accepted, and consistently applied theory of statutory interpretation” is “an accurate statement of what courts actually do with statutes.” Thus any empirical attempt to answer Vermeule’s empirical questions would not generate answers that would satisfy anyone with an ideological interpretive bent: it would not be of an empirical world sufficiently pure to produce an acceptable answer!

Faced with no possibility of answering the empirical questions, which must be answered before making the interpretive choice without which a statute cannot be understood and applied, what is a judge to do? That is the burden of the third stage of Vermeule’s argument.

C. Interpretive Choice Under Empirical Uncertainty

If we ignore the extreme frailty of the first stage of the argument and its undermining the relevance of all that follows, we now reach the nub of Vermeule’s strategy: “decisionmaking under conditions of se-

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143 (1983). But there is a converse that is at least as unsettling. A person can stay wedded to a particular proposition no-matter what, because one can always adjust other parts of the environment; “Any statement can be held to be true come what may, if we make drastic enough adjustments elsewhere in the system.” W.V.O. QUINE, FROM A LOGICAL POINT OF VIEW 43 (1953).


158. Vermeule, supra note 1, at 105; see also supra Part 1 B.

159. Justice Scalia (writing of constitutional interpretation) is sufficiently vague as to be accurate: it is “essentially lawyers’ work —requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth.” ANTONIN SCALIA, A MATTER OF INTERPRETATION 46 (1997).


Not surprisingly, people outside law have studied this sort of problem in other contexts. Vermeule surveys their arguments and techniques and assesses their effectiveness for interpretive choice. At the risk of tedium to the reader and injustice to Vermeule, I offer the following brief synopses.163

Decision Theory

Decision theory is a branch of rational choice. One assigns values to outcomes in order to compare the courses of action leading to them. The problem is that "because probabilities cannot sensibly be assigned to outcomes, decision theory loses some, but not all of its determinacy."165 In easy cases "[s]ome choices may be dismissed because they will produce worse outcomes than any other possible choice . . ."166 but in ordinary cases one will still have to employ some debatable strategy such as minimax or maximin or maximax or minimin.167 The uncertainty may be reduced or shifted, but it is not eliminated.

Consensus and Expertise

We do commonly rely on a consensus of experts; as Vermeule points out, "[t]he number of judges . . . usually increases as the case ascends through the judicial hierarchy . . ."169 Ironically, he notes that "[o]ne reference group of experts particularly popular with academics is the reference group of academics."170 Ah yes, but we are merely spectators; the rest of the world lacks sufficient trust to give us any decisional responsibility outside the academy, and the judiciary treats legal academics to a remarkable ignore. This points to the failure of expertise as a generally reliable method of resolving uncertainty, and consensus is little more than mob psychology, eschewed by our founding fathers and our judges.

162. Id. at 100.
163. In passing one must note that Vermeule offers some pretty formidable looking source material in footnotes. This reader can only marvel that there should be scholars prepared to build such Taj Mahals around so little.
164. Vermeule, supra note 1, at 115–17.
165. Id. at 115.
166. Id.
167. Id. at 115-16.
168. Id. at 117–20.
169. Id. at 117.
170. Id. at 118.
The Allocations of Burdens

This is familiar to all students of law beyond their first semester. The status quo ante reigns unless upset by the party with the burden of proof or going forward. But “[t]he character of the status quo will often be highly contestable” and in the context of interpretive choice “burden shifting will often have the largely rhetorical function of saddling one view or another with the weight of irresolvable uncertainty.” In one flight of common sense Vermeule remarks “why not just spend the time figuring out the best rule?”

All-Else-Equal

This is not simply an argument for the status quo ante. If all else is uncertain, there is one thing we do know: it is cheaper not to do something than to do it. We may not be able to determine error costs (the answer to a question like “[W]ill judges of limited competence do better at identifying legislative intent with legislative history or without it?”), but we do know that “[d]ecision 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.” As he says, it is trite “to point out that the ceteris are rarely paribus” but if the ceteris are merely indeterminate, “[u]nder the all-else-equal theory, then, courts are pushed a long way towards interpretive formalism.” The argument wears the seeds of its own destruction on its face. Vermeule quotes Jon Elster at length to the effect that it is wise to use the information you have, even if it is less than determinate and not all equal.

171. Id. at 120-23.
172. Id. at 121.
173. Id. at 123.
174. Id. at 122.
175. Id. at 123-27.
176. Id. at 84.
177. Id. at 124.
178. Id.
179. Id. at 124.
180. Id. at 125 (quoting Jon Elster, Solomonic Judgments: Studies in The Limits Of Rationality 135 (1989)).
Picking

Picking contrasts with choosing, which is done by weighing information. Picking is Judge Bridlegoose's decision procedure; he used a pair of dice to decide cases. But when we are to choose a rule for future decisionmaking (recall that Vermeule conceives of interpretive choice as between general rules binding henceforth) it has some justification where the costs of choosing would be high and the costs of negotiating around a maladaptive rule relatively low. As Lord Mansfield said, "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."

The next step is to take each of these in turn and work over the three central problems for interpretive choice, the use of legislative history and canons, and the power of stare decisis.

Legislative History

This section hones in on Vermeule's target: the use of legislative history as an interpretive aid. His position is implacably negative. He is unswerving: it ought to be banned and he aims to provide a solid ground on which to do so. In its place he would have, as a controlling doctrine, a "textualist prohibition on judicial resort to legislative history." It is advocacy, and, even at this most programmatic level, shot through with error, as we have seen already.

Unavoidably we must look at the argument as Vermeule does: the choice is not what to do in a particular case but which of four rules should be adopted to govern universally in all cases of interpreta-

181. Id. at 127-28.
182. Francois Rabelais, Gargantua And Pantagruel Bk.3, Ch.39 (Alfred A. Knoph 1929) (1546).
184. Vallejo v. Wheeler, 98 Eng. Rep. 1012, 1017 (K.B. 1774). Notice that Mansfield limited this observation to commerce. Justice Brandeis was not similarly precise: "[I]n most matters it is more important that the applicable rule be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).
185. Vermeule, supra note 1, at 129-39.
186. Id. at 134.
The four candidates are: "a. Exclusion . . . b. Exclusion as an authoritative source . . . c. The plain meaning rule . . . d. The hierarchy of legislative history sources." These are to be compared on "many empirical dimensions", namely, the answers to the epidemiological questions, including the decision and litigation costs incurred under each candidate doctrine. Each of the techniques of decision "under conditions of severe empirical uncertainty" laid out in the preceding section gets a run at each problem.

Decision theory is not very helpful as the data available at reasonable cost severely underdetermine the answers. Costs receive the most emphasis, with the unreliability of legislative history weighing in as increasing error costs. Nevertheless, "there is little in the choice of legislative history doctrines for formal decision theory to grasp." Allocating burdens of proof also fails to discriminate. It "misfires for the usual reason: The character of the status quo is uncertain, even in flux." Consensus and expertise fail because there is no consensus, even among experts.

All-else-equal turns the trick, selecting candidate a., "[a] textualist prohibition on judicial resort to legislative history".

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. But . . . 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. These costs and benefits might be assumed to wash out. All-else-

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187. See supra Part I, for some of the mistakes involved in this, for example, that we cannot have a universal rule or doctrine and there is nobody with the power to enact or enforce one.
188. Id. at 129-30.
189. Vermeule, supra note 1, at 100.
190. Quibble: If we are picking a general rule for all cases, the data need only be gathered once, when we make the choice. So each judge at each case doesn’t face this particular difficulty, does she?
191. Vermeule, supra note 1, at 130.
192. Id. at 131.
193. Id.
194. Id. at 132-34.
195. Id. at 134-39 (combined with "Maximin").
196. Id. at 134.
equal, then, decision-makers should dispense with legislative history to minimize decision costs.\textsuperscript{197}

And as if this were not sufficient hand-waving, the subsection ends:

The most manageable and useable considerations are those about which there is adequate current information, such as the high decision cost of legislative history in the existing regime. . . . What is not reasonably contestable is that, in the current regime, the expense of legislative history is exorbitant.\textsuperscript{198}

Victory by assumption and declaration.

Costs have long been a worry. Justice Jackson in his famous concurrence to \textit{Schwegmann Bros.},\textsuperscript{199} was bothered by the asymmetry in litigating power research costs may produce:

Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . . To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.\textsuperscript{200}

Of course the accessibility problem has been very greatly reduced by electronic search machines, available nearly everywhere.\textsuperscript{201} But electronic searches are still expensive.\textsuperscript{202}

\textsuperscript{197} \textit{Id.} The economic argument for textualism was originated by Professor Eskridge: "I was the first, in print, to make the economic argument for the new textualism." Eskridge, \textit{supra} note 15, at 1533 note 81 (citing William N. Eskridge, Jr., \textit{The New Textualism}, 37 UCLA L.REV. 621, 669, 684-85 (1991)).

\textsuperscript{198} Vermeule, \textit{supra} note 1, at 139.

\textsuperscript{199} \textit{Schwegmann Bros. v. Calvert Distillers Corp.}, 341 U.S. 384, 376 (1951) (Jackson, J., concurring).

\textsuperscript{200} \textit{Id.} at 396-97. Asymmetries in litigating power are endemic in our society and our lawmaking procedure. But their ubiquity doesn't mean that we ought to give up, that we ought not strive for fairness and equality.


\textsuperscript{202} As against proliferating access and reducing costs by electronic search engines, Vermeule posits an increase in the volume of legislative history, because it is easier to generate "so the increase in volume might outstrip the increasing capacity for research." Vermeule, \textit{supra} note 1, at 135. One seriously wishes for some empirical support here; and he does offer the nearest to empirical information in the whole subsection, a telephone interview with a former senate staffer. \textit{Id.}
The costs of research and the commensurate limit on access to legislative history bothered the English long after the original ground for their exclusionary rule had faded. They were key questions in Pepper v. Hart, where the House of Lords came around to the open use of a limited range of legislative history. The issue of cost was not resolved with very great alacrity, Lord Browne-Wilkinson saying little more than "[I]t is easy to overestimate the cost of such research." Anthony Lester, who argued for abolishing the exclusionary rule, observed: "The argument based upon delay and the increased cost of litigation applies to the use of any extrinsic aid to statutory interpretation. It is only the rare case which might call for a comprehensive reference to legislative history." Lester relied for support on empirical experience in the British Empire countries that had recently abandoned the exclusionary rule, viz, Australia and New Zealand.

