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BOND V. UNITED STATES AND INFORMATION-FORCING DEFAULTS: THE WORK THAT PRESUMPTIONS DO

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Bond v. United States[1] introduces a new presumption to the art of judicial interpretation of federal statutes. A court must presume that Congress did not intend for legislation implementing a treaty to regulate traditional areas of state authority in a manner that upsets the balance between federal and state power.[2] The presumption puts the burden on Congress to indicate a contrary intention. Forcing Congress to resolve a contestable issue raises the cost of enacting laws that express the presumed-against choice. The presumption thus makes it harder to adopt legislation that invades the traditional domains of state authority, even in pursuit of international law enforcement.

The case involved Carol Anne Bond's conviction for knowing use of a chemical weapon in violation of the Chemical Weapons Convention Implementation Act of 1998.[3] Bond had coated a mailbox used by a romantic rival with toxic chemicals in hopes of injuring her. Local authorities declined to prosecute under state law, but federal prosecutors charged her with violation

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1 134 S. Ct. 2077 (2014).

2 *Id.* at 2093–94.

3 *See* Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. §§ 6701–6771 (2012). The statute generally implements Article VII(1) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997), which requires that state parties, "in accordance with [their] constitutional processes, adopt the necessary measures to implement [their] obligations under th[e] Convention." *Id.* at 331. Bond also pled guilty to mail tampering, a less serious charge that presented no constitutional difficulties. The chemical weapons charge, however, was necessary to sustain under federal law the lengthy prison sentence that she received. *Bond*, 134 S. Ct. at 2085–86.

of the Act.[4] The lower courts rejected Bond's argument that the Act, as applied to her conduct, exceeded the enumerated powers of Congress under the Constitution and thus violated the Tenth Amendment.[5] The Court overturned her conviction, not on the ground that the Act violated the Constitution but instead because it should not be interpreted as reaching her conduct. "[W]e can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[6]

Over the last few decades, the Court has used a number of interpretative mechanisms that have the same structure as the *Bond* presumption. The presumption against extraterritoriality, the presumption against violating international law, the presumption against testing constitutional limits, and the presumption against implied causes of action all have the effect of truncating the reach of statutes. This truncation leaves courts in a significant range of cases lacking either subject matter jurisdiction or a federal rule of decision to apply to the dispute. What these presumptions do is demand that Congress, at a cost, disclose more information about its preferences regarding federal judicial intervention in the status quo. A consequence is that, absent such disclosure, a possibly unwanted status quo will endure. *Bond* thus reflects a general trend in the Court's approach to statutory interpretation, rather than standing as an isolated instance of rumination about the effect of treaties on congressional power.

What should we make of this trend? The legal academy offers many perspectives, including doctrinal analysis, constitutional theory, historical analysis, and political theory. One possibility, rare but not unheard of in the field of foreign relations law, is to turn to contract theory.[7] Contracts represent a profound mechanism for enabling cooperation through self-governance. Many contractual disputes turn on interpretation. What contract theorists think about the use of presumptions in contractual interpretation can inform how we approach presumptions in statutory interpretation.

Presumptions that force relevant actors to disclose information about their preferences are well known to contract theorists. Interpretative defaults pervade contract law, with a rich literature considering optimal defaults. Most lawyers will recall *Hadley v. Baxendale*,[8] which obligated a shipper to reveal additional information as a condition to obtaining coverage for conse-

4 *Bond*, 134 S. Ct. at 2085.

5 United States v. Bond, 681 F.3d 149, 152 (3d Cir. 2012). The lower court relied on *Missouri v. Holland*, 252 U.S. 416 (1920), for the proposition that "if a treaty is valid, 'there can be no dispute about the validity of the statute [implementing it] under Article 1, [Section] 8, as a necessary and proper means to execute the powers of the Government.'" *Bond*, 681 F.3d at 152 (second alteration added) (quoting *Missouri v. Holland*, 252 U.S. at 432).

6 *Bond*, 134 S. Ct. at 2090.

7 *See, e.g.*, ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN (2006); Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17 (2014).

8 94 Ex. 341, 156 Eng. Rep. 145 (1854).

quential, as opposed to out-of-pocket, damages. By refusing to award the victim of a breach compensation for the full extent of injuries absent an explicit agreement, the precedent puts the burden on shippers to disclose information not known to the carrier that, if shared, would extend the range of and improve the value of the contract.[9] Although no consensus exists about whether *Hadley* made the right choice between shippers and carriers, most scholars who draw on the insights of economics would agree that courts should employ information-forcing defaults to optimize the disclosure of information between the parties, given the value of the information concerned, the cost of disclosure to the party holding the information, and the cost of enforcing the default in the absence of disclosure.

This general principle—use information-forcing defaults to optimize the value of disclosure between the relevant parties—can guide our thinking about the statutory interpretive presumptions that the Court increasingly has embraced and extended. Do the presumptions choose the right instances in which the value of eliciting an express decision from Congress exceeds the cost of nonintervention in the status quo? How do we assess the value of express congressional decisions? In what ways is judicial nonintervention costly?

Contracts and legislation, of course, are more different than alike, even if they both raise interpretive issues and employ information-forcing defaults. What makes a good contract, from society's perspective, is not the same as what makes good legislation. But we can take the differences into account without discarding the basic analysis. To consider the desirability of the Court's recent trend, we need to determine what further deliberation and decision by Congress would accomplish, and how judicial nonintervention affects society. The answers to these questions may not be as clear or as quantifiable as in the case of private gains and costs, but they remain the right questions to ask.

This Article first places *Bond* in the context of the Supreme Court's growing reliance on interpretive presumptions to limit the effect of legislation. While some of the presumptions go back to the early days of the Republic, the current Court has expanded the roster of these devices and strengthened their effect. *Bond* is both the newest such presumption and, compared with the others, potentially the most far-reaching. Yet the case did not cry out for such a move. But for the Court's robust use of structurally similar presumptions in recent years, one might doubt whether it would have taken this path to decide the case.

A review of the treatment of information-forcing defaults in contracts scholarship follows. Contract theory, or more precisely the strand of contract theory that draws on economics, seeks to identify socially optimal rules for contract formation, interpretation, and enforcement. It first explores what rules optimize the value of a contract for the parties, and then looks for externalities that may drive a wedge between the parties' interests and those

9 *Id.* at 354, 156 Eng. Rep. at 150.

of society. A consensus has converged on the propositions that: (a) under certain conditions, rules that induce one party to disclose private information can enhance contractual value, and (b) parties seeking to get the most out of their relationship should prefer such rules regardless of which party bears the burden of the presumption. Another, more controversial claim is that a narrower class of presumptions, called penal defaults, can reduce the negative externalities of certain contracts by forcing contracting parties to disclose information to the benefit of society, but not to their own advantage.

To clarify the specific role of these rules, this Article compares information-forcing defaults to contract rules that allow parties to design mechanisms to deal with future contingencies about which no party has special knowledge. Delegation rules allow parties to specify a set of contingencies that, upon realization, entitle a selected third party to supplement the contract to incorporate post-contractual information. From a welfare perspective, information-forcing defaults and delegations are complements, each desirable under specified conditions. But, as to any particular issue, these strategies operate at cross purposes. Choosing a delegate to resolve downstream problems reduces a party's incentive to disclose relevant information at the time of contracting. The challenge thus becomes determining the conditions, both in theory and in practice, where each approach is likely to optimize the value of a contract.

After exploring the economic analysis of contract interpretation, this Article then considers how contract theory's insights, which illuminate the welfare effects of private ordering, might inform our understanding of the production of public law through the dynamic relationship between legislators and judges. A transposition of the private law analysis to public law production requires one to have some theory about how the production of public law works and what benefits and costs it generates. This Article looks at several informal models of how Congress and the federal judiciary operate, and in particular at how they interact with respect to statutory interpretation. It then identifies the circumstances under each model that would support a conclusion that the Court's current trend may contribute to the social good.

The result is a limited defense of the Court's recent practice in general and the *Bond* decision in particular. The rule announced in *Bond*, like the presumptions against extraterritoriality, violating international law, and testing constitutional limits, represents a plausible prediction of what Congress prefers. An approach to legislative interpretation informed by contract theory would regard this as a majoritarian default that most likely enhances, rather than impairs, democratic republican decisionmaking.

I. PRESUMPTIONS AND THE COURT

Many specialists in foreign relations law anticipated a significant constitutional decision in *Bond*. The Court had intervened in the dispute once before, requiring the Third Circuit to address the petitioner's constitutional

arguments rather than dismissing the claim on standing grounds.[10] The scholarly community hoped for judicial resolution of a debate over the ongoing validity of *Missouri v. Holland*[11] that had riven its ranks.[12] The issue, in its essence, was whether the subject matter limits that Article I of the Constitution imposes on Congress in deference to the reserved powers of the states apply to legislation enacted to fulfill a treaty obligation. What we got instead was an opinion deciding only that the question of whether Congress through treaty enforcement could regulate in a manner that encroaches on core state functions is problematic, and that this justifies interpreting an otherwise ambiguous statute as not authorizing the exercise of such power.[13] Three Justices offered their views on the constitutional issue, but the others kept silent. A decision that might have roared like a lion instead squeaked like a mouse.

All the same, the new presumption may end up doing some significant work. The *Bond* presumption, functioning something like a reverse preemption doctrine, does not decide whether a federal enactment divests state regulation, but instead divests federal regulation in the face of state authority.[14] Prior decisions of the modern Court policed constitutional federalism by invalidating federal legislation that exceeded the Commerce Clause powers of Congress, although none had treaty implications.[15] The *Bond* presumption, by contrast, is not necessarily tied to treaty enforcement and applies

10 Bond v. United States, 131 S. Ct. 2355, 2367 (2011).

11 252 U.S. 416 (1920).

