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ARTICLES

PREFERENCE-ESTIMATING STATUTORY DEFAULT RULES

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It is commonly assumed that statutory indeterminacy must be resolved by judicial judgment. This Article argues that where hermeneutics gives out, statutory indeterminacy instead can and should be resolved by default rules designed to minimize the expected dissatisfaction of enactable preferences. This probabilistic goal justifies many actual judicial practices, including the pattern of application for statutory canons of construction and broad-ranging inquiries into legislative history even if it does not accurately reveal any shared legislative intent. It also often supports adopting moderate interpretations even when more extreme interpretations are more likely to match legislative preferences. Further, while the general default rule normally requires estimating enacting legislative preferences, the enacting legislature itself would prefer to shift to a default rule of tracking current legislative preferences when those can be reliably ascertained from official action. The basic reason is that the enacting legislature would prefer influence over the interpretation of the entire stock of statutes being interpreted while it is in office rather than influence over the future interpretation (when it is out of office) of the statutory ambiguities that exist on the few topics for which it made enactments. Such a current preferences default rule explains many cases that rely on subsequent legislative action despite its hermeneutic irrelevance, and

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explains both the general doctrine of deference to agency interpretations and the pattern of exceptions to that deference.

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I. Introduction

Statutory interpretation involves two crucial issues. (1) How should courts divine the meaning of statutes? (2) How should courts decide what to do when they cannot divine a statute's meaning? The first issue raises fascinating issues of hermeneutics and has both dominated the literature and been dominated by debate about the extent to which interpretive theory can or should constrain judges to act as honest agents for the legislature. The second issue has suffered from relative neglect, with its typical answer—more assumed than justified—being that in resolving statutory indeterminacy, courts must exercise judicial judgment to choose the substantively best results or canons. To the extent the second issue is engaged, the typical argument is more about what the substantively best results or canons are, and whether they should be framed as case-by-case standards or categorical rules, rather than about the premise that judicial judgment is how to resolve the question.

I here take a different tack. I will skip the first issue and instead begin wherever hermeneutics leaves off by focusing exclusively on how courts should resolve admitted statutory ambiguities. Further, regardless of the extent to which hermeneutic theory constrains judges to act as honest agents, I will argue that, in resolving any statutory ambiguities left after interpretive inquiry, courts should not exercise judicial judgment

but rather should act as honest agents for the political branches. This may seem impossible since, by definition, this is the set of cases where the legislative instructions are unclear. And so many have thought.[1] But courts can still act as honest agents by adopting a set of statutory default rules designed to minimize political dissatisfaction with statutory results. In fact, I will argue that they largely have done just that, and that this explains various seeming anomalies in statutory interpretation. But, and quite counterintuitively, I will show that the statutory default rules that minimize political dissatisfaction often do *not* track the most likely meaning or even preferences of the enacting legislature.

Given my focus, I intentionally abstract not only from the debate about the extent to which hermeneutic inquiry constrains interpretations of statutory meaning, but also from interesting and important disputes about how best to conduct any hermeneutic inquiry. I rely, rather, on the simple premise that at some point these interpretive efforts must give out. No matter how much faith one has in the latest hermeneutic theory, sometimes we cannot determine statutory meaning through interpretative efforts. Interpretive theory may generally leave us with a range of possible meanings, but often cannot resolve which meaning to choose.[2] The need for a doctrine to resolve this indeterminacy only increases if one is sufficiently agnostic about hermeneutic theory to believe judges and scholars can reasonably subscribe to different theories, for in many cases reasonable hermeneutic theories point in opposite directions. But even a partisan for a particular hermeneutic theory should confess that reasonable persons applying that same theory would often reach different conclusions in the same case—that is, the theory has many ambiguous applications that cannot be resolved by the theory itself.

In short, in whatever set of cases one is willing to concede present statutory indeterminacy, what statutory doctrine should provide the de-

1. See, e.g., Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 413, 415–41 (1989) [hereinafter Sunstein, Interpreting Statutes] ("[T]raditional sources offer incomplete guidance and . . . their incompleteness reveals the inevitable failure of the agency conception of the judicial role.").

2. I will throughout use the term "meaning" to refer to whatever meaning or range of possible meanings results from the reader's favored interpretive methodology, which to some turns on the statutory text and linguistic conventions but to others turns on statutory "purpose," or legislative "intent" or "will." I mean the term "meaning" to be agnostic on that and all other hermeneutic issues of proper interpretation. I will also be abstracting from subtle hermeneutic distinctions about whether a particular form of statutory indeterminancy is best called a "gap," an "ambiguity," "vagueness," a "conflict," an "omission," "unclarity," or something else. I will instead use all those terms interchangeably to mean that whatever hermeneutic approach the reader favors has failed to resolve the question of meaning. For example, if one's favored interpretive method provides that a true statutory "gap" indicates the statute meant to exclude that case, then that person would see no indeterminancy creating the occasion for a default rule. But others might think that at least some gaps (like a failure to specify a statute of limitations) do create indeterminacy that judges must resolve, so I will sometimes refer to gaps as a possible basis for a default rule.

fault rules that resolve those indeterminacies? The importance of this question surely varies with how determinate our methods for divining statutory meaning are. To those who find those methods wholly indeterminate, the choice of default rules actually resolves more cases than the choice of interpretive theory—at the extreme, all cases. But even if one has a high degree of faith in interpretive theory, the choice of statutory default rules will resolve many interesting cases in whatever residual remains unresolved by interpretive theory. In Supreme Court cases, the proportion of such residual cases will be particularly large, and thus default rules particularly important, because cases that do not involve statutory ambiguity are less likely to split the lower courts.

The hermeneutic debate that has dominated the statutory interpretation literature has generally assumed that what must resolve any indeterminacy left by hermeneutic theory is judicial judgment. But far from producing consensus, this common assumption has only sharpened divisions because of differing reactions to such judicial judgment. Some fear it, some like it, and others simply think it inevitable. Those who fear it regard judicial decisionmaking as illegitimate or undesirable because it is politically unaccountable. This first camp tends to focus on hermeneutic efforts to constrain judicial judgment by defending and improving methods of divining statutory meaning (and judicial compliance with them) that produce more determinate results. Their assumption (and fear) is that unless constrained by hermeneutic theory, statutory gaps will be filled in by judicial judgment. Those who like judicial judgment tend to emphasize instead the weaknesses of hermeneutic methods of divining statutory meaning. Rather than seek to constrain judicial judgment, they celebrate it. Some in this second camp think the judicial process better protects certain fundamental values or traditions, in part because of its system of precedent and common law development. Others in the second camp stress that the judicial process is more nimble, aware of changed circumstances, and focused on fact-specific applications. But they share the basic premise (though here hope) of the first camp: that statutory issues unresolved by hermeneutic theory will be left to the judicial process. A third camp simply thinks that because hermeneutics are not very constraining (or often are not), judges have no choice but to exercise judicial judgment or maximize judicial preferences when deciding statutory issues. Those in this camp may be neutral on this fact,[3] or