203. For example, Lord Reid argued that allowing the use of legislative history "would add greatly to the time and expense involved in preparing cases involving the construction of a statute..." Beswick v. Beswick, [1968] A.C. 58, 74. Justice Frankfurter seems to have been influenced by the argument; he gives a plethora of older English authorities. Felix Frankfurter, Some Reflections On The Reading Of Statutes, 47 COLUM. L. REV. 527, 540-42 (1947).

204. [1993] A.C. 593, 1 All E.R. 42.

205. The exclusionary rule had already been partially relaxed by "allowing reference to white papers and commission reports but for the purpose solely of ascertaining the mischief which the statute is intended to cure but not for the purpose of discovering the meaning of the words used by Parliament to effect such cure." Id. at 630.

206. Id. at 637.

207. Id. at 602.

208. One way not only to cut costs but also to reduce asymmetries in the spending power of litigants is to require opposing parties to share relevant material as soon as it is discovered. (Suggested by Anthony Lester, Pepper, [1993] A.C. at 603. The Law Lords did not take up the suggestion.) We have such a requirement in our codes of professional conduct, requiring disclosure of "legal authority". For example, the ABA Model Rules of Professional Conduct:

RULE 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:

... (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; ...

Comment [3] says, inter alia: "The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case." We mostly think of such rules as requiring disclosure of cases; but "legal authority" clearly encompasses both statutes and legislative history. See also D.C. Rules of Prof'l Conduct R. 3.3 (a)(3) (2001); 22 NYCRR § 1200.37 (b)(1) (2001); Model Code of Prof'l Responsibility DR 7-106 (2001).
Was Lord Browne-Wilkinson correct? Do the critics overestimate the costs of researching legislative history? Or is it really "not reasonably contestable ... that, in the current regime, the expense of legislative history is exorbitant." Nobody really knows. Vermeule quotes lots of rhetorically splendid lines in support but no empirical data at all. The empiricism of exorbitant costs is as speculative as the empiricism of all the other questions. But alternative "a. Exclusion ..." does have two features prima facie distinguishing it from the intentionalists' free resort to legislative history. First, research costs look as though they might be quantified in dollars and cents, a great comparative advantage over nebulous increases in democratic values, clarity and the like. Second, "it provides a comparatively (although not perfectly) stable and enforceable rule." Both advantages are illusory. As pointed out in Part I C., above, no matter how clearly and easily formulable, as a rule "a. Exclusion ..." is not enforceable. Just as in England prior to 1993, the reality is that lawyers and judges would do the research when they felt they needed it, even if they were not allowed to use their findings as authority; much of the cost supposedly saved by textualism would be incurred anyway. As to the first apparent advantage, it too is illusory, as there are costs of giving up legislative history that are not readily measurable in billable hours.

Suppose your client asks whether she may copy and use an architect's plans without permission. Architect's plans are not listed in the copyright statute's coverage section, 17 U.S.C. §102. Will you tell her therefore that she is free to do so? Or, suppose a private school allows the children of its teachers to enroll and attend classes free, and that Congress decides that this benefit is to count as taxable income and enacts a statute to that effect. What is the taxable income to that teacher? Is it the market price of a place in the school (a significant sum to a schoolteacher)? Or, is it the marginal cost to the school of adding the extra student to a class (a sum approaching zero)? Your client has been offered such a job and needs to calculate the effective salary to decide whether to accept. In either case, whether there is an exclusionary rule in effect or not, do you look to legislative history? Of course you do. Suppose it is a pure textualist regime (candidate a., above): the judge is not allowed similar resort, and you may not use the dispositive history discovered in argument. Your interpretive powers will be greatly diminished. Opinions on these questions can differ

209. Vermeule, supra note 1, at 139.
210. Id. at 137.
211. See supra note 31 for the text of the statute.
212. This is hardly an imaginative problem; see Pepper, [1993] A.C. 593, 1 All E.R. 42.
and may well do so according to political predilection. Yours is like the old legal realist conundrum of the law's depending on who you get as judge and how she feels about her breakfast. You are in the dreadfully insecure position of having to give advice without any reliable foundation, a position making your opinion letter longer, more expensive, and greatly raising the uncertainty costs to your client. But in the real world, as Lord Griffiths confessed, the judge (respecting the democratic principle of legislative supremacy) will consult legislative history, and merely fail to include it in her opinion. The costs remain the same as under an "intentionalist regime"; only the honesty level recedes.

In either of these hypothetical cases you need an answer—the world needs an answer. In both the indeterminacy was readily resolved in the legislative history. Here in the United States, where access to legislative history is permitted and its use carries authority, the first question would not generate an infringement, let alone litigation and an appeal. Under England's textualist exclusionary rule, the second question, although readily (and democratically) resolvable in the legislative history, went all the way to the House of Lords—at great expense. Where certainty is needed, legislative history will sometimes provide it at very little expense; where legislative history is not available, costly appellate litigation is the only route.

The difference between the costs of certainty in textualist and intentionalist interpretive regimes lends itself to an argument just like Vermeule's "maximin approach to decisionmaking". This says that, although the assessment of the alternatives may be speculative, we should reject the one that has any additional downside; minimize the maximum regret, one might say. In Vermeule's hands it goes like this: we don't know what error costs are so let us suppose they are

213. "I have to confess that on many occasions I have had recourse to Hansard, of course only to check if my representation had conflicted with an express Parliamentary intention..." Id. at 618.


215. Certainty is of overwhelming value in Vermeule's calculus, and it has a substantial weight of opinion behind it. See Vallejo v. Wheeler, 98 Eng.Rep. 1012 (K.B. 1774); Burnet v. Coronado Oil, 285 U.S. 393 (1932). Justice Holmes said similarly 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." Letter from Oliver Wendell Holmes, Jr., to Franklin Ford (Feb.8, 1908), reprinted in Richard A. Posner, The Essential Holmes 201 (1992).

216. Vermeule, supra note 1, at 136.

217. Id.
equal in textualist and intentionalist regimes; the intentionalist regime has the additional detriment of the cost of researching legislative history; *ergo*, reject the intentionalist, adopt the textualist regime. On the argument from the need for certainty it goes like this: where a statute is facially underdeterminate, finding certainty will cost money; in a textualist regime the cost will be appellate litigation; in many cases (you don’t need *all*), in an intentionalist regime the cost will be researching the legislative history; the former is greater than (and realistically includes) the latter; *ergo*, reject the textualist, adopt the intentionalist regime. These may be pretty spurious arguments, but the second is still the better of the two: its premise (the need for certainty) has support that the first (equality of error costs) does not.

All-else-equal here means everything other than one’s variables of choice nets out at zero, “might be assumed to wash out.” Does it? Justice Breyer argues 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.” \(^{218}\) This is dismissed as “deeply controversial” and “empirically far too ambitious” because “most of the costs and benefits on either side are trans-scientific.” \(^{219}\) That means, remember, they are “empirical . . . [but] unresolvable at acceptable cost within any reasonable time frame.” \(^{220}\) Error costs may be truly undeterminable, but that is because what counts as error is so value laden, so *un-*empirical a judgment. \(^{221}\) What about the value of the clarity and accuracy legislative history may bring? It may indeed not have a market value – as, for example, have the hours of a team of clerks or associates – but it has been judged worthy of the effort by many who spend their days at decision-making. Justice Breyer, for example; Judge Wald too; \(^{222}\) in fact if their output is an indication, most of the judges writing appellate opinions over the last century have thought so. (Perhaps we should back up to the “Census and Expertise” argument?) Even in England under its “Exclusionary Rule” \(^{223}\) – a judicially adopted candidate rule *a.*

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218. Stephen Breyer, *The Uses of Legislative History in Interpreting Statutes*, 65 S.CAL. L. REV. 845, 869 (1992) (Based on a speech by the Justice, at the time Chief Judge of the 1st Circuit court of Appeals, this is full of clear, authoritative analysis and excellent examples.).
220. *Id.* at 100.
221. *See supra* text accompanying notes 33-42.
223. *See supra* text accompanying notes 85-91.
judges chose to research Hansard even though they could not use the fruits in opinions; and they did this without the benefit of lowly paid research clerks, raising the costs of decision to themselves and society. The weight of inside opinion here seems to favor a positive value for legislative history over error costs.

But what really is troublesome about the textualist alternative a. is not a matter of costs; justice in judicial decisions ought not be a matter of cost-benefit analysis, something to be sacrificed to economic expediency. The bother is that it would devolve too much power upon the judges, contrary to the democratic and constitutional principle of legislative supremacy. Justice Scalia argues that allowing access to legislative history and giving it authority would lead to judges’ “pursu[ing] their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.” But how could that be? It has support from Judge Leventhal’s incomparably quotable remark that searching congressional documents for a statute’s legislative history is like “looking over a crowd and picking out your friends.” Maybe, but denying access and authority to it extends the choice of friends from the crowd to the whole world. Legislative history as authority constrains judicial interpretation. And in so doing it enhances legislative supremacy, requiring the judge to pursue the legislature’s “objectives and desires” in so far as they can be ascertained, rather than her own.

So, even if we accept all the dubious premises (but see Part 1, above), and accept the relevance of Vermeule’s empirical questions (but see Part 2 A., above), the argument for textualist formalism, for alternative “a. Exclusion . . .” of legislative history, fails. This is really the central thesis of the new textualism; in Part 3, I shall see how much of it I can rescue from first principles. Without this, though, the remaining two doctrinal issues become considerably less interesting.