12 *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000). A generation earlier, this debate seemed unimaginable, as a broad consensus supported the antifederalism interpretation of *Missouri v. Holland*. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 302 cmt. d (1987).

13 Bond v. United States, 134 S. Ct. 2077, 2083 (2014).

14 *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (preempting a state law that conflicted with federal policy); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (preempting a state law that conflicted with federal law); Zschernig v. Miller, 389 U.S. 429 (1968) (preempting a state law that interfered with the field of federal foreign relations law); United States v. Pink, 315 U.S. 203 (1942) (preempting a state law that conflicted with an executive agreement with a foreign state); Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (authorizing application of state law to high seas "with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress"). Preemption doctrine functions much like information-forcing presumptions, inasmuch as Congress has the power to reverse the Court's outcome. Perhaps the best established example of reverse preemption in federal statutory interpretation is the *Parker* doctrine in federal antitrust law. This judicial gloss allows state regulation to oust the application of federal competition law. Parker v. Brown, 317 U.S. 341 (1943); *see* Milton Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1, 3–8 (1976) (reviewing doctrine).

15 *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); *cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585–93 (2012) (majority opinion); *id.* at 2643–47 (joint dissent).

even in the absence of a breach of the constitutional line between federal and state power. It is triggered by regulation, not necessarily only in the form of a criminal statute, that "intrudes on the police power of the States."[16] If invoked expansively, the presumption might impose a barrier, admittedly superable, to all federal legislation that interferes with traditional areas of state regulation.

Why the Court chose this path invites speculation. The government had refused to argue that the case on its facts sufficiently involved interstate commerce to come within the Commerce Clause.[17] The Court, however, did not have to hold the government to this choice. It might have determined, for example, that the statute was valid as applied to Bond, even if other applications might present constitutional issues.[18] This approach would have allowed the Court to avoid revisiting the constitutional question that *Missouri v. Holland* seemed to have answered nearly a century ago while dispensing with the need to create a new statutory interpretive presumption.

Alternatively, the Court could have reached the constitutional question. At least three Justices were eager to find constitutional limits on federal legislation designed to implement a treaty.[19] It is not unimaginable that in a case with greater consequences and cleaner facts, two other members of the present Court might have joined them in overruling, or at least restricting, *Missouri v. Holland*. Why did the Court instead invent a new presumption that, as they say in government work, kicks the can down the road, putting the burden on Congress to set up a constitutional confrontation?

My guess is that a majority of the Court, and in particular Chief Justice Roberts and Justice Kennedy, wished to pick and choose its constitutional battles, and had no great appetite for this one. It has identified issues about which it has some intuition as to its preferences, but unaccompanied by a conviction that a definitive and entrenched resolution of the dispute clearly will benefit society. In such cases the majority has invoked a presumption

16 *Bond*, 134 S. Ct. at 2090.

17 *Id.* at 2087.

18 Bond also pled guilty to mail tampering, a charge that the Court characterized as "natural[ ]." *Id.* at 2085. The existence of Article I jurisdiction over this charge might have sufficed to sustain the existence of Congress's competence to apply the Act on these facts. The government, to be sure, had disclaimed the Commerce Clause argument. *Id.* at 2086–87. Justice Scalia, concurring only in the result, described the government as having "waived" this ground for defending the statute. *Id.* at 2098 n.5 (Scalia, J., concurring in the judgment). The "waiver" label, however, is not conclusive. Although the Court may accede to the government's choice, it is not bound by it and instead remains free to decide a case on any ground it regards as appropriate.

19 Justice Scalia argued that Congress could rely only on its Article I powers when implementing a non-self-executing treaty. *Id.* at 2098–102. Justice Thomas, while agreeing with Justice Scalia, also maintained that the Article II treaty power contains constitutional limits, although the Chemical Weapons Convention does not test them. *Id.* at 2110–11 (Thomas, J., concurring in the judgment). Justice Alito, while agreeing with Justice Thomas, would have ruled that the Chemical Weapons Convention exceeds constitutional limits to the extent that it purported to authorize the adoption of federal legislation regulating Bond's conduct. *Id.* at 2011 (Alito, J., concurring in the judgment).

that pushes outcomes in a direction that it finds congenial, but leaves the door open for Congress to intervene. Other Justices may have joined in because the other alternatives on offer may have been even less attractive to them.

An obvious instance of this behavior is the previous term's decision in *Kiobel v. Royal Dutch Petroleum Co.*[20] That case involved the scope of the so-called Alien Tort Statute, a matter of great interest to human rights advocates and foreign relations law experts but lacking the broad public interest and political salience of matters such as LGBT rights, campaign finance reform, and religious exemptions to federal legislation.[21] By the time the decision came down, *Kiobel* had become something of a muddle. The Court originally had taken the case to decide a rather narrow question and then, after a round of briefing and argument, discovered that it raised a broader issue and ordered reargument.[22] The result was a rather cryptic invocation of yet another statutory interpretive presumption, namely that Congress should be presumed not to give an enactment extraterritorial effect.[23]

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20 133 S. Ct. 1659 (2013). For more on this decision and its implications, see Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749 (2014); Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609 (2014); Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773 (2014); William R. Casto, *The ATS Cause Action Is* Sui Generis, 89 NOTRE DAME L. REV. 1545 (2014); William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577 (2014); Eugene Kontorovich, Kiobel *Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671 (2014); Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" The United States: Justice Kennedy's* Filartiga, 89 NOTRE DAME L. REV. 1695 (2014); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014); Carlos M. Vázquez, *Things We Do with Presumptions: Reflections on* Kiobel v. Royal Dutch Petroleum, 89 NOTRE DAME L. REV. 1719 (2014).

21 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (concerning religious exemptions to federal legislation); United States v. Windsor, 133 S. Ct. 2675 (2013) (regarding LGBT rights); Citizens United v. FEC, 558 U.S. 310 (2010) (concerning campaign finance reform).

22 Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738, 1738 (2012) (mem.). Originally the Court had granted certiorari to resolve a circuit conflict over the amenability of corporations to ATS suits, *Kiobel*, 133 S. Ct. at 1663 (2013), an issue that its decision left unresolved.

23 To be precise, the presumption applies to a statute's mandate, not to all aspects of a transaction. Thus the presence of domestic elements in a dispute does not take it out of the presumption, if those elements do not engage the statutory rule. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010) (noting that the focus of Section 10(b) of the Securities and Exchange Act is the sale of securities, not fighting fraud in all its forms, so the presence of fraudulent conduct in the United States did not bring the case within the Act when all sales occurred outside the United States). Another complicating wrinkle in *Kiobel* was that the rule of decision at issue did not come out of any substantive statute, but rather the federal common law deemed to be generated by a jurisdictional statute. *See Kiobel*, 133 S. Ct. at 1662–69. Although the presumption does not apply to the question of a federal court's subject matter jurisdiction, *Kiobel* tells us that it does apply to the scope of

This presumption against extraterritoriality has ancient roots in the Court's jurisprudence, but the modern version has played a significant role only in the last quarter century.[24] At the time of *Kiobel*, the doctrine had come to the forefront of the Court's jurisprudence. *Morrison v. National Australia Bank Ltd.*,[25] decided three years previously, may have had special salience for Roberts and Kennedy. *Morrison* endorsed the presumption forcefully and categorically, overturning significant and prestigious lower court jurisprudence as it did so.[26] *Morrison* and *Kiobel*, in tandem, may have impressed on Roberts and Kennedy the value of presumptions generally, and induced them in *Bond* to trot out a similar device to dispose of the case.

This conjecture raises another question, however. A different and better established statutory interpretive presumption holds that Congress does not intend to force the Court to decide difficult constitutional questions. In *NLRB v. Catholic Bishop of Chicago*, the Court invoked this doctrine as the basis for restricting the application of federal labor law to a religious organization.[27] The presumption resolved a problem of statutory silence while avoiding apparently difficult Free Exercise and Establishment Clause questions. Although a modern restatement of the law rather than a break with the past, *Catholic Bishop* has done considerable work in the ensuing years.[28]

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the prescriptive rule that a court can enforce, whether such a rule is expressed explicitly in a statute or instead implied.

24 One can trace the presumption back to *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820). Between *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 285 (1949), and *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), however, the Court did not invoke the presumption, creating the suspicion that it had fallen into desuetude. The Third Restatement of the Foreign Relations Law, for example, did not acknowledge this doctrine. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 403 rptr. note 2 (discussing presumption of reasonableness as mechanism for regulating extraterritorial scope of statutes).

25 561 U.S. 247.

26 *Id.* at 255.

27 440 U.S. 490 (1979). Oddly, Chief Justice Burger's opinion cited *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), as support for the announced presumption. *Catholic Bishop of Chicago*, 440 U.S. at 500. In doing so it mischaracterized the earlier decision. *Id.* (describing *Charming Betsy* as "holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"). Chief Justice Marshall's opinion in *Charming Betsy* did not refer to the Constitution in its discussion of the decision's presumption or otherwise equate constitutional and international law.

28 According to a Westlaw search, the Court has relied on the *Catholic Bishop* presumption eleven times to limit the scope of a federal statute. *See* Skilling v. United States, 561 U.S. 358, 406 n.40 (2010); Clark v. Martinez, 543 U.S 371, 381 (2005); McConnell v. FEC, 540 U.S. 93, 192 (2003); INS v. St. Cyr, 533 U.S. 289, 300 n.12 (2001); Edmond v. United States, 520 U.S. 651, 658 (1997); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Bob Jones Univ. v. United States, 461 U.S. 574, 599 n.24 (1983); United States v. Sec. Indus. Bank, 459 U.S. 70, 82 (1982); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 788 (1981).