3. Outside the hermeneutic debate, rational choice theorists have in their models tended to assume that in making statutory decisions judges simply maximize their own preferences, without making any value judgment about whether judicial preference-satisfaction is desirable or not. See infra Part V.D. Since these models begin with this different premise, they not surprisingly reach different conclusions from mine.

regard it as lamentable,[4] but they assume it is logically inevitable.[5]

All these diverse camps thus share the premise—often unspoken and rarely analyzed—that judicial judgment is what does and must govern after hermeneutics gives out. To be sure, many articles and cases have begun to recognize the existence and necessity of statutory default rules (often by another name) to resolve statutory ambiguities. But they tend to base those rules on substantive judgments that they believe have been (or should be) adopted by precedent or the judicial process. These articles and cases thus do not really deviate from the premise that indeterminate meaning must be resolved by judicial judgment, but rather favor a more rule-like implementation of judicial judgment over case-by-case assessments by individual judges.[6]

This Article challenges this widespread premise that hermeneutic insufficiency means some substantive judicial judgment must resolve statutory indeterminacy. Instead, ambiguities about statutory meaning could and should be resolved by default rules that constrain judges to maximize political preference satisfaction. Or, to phrase the proposition in an alternative way that some may prefer, wherever one believes that statutory interpretation does leave matters to judicial judgment, courts should exercise (and generally have exercised) their judicial judgment to adopt default rules that maximize political satisfaction. This is true whether one categorizes the judicial judgment as an aspect of statutory interpretation or as an exercise of an interstitial common law power created by the relevant statute.[7] Indeed, under theories that the relevant constitution requires courts to be faithful interpretive agents, it would be constitutionally compulsory for courts to exercise their judgment to adopt statutory default rules that maximize political satisfaction.[8]

If one instead focuses on the possibility that legislatures might themselves enact statutory default rules binding on the courts in cases of statu-

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4. I hope to persuade such scholars that, even if they are correct in their hermeneutic skepticism, a properly defined set of statutory default rules may make the condition that they regard as lamentable less inescapable than they have presupposed.

5. See, e.g., Sunstein, Interpreting Statutes, supra note 1, at 438 (contending that the argument that failure of agency view requires judges to exercise substantive judgment "is a conceptual or logical claim, not a proposition about the appropriate distribution of powers among administrative agencies, courts, and legislatures. It depends not at all on a belief in the wisdom and decency of the judges."). **R**

6. See, e.g., id. at 461–62.

7. See generally Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 756–57 (4th ed. 1996) (describing the range of views on how to classify federal common law versus statutory interpretation). Sometimes, though, the political preference will be to delegate the issue to be resolved by the substantive judgment of courts or agencies. Id. at 754; infra text accompanying notes 25–26, 287; Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 Colum. L. Rev. 2163, Part II.A.3 (2002) [hereinafter Elhauge, Preference-Eliciting].

8. See Elhauge, Preference-Eliciting, supra note 7, Part VIII.C.6. **R**

tory ambiguity,[9] my analysis provides a recommended content for—and limits on[10]—the rules the legislature should adopt. In fact, as we will see, although the interpretive rules provided by statute in the United States Code and many state codes are inconsequential, many other states have enacted more substantive codes of construction that provide valuable evidence on the default rules most likely to maximize political satisfaction. Of course, even an interpretive statute must be interpreted, and courts will need default rules to do that, which in my theory should likewise be designed to maximize political satisfaction.

One indication that current widespread premises about statutory interpretation are not logically compelled is that they differ strikingly from premises about judicial interpretations of another kind of legal text: contracts and corporate charters. In cases and scholarship concerning contracts and corporate law, it has long been openly acknowledged that interpretive methods used to divine the meaning of contracts and corporate charters often run out. And this case law and literature generally assumes that what should fill these ambiguities or gaps in meaning are not exercises of substantive judicial judgment, but rather whatever default rules most accurately reflect or elicit the preferences of parties agreeing to such contracts or charters.[11] Given this, a small but growing set of scholarship has suggested the contractual default rule approach

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9. See, e.g., Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085 (2002) (arguing that Congress has the constitutional power to enact some interpretive rules and should exercise it, but not offering a theory of what the content of those rules should be); Stephen F. Ross, Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?, 45 Vand. L. Rev. 561, 566–72 (1992) (suggesting that Congress adopt such interpretive rules by statute without specifying the content). Rosenkranz's excellent article distinguishes between what he calls "starting point rules" and "default rules," both of which are interpretive rules Congress can avoid with a specific statutory meaning, but which in his terminology differ because Congress cannot opt out of the latter with a general interpretive statute. Rosenkranz, supra, at 2098. I will instead be using the term "default rule" in the more conventional manner—as a rule that the legislature can opt out of, either generally or in specific cases. As explained in the next note, I will be discussing certain recommended limits on the legislative ability to adopt general opt-outs, but these limits have more to do with *how* the legislature tries to opt out rather than with the claim that certain default rules are (as general defaults) legislatively immutable.

10. Generally, self-interest will drive legislators to adopt statutory default rules that maximize the satisfaction of enactable political preferences. But in some cases legislators might try to enact default rules that maximize careerist self-interest over the satisfaction of enactable preferences, or try to change default rules to favor their own interests or views over those of future legislatures. In those cases, I would limit legislative opt-outs from the default rules that maximize political satisfaction. See infra Part V.E.5; Elhauge, Preference-Eliciting, supra note 7, Part III.A.3. Those limits might even be deemed constitutionally mandatory based on an interpretation of the legislative and judicial powers under the relevant constitution, but in any event they set a limit on my recommendations. R

11. Although hypothetical consent and penalty default rules have been popularized and systematized by recent law and economics scholarship, see, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 91 (1989), in fact these notions go back at least to Lon Fuller. See Lon L.

might be applied to statutory interpretation, though often without endorsement, and certainly without yet working out any systematic defense of this proposition or account of what set of statutory default rules would maximize legislative preference satisfaction.[12] I aim to provide that systematic defense and account. One point the analysis will demonstrate is that, while the contract and corporate law approach of resolving textual gaps or ambiguities with default rules that maximize the preferences of the contracting parties is also fruitful for statutory texts, one must make many modifications because statutes raise unique issues.