The Canons of Construction

Vermeule’s argument here follows Lord Mansfield’s dictum on commercial statutes: certainty matters more than justice. Thus:

225. Judge Wald: “. . .citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to ‘looking over a crowd and picking out your friends.’” Wald, supra note 222, at 214 .
226. Peter Tiersma achieves rather more on behalf of textualist formalism than I can manage. Tiersma, supra note 18.
227. Vermeule, supra note 1, at 140-43.
228. See supra text accompanying note 184.
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. . . .[and] judges will conserve all the costs of argument over the content of the canons.229

If what matters is stability and certainty of the set of canons that will be applied, then we should minimize all costs and simply pick, not choose, that set. How they should be picked? "perhaps randomly.230 There may be a right rule for a statutory interpretation problem, but it will be difficult to ascertain and "the benefits of having arrived at the right rule would be far smaller than the costs (in legal uncertainty for legislators and litigants and decision costs for judges) . . . 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."231

All of the problems addressed in Part 1, above, come crowding around here. Also: Who would make the choice? By what authority? How would the chosen set be promulgated and to whom? Would the felicity conditions of normal communication be abandoned in favor of this set of rules? Would all the governed who read a statute in a good faith effort to abide the law have also to read the Official Canons and their application keys? What would be the transaction costs of a legislature's negotiating around a chosen canon? But one suspects Vermeule's heart was not in this one; mine is certainly not in criticizing it. I think one can safely say that this is a speculation without legs.

**Statutory Stare Decisis**

Economic calculus again control: Certainty and the cost savings it would bring suggest maximally strict stare decisis in statutory cases:

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229. Vermeule, *supra* note 1, at 140 (emphasis added).
231. Vermeule, *supra* note 1, at 141.
232. Id. at 143-45.
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.\textsuperscript{233}

Statutory decisions take on a statute-like quality under such a rule. The gain is statute-like certainty; as Justice Scalia observed, statutes enhance predictability and efficiency although at the cost of "a small possibility of inaccuracy" in justice.\textsuperscript{234}

This looks correct for the kind of behavioral domain in which the governed look to the law and take advice before acting, such as securities issues or estate planning. But it hardly seems relevant to, say, the sale of everyday groceries. How a merchant and customer ought to behave in everyday retail transactions should not require them to have heard of Article 2 of the Uniform Commercial Code let alone be familiar with its precedents. Courts in such cases might find it less costly to allow the ordinary decencies of the culture, rather than prior cases, to govern decisions.

A number of years ago, economically oriented analysts Edward Rubin and George Priest argued that common law would lead to efficient rules.\textsuperscript{235} Incentives to litigate inefficient rules, they reasoned, will lead to their refinement into such well adapted laws that the incentive will disappear. The trouble is that by "efficiency" they had to mean "favoring the rich and powerful": the merchant side of a dispute has many transactions at stake, the consumer only the one; so the merchant side will have an incentive to maintain the battle until it achieves precedents suitable to it. Strict stare decisis in statutory cases would not have quite the same effect as it would eliminate the incentive to re-litigate, transferring it to lobbying the legislature. But the asymmetry in spending power would still be a significant factor in the

\textsuperscript{233}Id. at 144.

\textsuperscript{234} Ass'n of Data Processing Serv. Org., Inc. v. Bd. of Governors of the Federal Reserve System, 745 F.2d 677, 689 (D.C.Cir. 1984) (Scalia, C.J.) ("But the whole point of rulemaking (or of statutory law as opposed to case-by-case common law development) is to incur a small possibility of inaccuracy in exchange for a large increase in efficiency and predictability").

\textsuperscript{235} Edward Rubin, Why is the Common Law Efficient?, 6 J. Legal Stud. 51 (1977); George Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977). Lord Mansfield beat them to the punch by a couple of hundred years: "[A] statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament." Omichund v. Barker, 1 Atk. 21, 33, 26 Eng. Rep. 15, 22-23 (Ch. 1744) (argument of Mr. Murray, then Solicitor-General of England, later Lord Mansfield).
initial, precedent setting litigation. The growth of consumer groups has, perhaps, ameliorated the gross disparities in litigation and lobbying power that used to bedevil the law, but has not eliminated it. A more flexible approach to stare decisis, at least where there is a difference in the spending power of the typical parties, might better preserve the hope of justice in the market place.

Summary

Vermeule’s article is certainly rhetorically exciting, even enjoyable; but as argument it does not stand up to examination. Even as rhetoric it is of dubious value. Rather, for those who find the end results congenial it will provide a veneer of rationality—albeit thin. Presently, that seems to be only social and economic conservatives, especially those who believe in market cost-benefit calculus as the ultimate democratic ideal. One might wish theories of interpretation be founded on less idiosyncratically subjective grounds.

Vermeule summarizes his conclusions: “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.” His most concise summary of the reasoning to these ends is another Manichean bifurcation: “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.” His response is to counsel judicial insensitivity to the nuances of fact, justice, and legislative language, “a prescription in favor of rule-bound, inflexible interpretation.”

There are indeed “uncertain and inescapable questions of interpretive choice” in some cases of statutory interpretation, but they are not the empirical questions on which Vermeule founds his argument.

236. For example, in pioneering litigation in negotiable instruments law, a defendant on a promissory note generated by the sale of a $60 domestic heating stove, won handsomely at the trial court—Buffalo Industrial Bank v. DeMarzio, 162 Misc. 742, 296 N.Y.S. 783 (Buffalo City Ct. 1937)—but lost the appeal—rev’d on other grounds, 6 N.Y.S.2d 568 (Sup.Ct. 1937)—the “other grounds” being a failure to appear. DeMarzio’s position became effective law thirty years later in a Federal Trade Commission rule for consumer paper, 16 C.F.R. §433.2 (1989) (effective May 14, 1976).

237. Vermeule, supra note 1, at 145.

238. Id. at 146.

239. Id. at 148.
Whether some language in the legislative history will resolve or ought to be used to resolve an indeterminacy in a statute’s application is not always transparently clear. Whether or not expressio unius limits the application of a statute may sometimes be questioned, and with reason, not merely a knee-jerk dislike for the canon;\textsuperscript{240} deciding such a question may often require reference to legislative history.\textsuperscript{241} Strategies for resolving such questions are weak only because they are not mechanistically determinative for all cases; but given the great variety of statutory drafting and the wide variations found in kinds of control exercised through legislation, one should surely not expect “one type of interpretation fits all.”\textsuperscript{242}

The other arm of the bifurcation, “ungrounded intuition,”\textsuperscript{243} has not proven too bad so far, probably because the intuitions of smart and experienced jurists are not ungrounded, quite the contrary. The wise and experienced did not become so by frequent interactions with the empirical questions Vermeule and Sunstein posit as necessary, nor by familiarity with empirical answers to those questions: that information “is largely unavailable and will remain so for a long time.”\textsuperscript{244} That empirical data is irrelevant to interpretive decision-makers, irrelevant to interpretive choice; nothing relevant flows from “the courts’ (and the academy’s) current ignorance of it” as it is not among the “determinants of interpretive doctrine.”\textsuperscript{245} The varieties in social climate, disruption generating litigation, statutory language, and background norms with which a practitioner and judge deals over a career tend to induce greater sensitivity, and lead to socially adaptive resolutions.

What sort of ingredients ought to go into a judge’s interpretive choice? In Part 3, I shall offer my present favorite set of answers.

\textsuperscript{240} Reed Dickerson—whose pioneering work anticipated much of the presently fashionable textualist argument—was implacably hostile to canons, and especially expressio unius . . ., of which he wrote “Far from being a rule, it is not even lexicographically accurate . . ..” \textsc{Reed Dickerson, The Interpretation And Application Of Statutes} 234 (1975).
\textsuperscript{241} See \textsc{Sinclair}, supra note 25, at 148-50.
\textsuperscript{242} Tiersma, supra note 18, at 443.
\textsuperscript{243} Vermeule, supra note 1, at 146.
\textsuperscript{244} \textit{Id}. at 148.
\textsuperscript{245} Elided from Vermeule, \textit{supra} note 1, at 148, where Vermeule states the opposite.
"What judges should be contemplating is not whether to be textualists, but when they should concentrate on the text and when, in contrast, they should use other strategies that look at other evidence of the intentions of the drafters."246

Interpretive choice is, as Vermeule says, inescapable for the statutory decision-maker.247 In most cases, the choice is easy: the statute reads onto the facts unequivocally, unambiguously, and determinately; nothing that we might call "interpretation" is required; no interpretive choice arises; the statute controls textualism, intentionalism, and all varieties in between coincide. We are interested in those cases in which there is not such clarity and determinacy, in which different outcomes are at least plausible, and thus in which interpretation is required. Interpretive choice is the decision-maker's answer to "How ought I proceed?"

Many commentators say that a theory of legal authority must lie behind one's answer. Vermeule himself agrees,248 but then has a problem: if so, doesn't that theory determine the judge's interpretive choice, not epidemiological data or deductions from its absence? His answer is that this theory of authority is at too high a level to constrain choice: "first principles do not dictate the selection of possible doctrines";249 "Those principles do not reach to the ground of interpretive doctrine."250 Different theories of legal authority may be compatible

246. Tiersma, supra note 18, at 434.
247. "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." Vermeule, supra note 1, at 90.
248. "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." Vermeule, supra note 1, at 82. He cites in support "Frank H. Easterbrook, Textualism and the Dead Hand, 66 GEO.WASH. L. REV. 1119, 1119-20 (1998) (noting that theories of "political obligation" or "political legitimacy" underpin theories of textualist interpretation); Heidi M. Hurd, Interpreting Authorities, in Law and Interpretation, LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 405, 406 (Andrei Marmor, ed. 1995) (noting that recent jurisprudential debates share premise that "a theory of legal interpretation is necessarily related to, and indeed dependent upon, an antecedent theory about the nature of law's authority.") Id. at note 31.
249. Vermeule, supra note 1, at 91.
250. Id. at 90.
with a single interpretive choice.\textsuperscript{251} This is centrally important to his thesis: It has to hold for interpretive choice to depend on empirical answers to epidemiological questions, because those data would be independent of the goals of the individual judges making the decisions. All the empirical questions ask is about the match between actual judicial decisions and the correct decisions (whatever that may be.)\textsuperscript{252} Vermeule doesn't offer much by way of argument other than an analogy,\textsuperscript{253} but he does offer a challenge. Words like "must lie behind", "determine" and "constrain", which I have used above, or "dictate" and "reach", Vermeule's choice of verbs, are used for conclusions. How does a first principle or a theory of authority "lie behind", "determine", "constrain", "dictate" or "reach" interpretive choice?

