

## Abstract

### The Penalty Default Canon

Lawmakers often have an incentive to avoid making important policy choices, shifting responsibility for the outcomes of those choices onto other governmental branches. Statutory incompleteness (that is, a statute containing a gap or ambiguity) provides a mechanism for accomplishing this transfer of responsibility. Drawing on the incomplete contracts literature, we argue that the reasons for statutory incompleteness should form an important consideration for courts faced with interpretive disputes regarding an incomplete statutory provision. Specifically, if lawmakers attempt to employ statutory incompleteness as a means to shift responsibility for difficult policy choices onto courts or agencies, courts should penalize lawmakers by holding that the provision in question is an unconstitutional delegation of legislative authority. In contrast, when statutory incompleteness is inadvertent or attributable to a legislative desire to enhance public welfare – such as, for example, an attempt to reduce the transaction costs of lawmaking or harness the special expertise of courts or agencies – a penalty would be futile or overly costly and should not apply.

This “Penalty Default Canon” sheds new light on the *Chevron* and non-delegation doctrines, as well as many theories of statutory interpretation. Indeed, we demonstrate that these theories and doctrines are flawed because they assume a single underlying cause of statutory incompleteness. The Penalty Default Canon, in contrast, is more nuanced, mimicking the approach taken by contract scholars and courts in the setting of contractual default rules. The article develops a three-part test for discerning the underlying source of statutory incompleteness through a careful examination of legislative history and interest group dynamics. We then apply this test to two statutory provisions that we argue Congress left intentionally incomplete: the “strong inference” provision of the Private Securities Litigation Reform Act of 1995 and Section 6 of the Clayton Act.