More precisely, I aim to explain how a doctrine of statutory default rules should (and now generally does) constrain judges to maximize the extent to which statutory results accurately reflect enactable political preferences, as measured by whatever political process is accepted in that society for enacting statutes. As I use the term, "enactable political preferences" are the political preferences of the polity that are shared among sufficient elected officials (taking into account any requirements for the concurrence of different political bodies like a House and Senate or President) that they could and would be enacted into law if the issue were on the legislative agenda. Enactable political preferences thus do not refer to polling data or other indications of the polity's general political preferences that are not manifested in their choice of elected officials, nor to strategic private aims that legislators may harbor but could not actually enact into law.

Throughout I will be making both the normative claim that my theory is desirable, and the descriptive claim that it largely fits the U.S. case law.[13] I do not by this descriptive claim mean that my theory matches what judges subjectively think they are doing or say they are doing in their opinions.[14] Rather, I mean that my theory fits and predicts the doc-

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Fuller & Robert Braucher, Basic Contract Law 557–58 (1964) (noting contract law is designed either to reflect reasonable expectations or to induce parties to clarify them).

12. See Ayres & Gertner, supra note 11, at 129–30 (noting in its conclusion that its analysis of contractual penalty defaults might be extended to statutory gaps as well); Elizabeth Garrett, Legal Scholarship in the Age of Legislation, 34 Tulsa L.J. 679, 682, 685–86 (1999) (noting, without endorsing, this possibility); Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74, 85 (2000) [hereinafter Vermeule, Interpretive Choice] (same). Perhaps the most extensive prior treatment is in Cass R. Sunstein, Must Formalism Be Defended Empirically?, 66 U. Chi. L. Rev. 636, 645–50 (1999), which outlines this possibility and agrees it provides "at least a reasonable place to start." Id. at 649. But Sunstein ultimately does not endorse this approach, id., and indeed at least partially rejects it to the extent he also argues for the traditional position that interpretation should be affected by judicial judgment about public policy values. Id. at 649–50; see also Sunstein, Interpreting Statutes, supra note 1, at 413, 466–67, 476–89. R R

13. I will not here be making or addressing any claim that my recommended statutory default rules are logically necessary or otherwise inevitable as a matter of hermeneutics itself. Further, although I extend my normative theory to other nations, I have not yet undertaken the systematic investigation necessary to establish whether statutory doctrine elsewhere also fits my descriptive theory.

14. But there is some evidence of that as well. Seventy percent of Supreme Court conference discussions about nonconstitutional cases refer to the preferences or likely

trine. Indeed, designing default rules to minimize political dissatisfaction explains and justifies many judicial practices, doctrinal distinctions, and canons of construction far better than do existing interpretive or substantive theories. It also helps resolve what might otherwise appear to be little more than open-ended conflicts among statutory canons and cases. But rather than fitting the self-description of these practices by judges, many of the insights will come from using default rule theory as a way of *re*-describing (in ways that better justify, cabin, and make sense of judicial practice) existing phenomena in statutory interpretation that under current descriptions have been entirely mired in intractable hermeneutic debate, including many uses of legislative history and linguistic canons. This improved understanding of the reasons underlying statutory constructions, and the justifiable grounds for their seemingly inconsistent application, also renders them more determinate, and thus more constraining on judges.

The normative and descriptive claims stand separately, but draw additional strength from their combination. They stand separately in the sense that, if one disagrees with the normative thesis, my claim would remain that this theory best explains the actual contours of current statutory interpretation. Likewise, if one disagrees with my descriptive thesis, my point would remain that courts *should* exercise their power over statutory interpretation to adopt statutory default rules that maximize political satisfaction, and that legislatures should require them to do so if they prove unwilling.

But my argument also invokes that combination of descriptive and normative claims that is the particular province of law professors. Because one of the tasks of legal scholarship is to explain legal doctrine in a way that can provide guidance to future courts, it has always been important to establish that any proffered theory has both normative attraction and a sufficient fit with extant doctrine. For example, suppose one concluded that my descriptive claim was not as accurate as the contrary claim that judges simply interpret statutes in whatever way furthers their personal ideological preferences. Even if this offered a viable positive account acceptable in political science and rational choice theory, such a normatively corrosive position cannot offer an attractive legal theory for guiding future courts. A valid legal theory must instead have some normative justification to merit adoption. Conversely, a perfectly valid normative argument that has no connection to existing doctrine may offer a useful blueprint for legislative reform, but has no claim to being a theory

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actions of current legislatures or other governmental actors. See Lee Epstein & Jack Knight, The Choices Justices Make 149–50 (1998). Supporting the preference-eliciting theory explored in the companion paper, 10% of Supreme Court statutory decisions actually expressly invite legislative override. See Elhauge, Preference-Eliciting, supra note 7, Part II.B.3. Statistical evidence about the connection between court outcomes and legislative responses also fits the theories presented in these papers, id., though I will mainly focus on the correspondence between the theory and legal doctrine.

of legal doctrine. Without any grounding in the authority of existing doctrine, such a normative theory cannot offer guidance to an agency, trial court, or intermediate appellate court. Its utility would even be limited before a jurisdiction's high court, partly because of the presumption in favor of stare decisis, but even more so because that court must rule case by case in reviewing lower courts that will generally be following existing doctrine. This tends to limit high court decisions to altering the margins of existing doctrine and makes it difficult to accomplish a wholesale shift to an entirely different normative foundation. Thus, while legal theory often includes pure positive or normative theory, what distinguishes it from those endeavors is that it also focuses on determining which of the possible normative justifications is most consistent with the descriptive landscape. The best legal theory might thus be neither the most descriptively accurate nor the most normatively attractive, but rather the theory that provides the best combined fit of descriptive explanation and normative justification. As well as making the separate claims, I make precisely such a combined claim on behalf of my legal theory of statutory interpretation.

I begin by justifying, in Part II, the claim that statutory default rules should maximize the extent to which statutory results accurately reflect enactable political preferences. I defend this claim against arguments that courts should instead advance other conceptions of the good, statutory coherence, or legislative deliberation. I then develop my counterintuitive conclusion that, where statutory meaning is substantially unclear, an approach of maximizing political satisfaction often dictates adopting canons of statutory construction that do *not* reflect the enactors' most likely meaning—or sometimes even their preferences. I develop this point in three stages.

In the first stage, considered in Parts III and IV, I assume there is no reason to think that the political preferences of the enacting and current government differ,[15] nor that the political process would respond to any statutory interpretation by enacting a different statute. In this case of static nonresponsive preferences, the statutory default rules should be chosen to maximize the satisfaction of the enacting government's preferences. These enacting preference-estimating default rules come closest to paralleling the meaning that most likely would have been attached to indeterminate text by the enacting government. But the inquiries differ, mainly because the sources of information for making probabilistic estimates of political *preferences* are broader than those for divining the *meaning* the enactors likely attached to a particular text. Further, given suffi-

15. By the "current" government, I mean the one that exists when the court interprets the statute. The "enacting" government is the one that existed when the statutory text was enacted. I will often use the term "government" (or "enactors") rather than the term "legislature" to emphasize that it includes all those who affect which political preferences could be enacted even if they are not technically part of the legislature (like a President or governor under U.S. law).

cient uncertainty about which preferences are enactable, minimizing the dissatisfaction of those preferences will often dictate adopting moderate interpretations even when extreme interpretations are more likely to be enactable.