Answering that question is the burden of Part 3.

A. Axiom #1: Legislative Supremacy

When I was interviewed at the Immigration and Naturalization Service, I was asked, "What is the supreme law of the land?" "The Constitution!" said I without a moment's hesitation, and soon had the honor of being admitted to citizenship by Judge Lasker, in the Southern District of New York.

This answer is very dear to us, both jurisprudentially and otherwise. In a circular, self-referential way, it is in the Constitution itself.\textsuperscript{254} The Constitution is the text constitutive of the United States as a socio-political entity; it is the root stock of our federal law.\textsuperscript{255} That goes also for statutory interpretation. Professor Mashaw:

[W]e must ground all methodological commitments in the Constitution before we can recognize them as legitimate. By this I mean simply that it must be possible to explain, by relying explicitly on some vision of the consti-

\textsuperscript{251} "Note that interpreters need not agree upon any particular theory of authority in order to agree upon interpretive choice doctrines." Id. at 89. Vermeule himself resists stating any such goal, using only various hypotheticals.

\textsuperscript{252} But: doesn't what counts as correct depend on the theory adopted by the epidemiological study? If so, even on his own grounds Vermeule would be wrong, first principles would determine interpretive choice.

\textsuperscript{253} The analogy is to the problem of choosing the appropriate institution to implement a policy. This critical argument is in Vermeule, supra note 1, at 89-91.

\textsuperscript{254} U. S. Const., art.VI, cl. 2.

\textsuperscript{255} What am I, a farm boy from the antipodes, doing preaching at Americans? Well, maybe we immigrants have a practical appreciation that those born to citizenship do not; we chose it, after all, and for reasons.
tutional polity, why that method of interpretation is appropriate for that interpreter with respect to that text.\textsuperscript{256}

Mashaw in that lecture made his explanation, his case for such a grounding. I believe his foundational requirements are too narrow, that one can justify more and in fact must (Axiom #2, below).

The Constitution’s Supremacy Clause also gives us the doctrine of legislative supremacy: “Laws of the United States which shall be made in pursuance [of the Constitution] . . . shall be the supreme law of the land . . .”\textsuperscript{257} How do we get those laws? “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”\textsuperscript{258} Thus legislative supremacy is a fundamental constitutive feature of our system of government.\textsuperscript{259} We do not test it for empirical validity; it is a condition of jurisprudential validity. We do not test it for normative validity: a statute may be ill-suited to prevailing needs or out of accord with societal norms, but it still reigns as governing law.\textsuperscript{260} If a court ignores a statute, it is for that reason subject to criticism and reversal on review.\textsuperscript{261} Legislative supremacy is a deeply ingrained part of our society, embedded in the concept of democratic self government.\textsuperscript{262} I don’t believe it has been seriously challenged in the twenty years since (then Professor, later Dean, now) Judge Calabresi advocated judicial power to “sunset” statutes found maladaptive,\textsuperscript{263} an argument which has found few followers, even its author since becoming a member of the judiciary.


\textsuperscript{257} U. S. CONST., art. VI, cl. 2.

\textsuperscript{258} U. S. CONST., art. I, cl. 1.

\textsuperscript{259} See Sinclair, supra note 25, at 4-5.

\textsuperscript{260} “Statutes and constitutions are fundamentally different [from the common law]. They are communications, and neither logic nor policy is the key to decoding them…” Richard Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179, 181 (1987).

\textsuperscript{261} Not surprisingly, published decisions contrary to statutes are rare. An example is the New Jersey supreme court’s decision in Blackman v. Isles, 4 N.J. 82, 71 A.2d 633 (1950).

\textsuperscript{262} See, e.g., The Federalist Nos. 48, 51 (James Madison); The Federalist No. 71 (Alexander Hamilton); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L. J. 281, 292 (1989). It is not, however, necessary to the concept of self-government; our system could have been otherwise, and its forbears were; see Sinclair, supra note 25, at 5, and authorities cited therein.

\textsuperscript{263} Guido Calabresi, A Common Law For The Age Of Statutes (1982).
Why beat so hard on the solidity of the doctrine of legislative supremacy? First, I am calling it an axiom, as solid a veridical status as can be claimed within a system. But second, as an axiom it is not just unquestionable within the system, it's effects should be pervasive, consequential: at a very minimum, as Reed Dickerson says, "any conflict between the legislative will and the judicial will must be resolved in favor of the former." Axioms matter. And, this Vermeule has disputed. He argues that although the Constitution may be interpreted to "specify the theory of statutory authority that, in turn, supplies interpreters with the aims towards which interpretive choice is directed . . . 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 the means as well as ends." The Constitution, he writes "cannot plausibly be read to say a great deal about statutory interpretation doctrine" and its legislative supremacy sources, in particular, mandate only that "judges should pay attention to the statutory text. . . . At the level of express commands, the Constitution simply does not speak to the subject." Thus, he concludes —for the vitality of the Sunstein/Vermeule epidemiological thesis he has to conclude —that the Constitution neither commands nor prohibits any interpretive doctrine. To contest these propositions, to argue that the legislative supremacy provisions of the Constitution do reach right down into a judge’s interpretive choice, I had better have the starting points quite firmly in place.

B. Axiom #2: The Necessity of Notice

In a wonderful passage of THE MORALITY OF LAW, Lon Fuller tells of good king Rex and the eight ways in which he tried, but failed to make law. His second “route to disaster” was “a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe.” This failure “does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except in the Pickwickian sense in which a void contract can still be said to be one kind of contract.” A person cannot

264. Reed Dickerson, The Interpretation and Application of Statutes 8 (Little, Brown & Co., Boston, 1975); see also Thomas Hobbes, Leviathan 139-140, 145 (1651); The Federalist Nos. 78, 81, 83 (Alexander Hamilton).
265. Vermeule, supra note 1, at 97.
266. Id. at 98.
269. Id. at 39.
270. Id.
be bound, morally or legally, by a rule of which she or he could not have notice.271

Suppose a law could be valid without notice to the governed, that is valid and effective although secret. Then an authority could apply it or not according to her whim and fancy. If she does not apply it, nobody will know; if she does, ex hypothesi the victim would have no legal grounds for complaint. Insecurity would be rampant; at any time any denizen could fall victim to a law of which he could not know in advance. (Perhaps as rampant as insecurity would be the strategy of prior purchase of the authority's good graces?) This would not be government by law, but government by authorities' choices. It certainly would not be the free, secure, and lawful society contemplated by our founding fathers.272 As Justice Harlan said, the requirement of notice "is essential in a practical sense to confine the discretion of prosecuting authorities."273

Thus, for an enactment to become law, the denizens must have notice of it; that means it must be promulgated. Jeremy Bentham: "That a law may be obeyed, it is necessary that it should be known; that it may be known, it is necessary that it be promulgated."274 Statutes are the means—historically it was said the only means275—by which our governors communicate control data to us, the governed. The exclusivity of statutes for this purpose has been eroded in the modern, regulatory state by the rule-making powers delegated to administrative agen-

271. E.g., ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Question 90, art. 1, 3 (1273); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 56, 136 (1690); WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 45-46 (George Chase ed., 4th American ed. 1938); Jeremy Bentham, Of Promulgation of the Laws, 1 WORKS 155 (Bowring ed., 1859); Lambert v. California, 355 U.S. 225 (1957); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

272. See Kolender v. Lawson, 461 U.S. 352, 358 (1983) (statute placing "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute" unconstitutional).


274. Bentham, supra note 271, at 157; see also AQUINAS, supra note 271, at art. 4; Locke, supra note 271, at 136.

275. "[T]he constitutional power granted to Congress to legislate is granted only if it is exercised in the form of voting on specific statutes." Max Radin, A Case Study in Statutory Interpretation: Western Union Co. v. Lenroot, 33 CAL. L. REV. 218, 223 (1945); U. S. CONST. art. I, §7.
cies, but the requirement of notice by promulgation applies to regulations as it does to statutes.

That said, oughtn’t we to take a grain of reality salt here? How many of us actually take notice of our tax liability from the Internal Revenue Code itself? How many of us could? Even among an expert audience, how many take actual notice of a law like the 1989 Financial Institutions Reform, Recovery and Enforcement Act, which ran to 783 pages? In more mundane social interaction, our everyday shopping for newspapers, candies, groceries, lunch . . . is governed by Articles 1 and 2 of the Uniform Commercial Code: what proportion of all the daily buyers and sellers have heard of them, let alone read them? And what about common law? We often identify it with “case law” but it can hardly be that: even now only a small part of society knows how to find cases, and any two of those on opposite sides of a question will find ways to interpret them differently, so notice cannot be from cases. How then do we ordinary denizens who must still obey get notice of the governing common law?

For present purposes we need only account for notice by statute and that will have to await the introduction of a further distinction.

C. An Empirical Distinction

I think the only laws I regularly look up to govern my everyday behavior are those posted in large black numbers on a white, rectangular background, or in white letters on a red, octagonal background along the side of the road. While I occasionally teach Article 2, I don’t even think of it at the grocery check out counter. It is seldom that I


278. H.R. Rep. No. 1278 (1989). Justice Scalia might, quite rightly, worry about how many legislators read the committee reports before voting on a bill — Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment: “I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote . . .”). But, how many of those who voted on FIRREA could realistically have skimmed it all, let alone taken it in?