Why didn't the Court invoke this presumption in *Bond*, instead of inventing a new one?[29] One possible reason is that the *Bond* majority did not want to indicate that the continuing validity of *Missouri v. Holland* presents a difficult constitutional question. Notwithstanding the enthusiasm of the three Justices who did restate the limits that constitutional federalism imposes on treaty enforcement, Roberts and Kennedy may have wished to stand above the fray, and the other four Justices may have liked *Missouri v. Holland*. The *Bond* presumption, by contrast with *Catholic Bishop*, requires only that a debatable extension of statutory language would intervene in an area traditionally reserved for the states.[30] It does not require a court to determine that the Constitution necessarily casts a shadow on congressional action in that area. Rather, it indicates only that federalism matters even in the case of treaty enforcement, whether a constitutional exception exists or not.

One implication of this reasoning is that *Bond* applies to all federal statutes, not just those connected to a treaty. Nonuse of the *Catholic Bishop* presumption might imply that federalism has force even when it does not rest on a constitutional mandate. Bond's creation of a separate and distinct rule suggests that all encroachments on core state functions are suspect, whether they come close to the constitutional line or not. If the constitutional line is irrelevant, then the argument that treaties provide an exception to constitutional federalism also does not matter.[31]

Two other statutory interpretive presumptions provide additional background to *Bond*. The first is the presumption against violations of international law. Chief Justice Marshall in *Murray v. Schooner Charming Betsy* announced that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[32] This pre-

29 *Bond* did refer to a somewhat different principle, namely that if a case presents a constitutional and a nonconstitutional ground for decision, a court should prefer to dispose of the case on the nonconstitutional ground. *See* Bond v. United States, 134 S. Ct. 2077, 2087 (2014) (citing Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam)). This principle, like the *Catholic Bishop* presumption, reflects a norm of avoiding unnecessary constitutional decisions, but addresses a court's "order of battle" in addressing the issues presented by case, rather than statutory interpretation as such.

30 *See Bond*, 134 S. Ct. at 2090.

31 *Bond* leaves open what constitutes a "core" area of state authority. Many treaties implemented by legislation encroach on areas of traditional state or local concern. Examples include the New York Convention on the Recognition and Enforcement of Arbitral Awards (concerning the enforcement of contracts) and the Hague Convention on the Civil Aspects of Child Abduction (concerning family law). The Court's practice suggests that these areas are not sufficiently vital to the balance between federal and state authority to elicit any limiting presumption concerning the statute's scope. *See, e.g.*, BG Grp. PLC v. Argentina, 134 S. Ct. 1198 (2014) (regarding the New York Convention); Chafin v. Chafin, 133 S. Ct. 1017 (2013) (regarding the Hague Convention); Abbott v. Abbott, 560 U.S. 1 (2010) (same); *cf.* Medellín v. Texas, 552 U.S. 491, 532 (2008) (distinguishing federal interference with state criminal justice process from federal interference with state property law).

32 *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

sumption is the structural obverse of that invoked in *Catholic Bishop*. It requires the Court to decide, rather than avoid, a possibly contestable question of international law, while *Catholic Bishop* rests on a policy of avoiding hard and important questions. What both have in common, however, is an interpretive move that narrows the potential scope of a statute while leaving to Congress the power to revisit the question.

The *Charming Betsy* presumption provided no help in deciding *Bond* because the government did not argue that the Chemical Weapons Treaty required the United States to adopt a statute that would invade areas traditionally reserved to the states.[33] The Treaty sets out obligations, but does not address how a state party might adjust its domestic law to satisfy those obligations. The government argued that a comprehensive interpretation of the statute lessened the risk of the United States violating the treaty, but it never maintained that this move either avoided all disputes over treaty compliance or was necessary to avoid a serious risk of violation.[34] The case, in other words, involved the capacity of the government to promote treaty compliance, but not a substantive issue based directly on the treaty.[35]

Another presumption that has less direct bearing on *Bond*, but might offer the best insight into the modern Court's practice of creating and applying statutory interpretive presumptions, is the rule requiring Congress to indicate explicitly that it wants to authorize private enforcement of a rule of federal law. This doctrine, which functions as a presumption against implied causes of action, emerged first in a solo dissent by Justice Powell.[36] Over the course of the 1980s, a majority of the Court embraced it, and today's Court seems to regard the presumption as settled and robust.[37]

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33 *Bond*, 134 S. Ct. at 2086–87.

34 *Id.* at 2091.

35 Even Professor Sloss, perhaps the most vigorous supporter in this symposium of expansive legislative power in the service of international law, does not maintain that the Chemical Weapons Treaty requires the adoption of a federal statue governing the private use of toxic chemicals for socially undesirable ends. David Sloss, Bond v. United States*: Choosing the Lesser of Two Evils*, 90 NOTRE DAME L. REV __ (2015).

36 Cannon v. Univ. of Chicago, 441 U.S. 677, 739–42 (1979) (Powell, J., dissenting). A disclaimer needs repeating here: "I worked as Powell's law clerk at the time that he wrote this opinion, which may explain my attraction to his argument." Paul B. Stephan, *Private Remedies for Treaty Violations after* Sanchez-Llamas, 11 LEWIS & CLARK L. REV. 65, 72 n.24 (2007).

37 *See, e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378 (2015); Gonzaga Univ. v. Doe, 536 U.S. 273 (2002); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); Alexander v. Sandoval, 532 U.S. 275 (2001); Thompson v. Thompson, 484 U.S. 174 (1988); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804 (1986); Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981); Univs. Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (recognizing a parallel between creating private rights of action and developing federal common law). *But see* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183–84 (2005) (refusing to overrule majority opinion in *Cannon*).

Powell's dissent articulates several related arguments for adoption of the presumption.[38] At bottom, they rest on a theory about legislative deliberations and the impact of judicial activity. Powell depicts the decision to authorize private enforcement as "often controversial" and resting on "hard political choices."[39] This implies that the question of whether private enforcement is a good thing, from the perspective of a detached observer, is morally neutral and subject to a contestable welfare analysis.[40]

Powell's argument presumes that Congress pays attention to judicial choices and alters its behavior in response to them. Judicial willingness to assume the burden of making the private enforcement decision, Powell stated, means that "Congress is encouraged to shirk its constitutional obligation."[41] This shirking comes at a cost: "[T]he legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned. . . . [T]he public generally is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process."[42]

Absolving Congress of responsibility for making these choices affects private interests as well: "[T]he intended beneficiaries of the legislation are unable to ensure the full measure of protection their needs may warrant. For the same reason, those subject to the legislative constraints are denied the opportunity to forestall through the political process potentially unnecessary and disruptive litigation."[43] The decision to authorize private enforcement, in other words, is a contest between competing interests, none systematically privileged in relation to others, for which Congress, as the site of "the normal play of political forces," provides the best forum for resolution.[44]

Powell's vision of normal politics as the preferred method for resolving morally neutral choices with ambiguous welfare effects, as well as his characterization of the choice of the boundaries of federal court remedial power as a matter of brokering private interests as well as ascertaining the public good, has implications beyond the recognition of private causes of action. It underlies disputes about the domain of statutes, not just the method of their enforcement.[45] Presumptions that narrow a statute's domain by deterring extraterritorial application or violations of international law, for example,

38 *Cannon*, 441 U.S. at 730–49 (Powell, J., dissenting).

39 *Id.* at 743.

40 Powell's position provoked criticism in the scholarly community. Richard Stewart and Cass Sunstein argued that statutory interests should be seen as extensions of the common law, rather than as substitutes, and that the common law enforcement mechanisms should apply to these interests. Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1316–22 (1982). A dissenting opinion in a later case alluded to this argument, but the Court never embraced it. *See Merrell Dow*, 478 U.S. at 832 (Brennan, J., dissenting).

41 *Cannon,* 441 U.S. at 743 (Powell, J., dissenting).

42 *Id.*

43 *Id.*

44 *Id.*

45 *See generally* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

similarly assume that the ultimate decision, although constitutionally permissible no matter what the choice, is Congress's to make and that Congress should do so in a way that ensures its own accountability for the outcome. Powell's *Cannon* dissent thus suggests the outline of a political theory that might influence the modern Court's statutory presumption jurisprudence.

To summarize, the *Bond* presumption bears a family resemblance to other commonly invoked statutory interpretive presumptions, such as *Catholic Bishop* (which might have applied to the case), *Charming Betsy* (which could not have applied but is relevant to treaty enforcement), and the presumption against extraterritoriality (which also could not have applied but the recent robust use of which might have induced the Court to create a new presumption in *Bond*). All of these presumptions in turn overlap analytically with the presumption against implied private causes of action, which frames the structural issue in all such presumptions as a choice between legislative responsibility and judicial aggrandizement.

The contemporary Court's enthusiasm for statutory interpretive presumptions is evident. But is it justified? The effect of these presumptions is to reduce the competence of the federal judiciary, by limiting either its jurisdiction or the scope of federal rules of decision that it might apply. Federal judicial power is not presumptively malignant; it can rectify individual injustices, hold public and private actors to compliance with federal policy, and generate precedents that can serve as a pure public good through the information they provide. Why employ rules that confine it? The remainder of this Article looks at reasons why the Court's choice of statutory interpretive presumptions nonetheless might advance public welfare.

II. CONTRACT THEORY AND INFORMATION-FORCING DEFAULTS

Statutory interpretation shares with contractual interpretation the goal of eliciting meaning from texts in a manner that serves some social end. In the case of statutes, a court looks at the language of the enactment, which it decodes using a variety of tools such as dictionary meaning, legislative purposes express or imputed, relevant presumptions, and the like.[46] Contracts present a similar task of decoding a text by resorting to a range of interpretive techniques.[47]

Modern contract theory focuses on problems presented by bargaining between sophisticated parties, understood as repeat players not impaired by systemic information asymmetries and related disabilities.[48] For these actors, theorists posit that the social goal of optimum benefit to society aligns with the private goal of maximizing the value of the contract to the parties, absent externalities of the sort that normally elicit a regulatory response by the

46 *See generally* CALEB NELSON, STATUTORY INTERPRETATION (2011).