In the second stage, addressed in Parts V–VII, I add the complication that the political preferences of the enacting and current governments may differ. Contrary to ordinary supposition, in such cases, the default rule that overall best maximizes the political preferences of the *enacting* government will track the preferences of the *current* government where they can be reliably ascertained from official action. This argument for a current preferences default rule may seem counterintuitive—would not the enacting government want its *own* political preferences followed? The answer would be "yes" if we asked the hermeneutic question: that is, what meaning would that enacting government most likely want for that particular statute? But the answer is "no" if we instead ask the default rule question: that is, what *general* rule for resolving indeterminacies about statutory meaning—including those in older statutes being interpreted and applied during the time that the enacting government holds office—would most maximize the political satisfaction of the enacting government?

In the third stage, I add the complication that statutory interpretations (or the prospect of them) can themselves often elicit a legislative reaction. In a limited set of cases, political satisfaction can be maximized by choosing what I will call a preference-eliciting default rule, which intentionally *differs* from likely political preferences in order to elicit a political response that will make it clearer just what the government desires. In those cases, a preference-eliciting default rule can create statutory results that reflect enactable preferences more accurately (and deliberatively) than any judicial estimate possibly could. This proposition is established in a companion piece, which analyzes the necessary conditions and explains how many canons of statutory construction can best be explained on these grounds.[16]

In this article, however, I will instead focus on how to arrive at a statutory default rule for the common case where the proper conditions do not exist for choosing a statutory interpretation that elicits a legislative reaction. Beginning with the simplest case of static preferences permits us to focus on the distinction between the normal hermeneutic question (what indications do we have about what the enactors meant or intended?) and the default rule question (what rule would maximize the enactors' political preferences?). The latter, Part III demonstrates, provides a more solid foundation for traditional doctrines like the canon against absurd interpretations and for modern proposals to update statutory interpretations when circumstances change, each of which sits uneasily with hermeneutic theories of meaning. That is, even if one is not con-

16. See Elhauge, Preference-Eliciting, supra note 7. **R**

vinced by hermeneutic theories that courts can disregard a statutory meaning that seems to have become absurd to the judge given unanticipated or changed circumstances, a default rule that asks what will maximize the satisfaction of the enacting government's political preferences would certainly avoid absurd results and vary with changed circumstances.

An enactable preferences default rule approach also provides entirely different—and more persuasive—grounds for relying on legislative history. Even if critics are correct that legislative history does not establish statutory meaning or legislative intent, it helps make at least a probabilistic estimate of the political preferences that were influential enough to be enactable. As long as those probabilistic estimates are better than random, this will suffice to minimize political dissatisfaction even if, as many argue, legislative intent is a incoherent concept. Indeed, even if legislative history is often inaccurate, a default rule of relying on it will elicit corrections on the legislative record. Further, default rule analysis suggests that, where inquiry into legislative history is necessary to resolve a statutory ambiguity, the inquiry should extend beyond the legislative history of the particular statute. It should include any other debates or information bearing on the relevant political preferences, including the enactment of other statutes and general historical information about the political forces of that period.

Part IV then explores an ambiguity under default rule analysis: what should courts do when no one interpretive option more likely than not matches enactable preferences? This ambiguity has never been resolved by the corporate and contract law scholarship on default rules. The analysis here shows that where no one option is more than 50% likely to be enactable, courts should *not* just choose the plurality option (i.e., the option with the highest likelihood of matching enactable preferences). Instead, somewhat surprisingly, it minimizes expected political dissatisfaction to choose a moderate interpretive option even though extreme options are more likely to match enactable preferences. This is *not* a claim that the moderate option would most likely have been needed to pick up the median legislator. Even if one predicts that the median legislator would be more likely to pick an extreme option, a moderate option should be chosen when the extreme option is less than 50% likely to reflect enactable preferences. Likewise, it would minimize the expected dissatisfaction of contracting parties or corporate participants to adopt a "moderate" default rule for similar cases of contract or corporate law interpretation.

Moving to the second stage allows us to consider the implications of changed political preferences. From the perspective of the enacting government, as detailed in Part V, a current preferences default rule makes future statutory interpretation of those statutes it enacted correspond less well to its preferences, but makes present statutory interpretation of all statutes correspond better. Which will be more important to the govern-

ment: satisfying its political preferences regarding the future or the present? As a general matter, political preferences for a given statutory result are likely to be stronger in the present because those who hold those preferences (and elect the government) are those who experience that result. Only some of them (in some cases none) will still be around when the future statutory result comes, and even if they are still around, many will have different political views or be affected differently by the statutory result because their life-situation has changed. They are thus likely to have weaker preferences about whether their favored statutory result obtains in the future than in the present. Additionally, the set of all statutes being applied in the present when the enacting government sits will cover the full range of statutory results that affect their electorate's experience, whereas the enacted statutes being applied in the future will be smaller in number and cover some more narrow range of life experiences. Thus, even for the enacting government, a general default rule that accurately tracks current preferences (rather than the preferences of the government that enacted each statute) will maximize its political satisfaction.

This reasoning provides a much more solid (and limited) ground supporting proposals for updating statutes to take into account changed political preferences, which some prominent scholars have made on different grounds.[17] We need not rely on a controversial conclusion that current political preferences are better or should take precedence over enacting preferences. Rather, we can rely on the ground that both current and enacting governmental preferences can often better be satisfied by a general default rule that maximizes the preference satisfaction of each during its time of rule. But this justification is limited to cases where statutory meaning is actually unclear, and the current political preferences tracked are those most likely to be enactable. The approach here thus rejects the prior proposals, which would allow judges not only to modify statutory meaning itself, but to exercise substantive judicial judgment either in choosing among unenactable positions held by current public opinion or values or in determining what the public would enact without political obstacles that, although constitutional, the judge deems undesirable.

Instead, the argument here justifies dynamic interpretation that reflects changing political preferences only when it is both limited to the resolution of statutory ambiguities and tracks the preferences that are the most likely to be enactable under the actual political system. Concerns about the reliability of ascertaining current enactable preferences, and about making sure that interpretations are stable enough to induce some behavioral reliance, further suggest that judges should follow only those current preferences that have been memorialized in some *official* action. Not surprisingly, when enacting preferences are obscure or ancient, courts are more relaxed about how certain their estimate of current en-

17. See infra Part V.

actable preferences must be, since the enacting governmental preferences will be weak.