279. See SINCLAIR, supra note 25, at 22 for an account of notice in common law.

280. See id. at 8-9.
look up statute books, or pay somebody else to look them up. For me, then, in most—almost all—aspects of my life it is much more important that the law be just than certain because, if it is written down somewhere, I don’t know what that writing says. And this, I believe, is so if not for everyone, then at least for an overwhelming majority. How about you?

What is going on here? In most behavior, as a practical matter we do not take notice of the governing law by looking up the statute books or the reported decisions. We just act according to prevailing social mores because that is how, decently, to behave. If the law is just, as ordinarily moral persons we have a pretty good chance of abiding by it. This is something the common law, by drawing on the socio-moral background, recognizes and depends on: common law ought always therefore be just, rational, in accord with prevailing social morality.281 We might call those behavioral domains in which one ought not be expected to look up “the law” before acting “non-notice domains”. In such domains ordinary actors do not take notice of and then rely on a governing statute; they simply behave properly. So we might call the law governing such domains “non-reliance law” because we do not rely on it in choosing courses of action. For example, it would not make sense to consult a lawyer before deciding whether or not negligently to inflict emotional distress.

On the other hand if you’ve committed a tort, it makes a lot of sense for your lawyer to investigate the prevailing law on damages. Settlement negotiations are not likely to proceed sensibly unless she has the boundaries of your potential liability firmly in hand. If you decide to “go public”, to sell shares in your developing business, you will have to consult some experts, including legal experts. Experts in new issues of securities govern their advice by statutes and regulations; they are or soon become absolutely familiar with those statutes, their legislative histories, and the decisional law under them. When anything new breaks on the legislative or decisional fronts, the whole community takes notice. Among the more mundane, for most of us buying a house is about the biggest transaction—after marriage—we get into. There too it is normal to have expert assistance, and the experts know of the relevant governing law and its nuances. These and similar be-

281. Chief Judge Charles Breitel on common law decision-making: “The judicial process is based on reasoning and presupposes—all antirationalists to the contrary notwithstanding—that its determinations are justified only when explained or explainable in reason.” Charles Breitel, The Lawmakers, 65 COLUM. L. REV. 749, 772 (1965).
behavioral domains might be called "notice domains", and the law governing such domains, "reliance law"; normally people take notice of such law, or get expert assistance, before acting. So, directly or indirectly, in notice behavior we rely on the law. In notice domains, it is more important that the law be certain than just.\textsuperscript{282}

What about those traffic signs then? Like you, I drive on the right hand side of the road without ever having seen or read the law requiring it. But I know the speed limits are different for different segments of our road system, so I look for them, I take notice. Driving may be a very mundane activity, but it is nevertheless a notice domain. We don't need expert help for this: because, unusually among notice domains, this one is so commonplace, the traffic overlords post notices –clear, obvious notices –for us to observe and govern our behavior (especially speed) by. Filling out tax forms every April is, for most of us, a more occasional but somewhat similar behavior. Most of us don't need expert help (and can't afford to pay for it) but we don't need to read the actual statute either, and certainly not its history, regulations, or tax decisions. But we do need the simple instructions (analogous to the white "STOP" in the shiny red octagon) to guide us through our "1040s".

D. A Legislative Distinction\textsuperscript{283}

A legislature might wish to control behavior quite strictly in some certain respect. The governed should not, in this domain, have much choice, but should follow the enacted rules with precision. Sociologists call such a behavioral domain "strictly coupled" (or "tightly coupled").\textsuperscript{284} Examples might be the Uniform Probate Code,\textsuperscript{285} Articles 3, 4, 4A and 5 of the Uniform Commercial Code, the classifications of crime into

\textsuperscript{282} As limited by Lord Mansfield in Vallejo v. Wheeler, 98 Eng. Rep. 1012, 1017 (K.B. 1774); see also supra text accompanying note 184.

\textsuperscript{283} See Sinclair, supra note 25, at 119-28.


\textsuperscript{285} It may be characteristic of "implementives", laws that tell how to achieve some legal end otherwise not available, that they be strictly coupling; after all, they are recipes to be read before acting. The U.P.C. is also set against a default background of losing all control by dying, something that seems curiously to have been forgotten in the present propaganda campaign about "death tax."
detailed sub-categories, such as murder-1, murder-2, or any definition. In order to exercise such control, the legislature had better speak carefully, clearly, and with precision. One would, therefore, expect statutes designed to exercise such control to be detailed and in a well defined jargon.

The contrasting end of the spectrum is the loosely coupled legislative domain. The denizens here are presumed to be able to choose for themselves, not to require governmental guidance. Examples are the natural common law domains, like the everyday, non-commercial human interaction, where serious misbehavior leads to torts, or small-scale day-to-day commerce, as is governed by Article 2 of the Uniform Commercial Code. Statutes governing such domains should have open textured terms, terms the content of which has to be filled in according to local conditions. Article 2 is replete with them: "reasonable/reasonably/unreasonable," "reasonably certain/time," "seasonable/seasonably," "material/materially."

We might call the legislature's choice of manner of exercising governance along this strict coupling - loose coupling spectrum, "legislative attitude." It is a second order of legislative intent, not intent as to the actual governance of the statute, but intent as to how the statute is to control. Those who doubt the existence of legislative intent should have fits at legislative attitude. While it is unlikely that any legislature should enact an unintentional statute - except by mistake - it seems reasonably likely that a bill should become law without there being any discussion or overt thought at all given to legislative attitude. Nevertheless, the same sort of argument applies to it as worked against the categorically mistaken arguments against intent. Indicia are to be

286. See, e.g., 39 N.Y. PENAL LAW §§ 125.25, 125.27 (McKinney 2001); Cal. Penal Code §§ 187, 189 (West 2001). These are instructions to prosecutors, defense lawyers, and courts, and are passed along to juries by judges. Contrast the prohibition against murder, of which only a psychopath need take notice.

287. Note that the delivery terms sections, U.C.C. §§ 2-319 to 2-322, are exceptional. They are designed to be relied on in commerce. The difference in drafting style is quite apparent.

288. U.C.C. §§ 2-201(2) & (3)(a); §§ 2-206(1) & (2); § 2-208(2); § 2-209(5); § 2-210(5) (1998); etc.


292. I might have written that it is "meta-intent" but "meta-" a once useful word, has been so over- and mis-used in writing on legal theory as to become a hazard to communicative health.
found first and primarily in the statute's language, then in its function in society, and insofar as it is helpful, in the public record of the statute's emergence as such, i.e., the legislative history. 293

Primarily, legislative attitude determines the locus of decisional power. The democratic doctrine of legislative supremacy says that power resides in the legislature; but the legislature can in its exercise devolve it downwards to local decision-makers, should it so choose.

If the enacting legislature intends strict coupling, then it is retaining power in itself. The values and social conditions that are the background for interpretation should be those that motivated the legislation, determined at the time of enactment. Word meanings should be determined at the time of enactment; if a dictionary must be used it should be of that vintage. In contrast, if the statute is intended to be loosely coupling, then decisional power under its more open language is devolved downwards to the courts, variable with time, place, and the nature of the behavior in question. Word meanings should be determined locally under local social values; a dictionary should be current, as of the time of decision, not historical, as of the time of enactment.

PART 4: LEGISLATIVE ATTITUDE AND BEHAVIORAL DOMAINS, LEGISLATIVE SUPREMACY AND NOTICE

These inter-relating spectra are—or should be—the determinants of interpretive choice. In any particular interpretive problem, how they interact may be quite clear, and if it is not, then what the unclarity stems from, and thus what would resolve the dispute, is likely to be. But there is enough possible variety in the interactions that one is hardly likely to find anything that could be mistaken for interpretive doctrine.

Behavioral domains are empirical. We ask: how do people doing this sort of thing in fact make their decisions? It is a factual dimension but, like currently prevailing social attitudes, one that is for judicial, not jury determination. Legislative attitude is determined historically, and is within the deliberative control of the legislature. A notice domain lends itself naturally to strict coupling; knowing that the governed will study the law before taking action, the legislature can

increase the detail and precision of a statute comfortable that it will not entrap any of its denizens. If it perceives itself to be governing a non-notice domain, the legislature will know that the governed will not rely on the law but act according to their prevailing sense of the just and good (and, sometimes, the efficient.) Accordingly it would do well to choose a loosely coupling mode of control, and to model its behavioral constraints on justice and goodness. Perhaps the remarkable durability of Article 2 of the Uniform Commercial Code is attributable to its "flabby drafting" and "weasel words", its open expressions devolving decisional power to the local level.

But legislatures may not always get this match-up right. Legislative supremacy says the legislature is still boss; but still, strictly coupling a non-notice, non-reliance domain is unlikely to be successful. Should a legislature wish to change behavior in a non-notice domain, notice of the change would have to be extremely well publicized. For example: If you are driving along and wish to turn right at the same time as a car approaching from the other direction wants to turn left up the same road, you will have the right to go first. Now suppose traffic engineering studies showed that reversing that law by giving the car turning left from the other side of the road the right-of-way would, overall, lead to more efficient traffic flows; suppose also that the legislators are convinced and change the law accordingly. Notice would have to be load, clear, dramatic, and repeated, wouldn't it? Exactly this happened (*mutatis mutandis*—they drive on the left) in New Zealand about twenty years ago. My late Uncle Noel, who failed to give way to a traffic cop, told the judge it was as though, having all his life put his food in his mouth, he was now being told "to stick it in my ear." Notice of a change in a non-reliance law for a non-notice behavioral domain has to work as re-training, has to bring about a new, ingrained, social more. It's a tall order.  