47 Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 276–79 (1985).

48 Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544–48 (2003).

state.[49] This postulate supports a powerful and a weak inference about the role of the third-party interpreter assigned to resolve a dispute over a contract. The powerful inference is that the interpreter should decode the contract in a manner that the parties would have specified, were they able to contemplate the subject of the dispute and had they faced minimal bargaining costs. The interpreter should assume, in other words, that sophisticated parties know what they are doing. The weak inference is that the parties should be presumed to desire interpretations of the contract that optimize its joint value ex ante, absent indications to the contrary.[50]

A common problem in contractual bargaining is the presence of private information—knowledge that one party has and the other does not—that may affect the value of the contract.[51] This information might involve states of the world outside either parties' control (for example, where the government will locate a highway), but it also may entail information about a party's preferences and capabilities. Contract theory focuses on the latter.[52] In *Hadley*, for example, the Court posited that the shipper knew, but the carrier did not know, that late delivery of the new axle would have an enormous impact on the shipper's business.[53] By hypothesis, disclosure would have benefited both parties: The shipper would have had access to a stronger contractual guarantee with greater penalties for default, and the carrier would have gotten a higher fee for its services. If the shipper chooses not to disclose when knowing that a weaker contract would result, it reveals that the cost of a stronger contract (including the cost of revealing information that it might prefer to keep private) is greater than the value of the incremental protection. If the parties know what they are doing, the information-forcing default rule works to induce disclosure when doing so will increase the joint surplus value of the contract, and will not when doing so would not optimize the joint surplus.

The reference to joint surplus might require some unpacking. Contract theory assumes that the purpose of contract is to encourage reliance that lowers the cost of cooperation and makes the undertaking of desirable activity more feasible. It posits that contracts create a surplus over the value of the possible relationship in the absence of legal enforceability.[54] The value created by the contract is the main thing, and the distribution of the joint surplus is secondary. Experienced parties will reach a reasonable distribution of the benefits of cooperation, but these benefits—the joint surplus—exist only because enforceable contracts enable the cooperation in the first place.

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49 *Id.* at 554.

50 Goetz & Scott, *supra* note 47, at 306–09.

51 *See* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 1–9 (1978).

52 As to exogenous information, the argument for reducing the acquirer's rights to control by imposing a duty to disclose is weaker. *See id.* at 32–33.

53 94 Ex. 341, 349, 156 Eng. Rep. 145, 149 (1854).

54 Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1274–1286 (1980).

To return to *Hadley*, the shipper of course would prefer a rule that provided consequential damages whether it disclosed or not. But if this rule were known to the carrier, it then would impose a surcharge on all customers reflecting the value of the stochastic range of damages that its customers might suffer. The carrier in effect would bundle an insurance policy along with each contract of carriage. Combining these two distinct products may or may not be optimal, but it is not crazy to think that separating them would benefit shippers as a whole by giving them more choices.[55]

Contract theorists describe these rules as belonging to a more general category of majoritarian defaults. As noted above, their strongest claim is that interpreters should honor party preferences in the absence of externalities. Majoritarian defaults are those rules that a majority of contracting parties would prefer to find in their contracts at the time of contract formation, before downstream events reveal which provisions advantage or disadvantage which party.[56] In the absence of externalities associated with the contract, society should focus on minimizing the transaction costs associated with contract formation. Bargaining is costly, so using majoritarian defaults as the presumptive interpretive outcome spares parties the cost of adverting to, and perhaps haggling over, these terms.[57]

Avoiding the costs of bargaining means using off-the-rack terms that cannot meet the needs of all prospective parties. What the majority wants usually is not what everyone wants. Theorists respond to this dilemma by distinguishing between conventional and idiosyncratic parties.[58] If a rule fits the needs of a substantial majority of potential contractors, using it as a default allows the greater number of parties to avoid bargaining.[59] The idiosyncratic party then bears the burden of bargaining for unconventional terms to satisfy its atypical characteristics. Assuming that the idiosyncratic party faces no unusual bargaining costs or that no overriding social concern might justify special treatment for this particular idiosyncrasy, embracing

55 Again, the claim applies only to sophisticated repeat-player shippers, not to inexperienced consumers who rarely ship and have difficulty assessing the risks associated with particular contracts. The argument in text also assumes, unrealistically, that carriers do not also have private information that shippers might value. For discussion of complications with *Hadley* under certain conditions, see Barry E. Adler, *The Questionable Ascent of* Hadley v. Baxendale, 51 STAN. L. REV. 1547, 1559–60 (1999); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 616–18 (1990); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 406–11 (1993); J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 919–23 (2015).

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

57 Schwartz & Scott, *supra* note 48, at 594–609; Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 606–13 (1990).

58 Goetz & Scott, *supra* note 47, at 266.

59 Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. Rev. 563, 568 (2006); Scott, *supra* note 57, at 607–08.

majoritarian defaults should lower the cost of contracting and thus maximize the social benefit from contractual cooperation.[60]

It might be the case, for example, that it is rare for a shipper to need a part to arrive on time to avoid a catastrophic loss. The court in *Hadley* seemed to think so.[61] If this assumption matches reality, and if the *ceteris paribus* limitation applies, the announced rule might lower bargaining costs without an unacceptable offsetting welfare loss. The cost to the idiosyncratic shipper of identifying its status would be less than the social benefit of saved costs in the majority of bargaining contexts.

Conversely, it instead might be true that most carriers adhere to a high standard of reliability. Only a minority might have private knowledge of special incapacities that will reduce the likelihood of on-time delivery. Where this is true, contract law might require the carrier to disclose this incapacity as a condition for avoiding the imposition of consequential damages.

As this example illustrates, a majoritarian default rule works as an information-forcing default with respect to the unconventional contractual party. It is a rule that a majority of parties would prefer, because it reduces bargaining costs while providing valuable inducements to disclose private information that contributes to the contract's joint surplus. The selection of a particular rule thus rests on a guess about the state of the world, namely which attributes are general and which are idiosyncratic.

The adoption of the "majoritarian default" terminology arose partly in response to an influential paper proposing the adoption of "penalty defaults." The latter are rules that compel parties to reveal socially useful information that they otherwise would prefer not to disclose.[62] That paper sowed some confusion because it seemed to propose a theory that would explain information forcing both when parties preferred this outcome and when they did not. Later work clarified that a nonmajoritarian penal default comprises only information-forcing presumptions imposed by society in instances where the contractual parties, in the absence of social intervention, would reach contracts that would maximize their private contractual surplus but, due to externalities associated with the contract, would harm society as a whole.[63] A simple example would be a contract with anticompetitive effects.

Although private law scholars might understand the externality versus no externality distinction well enough, public law scholars writing about statutory interpretation have not always demonstrated a clear grasp of the difference. In some cases, their work seems to assume that nonmajoritarian penal defaults are the dominant outcome dictated by social welfare policy, rather

60 Goetz & Scott, *supra* note 47, at 265–67; Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1948–53 (2011).

61 94 Ex. 341, 356, 156 Eng. Rep. 145, 151–52 (1854).

62 Ayres & Gertner, *supra* note 56.

63 Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992). For criticism of the nonmajoritarian-penalty-default concept, see Posner, *supra* note 59, at 570.

than an exceptional result.[64] This confusion over the distinction between conventional information-forcing interpretive devices (majoritarian defaults, because they reflect the preferences of a majority of contractors), and penal defaults (rules that persons in the shoes of the contracting parties would not prefer ex ante) rests on a failure to specify the conditions under which contractual relationships generate externalities that cause the parties' incentives to diverge from optimal social welfare. Penalty defaults, as rules of interpretation, can respond to externalities produced by contracts. But that capacity does not distinguish this mechanism from other forms of regulation, such as a special statutory or administrative regime. More importantly, it overlooks the large range of information-forcing defaults that enhance both the parties' welfare and that of society as a whole.

What contract theory teaches us, in sum, is not that the rules of interpretation should seek to maximize the volume of information disclosure. Actors acquire information at a cost and, economics teaches, may acquire less of it if the law forces them to part with it other than on their own terms. What the law should do, at least from a welfare perspective and in the absence of externalities, is induce optimal disclosure, namely those releases of information that, through contract-based compensation, will produce a net benefit for the persons that possess it. If externalities exist, a range of regulatory responses are available, including the application of penal defaults. The choice of regulatory response rests in turn, from an economic perspective, on a careful cost-benefit analysis informed by empirical investigation.

A full understanding of information-forcing defaults requires an appreciation of other contractual mechanisms that solve other information problems. Sophisticated parties may confront situations where the value of cooperation turns on information that will emerge only in the course of a contractual relationship. Different contingencies will affect the value of the joint surplus, but the parties lack the information to make confident calculation of the probabilities that can be assigned to these contingencies. The problem in these cases is not inducing information sharing at the time of contract formation, but capturing through contractual design the benefits of downstream information.[65]

Parties always can renegotiate the terms of the agreement in light of new information, but this approach has its own problems. If party investments in

64 *See, e.g.*, EINER ELHAUGE, STATUTORY DEFAULT RULES 152–56 (2008); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 121 (1998); Rebecca M. Kysar, *Penalty Default Interpretive Canons*, 76 BROOK. L. REV. 953, 959–65 (2011); *see also* Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 664 (2004) (using the concept of penalty defaults to analyze the constitutional nondelegation doctrine). In the case of Professor Elhauge, the confusion might stem from his deep expertise in antitrust law, a field that focuses on privately beneficial but socially harmful contracts. Concentrating on contracts that cry out for regulation easily can distract one from the core features of the large majority of contracts that advance social welfare.