This default rule analysis, as shown in Part VI, provides a sounder explanation for (and better explains the limitations on) judicial treatment of subsequent legislative action and inaction, decisions overruling statutory precedent, and decisions like *Bob Jones* that resolve statutory ambiguities with a current legislative policy where it is sufficiently clear even though it conflicts with likely enacting legislative preferences. It further provides an improved way of understanding *Chevron* deference to agency interpretation, and the various nuanced doctrines limiting such deference. Part VII analyzes those doctrinal nuances in some depth, providing a fresh justification for the *Mead* doctrine and other denials of deference that have so far seemed perplexing under traditional *Chevron* theories.

II. Should Statutory Default Rules Be Designed to Maximize Political Satisfaction?

A. *Political Satisfaction vs. Judicial Judgment*

The guiding principle throughout my analysis will be that statutory default rules should be devised to maximize the satisfaction of political preferences, which necessarily entails that they will, to some extent, constrain judges from imposing their own views or judgments. Some may doubt that these (or any) rules could really constrain judges, especially since many of the default doctrines are not that rule-like, but rather offer guidance whose content will be determined by context. But a doctrine need not be 100% determinate to have a meaningful effect on judicial outcomes. True, clever and dedicated subverters of such default rules can no doubt manipulate them to reach whatever result they personally prefer in most cases. So it is with any legal doctrine or any instruction a principal gives to any agent. But it is hard to see why the political process would want to appoint the kind of judicial agents who misuse their interpretive powers to pursue their own political views or judgments. To the contrary, the political process would want to commit itself to a strategy of refusing to appoint—and, where feasible, reversing the statutory decisions of—judges who just tried to further their own political views or judgments, for commitment to such a strategy would maximize the expected influence of those in the political process. Some mistaken judicial appointments will no doubt slip through the screening process, but over the entire range of judges and cases, identifying the correct default rules should increase the extent to which statutory results accurately reflect enactable political preferences. If the judiciary is sufficiently wayward, the legislature can also try to reestablish the supremacy of democratic choice

This analysis provides my own theory for the proper dividing line between default rule inquiries into governmental preferences and hermeneutic inquiries into statutory meaning. Although the inquiries share similarities, in my analysis the line is crossed when the enacting government creates indicia that it desires to opt out of any process of judicial gap-filling or updating. Such indicia should be understood to bear on statutory *meaning* and not just preferences, because when persuasive they indicate a legislative opt-out from default rules. But if (like the shareholder in the close corporation above) the enacting government leaves no indicia that it meant to opt out of normal dynamic default rules, then the relevant evidence should be taken to establish not the most likely fixed meaning, but rather the most likely political preferences out of which to form a default rule that will operate on changed circumstances.

I hasten to add that the remainder of the analysis stands whether or not one accepts this definition of the limits to hermeneutic inquiry. Wherever one defines the limits on that inquiry, one needs a set of default rules that take up where hermeneutic inquiry leaves off. And the foregoing means that those default rules should be updated for changed factual circumstances whether or not one believes that statutory meaning (or other hermeneutic conclusions) should be updated as well.

IV. When No One Interpretive Option Is More Than Likely to Reflect Enactable Preferences

Most rational choice models assume that judges pick statutory interpretations from an infinite set of options in a policy space.[142] This is an unrealistic depiction of actual statutory interpretation. Although legal

142. See Eskridge, Dynamic, supra note 139, at 167–70; Eskridge, Overriding, supra note 139, at 378–85; William N. Eskridge, Jr. & John Ferejohn, Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State, 8 J.L. Econ. & Org. 165, 168 (1992) [hereinafter Eskridge & Ferejohn, Deal]; Eskridge & Ferejohn, Game, supra note 118, at 549–51; John A. Ferejohn & Barry R. Weingast, A Positive Theory of Statutory Interpretation, 12 Int'l Rev. L. & Econ. 263, 267–68 (1992); Edward P. Schwartz et al., A Positive Theory of Legislative Intent, Law & Contemp. Probs., Winter 1994, at 51, 56–57 & n.23; see also Linda R. Cohen & Matthew L. Spitzer, Solving the *Chevron* Puzzle, Law & Contemp. Probs., Spring 1994, at 65, 69–76 [hereinafter Cohen & Spitzer, Puzzle] (assuming there is a best statutory interpretation but that courts are free to deviate from it across an infinite continuum of views about policy and process); Rafael Gely & Pablo T. Spiller, A Rational Choice Theory of Supreme Court Statutory Decisions With Applications to the *State Farm* and *Grove City* Cases, 6 J.L. Econ. & Org. 263, 268–83 (1990) (basing most of analysis on assumption of infinite continuum but also considering possibility court can make only a yes-or-no choice). A slightly different take is offered in Pablo T. Spiller, Rationality, Decision Rules, and Collegial Courts, 12 Int'l Rev. L. & Econ. 186, 188–90 (1992), which assumes judges always have interpretive discretion to choose any point in a policy space, and would generally prefer to do so, but are sometimes driven by cycling problems to decide instead on a yes-or-no basis in order to achieve stable agreement on the point most likely to come close to the judicial policy preferences. None of these articles considers the possibility that hermeneutic methodology might reduce the interpretive choices to, say, three possibilities.

methods of statutory interpretation often fail to point to one unambiguous interpretation, legal methodology is sufficiently constraining that it normally produces some limited set of legally plausible interpretations, from which the court must choose.

Nonetheless, often there will be more than two legally plausible interpretive options, meaning that none of the options might be the one the legislature "most likely" would have chosen if it had made a choice. What should courts do when there are multiple interpretive options, none of which seems more than 50% likely to be what the enactors would have chosen if it had made a choice? Suppose, for example, there are three plausible interpretive options, and the court's best estimate of the relative odds of what the government would have enacted had it made a choice is 40% for option 1, 30% for option 2, and 30% for option 3.[143] Should the court just go with option 1 because its odds of matching enactable preferences are higher than those of the other options?

A similar theoretical problem has been raised, but never satisfactorily resolved, for contract or corporate default rules.[144] But under the general framework of this Article, the abstract answer seems clear. The goal of an honest interpretive agent is to maximize the extent to which interpretations satisfy the preferences of the text-making authority. An interpreting court should accordingly choose the interpretive option that minimizes the expected preference dissatisfaction of the parties making the legally binding text (be it a contract, charter, or statute). In the case of statutory interpretation, the court should choose the option that minimizes the expected dissatisfaction of enactable preferences. But the analysis extends in obvious ways to contracts and charters too.