In notice domains, certainty becomes a primary value in statutory interpretation, for then, as Lord Mansfield said, "speculators in trade then know what ground to go upon." And, provided transaction costs are reasonable, Ronald Coase assures us that no matter what the

294. If you go to New Zealand you'll find driving on the left easy, but adapting to this strange rule extremely difficult. Don't worry, those with the right-of-way from the other side of the road seldom press the right; to this day even those who have grown up with the rule know better than to rely on it!

rule, the most efficient arrangement can still be negotiated. Thus justice recedes in importance. By contrast, in a non-notice domain, certainty under the statute becomes of little relevance, for people will act without reading let alone relying on it. Of much more importance to the governed will be the justice and good sense of the law, for then they will not be caught out by it. That will require the law to be adaptive to local times and conditions; the common law, "that works itself pure by rules drawn from the fountain of justice," as Lord Mansfield saw it, "is for this reason superior to an act of parliament." Common law courts have not always been eager to draw on that "fountain of justice", as critics have often lamented. Article 2 of the Uniform Commercial Code in part sets out to cure some of the more entrenched and wooden of precedential reifications. Look, for example, at the ingenious way in which §2-207 dealt with the more mindless and maladaptive of the old "mirror image" rule's injustices. But as Article 2 again illustrates, to be effective, a statutory scheme for a non-notice domain must incorporate local standards of behavior, for that is how people will behave no matter what the "law-on-the-books" tells them. At most it will be able to set boundary conditions and give instructions to lawyers and judges charged with the *ex post facto* resolution of disputes.

Thus we see that legislative supremacy and the requirement of notice do not always work in sympathy. Actual notice of what a statute says is not easily to be had by most people most of the time; actual notice is expensive. But legislative supremacy is an empty ideal if actual notice is not, in reality, a serious possibility. In those domains in which we do take actual notice of statutes, we normally do so only when something important is at stake and then through costly professional intermediaries with knowledge and expertise: lawyers. Justice

298. Arch-positivist John Austin wrote:
   But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future). . . . [T]he Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.

2 AUSTIN, LECTURES ON JURISPRUDENCE 647 (5th ed. 1885).
may be sacrificed, as Justice Scalia wrote, but for the enhancement of certainty. Most of the transactions in ordinary life neither warrant the expense nor need the certainty.

This tension between legislative supremacy and the reality of notice lies behind much of the current debate about statutory interpretation. It may also provide an explanation for the oft-remarked phenomenon that conservatives and the rich-and-powerful favor textualism — even though they are more likely to be able to afford access to legislative history: they have more of their interests tied up in notice domains; the management of wealth according to the law relies on guidance from the law; greater certainty rather than justice therefore will matter more to them. In contrast, the poor and downtrodden do very little within notice domains; if they're lucky they buy a house; their employment may be within a notice domain, and if they are lucky they will have a trade union to care for their interests under the law. But for the most part, they must rely on the co-occurrence of the law with justice and decency as they see it. You can see this in the surprise most ordinary folk show at learning that employment at will is the default law in the United States, or that a bare promise of a couple of days in which to decide whether to buy is not enforceable.

How, then, does all this analytical rigmarole play out in the three central arenas Vermeule chose for interpretive choice: legislative history, canons of construction, and stare decisis?

A. Legislative History

Legislative history is potentially relevant at two levels of the interpretive choice: in determining legislative intent, and in determining legislative attitude. The latter is a precursor to the former. As an intent about how the legislation is to operate in society, ascertaining legislative attitude will help determine the relevance of legislative history to the interpretation of the statute in question. If the legislature intended strict coupling, then values, motives, and societal needs will be determined as of the time of enactment. That will make legislative history more relevant to the resolution of uncertainties left by the stat-

299. Ass'n of Data Processing Serv. Org., Inc. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 689 (D.C. Cir. 1984) (Scalia, C. J.) ("But the whole point of rulemaking (or of statutory law as opposed to case-by-case common law development) is to incur a small possibility of inaccuracy in exchange for a large increase in efficiency and predictability").

300. I treasure the resistance of students to these legal facts.
ute's language. Conversely, if the legislature intended loose coupling, legislative history will be less relevant and local conditions more relevant. But legislative attitude is itself tied to the time of enactment; it is strictly historical. And one might expect that on this more subtle dimension, inconcinnities between attitude and the finally drafted text will be more frequent. Thus, although the statute's language may be the primary determinant, it ought not to be the only one. If legislative history can shed light, then it ought to be used.

Take for example the fair use section of the federal copyright law, §107 of the 1976 Copyright Act. It was our first codification of fair use, hitherto a common law doctrine allowing limited copying rights. It is comprised of two lists, both of which are expressly made non-exclusive. Yet the mere presence of a list, especially an elaborate one, will tempt people to think that the list is exhaustive; and the fact of enactment itself might encourage that feeling. So, might a lawyerly-oriented pirate treat it as strictly coupling, and deliberately play up to its edges, as a tax lawyer quite properly should exploit the boundaries of the tax code? No. From beginning to end, the intent was to preserve the developing judicial doctrine; the statute was to be a legislative recognition, lest its omission should be construed as abolishing the doctrine. But that judicial doctrine included, and still includes, the

302. A popular definition was: "[A] privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner, without his consent, notwithstanding the monopoly granted to the owner by the copyright." Elizabeth Fischer Miller, Note, Copyrights — "Fair Use," 15 S. Cal. L. Rev. 249 (1942), commonly attributed to H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944).
303. The Registrar of Copyrights' statement at the introduction of the bill that "[t]he intention of section 107 is to give statutory affirmation to the present judicial doctrine, not to change it" was accepted without disagreement. Copyright Law Revision — Part 6, 89th Cong., 1st Sess., Supplementary Report of The Registrar of Copyrights On The General Revision Of The U.S. Copyright Laws: 1965 Revision Bill 28 (Comm.Print 1965). There were some objections to it along the long route to enactment on exactly the grounds of the need for greater certainty; Copyright Law Revision: Hearings on H.R. 4847, 5680, 6831, 6885 before Subcommittee No. 3 of the Comm. on the Judiciary, 89th Cong., 1st Sess., 1673, 1774 (1965) at 1554-55 (statement of Frederic Burkhardt for American Council of Learned Soc'ys), and at 1906 (statement of Gordon M. Freeman, Pres., Int'l Bhd. of Elec. Workers). But the final reports on the subject repeated that in §107 Congress sought "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." S. REP. No. 473, at 62 (1975); H.R. REP. No. 1476, at 66 (1976).
classic case *Sheldon v. Metro-Goldwyn Pictures* in which the defendant movie studio lost arguably because it had tried to exploit the limits of fair use when it failed to obtain a consensual license. The fair use statute should be interpreted as loosely coupling, devolving authority downward to the time and place of the events leading to litigation. Fair use retains its moral roots: "Take not so much from another as would give offense were it taken from you." In this example, legislative history helped ascertain the legislative attitude of loose coupling. Where legislative history can be useful at this level, it ought to be used, even if, as in this example, that legislative history should point to loose coupling, and so to the exclusion of further use of legislative history in interpretation.

If a statute is strictly coupling and – as it should – governs a notice domain, then there is unlikely to be any problem in deciding whether to use legislative history. *Ex hypothesi* the statute's language is under-determinate in some way. Usually a person will only know that because the expert advisor has told her so. That expert advisor will, in this day, age, and place, also be familiar with the relevant parts of the legislative history and relevant precedent. (Most will be law school graduates. What law teacher no matter how devoted to textualism would fail to mention relevant legislative history to her students?) There will not be an uncertainty problem if that history resolves the under-determinacy. Could a legal advisor in good conscience not take advantage of that resolution? Prospectively, if it is inefficient the parties can negotiate around it. Experts have notice of legislative history, just as they do of the contents of statutes and decisions within their area of expertise. That is what constitutes being an expert and justifies legal fees. Ought not a judge be aware of these empirical facts?

Legislative supremacy is at its fullest and most effective in tightly coupled governance of notice domains. The governed take notice of the statute and seek to resolve under-determinacies by reference to legislative history. Eschewing legislative history reduces legislative supremacy. This bears repeating: an advisor or judge who takes guidance from legislative history is *more limited* in her range of choices than is the textualist who places everything but the text off limits. That increased limitation reflects the democratic principle of legislative supremacy. If not legislative history, then what? Judge Wald:

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304. 81 F.2d 49 (2nd Cir. 1936) (a wonderful opinion from Judge Learned Hand, reversing a wonderful opinion by Judge Woolsey, 7 F. Supp. 837 (S.D.N.Y. 1934); see B. Kaplan, An Unhurried View Of Copyright (1967).
The second alternative source of meaning is for the courts to supply their own suppositions and assumptions regarding the will of Congress in preference to consulting the evidence we have, imperfect though it may be, about what the actual players thought they were doing. . . . The phrases “Congress must have meant this or that” or “Congress probably did this for that reason” appear often in such opinions without apparent source other than the writing judge’s mindset.  

There are remaining those intermediary areas in which it is normal to take notice but abnormal to seek expert advise. Rules for driving are the paradigm example. Here the government retains power not simply because it wants to demand strict obedience — rather obviously, that would be a vain hope — but because it needs to retain decisional power. Rules like “Drive so as not to endanger yourself or others” aren’t suitable as speed limits; almost every time a person (who could afford to fight) got a speeding ticket there would be a detailed factual dispute, and traffic cops would spend more time in court than on patrol. The certainty of “55 m.p.h.” not only precludes such disputes, but assures those within the limit that they are safe from the law. But notice of speed limits and stopping places and the like is not given by the statutes themselves; I’ve never actually read one, have you? Rather we take notice from the delegated notice devices, the roadside signs. The tax code is strictly coupling, but most of us take our notice from the form 1040 and sometimes Schedule A, and the instructions we receive with them. Those instructions need to be simple and reliable, like the roadside speed limit signs. Legislative history should be completely irrelevant.