65 Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 837–39, 840–48 (2006).

the relationship are asymmetrical, the less invested party might hold up the other. Knowing this in advance, parties might avoid making such contracts altogether. An alternative approach to this problem is instead to delegate to a third party, such as a judge or arbiter, the authority to round out the contract once the contingencies are resolved. Contract theorists argue that common contractual terms such as "best efforts" or "material adverse change" have this function and under plausible conditions may optimize welfare.[66]

Contract theorists emphasize two aspects of this mechanism. First, the parties design the delegation, rather than counting on third parties generally to overlay general standards of fairness on otherwise specific and precise contractual terms.[67] In other words, contract law does not assume that delegation is invariably optimal, even though the problem of contingent future states is pervasive in all contracts. Second, the mechanism does not force the disclosure of private information at the time of contracting but rather functions to take advantage of information that was unknowable at the time of contracting and will enhance the value of the contract.[68] Accordingly, theorists advise adjudicators not to assume a general delegation to fill in contracts, but rather to adhere closely to their terms of reference.[69]

The delegation mechanism puts in relief the function of information-forcing defaults. To the extent a contract authorizes a downstream adjudicator to remodel the contract to account for information available at the time of dispute, it reduces the incentive of the parties to reveal private information at the time of contract formation. Information-forcing defaults work only to the extent that the failure to share information has consequences. Optimal contracts thus distinguish between private information existing at the time of contract formation and information developed in the course of a contractual transaction. Information-forcing defaults address the former, third-party delegation the latter.

This stripped-down account of contract theory has several implications for an assessment of statutory interpretive presumptions. First, contract theory posits as its goal optimizing the value of contractual relationships (the joint surplus) in the absence of externalities. Similarly, interpreters of statutes may seek to optimize the value of the legal relationships that a statute might establish. Second, contract theory focuses on incentives to share private information in the process of contract formation, both in the absence and presence of externalities. Information-forcing defaults, which have a similar structure to statutory interpretive presumptions, should apply when sharing the information will either increase the value of the joint surplus or,

66 SCOTT & STEPHAN, *supra* note 7, at 72–75; Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 852–55 (2010); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1415–22 (2010); Scott & Triantis, *supra* note 65, at 817–19.

67 Gilson, Sabel & Scott, *supra* note 66, at 1382–83 & n.9.

68 *Id.* at 1383–84.

69 Scott & Triantis, *supra* note 65, at 848–49.

perhaps more rarely, respond to an externality. Interpreters of statutes also may use presumptions as opportunities to bring into the public domain socially valuable information. Third, the choice of information-forcing defaults is affected by bargaining costs, which *ceteris paribus* they seek to minimize.[70] The use of majoritarian defaults in low-externality contexts achieves this goal. Statutory interpreters similarly might minimize the costs of bargaining over legislative content by interpreting the enactment to reach results that the Congress most likely preferred at the time of enactment. Fourth, contract theory posits another mechanism, third-party delegation, to deal with a functionally distinct information problem, namely anticipated future information, the assessment of which is optimal when ex post. Statutory interpretation similarly can ask whether the legislators sought to delegate to courts the power to modify the statutory mandate in light of downstream information.

III. INFORMATION-FORCING DEFAULTS AND THE CONGRESS-JUDICIARY DYAD

For many, making the leap from contracts to institutional separation of powers may provoke more skepticism than interest. The Constitution, to be sure, is a contract, but the identity of the parties is both a bit mysterious and a point of contention in political theory. Moreover, even if one takes a purely rationalist and utilitarian approach to both bodies of law, important divergences emerge. The general public normally has a direct interest in the outcome of public law disputes, while the adjudication of private disputes largely engages the interests of the particular parties.[71]

Still, one can translate insights from one field to the other. Both public law and contract law involve the use of legal mechanisms to pursue cooperative ventures. Strategies that address the problems that private ordering encounters and, to some extent, solves can help us unpack questions of public regulation. Even those scholars who do not work with law and economics, much less contract theory, would agree that statutory interpretive presumptions function as a means of managing the relationship between Congress and the judiciary.[72] To the extent that legislators pay attention to the courts, their enactments should reflect the rules of interpretation that the courts have announced they will apply. Courts in turn should take account of the capacities of this audience when they announce their interpretive rules.

Contract theory models the world based on sophisticated actors driven out of considerations of (not necessarily self-conscious) gain optimization that has at least some observable and even quantifiable aspects.[73] For the translation of this theory to legislative interpretation to work, one must have some sense of what motivates Congress, what drives the federal judicial pro-

70 Scott & Triantis, *supra* note 65, at 823–24.

71 *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2145–47 (2002).

72 ELHAUGE, *supra* note 64, at 168–87.

73 *See* Gilson, Sabel & Scott, *supra* note 66, at 1386.

cess, and how the two institutions respond to each other's actions. A vast scholarly literature exists on all three subjects. For present purposes, however, it should suffice to propose fairly simple and informal models of the functions of Congress and the judiciary in a context of dynamic interaction.

Throughout, this analysis equates social welfare with maximization of democratic preferences, i.e., the summed preferences of all members of the polity. To clarify, I assume that one purpose of constitutional rules is to suppress those realizations of democratic preferences that might harm social welfare. My discussion thus is limited to lawmaking that does not encroach on constitutionally protected interests.

A. Dynamic Effects

Whatever the motivations of Congress and the federal judiciary, one cannot assert that judicially articulated presumptions in statutory interpretation will function as information-forcing defaults without positing some relationship between congressional and judicial practice. An information-forcing default works only if actors pay attention to it. For the theory to capture reality, the legislature both must care about the default and have the capacity to respond to applications of presumptions that do not reflect its preferences.

In the legislative process, Congress has two chances to take judicial reaction into account. First, it can draft statutes with the default in mind. At the moment of enactment it can provide the information that the default forces by either accepting the default or indicating clearly that it prefers the presumed-against outcome. Second, Congress can respond to unanticipated judicial applications of a presumption by adopting new legislation that makes its preference explicit.

Neither point of interaction is frictionless. Legislators might focus more on the process of producing an enactment than considering the downstream implications of the statute's enforcement. Features of the legislative process designed to forestall hasty decisionmaking, such as committee structure, filibusters, linkage to irreconcilable conflicts, and other obstacles, might block adoption of a statute that would respond to an unanticipated and unwanted judicial application of a default.[74] The greater the friction at either point, the less likely that information-forcing defaults will work as intended.[75]

Estimating the size of these barriers' effects is difficult. Private contracting also may respond less than perfectly to downstream legal changes. New contractual terms, even if provoked by unanticipated court decisions, are costly to incorporate into standardized contracts. Boilerplate terms thus may survive unwanted judicial applications.[76] Yet considerable evidence indi-

74 *See* Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. (forthcoming 2015).

75 ELHAUGE, *supra* note 64, at 157–65.

76 *See* MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION 2 (2013).

cates that the standard contract theory of interpretation, with its emphasis on majoritarian defaults and dynamic interaction between default terms and contract formation by sophisticated parties, captures a significant slice of reality.[77]

Similarly, it seems implausible that Congress and the judiciary operate completely independent of each other. Even if the legislative process contains substantial elements of kabuki and short-term gamesmanship, enacted statutes do have consequences, in some instance due to judicial enforcement. These consequences affect democratic preferences, about which legislators have some incentive to care (as discussed in the next Section). It is simply implausible that Congress remains invincibly ignorant of potential judicial reaction to its work product, even if other concerns compete for legislators' limited mind space.

Moreover, Congress has demonstrable capacity to respond to judicial interpretation. In areas of specialized law that rely heavily on judicial enforcement, such as taxation, legislative responses to antigovernment, and to a lesser extent anti-individual, outcomes are reasonably expeditious.[78] Anecdotal evidence also indicates that Congress can and does respond to information-forcing interpretative defaults.[79]

On balance, then, it is not foolish to believe that the feedback loop between Congress and the federal courts does function, even if imperfectly. In matters of statutory interpretation, courts do not have the final word. Congress cares about many things, including how its enactments work out in practice, and engages in ongoing supervision of judicial implementation of its edicts. In this environment, information forcing through statutory interpretive presumptions can occur.

B. Models of Legislative Motivation

To evaluate the impact of information forcing in statutory interpretation, one needs some sense of what both legislatures and courts seek to accomplish. Information-forcing defaults might either help Congress to enact laws that better express its best guess about social welfare, or thwart it

77 *Id.* at 1–8.

78 *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334, 343–45 (1991).

79 For the response to *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), see Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (1991) (codified as amended at 42 U.S.C. § 12111(4) (2012)) (amending Title VII of the 1964 Civil Rights Act to apply extraterritorially). For the response to *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), see Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864 (2010) (codified as amended at 15 U.S.C. § 77v) (amending the Securities Exchange Act to provide extraterritorial jurisdiction in suits by the government involving significant conduct or substantial effects in the United States).

from adopting beneficial laws. I first consider what we might imagine Congress seeks to optimize when it adopts legislation.[80]

Any model of legislative motivation must posit some connection between legislators' preferences and those of electors. In a democracy, a legislator faces some kind of electoral accountability. The strength and scope of this accountability may turn on many factors, including party structure, historical contingency, voting rules, effectiveness of third-party oversight, and the like, but the existence of some kind of popular check on legislative preferences is assumed in all the models I discuss here.

For simplicity's sake, I propose four highly stylized conceptions of legislative preferences based on electoral pressure. The models focus on two variables, namely the ability of legislators to separate future voter preferences from current ones, and the degree that voter preferences are weighted rather than uniform. These choices omit a great deal of useful knowledge, but have the advantage of tractability.