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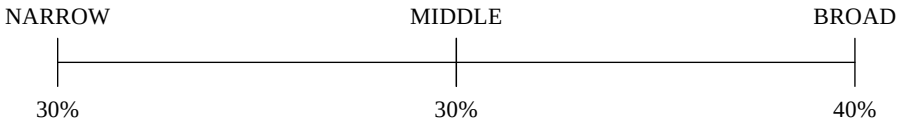
143. Because the probabilities are relative, they will add up to 100% even though there might also be positive odds that legislative preferences or deadlock would have prevented any of the interpretive options from being enacted. See supra note 84. For example, if the odds of deadlock were 50%, and the odds of 1, 2, and 3 being enacted were respectively 20%, 15%, and 15%, then the relative odds of enactment if the government had made a choice would respectively be 40%, 30%, and 30%.

144. See Ian Ayres, Default Rules for Incomplete Contracts, *in* 1 The New Palgrave Dictionary of Economics and the Law 585, 586 (Peter Newman ed., 1998); Ian Ayres, Making a Difference: The Contractual Contributions of Easterbrook & Fischel, 59 U. Chi. L. Rev. 1391, 1402 (1992); David Charny, Hypothetical Bargains: The Normative Structure of Contract Interpretation, 89 Mich. L. Rev. 1815, 1816–17 (1991). In contracts and corporate charters, the problem arises in a somewhat different guise, because the usual question is what to do when the population entering into contracts or corporate charters differ in what default rule they would prefer, but the court cannot tell them apart and no single default rule seems likely to command a majority. Thus, for contracts and corporate charters this question would normally be framed as which of the "minority" options to choose as a general default rule where tailoring seems impossible. Here, in contrast, I am assuming courts are tailoring and the percentages do not refer to the share of the population that favors a particular statutory interpretation, but rather refer to the estimated odds that the interpretation could have been enacted if the enactors had been required to make a choice. Of course, this question can also arise for tailored contract or corporate default rules where the court is tailoring the default rule and is uncertain what the parties would have wanted.

Perhaps surprisingly, this is not the same as choosing the option that has the highest odds of being right. A diagram might help. Suppose statutory uncertainty leaves us with three possible interpretive options that can be plotted on a line where the distance between options indicates the extent to which the preferences of a enacting government desiring one option would be dissatisfied with the other option. Let us call the options Narrow, Middle, and Broad, with each separated by 10 units of preference dissatisfaction: that is, if the enacting government would have preferred the middle option, it suffers 10 units of dissatisfaction from either the narrow or broad options; if it would have preferred one of the extremes, it suffers 10 units of dissatisfaction from the middle option and 20 units from the opposite extreme.



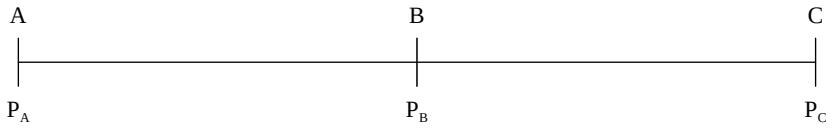
Suppose further that, while a court cannot be sure which option best fits enactable preferences, its best estimate is that the broad option is 40% likely to match enactable preferences, with the other options each 30% likely.[145] Choosing the broad option is more likely to fully satisfy enactable preferences, but overall will produce more expected preference dissatisfaction than necessary. If the court chooses the broad option, the expected preference dissatisfaction will be $(.4)(0) + (.3)(20) + (.3)(10) = 9$. But if the court chooses the middle option, the expected preference dissatisfaction will only be $(.3)(10) + (.3)(0) + (.4)(10) = 7$. The court should thus choose the middle option even though it is less likely to match enactable preferences than the broad option.

I should emphasize that I am *not* saying that judges, when deciding cases, should try to measure units of expected political dissatisfaction. I am rather using this example to show why, when no one interpretation is more than 50% likely to reflect enactable preferences, adopting the moderate interpretation will naturally lead to less political dissatisfaction even if a more extreme option is more likely to reflect enactable preferences. The units of dissatisfaction drop out of the analysis and need never be measured by judges, as we can see by generalizing the analysis using a little bit of math.[146]

145. Note that these percentages do not correspond to the share of persons who hold that view, but rather the relative odds that this position would be enactable. Intensely interested persons often have more influence than their numbers alone would suggest, making the odds that their favored position is enactable exceed their numbers. See Elhauge, Interest Group Theory, supra note 21, at 64–66.

146. Relatedly, the claim is not that this default rule maximizes utility, a goal that is normatively controversial and may or may not be maximized by the enactment process. The claim is rather that it will maximize the satisfaction of those preferences that are enactable and thus make the political preferences reflected in statutory interpretations parallel those reflected in statutory meaning. See supra Part II.A. If it were viewed

Suppose we have three interpretative options (A, B, and C) that can each be conceptualized as points along a policy continuum so that the further the point is away from the enactors' ideal point, the more dissatisfied they are, with B signifying some point between A and C.



Let D_{AB} stand for (the absolute value of) the dissatisfaction resulting from a difference between options A and B, with D_{AC} and D_{BC} meaning the same for the differences between options A and C, and B and C. Suppose further that the relative probability that, had the enactors made a choice, they would have enacted A is P_A, for B is P_B, and for C is P_C. Then, the expected political dissatisfaction from choosing each point will be:

If choose A: $P_B\ D_{AB} + P_C\ D_{AC}$

If choose B: $P_A\ D_{AB} + P_C\ D_{BC}$

If choose C: $P_A\ D_{AC} + P_B\ D_{BC}$.

A judge who is trying to minimize political dissatisfaction will choose the option with the lowest expected dissatisfaction value. Thus, this judge should choose middle option B if both:

$P_A\ D_{AB} + P_C\ D_{BC} < P_B\ D_{AB} + P_C\ D_{AC}$ AND

$P_A\ D_{AB} + P_C\ D_{BC} < P_A\ D_{AC} + P_B\ D_{BC}$

I first solve to see when middle option B would be a better choice than extreme option A, even though A has the highest odds of matching enactable preferences. Since $P_A + P_B + P_C = 1$, we know that $P_B = 1 - P_A - P_C$. Thus, the judge should choose B over A if:

$P_A\ D_{AB} + P_C\ D_{BC} < (1 - P_A - P_C)D_{AB} + P_C\ D_{AC}$, which can be rearranged as:

$(2P_A - 1)\ D_{AB} < P_C\ (D_{AC} - D_{BC} - D_{AB})$.