United States v. Locke shows these various considerations, but also shows that they do not provide a talismanic solution. The statute in issue required holders of unpatented mining claims to comply with annual filing rules of a federal recording scheme. In relevant part, the statute required that, “prior to December 31” of each year following

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305. Wald, The Sizzling Sleeper, supra note 222, at 304-5. Even Justice Scalia has agreed: “And likewise [it is] dangerous to assume that, even with the utmost of self-discipline, judges can prevent the implications they see from mirroring the policies they favor.” Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring).


307. The very small proportion of society with the wealth and/or income to justify tax planning uses advisors who are expert at the code, the regulations, the precedents, and “how the service presently thinks,” and play up to the limits, as strictly coupling rules invite them to do.

the initial recording, the claimant had to file certain documents with the Bureau of Land Management of the Department of the Interior. Failure to comply was to be conclusively deemed an abandonment of the claim. The appellees' sad story was that they had filed on December 31 and had been notified that their claims were deemed abandoned because of failure to comply with the "prior to December 31" deadline. The Court held that the meaning of "prior to December 31" was abundantly clear and that, even though a December 30 deadline may be peculiar, "[d]eadlines are inherently arbitrary." One trouble was that the Bureau of Land Management brochure misled Locke, suggesting that the end of the year was the deadline and even allowing receipt of the documents in January provided they were mailed by the end of the year. Ought that brochure be held authoritative notice, like the instructions for filling out a 1040? Or ought the mine owner look to the statute itself or have his lawyer do so? If there were anything relevant to the interpretation of "prior to December 31" in the legislative history, ought one's lawyer go to the expense of finding it? I doubt it; numbers and dates, as Justice Marshall wrote, are about as clear and certain as any notice our government can give. I think if I had a pit producing more than a million dollars worth of gravel a year I'd have my lawyer do the requisite filing — and let the cost of failure fall on his malpractice insurer. But I don't and I don't know anyone who does own a mine of any kind. What is the mine owners culture like? How ought we expect them to behave? What was congress's attitude in enacting this statute? Many people sympathize with Justice Stevens' dissent, but until I know the answers to those questions, I really can't say. However, if the sign says "70" that's how fast I shall drive, even if the statute says "no more than 65 m.p.h.", and legislative history won't matter a fig.

What all this suggests is that there is no uniform rule about the admissibility of legislative history to aid interpretation. Legislative choice, in this respect, is and should be ad hoc. But there are pertinent considerations that frame the choice. Among those is the empirical question of the nature of the society governed: is it one that relies on the statute for planning its affairs in this respect, one which does not

310. Locke, 471 U.S. at 94 (citation omitted).
311. He argued that the Court had misunderstood congressional intent: "Congress actually intended to authorize an annual filing at any time prior to the close of business on December 31st, that is, prior to the end of the calendar year to which the filing pertains." 471 U.S. at 119. Of course he incurred the wrath of the textualists for substituting un-enacted intent for the actual words of the statute.
and should not have to know of the statute, or somewhere in between? This is the sort of question about which lawyers can make arguments—"Your honor, surely my client ought not have to go to the trouble and expense of searching the statute books before..."—and about which judges can make informed decisions. Legislative supremacy, with its roots in the Constitution and in the practical exercise of the concept of democracy commands respect; but so too does the moral, political, and practical principle that the governed must be given notice. How these jurisprudential foundations play out in different empirical environments is richly varied, but not intuitively difficult. Legislative history comes up smelling of roses in most circumstances.

B. Canons of Construction

It depends what you mean by 'canon'. Some people apply the word to any formulaic wise saw that could be used in interpretation of some statute, especially one in a formula attributable to a powerful court, i.e., the United States' Supreme Court. That seems rather to dilute the canonical flavor we associate with the traditional canons, but on the other hand I have no more authority than anyone else to choose the limits of the class. I shall discuss only the two most familiar Latin favorites, expressio unius...and ejusdem generis, as examples. As I shall argue that the interpretive choice of whether to apply a canon is to be made ad hoc for each statute, demonstrative examples are the best I can offer. Were one to be picking a determinate list for universal and automatic application, the burden of demarcating the set from which to pick would be telling.

Pragmatic canons, of which expressio unius est exclusio alterius is the clearest and most famous, depend on the context of enactment. In the famous rules of Heydon's Case, one asks "1st. What was the common law before the making of the Act[?]") and "2nd. What was the mischief and defect for which the common law did not provide[?"", and now we would surely include in this background context the possibility of prior statutory governance in need of repair. Is the legislature writing structure onto familiar restrictions? Or is it imposing a new control on a prior freedom?

312. See, e.g., Eskridge, supra note 24, at 323-28.
313. See Vermeule, supra note 1, at 140-43.
Consider the first rule of the statute of wills: "An individual 18 or more years of age . . . may make a will."\textsuperscript{316} If that is to preclude a person of twelve from making a will, it is only by \textit{expressio unius} . . . . What is the background? If it is one in which anybody of any age could dictate the disposition of his or her property after death, then this rule merely affirms a prior understanding. But we know that is not the background. As Thomas Jefferson wrote, "The earth belongs in usufruct to the living; the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when he himself ceases to be, and reverts to society."\textsuperscript{317} Thus: "Rights of succession to property of a deceased, whether by will or intestacy, are of statutory creation, and the dead hand rules succession only by sufferance."\textsuperscript{318} So the legislature enacting this "who-may" rule for the statute of wills is carving out an exception to the background; it is saying as much as it wishes to, no more: \textit{expressio unius est exclusio alterius}. One needs some legislative history here, but it is in an area in which the requirement of notice is not likely to be compromised.

Not all statutes are like that. In a non-notice domain a pragmatic canon that depends on speech act theory will get no grip on the attention of the governed; they won’t read it. Think of most of the rules governing small scale commerce in goods, Article 2 of the Uniform Commercial Code. But should a dispute arise, then those rules will be read by lawyers and judges, as will their drafters’ comments. \textit{Expressio unius} . . . still will find no purchase on a statute with open textured terms and a pervasive duty of good faith and reasonableness. Open textured expressions devolving power to local decision-making preclude the argument that the legislature is saying carefully only as much as it can.

There are exceptions. Take for example the "Firm Offer" rule of §2-205 of the U.C.C. It allows for enforcement of an option contract unsupported by consideration or reliance. What was the background, "the common law before the making of the Act"?\textsuperscript{319} An option was a contract subject to all the restrictions on enforceability governing all contracts. And "\textsuperscript{2nd}. What was the mischief and defect for which the

\begin{itemize}
\item \textsuperscript{316} \textsc{Unif. Probate Code} §2-501 (1990).
\item \textsuperscript{317} \textsc{Thomas Jefferson}, 7 \textsc{Jefferson's Works} 454 (Monticello ed. 1904) (Letter to James Madison, dated September 6, 1789).
\item \textsuperscript{318} Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942).
\item \textsuperscript{319} \textsc{Heydon's Case}, 76 Eng. Rep. 637.
\end{itemize}
common law did not provide.” So many people are surprised to learn the basic law that it was a trap for the unwary, not something of which an ordinary person would know in this non-notice domain. Options are not ordinary contracts at all; they are contracts about the duration of offers, second order promises. The justification for treating them as undifferentiable from first order contracts has always been strained. So here, in §2-205, our legislatures created a sensible but revolutionary exception to a mysterious judicial (and treatise enhanced) rule. It is hedged in with restrictions: could I (a mere law professor) make a firm offer to sell my car? No. Could the used car dealer make an enforceable, oral firm offer to me of a nice $300 heap? No. Why not? Read the statute and add expressio unius est exclusio alterius. On the other hand, though, could I buy from that car dealer for a couple of bucks a seven-month option to buy a $300 speedster? Of course I could. The background is freedom of contract, and this option contract is not illegal. Expressio unius . . . does not say §2-205 is the only way to create an enforceable option against this more general background: the “Firm Offer” section carves out an exception to the requirement of consideration, not to freedom of contract.

What about the special class of strictly coupled notice domains in which the ordinary person doesn’t read the statute but does read subsidiary notices: speed limits, stop signs, IRS instructions, and the like? Expressio unius . . . operates there with a vengeance. If the sign says “55 m.p.h.” then that is the limit: at 50 m.p.h. a driver must be confident of safety from the radar wielding traffic cop; at 60 m.p.h. the driver must be confident she is not so secure. Why is driving at 50 m.p.h. a solid defense against a speeding ticket in a posted 55 m.p.h. zone? Expressio unius est exclusio alterius. It would be utterly infelicitous to signal “55 m.p.h.” and ticket those driving 50 m.p.h. as a lesser included subset of 55 m.p.h., wouldn’t it?

One can see lenity as a subclass of this general pragmatic canon. Lenity tells us to interpret criminal statutes narrowly. This makes

320. Id.
321. Chief Justice Marshall in 1820:

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime. . ..

It is said, that notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal, as well as other statutes. This is true.
sense. We live in the land of the free, which surely means that one can do anything which is not forbidden. Most really rotten behavior, acts we call *mala in se*, are socially prohibited; society otherwise would not be possible. But many crimes are created by society and are impositions on freedom. Speed limits on open roads, for example. The democratic principle of legislative supremacy gives our governments the power to make such rules, but the requirement of notice says we are entitled to be told clearly. To go beyond such notice would defeat the background presumption of our society. *Expressio unius* . . . Lenity is still alive and well, but not in those behavioral domains, like dealing in illegal narcotics, where our legislatures' rampant hostility is open and notorious. It fits.

Another class of statutes to which *expressio unius* . . . does not apply is those with lists preceded by “such as” or ending in “and similar . . .”. For example the fair use provision of the 1976 Copyright Revision Act says it extends to copying “for purposes *such as* criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research . . .”. Why would a legislature use such a device? Why not tell us some general description of the class of copying covered? In good faith, felicitously giving notice, the legislature would give such a general description if it could; but here no description could be found adequately expressing the class intended. The statute carving an exception in the background doesn’t say all it can because no way could be found to do that; the list with an “and so forth” extension is thought to be the best available notice. It’s not a bad device; after all, common law has relied on it for half a millennium. But just as common law doesn’t tell us authorita-

but this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature.