The *leadership model* depicts a legislature as comprising policy-driven advocates operating under systemic uncertainty. The legislators understand that they face electoral accountability based on the preferences of their electors at some future date. They also believe, however, that current evidence of electoral preferences (measured, say, by opinion polls) may be insufficient to base a prediction of what those preferences will be at the relevant time. Successful legislators (in the sense that they keep on getting reelected) have superior ability both to predict popular sentiment and to shape it. Under this model, legislators function as norm entrepreneurs. Through both persuasion and action, these legislators create conditions that induce electors to embrace their preferences, whatever the state of the elector's preferences at the time of the legislators' salient actions.[81]

The *passive model* views legislators as focused mostly on reelection and legislative votes as tools to be disposed of toward that end. Unlike the first model, these legislators cannot predict with confidence how adoption of the legislation will alter voter preferences. Moreover, they lack any comparative advantage in influencing voter opinions. The legislator takes whatever actions (and inactions) are most likely to lead to reelection based on what

80 For purposes of simplicity, I ignore the Executive as a separate lawmaking actor. One could just as well say that the political branches together make law that the courts must interpret. Hence, when I refer to Congress or the legislature, I mean to take in any modifications or extensions that emerge in the administrative process, and when I refer to a statute, I mean to include any administrative actions taken under the statute's authority. By disregarding the separate roles of Congress and the Executive in lawmaking, one can avoid issues of administrative law and judicial review of administrative action. For further discussion of the problem, see ELHAUGE, *supra* note 64, at 79–111.

81 This model is consistent with the Burkean position that a legislator should instruct the electorate as to its best interests, rather than slavishly following its current desires. Edmund Burke, *Speech to the Electors of Bristol*, *in* 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 95–97 (8th ed. 1884). One need not embrace Burke's views to accept a general account of legislator accountability based on future voter preferences that the legislator has some ability to shape.

that legislator currently knows about voter preferences. Unlike the leadership model, these legislators invest in determining what voters want rather than in shaping those preferences.[82]

The *public choice model* draws on public choice theory to depict legislators as willing to place their votes at the disposition of powerful interest groups that enjoy a competitive advantage in influencing electoral outcomes, relative to dispersed and heterogeneous voters, and to ignore the politically powerless altogether. These legislators do not act corruptly, in the sense that they receive private benefits for their votes, but rather rationally, in the sense that favoring well-organized and homogenous groups can improve their chances of reelection even though the public welfare suffers. The model assumes that the capacity and willingness of interest groups to reward or punish legislators exceeds by a substantial margin that of dispersed and heterogeneous groups, magnifying the impact of the former on electoral outcomes, and that some potential voters as a practical matter have no effect on legislative outcomes.[83]

Finally, the *crusader model* assumes both some legislator agency, as does the leadership model, and weighted voter preferences based on intensity and organizational advantages, as does the interest group model. Under these conditions, legislators may respond to powerful interest groups in two ways. They might magnify interest group influence by inducing mainstream voters to embrace interest group causes. Alternatively, they could combat interest groups by exposing the gap between interest group payoffs and the public good. Depending on the circumstances, either strategy might be a winning play.

C. Models of Judicial Motivation

To determine whether statutory interpretation presumptions advance benign information forcing or instead frustrate the fulfilment of democratically approved policy, we must have some sense of what judges seek to do when they decide cases. But developing a credible model of judicial motivation presents a challenge. Sociological and ideological considerations seem to do a better job of explaining the motivation of federal judges than do material inducements such as job retention. Article III's life-tenure and no-reduction-in-pay protections, along with a narrow reading of the impeach-

82 This model does not require a flawless legislative process, but does posit that competition among interest groups dissipates the rents that legislation otherwise might provide. Gary Becker developed an influential model of legislative rent dissipation in response to public choice literature cited in note 83, *infra*. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

83 JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); DENNIS C. MUELLER, PUBLIC CHOICE III (2003); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). For discussion of the implications of public choice theory for law, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991).

ment power, largely insulate these judges from accountability to Congress.[84] Such external constraints as exist on their behavior work mostly through reputational effects.[85] Yet reputations vary greatly among communities and over time, whatever the contribution of the judge to the outcome.

Again for reasons of tractability, I will concentrate on two general attributes that can vary among federal judges. First, a judge might (or might not) regard his or her preferences as superior to those expressed by conventional political processes. Second, a judge might (or might not) seek to compensate for structural defects in the manner in which Congress translates democratic preferences into legislation. As with the reductionist depiction of legislator preferences sketched out above, a two by two matrix results.

The *Olympian model* regards judges as largely self-regarding. These judges consider their moral rectitude, intellectual talents, and capacity for reflection unpolluted by quotidian politics as superior to that of the median voter. They substitute their own preferences for those expressed through legislation because they believe society will thereby benefit. Concern about reputation might encourage such judges to dissemble somewhat about their motivation, but they will seize any opportunity to instruct and elevate the public. Like the legislator depicted in the leadership model, these judges also may believe that they can shape public preferences through persuasion and the benign effects of their wise decisions. Accordingly, these judges also are norm entrepreneurs.

The *reformer model* assumes that judges prefer their own preferences to those expressed by the democratic process and also regard the legislative process as a flawed means of representing the preferences of median voters. To some extent these qualities reinforce each other, as an appreciation of the shortcomings in legislative decisionmaking may induce judges to turn to their preferences as an alternative. In the most extreme instance, a judge might regard a failure to adopt a preferred outcome as *prima facie* evidence of a fundamental structural defect in the legislative process. Recognizing the unattractiveness of vanity as a reputational quality, however, these judges might rely more openly on process defects as a ground for decision in particular cases. At the same time, they would welcome arguments about process defects as an excuse for substituting their preferences for those expressed in legislative outcomes.

The *modesty model* depicts judges as skeptical about their comparative advantage in ascertaining the public good. They will implement democratic preferences wherever they find them expressed. They also doubt their capac-

84 The Senate's acquittal of Samuel Chase in 1805 is conventionally seen as ending the possibility of removing Article III judges simply because of a change of political regime. Alexander Pope Humphrey, *The Impeachment of Samuel Chase*, 5 VA. L. REG. 281, 293 (1899); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 988 (2007).

85 *See* Barry Cushman, *Clerking for Scrooge*, 70 U. CHI. L. REV. 721, 738–49 (2003) (reviewing JOHN KNOX, THE FORGOTTEN MEMOIRS OF JOHN KNOX (David J. Garrow & Dennis J. Hutchinson eds., 2002)) (discussing history of judicial efforts to build reputation).

ity to correct the shortcomings of the legislative process. They thus believe that loyal, almost anonymous deference to the popular will as formally expressed through legislation will do more for their reputation than any effort to improve society on their own account. In economic terms, they see themselves as agents whose principal job is the minimization of agency costs.[86]

The *process model* assumes that judges seek to implement democratic preferences but recognize that structural defects in the legislative process may thwart the accurate expression of those preferences.[87] Unlike the reformer model, these judges approach the issue of structural defects stringently. Two general categories of structural arguments that such judges might embrace are systematic exclusion from the political process (powerlessness) and uneven weighting of voter preferences due to public choice effects. In the absence of evidence of structural defects, these judges will behave in accordance with the modesty model.[88]

These reductionist models hardly capture all that motivates federal judges. But they do identify the factors most likely to determine whether information-forcing presumptions reinforce or thwart legislative preferences and advance or harm social welfare. I consider these issues in the next Section.

D. Assessing Information-Forcing in Statutory Interpretation

To avoid dealing with sixteen separate pairings of models, I make several simplifying, but plausible, assumptions. First, the entire analysis fails if one institution is associated with systematically benign inclinations and the other with systematic defects. Under these conditions, institutional attributes become irrelevant and one instead looks simply for the best policy. I do not mean to exclude the possibility that, in any historical moment, one institution might seek to enact preferences that reflect the popular will or otherwise promote social welfare, and the other might oppose those outcomes. The point instead is that these moments seem historically contingent and not susceptible to positive economic analysis.

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86 Easterbrook, *supra* note 45, at 551–52.

87 Process models are most familiar in constitutional theory, where they serve to justify constitutional review of the acts of the political departments by the judiciary. *E.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). As Elhauge has argued, however, the same arguments can underlie a theory of statutory interpretation. ELHAUGE, *supra* note 64, at 168–87.

88 One might embrace one or the other of these accounts of legislative dysfunction, but not necessarily both. Elhauge, for example, argues against the comparative advantage of judges in addressing public choice problems but supports rules of statutory interpretation that take account of the interests of systematically powerless voters. *Compare* ELHAUGE, *supra* note 64, at 168–87, *with id.* at 163 and Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991). The distinction rests on assumptions about the ability of judges to detect these effects at particular degrees of granularity.

A nonobvious corollary of this argument is that certain attributes, such as the ability to engage in preference shaping, are not specific to particular institutions. There is no reason to believe that, as a general matter, a legislature containing successful norm entrepreneurs will function alongside a judiciary that has no capacity to persuade and uplift the general public. At the *a priori stage*, the ability to mold public preferences ought to be shared by all public actors or none.

To be clear, I am not arguing that such disjunctions do not arise in the real world. Rather, as suggested above, it seems likely that their occurrence results from random, and most likely transient, social variation rather than as an inevitable result of fundamental conditions. To the extent that a particular historical moment contains, say, a leadership legislature and a passive judiciary, the analytic problem is essentially no different from that arising from the assignment of socially benign leadership ability to one institution and malign leadership to the other. In both cases, the differences may be very interesting, but a positive economic analysis has nothing significant to offer.