Since B is some point between A and C, $D_{AC} - D_{BC} - D_{AB}$ necessarily equals 0, no matter where option B lies between options A and C.[147] Also, since A and B are by hypothesis different points, $D_{AB} > 0$. Thus, the above equation produces the result that the judge should choose option B over A if $2P_A - 1 < 0$, or $P_A < .5$. For example, option B is the better choice even if option A is 49.9% likely to match enactable preferences, and options B and C are, respectively, 24% and 26.1% likely to match enactable preferences. Indeed, middle option B is the better choice as long as the probability that extreme option A will match enactable preferences does not equal or exceed 50%.

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desirable for statutes to maximize utility, then the enactment process should be designed to do so, and then interpretations that tracked enactable preferences would maximize utility. Otherwise, they would not.

147. This follows because if B is some middle point, the distance from A to B, plus the distance from B to C, must add up to the distance between A and C.

Where end point A has the highest odds of matching enactable preferences, middle option B is also always a better option than end point option C. Option B will produce less dissatisfaction than option C if:

$P_AD_{AB} + P_CD_{BC} < P_AD_{AC} + P_BD_{BC}$

Again, $P_B = 1 - P_A - P_C$. Thus, the judge should choose B over C if:

$P_AD_{AB} + P_CD_{BC} < P_AD_{AC} + (1 - P_A - P_C)D_{BC}$,

which can be rearranged as:

$(2P_C - 1)D_{BC} < P_A(D_{AC} - D_{BC} - D_{AB})$.

Again, $D_{AC} - D_{BC} - D_{AB}$ necessarily equals zero (and D_{BC} is positive since B and C are not the same point). Thus, the condition is met whenever $2P_C - 1 < 0$ or when $P_C < .5$. Since by hypothesis A is the option with the highest odds of matching enactable preferences, this must always be true.

The way to see intuitively why middle option B is always preferable to end point A is to begin with the extreme case where $P_A = 49.9\%$ and $P_B = 0\%$. In this case, P_C must equal 50.1%. A decisionmaker would prefer option B over A because while the move from A to B increases dissatisfaction by the difference between B and A with probability 49.9%, it decreases dissatisfaction by the same difference with probability 50.1%. Of course, this example does not satisfy the hypothetical assumption that A has the highest odds of matching enactable preferences. But now suppose we alter this hypothetical to transfer from option C to option B any percentage necessary to make A the highest odds option without increasing A to over 50% (here, any percentage > 0.2%). Such a transfer can only make B a more attractive option than it was before (since we are increasing the odds that it precisely matches legislative preferences), and thus B continues to be preferred over A. Moreover, since B is preferable to any end point A (whose probability is below 50%), it must necessarily be preferable to any end point C (whose probability is lower than that of A).

Can middle point B ever prevail over option A if it is more likely than not that option A matches legislative preferences? No. Under this assumption $P_A > .5$. And then it will be impossible to satisfy the condition that $2P_A - 1 < 0$.[148] The way to see this point intuitively is to take the extreme case where there are only two points, A and C, with A thus 51% likely to be the correct choice. Obviously, A would be the right choice over C. This cannot be altered by switching some percentage from C to an option B that is closer to A, for that only makes A more desirable.

The interesting result is that *when, among the available interpretive options, no one option is more likely than not to be what the legislature would have enacted had it made a choice, a court trying to minimize expected political dissatisfaction should choose a moderate interpretive option even though extreme options are more likely to match enactable preferences.* Note that this proposition goes beyond the point, considered above, that in estimating what political

148. A fortiori, option C cannot be preferable to A because option B dominates C.

preferences are enactable, the court should focus on the marginal legislators whose agreement was necessary to enact the legislation.[149] That point is true, and the views of that marginal legislator should be followed when a court can determine with greater than 50% odds that their preferences would have governed. But suppose that after going through this thought process, one determines that no one interpretive option is more than 50% likely to reflect enactable preferences. Then, even if one predicts the marginal legislator would be more likely to pick an option that, among the available interpretations, is more extreme, the court should nonetheless choose a more moderate option.

Of course, courts will rarely have these sorts of precise percentages in mind, but one can employ the same insight in the form of a cautionary axiom. The axiom would simply provide that, where multiple interpretive options seem plausible, courts are justified in favoring middle ground options when interpreting what the legislature would have wanted. One often sees just such a tendency in statutory interpretation cases, in part because the need to get a majority of multi-member appellate panels naturally encourages it. Indeed, this proposition provides one justification for the whole appellate structure of using multi-judge panels, and following the middle ground position in a fractured court even when, as in *Bakke*, it reflects the position that garnered the fewest votes.[150]

V. The Theory Behind a Current Preferences Default Rule

When statutory meaning is unclear, how should courts fill in the default rule when the preferences of the current government differ from those of the enacting government? This problem is different from the case of changed circumstances, for in that case one could readily conclude that changing interpretations would better satisfy the enacting government's political preferences.[151] Here, it may be the case that the circumstances are largely the same, and that any change would have to be justified by changed political preferences about how to respond to those circumstances.

Several eminent legal scholars, including such luminaries as Ronald Dworkin, William Eskridge, Guido Calabresi, and Cass Sunstein, have taken the position that statutory interpretation should be sensitive to changes in political preferences.[152] But their analysis differs from mine in at least four important respects that are important to emphasize at the outset.

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149. See supra Part III.B.

150. Justice Powell's middle ground opinion in Univ. of Cal. Bd. of Regents v. Bakke, 438 U.S. 265, 269–320 (1978), has effectively become the governing law on affirmative action even though the other eight justices disagreed with it.

151. See supra Part III.C.

152. See Calabresi, supra note 139, at 7; Dworkin, supra note 27, at 348–50; Eskridge, Dynamic, supra note 139, at 5–7, 9–11, 69, 107–08, 120–21; Sunstein, Interpreting Statutes, supra note 1, at 412, 433 & n.99, 495. R R R

First, these scholars would have courts look to loose understandings about current public opinion or social norms, whether or not there is any evidence that those reflect the preferences most likely to be enactable in the current legislature.[153] Their approach thus requires the exercise of substantive judicial judgment about which of the unenactable current public opinions or values are meritorious enough to govern statutory interpretation.[154] Indeed, these scholars would make statutory interpretation turn on a judicial view about which public opinions or majority preferences *would* be enactable but for certain political realities that these scholars deem normatively undesirable even if they are not unconstitutional.[155] Accordingly, even when these scholars would have judges look

153. See Dworkin, supra note 27, at 349 (looking to whether interpretation is "fair" given current "public opinion"); Eskridge, Dynamic, supra note 139, at 10–11, 156–59 (looking at modern "social developments, and current values and social needs" and looking to "majority preferences" even though they would not actually be enactable because the actual legislative system is responsive to an interest group minority); William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1017–61 (1989); Sunstein, Interpreting Statutes, supra note 1, at 495 (stating that interpretation may change if statutory provision is "no longer consistent with widely held social norms"). Eskridge does argue that courts must make sure not to adopt interpretations that will be legislatively overridden, Eskridge, Dynamic, supra note 139, at 7, 69, but not that they should adopt the interpretation most likely to be enactable. Indeed, he even argues in favor of statutory interpretations that are sometimes "counter- or nonmajoritarian." Id. at 151. Calabresi argues that courts should overrule old statutory meanings that are no longer enactable by the current legislature, but he would not require any evidence that the new meaning is the one most likely to be enactable. Calabresi, supra note 139, at 2, 7.