United States v. Wiltberger, 18 U.S. 76, 95 (1820). The rule is indeed an old one; it appears in a footnote to *Heydon's Case*, 76 Eng. Rep. supra note 314, at note (B).

322. See, e.g., United States v. Hartec Enter., Inc., 967 F.2d 130, 133 (5th Cir. 1992).


325. “Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible.” H.R. REP. No. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.
tively what criterion of similarity links this case to a precedent, so too
the “such as + list” device doesn’t tell us what exactly counts as “such
as”. (If it could then that should have been used as a general charac-
terization, not the list.) Yet “such as” is a limitation; Chief Justice Rehn-
quist says it limits the extension of the list “to other items akin to those
specifically enumerated.” That is the rule of *ejusdem generis*. But it
always begs the question of what are the determinants of kinship?

In a notice domain *ejusdem generis* throws the advisor onto her own
resources. Should she take comfort from legislative history? Authorita-
tive comfort? Suppose she has a parodist client, who can’t get a consen-
sual license for his lampooning of the original. “Parody” is not on
the §107 list of permissible purposes for fair use; might it be in the
*ejusdem generis* extension? Both House and Senate committees said it
was. Surely that will give her confidence that it is worth looking
further. If she does so she will find the legislative history suggests look-
ing to cases, including those dated prior to the enactment of the sec-
tion. Should she fail to make use of this readily accessible legislative
history, one might doubt the expertise of this advisor, don’t you think?

What we see here are canons relying on the good faith, felicity,
and practical realism of the legislature, not only in the exercise its leg-
islative supremacy, but also in its fairly and effectively communicating
enacted control data to the governed. How these jurisprudential
fundaments play out in supporting canons of construction varies ac-
cording to the kind of domain governed and the kind of governance
being exercised. It is hardly surprising that the output of the deci-
sion-maker’s analysis, interpretive choice, should vary greatly with varia-
tion in these determinants.

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326. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980); *see also* United States v.

327. *See* *Sinclair*, *supra* note 25, at 150-51.


329. The purpose of copyright is given (and limited) in the Constitution: promot-
ing the progress of science and useful arts. U.S. Const., art. I, § 8, cl. 8. But in enact-
ing the fair use section, Congress also aimed “to restate the present judicial doctrine of
fair use, not to change, narrow or enlarge it in any way.” S. REP. NO. 94-473, at 62

330. As we have seen, legislative history is always relevant to the latter.
Should one apply *stare decisis* more or less rigidly than in common law? It should not be surprising that this analysis produces no single, uniform answer. But it does produce answers, and rather clearly too.

First, suppose a statute that is intended to provide strictly coupled governance of a notice domain. The legislature’s exercise of supremacy here retains power in itself, so any necessary interpretive resources exogenous to the statute should be those associated with enactment. The governed in such a domain will rely on the statute to guide their behavior, but notice of the statute, legislative history, and subsequent judicial decisions is not compromised because of the well-informed expertise of the professional advisors typically involved. Certainty of interpretation is valued over justice. If the legislature does not like a decision, it can amend the statute and all those involved in the behavioral domain will take notice. It all rather falls into place, doesn’t it? *Stare decisis* should be strict.

At the other end of the spectrum is loosely coupled governance of a non-notice domain. Denizens for the most part will never read the statutes but take their behavioral guidance from the common decencies of the community. As times, technology, mores, and thus community values change, so too will behavior and expectations. Justice takes priority over certainty of interpretation, the latter being as unknown to the governed as the statutes themselves. One doesn’t need “democracy forcing”: societal values under open textured terms serve the purpose. Again, it all falls into place: *Stare decisis* should be weak, judicial decision-making local, flexible, and adaptive.

Of course, in the real world, things do not work out as one might characterize them in the abstract. But these have been the characteristics of decisions within paradigmatically different domains. For example, when the Massachusetts Supreme Court faced the exploitation of an old decision to subvert a fundamental tenet of estate planning—a notice and reliance domain—it made its decision changing the old rule prospective only: “We announce for the future that, as to any inter vivos trust created or amended after the date of this opinion, we shall no longer follow the rule announced in *Kerwin v. Donaghy*.”

Thus it was able to maintain the strictness of precedent in the strictly coupled, notice domain without compromising either legislative

supremacy or notice to the estate planners, all of whom were well aware of the decision. Compare decisions under Article 2 of the Uniform Commercial Code's "Unconscionability" statute, § 2-302. The decision, though factual, is for the judge, and is intensely local. Apart from the early language exploitation cases, few of these are appealed or reported. It would be quite out of keeping with the nature of the statute's control to instruct a business client on the basis of prior decisions how to exploit the limits of permissible conscience without falling afoul of § 2-302.

What about that quirky category, the everyday behavior where we do not take expert advice and do not read the statute, but do take and do rely on available notice? What do most of us know of traffic court appeals? Are there any appeals? Doesn't one just lose? I should hope that stare decisis here should be extremely weak and that judges should be finely attuned to the nuances of justice and fairness. But I think of my late Uncle Noel's $NZ60.00 fine and don't hold out much hope.

CONCLUSION

"Interpretive choice" is a good neologism for the problems facing interpreters. But those problems do not lend themselves to uniform answers, and certainly not to Professor Vermeule's answers: One should never use legislative history; canons are good but are to be picked rather than chosen, that is arbitrarily, not with reason but with certainty; the strongest, least flexible stare decisis is best. Statutory law, kinds of human interaction governed, and statutory interpretation are more complicated than that.

"It's more complicated than that" is one of the most common and most annoying responses one gets to a theory. You have, you think, come up with a useful way to handle a set of data, a tool with which the practitioner can make some advance, only to be told "it's more compli-

333. E.g., Frostifresh Corp. v. Reyneso, 281 N.Y.S.2d 964 (App. Term 2nd Dept. 1967). Even the great early analyses, such as Judge Skelly Wright's brilliant opinion in Williams v. Walker-Thomas Furniture, 350 F.2d 445 (D.C. Cir. 1965), break up the moral elements of unconscionability, but do not free it from sensitivity local conditions and transactional nuance.
334. See supra text accompanying note 294.
335. Vermeule, supra note 1, at 134.
336. Id. at 140-41.
337. Id. at 144.
cated than that.” I can hear my old philosophy professor’s gleeful “Oh, another distinction! Go-ood!” I had the impression that nothing could count as well grounded but a list of particulars! Of course it is more complicated, it always is. But we cannot convey knowledge and understanding by a list of particulars; some abstraction is necessary, and with it is lost some detail treasured somewhere by somebody. The trick for the theorist is to pick a level of generality that makes a useful unification without losing too much valuable diversity. So I sympathize with Vermeule, and might anticipate a similar response to my theorizing as I have made to his.

But Vermeule’s abstractions went astray from their very beginning in the Sunstein/Vermeule thesis that empirical, epidemiological data on the accuracy of judicial decision-making would, if obtained, be relevant to a judge’s interpretive choice. It would not. At most it would be of interest to academic spectators, and might possibly influence legislation, but the judge herself would still have to decide individual interpretation cases in all their variegated, individual splendor as wisely and fairly as she could. That wisdom and fairness does not depend on statistics about the accuracy of other judges’ decision-making.

All that empiricism might still make a relevant argument to academics, if only there were some determinate criterion of accuracy in decision-making deviation from which could be the basis of epidemiological studies. But what counts as correct in interesting cases is not empirical; it is the sort of moral, jurisprudential claim about which reasonable people can differ. That’s why we have dissents. So the foundational empirical questions of the Sunstein/Vermeule thesis depend, conceptually, on non-empirical judgments.

Yet even these problems might not undermine Vermeule’s end result. His central argument in Interpretive Choice is that the very undecidability of the essential questions has consequences. But no matter what theoretical edifices he may construct around the problem of making decisions on radically incomplete information, his analysis comes down to efficiency and certainty. The textualist’s longed for certainty is a myth. Efficiency? Cutting aggregate costs may be a popular talisman in Chicago, but it is not, thank goodness, coextensive with justice in most courts (outside Rabelasian France.)

I have argued that there are indeed empirical and quasi-empirical questions to be answered in making the interpretive choice. But they are about the nature of the social domain governed by the statute, not about the success rates of judges: What is the nature of the control the
legislature sought to exercise in this statute? How did it allocate decisional power? How do those in the behavioral domain governed use the statute? The answers to such questions may not be fully determined by available data, but usually they can be narrowed satisfactorily enough. And they are the sort of questions that have traditionally been involved in legal argument.

Some behavioral choices are made with prior consultation of the statute books and all the paraphernalia associated with them: regulations, legislative history, judicial decisions. Most behavioral choices are made without a thought to the law. I have dubbed these “notice” and “non-notice” domains, respectively. Wise legislation will not attempt precision, strict coupling, in statutory governance of a non-notice domain. But where professional advisors are typically involved in planning, and the state of the law taken into account, then statutes can be formally detailed and other aids to interpretation may play a significant role. The interaction of these dimensions with the foundational democratic principle of legislative supremacy and the fundamental jurisprudential requirement of notice generate a systematic framework for interpretive choice.

If doctrine requires stability over time and generality over cases, I have not provided it. What I have tried to provide is an analytic framework: these are the kinds of empirical and legal questions the answers to which determine interpretive choice; first, find those answers in this case and see how they interact. You will only get clear determinate answers in easy cases; but you should be able to isolate the difficulties and the nature of the arguments to be made about them in the hard cases. What more could you expect in the governance of the rich and varied society we live in?

One would hope the output of this analytic framework would look rather ordinary. No novel substance should count as important to interpretive choice. After all, members of our judiciary have been interpreting statutes for a couple of hundred years, interacting with the governed and the legislative governors in a wide variety of circumstances with only one brief spell of societal failure. What they have been doing must have been roughly right (even as it varied), and available at a cost society thought justified. Otherwise we would have changed it. In this analysis of interpretive choice, my aim has been to capture that adaptivity, variability, and resilience.