Second, although the models capture logically distinct characteristics, external observation of some of these distinctions seems unlikely. As a practical matter, for example, very few judges would own up to all that the Olympian model implies when the reformer account would be available. Similarly, distinguishing the leadership from the crusader models of legislative choice seems unnecessary. Both emphasize the norm-shaping capacity of the legislature and, as a result of the first simplifying assumption noted above, are agnostic as to the social benefits of this ability.

Finally, assigning to the judiciary a mission to combat the effects of distortions in the legislative process becomes irrelevant if those effects either do not exist or are too subtle for judges to detect. The process model matters only if judges can distinguish outcomes that reflect true democratic preferences based on inclusion and equality of all voters from those that do not.

This process of elimination leaves us with four model combinations. Legislators with the capacity and confidence to lead the electorate might confront judges who prefer their preferences to those expressed by the legislature (the leadership-Olympian dyad). Legislators who simply identify and act on current preferences of all voters might confront judges who simply try to ascertain what the legislature wants (the passive-modest dyad). Legislators who reflect the weighted preferences of voters, given powerlessness or public choice factors, might confront judges who seek to overcome such structural problems (the public choice-process dyad). Finally, legislators who act on voter preferences as filtered through a flawed system (due either to public choice or powerlessness effects) might confront a judiciary that seeks to give the legislature what it wants (the public choice-passive dyad). Each has distinct implications for the efficacy of information-forcing presumptions.

1. Leadership Legislative Model and Olympian Judicial Model

In this combination of models, both Congress and the judiciary are occupied by people with some confidence in their ability to shape public opinion, rather than passively follow it. In the case of the legislators, an electoral constraint weeds out persons who are systematically unsuccessful at leading the electorate. Judges do not face as strong a limit on their discretion, in the sense that they answer to history rather than to voters, and the judgment of history may shift over time. At least over the short term, it is impossible to tell ex ante whether either's preferences will lead to social welfare optimization or not.

This scenario presents the circumstances where the case for information-forcing presumptions is weakest. If legislative and judicial preferences overlap, the judiciary should not need additional information to mold the enacted law to their shared purposes. Teleology should do all the work. If their preferences instead conflict, one would expect the judiciary to obstruct the legislative agenda. Invoking an interpretive presumption allows the judiciary to trump the legislature's preferred outcome. The restrictive interpretation of a statute produced by a presumption delays the intended effect without resort to a constitutional confrontation.

These conditions also raise the greatest doubts about inferred delegations of discretionary authority. Again, if legislative and judicial preferences overlap, delegations are likely to be clear. If these preferences conflict, judges would be inclined to find delegations wherever they can. In these circumstances, an inference of a delegation would achieve the same result as imposition of an interpretive presumption, namely raising the costs to Congress of adopting laws that implement its, and not the judiciary's, preferences.

2. Passive Legislative Model and Modest Judicial Model

This combination of models generates the least complicated account of interactions between Congress and the federal judiciary. Congress seeks only to express current democratic preferences. Any gap between its actions and the preferences of the median voter represents irreducible agency costs (noise, if you will) rather than structural deficiencies in electoral accountability. The judiciary in turns seeks only to ascertain what Congress wants. Where an enactment is clear, judges follow its instructions without embellishment. When faced with ambiguity, judges look for the strategy that is most likely to bring about the outcome that Congress prefers.

These conditions correspond to those applicable to contract interpretation in the absence of externalities. If one excludes both structural flaws in the legislative process and the possibility that judicial policy preferences are anything but neutral with respect to optimal social outcomes, then judges ought to treat legislators just as if they were sophisticated contracting parties. For exactly the reason that judges engaged in contractual interpretation should seek to realize party preferences in these circumstances, judges

engaged in statutory interpretation should undertake that task in a manner that results in the best expression of legislative preferences.

In an externality-free world, contract theory counsels courts to apply all clearly expressed rules. Where a statute is ambiguous, a court should determine, based on context as well as choice of statutory language, whether Congress meant to use a delegation mechanism that would allow courts to take account of post-enactment information. If the prerequisites for inferring such a mechanism do not exist, then a court should invoke an interpretative presumption that best matches the most likely substantive outcome that Congress would prefer. Such a presumption would be the equivalent of a majoritarian default in contract.

Modest judges seeking to identify majoritarian defaults should look at all credible evidence of legislative preferences. They might, for instance, take a negative approach, identifying policy areas that, evidence suggests, Congress regards as difficult and wishes to avoid. Consistent with the conditions specified by this model, the judges would not substitute their own intuitions about difficult areas for evidence of legislative preference.

3. Public Choice Legislative Model and Process Judicial Model

Unlike the prior pairing, this dyad depicts a legislative process impaired by structural flaws and a judiciary that has the capacity and inclination to identify and push back against outcomes that reflect those flaws. The precise nature of these flaws is, for present purposes, immaterial. Interest groups may have disproportionate influence that allows them to capture economic rents through suboptimal legislation. Alternatively or in addition, systematic discrimination or pervasive poverty might deny some groups effective political power. The model assumes that the flaws do not affect everything that Congress does, but that their effects, when they do occur, are observable by the judiciary.

When a law emerges from the legislative process without apparent effects from structural deficiencies, a process-model court will approach its interpretation in the same manner as if a passive-model legislature had enacted it. In that case, the analysis reduces to that described in the prior subsection.

Where a process-model court detects the effects of structural deficiencies, however, it will seek to counter them. Imposition of a true penal default, i.e., an information-forcing mechanism that does not reflect assumed legislative preferences, is one way to pursue this strategy. A penal default functions somewhat like a tax on socially undesirable behavior. It requires Congress to reaffirm its commitment to a suboptimal outcome in a more explicit manner. Not only must the legislature reassemble the coalition that supported the enactment the first time, but it must make the law more explicit. Greater clarity might lead to more democratic accountability and consequently greater resistance to the project. Aware of this, the legislature in marginal cases will not readopt the measure.

4. Public Choice Legislative Model and Modest Judicial Model

In this combination of models, the legislature adopts some laws that do not reflect democratic preferences but the judiciary lacks the capacity to distinguish between enactments that result from flawed legislative processes and those that do not. Judges still will craft presumptions to induce clarification of legislative preferences and will base the default outcome on their perception of the most likely legislative preference. As in the second dyad (passive legislative model and modest judicial model), they will not apply any penal defaults because, by assumption, they cannot distinguish flawed expressions of democratic preferences from normal ones. Here, however, this modesty creates a problem.

Under the assumptions of the second dyad, statutory interpretive presumptions generally advance social welfare. But once one introduces structural deficiencies that distort legislative outcomes relative to democratic preferences, the judiciary's loyalty to legislative preferences brings about suboptimal results. Courts fail to discourage the adoption of laws that exclude the powerless or reward special interests at the expense of the general public. This deficiency, however, results from too few defaults that limit the scope of enactments, not too many.

E. Bond *and Social Welfare*

The foregoing provides an analytic structure for determining when presumptions like that articulated in *Bond* make us better off, and when they do not. As argued above, the analysis provides no help in cases where, in the particular historical moment, the legislature and the judiciary act on the basis of conflicting normative commitments not derived from democratic preferences. In particular, it does not help anyone with commitments to normative outcomes other than welfare maximization. It has greatest value in cases where Congress seeks to act on the basis of democratic preferences, and the judiciary seeks to elicit legislative preferences.

With these limits, an analysis derived from the contract theory approach to information-forcing defaults might address several questions. Does the *Bond* problem—legislation that ambiguously displaces pre-existing state legal regimes, not necessarily in a manner that raises constitutional concerns—represent an area where Congress plausibly may expect downstream information not available at the time of enactment to affect the choice of whether to encroach or not? If the answer to that question is no, what would be the most likely congressional preference about encroachment? Are there any reasons to think that defects in the legislative process might distort congressional preferences on this issue?

First, it seems unlikely that the ideal rule for displacing legal regimes involving core state functions depends on the development of downstream information. To be sure, the optimal distribution of national and local regulation might shift over time in response to changes in technology, communication, transportation, and other structures that shape the nature of social

behavior and its externalities. But Congress certainly acts in awareness of the basic structure of federalism. Many members of Congress come up through the ranks of state politics and presumably have a highly developed sense of the current balance of authority. Nor is there anything about the context to indicate great dependence on future events. Those structural changes that might shift the balance between federal and state authority are unlikely to emerge as rapid transformations, but rather as gradual adjustments to phenomena that the general public, and therefore Congress, recognizes.

Needless to say, the Chemical Weapons Convention Implementation Act contained no language indicating a congressional desire to delegate to the judiciary the discretion to adjust the statute to changing conditions of federalism.[89] Moreover, the context does not suggest such a preference. Downstream information does not seem to play much of a role in determining the best adjustment to federalist concerns. Accordingly, the answer to the first question seems to be a negative.

Second, imputing to Congress a desire to avoid undue interference with traditional areas of state authority, and then basing a majoritarian default on this move, seems defensible. To be sure, the impact of interference resulting from extension of federal criminal law is limited, because it does not put demands on the resources of state or local governments.[90] But the question is which branch of government has conclusive authority over criminalization of socially undesirable conduct. Although the federal charges against Bond did not bar Pennsylvania from reaching the opposite conclusion, the federal prosecution did prevent Pennsylvania from giving effect to its considered assessment of the proper response to Bond's conduct.[91]

The facts of the dispute bolster the argument that the Court chose an appropriate majoritarian default. Nothing in the case implicated an enacted federal policy. The chemicals that Bond appropriated for her bizarre scheme were not subject to a specific federal regulatory regime.[92] The injury she sought to inflict—bodily harm to a romantic rival—implicated no significant federal interest.[93] The link between her conduct and the Chemical Weapons Convention was, at best, tenuous.[94] One cannot believe that any other party to the Convention would have faulted the United States had the local decision not to bring charges prevailed. If anything, one might suspect that Congress would have been dismayed to learn that federal prosecutorial resources were devoted to such a local affair.

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89 Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. §§ 6701–6771 (2012).

90 Accordingly, the context presents no issue of commandeering. *Cf.* Printz v. United States, 521 U.S. 898, 933 (1997) (prohibiting Congress from commandeering state resources to enforce federal policy); New York v. United States, 505 U.S. 144, 188 (1992) (same).

91 Bond v. United States, 134 S. Ct. 2077, 2092–93 (2014).

92 *See id.* at 2085 (indicating that the chemicals were available for purchase on Amazon.com).

93 *Id.* at 2093.

94 *Id.* at 2091.

One might respond that Congress generally wishes to delegate broad discretion to federal prosecutors and to trust the good judgment of these actors not to abuse this authority. The facts of the *Bond* case might indicate that prosecutorial abuse occurs, but not that there exists a systemic problem for which a general judicial response is needed. Tolerating the occasional bad outcome is simply the price of supplying prosecutors with sufficient discretion to deal with uncertain future events.

This argument, however, can be flipped. It is not clear that the chemical weapons regime, or any related federal regulatory scheme, is undermined by a lack of broad prosecutorial discretion. Given the gravity of criminal law, we might manage uncertainty by forgoing prosecution rather than tolerating disproportionate punishment.

In federal criminal law cases generally, the modern Supreme Court intermittently pushes back against the use of capacious or ambiguous statutory language to justify broad prosecutorial discretion.[95] Legislative reversal of these decisions, although not unheard of, is rare.[96] Admittedly, Congress has not responded generally by adopting more precise statutory language to limit the federalization of criminal law. But neither has it expressed broad dissatisfaction with judicial reductions of prosecutorial discretion in this field.

One can extend this argument to some of the other presumptions embraced by the modern Court. The common factor that links *Bond*, the presumption against extraterritoriality (*Kiobel*), the presumption against violating international law (*Charming Betsy*), and the presumption against testing constitutional limits (*Catholic Bishop*) is encroachment on other forms of sovereignty that compete with congressional authority. *Bond* involves state competence, *Kiobel* involves the competence of other nations, and *Charming Betsy* involves the prerogatives of the international community. The *Catholic Bishop* presumption involves constitutional interpretation, an area where the judiciary generally, and the Court in particular, exercises supreme power. Attributing to Congress an inclination to avoid conflicts with these competing sovereigns, even where the constitutional rule would allow Congress to prevail, seems a plausible majoritarian default based on a reasonable assumption about the legislature's preferences.

The one instance where the majoritarian argument does not apply is the presumption against implied causes of actions. The issue in these cases is not which sovereign should be regarded as the default decisionmaker, but rather

95 *See, e.g.*, Yates v. United States, 135 S. Ct. 1074, 1081 (2015); *id.* at 1089 (Alito, J., concurring in the judgment); Sekhar v. United States, 133 S. Ct. 2720, 2727 (2013); Skilling v. United States, 561 U.S. 358, 368 (2010); Jones v. United States, 529 U.S. 848 (2000). *But see* Pasquantino v. United States, 544 U.S. 349 (2005) (invoking prosecutorial discretion as argument for supporting the extension of federal criminal law to evasion of foreign revenue laws).

96 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2012)) (overturning McNally v. United States, 483 U.S. 350, 360 (1987)).

which actors should have the capacity to enforce a concededly applicable statutory rule. The question is one of remedies, not of prescriptive jurisdiction.

One could argue, however, that the modern presumption rests on a defensible nonmajoritarian penal default. The defect in the legislative process to which it responds is not powerlessness, but rather interest group contestation and an evident preference of Congress to avoid accountability for the choices it makes. Adoption of a substantive rule while excluding private enforcement frustrates lawyers who derive rents from private suits. Plaintiffs' attorneys lose an opportunity to make money, and defense attorneys face reduced demand for their services. Embracing private enforcement rewards that group at the expense of the regulated, who may regard private litigation as a costly and somewhat random regulatory instrument. Congress might prefer to remain at peace with both groups by shifting responsibility for the key decision to a largely unaccountable decisionmaker.

Powell said something like this in his *Cannon* dissent. Where Congress faces competing claims by reasonably well-defined interest groups that do not implicate downstream information, the judiciary might abstain from making the choices that Congress ducked. The courts may treat the pre-enactment status quo as the default outcome so as to induce Congress to assume responsibility for its actions.

The case for invoking a penal default in these circumstances rests on an argument about the optimality of electoral accountability. Legislators might prefer to avoid having to answer to electors and instead would like to entrench incumbency, but this preference, perhaps that of the majority of legislators, does not serve the public interest. Courts might hold the legislature's metaphorical feet to the fire to resist, to use Powell's term, legislative shirking.[97] Rather than asking which outcome Congress might prefer most of the time, the judiciary might choose the rule that minimizes the effect of the enacted legislation. Enactments that reflect shirking might deserve less respect, and be given less of an impact on the status quo, than legislation that facilitates legislative accountability.

One might object that the penal default argument substitutes judicial preferences for those expressed by legislators.[98] If legislators want to avoid accountability to electors, who are federal judges, the beneficiaries of Article III protection from accountability, to obstruct them? This argument, however, confuses substantive preferences with structural insights. The view that legislators should face electoral accountability, and that judicial interpretations should facilitate this process, is transubstantive. Rather, it rests on a conception of the proper roles of legislators and judges in a democratic republic. The judiciary can object to shirking without having any views about the content of the product of Congress's evasive conduct.

97 Cannon v. Univ. of Chicago, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

98 *See* ELHAUGE, *supra* note 64, at 23–29; Elhauge, *supra* note 88, at 44–48.

To summarize, under certain plausible assumptions about legislative and judicial motivation and the nature of the dynamic interactions between the legislature and the judiciary, the *Bond* presumption is defensible. Contract theory asserts that, in the absence of externalities, courts should respond to ambiguous legal language with a majoritarian default. An information-forcing default that presumes no encroachment on the prosecutorial discretion of local officials seems to be a reasonable guess about what Congress prefers. That this is a majoritarian default, rather than a true penal default, does not mean it is a bad outcome. Indeed, majoritarian defaults require fewer assumptions and thus are easier to defend in the context of legislative interpretation than are punitive defaults. Similar arguments support *Kiobel*, *Charming Betsy*, and *Catholic Bishop*. The presumption against implied causes of action, by contrast, illustrates how a penal default analysis might justify the Court's modern jurisprudence even where a majoritarian default analysis does not.

The operative word, of course, is "might." The analytics borrowed from contract theory help us to understand particular outcomes, but do not serve as a proof of the outcome's desirability. The underlying questions remain empirical. What the analysis does is expose the assumptions on which the outcomes rest and invite the testing of those assumptions through investigation of the world in which they function.

In sum, contract theory helps us think about statutory interpretive presumptions. It focuses our intention on what Congress knows, and what an enacting majority of legislators prefers. It links statutory interpretive presumptions to problems of information management, both in the legislative process and in downstream judicial applications. Contract theory does not force normative outcomes, but rather directs us to ask the right questions.

CONCLUSION

Bond's failure to address the constitutionality of treaty-enforcing legislation no doubt disappointed many foreign relations scholars. Constitutional law has broad popular appeal, both within and outside the legal profession. By refusing to resolve the constitutional issue, *Bond* denied foreign relations law a moment in the sun.

All the same, specialists in the law of statutory interpretation, perhaps a drabber group, should love the case. *Bond* gave birth to a new statutory interpretive presumption. It thus offers a window into the Court's methods for creating such presumptions and invites reflection on the purposes of, and the justifications for, these devices.

Contract theory offers an attractive analytic approach for considering these problems. It provides a powerful, even compelling, account of private transactions. Translating its insights to public transactions is not straightforward, but neither is it impossible. On balance, it identifies a set of arguments that can justify *Bond* as well as the modern Court's general approach to presumptions.

For someone with particular normative commitments, of course, the analysis is unhelpful. If one regards federalism as atavistic and the modern Court's federalist decisions as simply an effort to obstruct progressive legislation, then *Bond* is, if not a disaster, at least regrettable. If one divides the world into categories of liberal and conservative and regards one as fundamentally good and the other as largely bad, contract theory and its insights will seem at least irrelevant, if not a pernicious effort to disguise the insidious nature of the Court's jurisprudence. To the extent such commitments are inflexible, rather than open to contestation and inquiry, those who have them may safely ignore this Article.

If, however, one wishes to achieve a broader understanding of federal statutory interpretation in general and the modern jurisprudence of statutory presumptions in particular, contract theory can help. It is both theoretically rigorous and, within the field of private contracting, well validated empirically. It provides a clear account of what these presumptions do and illuminates the empirical conditions under which the Court's modern approach makes the world a better place. It can help everyone—judges, practitioners, and scholars—understand statutory presumptions and anticipate the kinds of evidence that is needed to either extend or limit their effect.

All this might seem like a lot to take away from a case that rested at bottom on the culpability of an aggrieved romantic rival whose pathway to revenge involved troubling, but ultimately not dangerous, conduct. But the pettiness of the dispute in a way is the point of the case. It is difficult to see why federal prosecutors brought such serious charges against Bond. Confronted with what seemed to be a clear case of prosecutorial abuse, the Court responded not on the facts, but with a general principle of law. The general principle it invoked fits within a general pattern of doctrine. Contract theory indicates that this doctrine, under certain plausible assumptions about legislative and judicial competence, may be desirable. At the end of the day, this kind of problem solving by the Court may do more for the general welfare than any of its grand constitutional pronouncements.