154. Dworkin argues that the judge should act as the legislature's "partner" (rather than agent), developing the statutory scheme in "the best way," which will turn in part on the judge's "own judgment." Dworkin, supra note 27, at 313. He rejects the view that "statutes should be read, not according to what judges believe would make them best, but according to what the legislators who actually adopted them intended," and argues that interpretive questions "must be answered in political theory, by taking up particular views about controversial issues of political morality." Id. at 313–14, 316; see also id. at 320 ("[A judge's] judgments will also be sensitive to his convictions about the relative importance of fairness . . . ."); id. at 334 ("A judge must ultimately rely on his own opinions [and] [h]is own political convictions . . . ."); id. at 347 (stating that interpretation should turn in part on the judge's "substantive opinion" about which statutory reading "would make it better from the point of view of sound policy"); id. at 354 (arguing that which cases are easy or hard turns on the judge's personal "convictions about justice and fairness"). Eskridge likewise regards it as unavoidable that courts must make "value choices," and ultimately supports his theory of dynamic interpretation with the argument that it is "normatively desirable" for courts to adopt a stance of critical pragmatism that considers whether an interpretation will "unsettle existing practice," "reasonably accommodate a diversity of interests," and be "responsive to social needs and public values." Eskridge, Dynamic, supra note 139, at 174–76; see also Sunstein, Interpreting Statutes, supra note 1, at 412–13 (rejecting view that "controversial views about public policy . . . should never be part of statutory construction" and setting forth the "substantive norms" courts should follow and those it should reject).

155. See Dworkin, supra note 27, at 319 (arguing that interpretation should reflect judicial "opinions about the influence that the attitudes, beliefs, and ambitions of particular groups of officials and citizens *ought* to have in the process of legislation" (emphasis added)); Eskridge, Dynamic, supra note 139, at 156–61. The most common

to current political preferences, their approach has more in common with theories that advocate the exercise of substantive judicial judgment to resolve statutory ambiguity. They therefore differ sharply from my approach of adopting statutory default rules that maximize the satisfaction of those political preferences that are enactable.

Second, these scholars would not make even this loose understanding of current public opinion binding on interpretive questions. Dworkin argues that judges must also make their own normative judgment about whether the issue is an appropriate one for legislators to disagree with public opinion,[156] concluding that judicial interpretation should be sensitive to "general public opinion" only when the judge "believes" the statutory issue does not "involve any question of principle" that merits deviation from public opinion.[157] The substantive contestability of which issues involve such questions of principle is neatly illustrated by Dworkin's assertion that no such principle is implicated by the preservation of a species.[158] In the end, Dworkin only argues that the judge should "not wholly ignore the public's opinion" because sometimes the judge's own view of "political fairness" will make public opinion normatively relevant.[159] This approach thus dissolves into a faith in substantive judicial judgment. Likewise, Eskridge argues that "statutory interpretations *should* often be counter- or nonmajoritarian."[160] In particular, statutory interpretation should in his view favor a minority group if it has been marginalized.[161] But, as Professor Tribe showed long ago, judges cannot determine when a minority has too little political influence without making substantive judgments about the degree of political influence that minority ought to have.[162] And, especially outside the limits of constitu-

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argument is that statutory interpretation should lean against special interest groups because they have disproportionate political influence. See Dworkin, supra note 27, at 319 (arguing that judicial interpretation should take into account the judge's views on "whether lobbying, logrolling, and political action committees are a corruption of the democratic process"); Eskridge, Dynamic, supra note 139, at 157–58. But as I showed in a prior article, any claim that a special interest group has disproportionate influence depends on an underlying normative judgment about the degree of influence that is proportionate to the group's justifiable interest, and produces results no different from applying that normative judgment directly. See Elhauge, Interest Group Theory, supra note 21, at 49; see also supra Part II (rejecting alternative of having interpretation turn on substantive judicial judgments, including the judgment that the current political system underweighs certain interests). **R** **R** **R**

156. Dworkin, supra note 27, at 313 (arguing that judicial interpretation will depend on judge's "best answer to political questions [like] how far Congress should defer to public opinion in matters of this sort . . . ."); id. at 319 (arguing that judicial interpretation turns on judge's "views on the old question whether representative legislators should be guided by their own opinions and convictions" rather than public opinion). **R**

157. Id. at 341.

158. Id. at 340–41.

159. Id. at 342; see also id. at 349.

160. Eskridge, Dynamic, supra note 139, at 151 (emphasis added). **R**

161. Id. at 156–57, 159–61.

162. Tribe, Puzzling Persistence, supra note 21, at 1072–77. **R**

tional law, it is unclear what would authorize judges to impose their substantive judgments on a democratic political process. In contrast, I argue that, when interpreting statutes, judges should not exercise substantive judicial judgment but rather should (and do) try to maximize political satisfaction.[163]

Third, the position of these scholars is not limited to resolving how courts should fill in the default rules that resolve ambiguities in statutory meaning. Rather, these scholars argue that current public opinion or values should prevail over enacting preferences even when this requires a change in statutory meaning.[164] Their form of political updating thus has a much wider zone of application since it is not limited (like mine) to cases of hermeneutic exhaustion but can occur at any time. This not only makes their approach far more fluid but also raises a fundamental problem that I address in more detail below: the current polity, unlike the enacting one, did not actually complete the process for enacting a text with an understood statutory meaning, and thus has less claim to authority and less accurately ascertainable preferences.[165]

Fourth, the underlying rationale of these other scholars is significantly different. These scholars essentially argue that current public opinion and values should (at least when judges deem them substantively important) normatively take precedence when they conflict with enacting legislative preferences.[166] In contrast, my argument will be based on an analysis about what statutory default rule the enacting legislature *itself* would prefer.

Notwithstanding these fundamental differences, my analysis produces a similar conclusion in favor of dynamic interpretation, albeit one with a more solid basis, more constraining methodology, and more limited scope. Namely, I conclude that where there is ambiguity in statutory meaning, the *enacting* government's preferences would overall be maximized by a general default rule that dynamically tracks the enactable preferences of the current government—where those preferences can be determined with relative reliability—rather than statically sticking with the enacting government's preferences.

This probably seems counterintuitive. One would naturally think that the enacting government's political preferences would necessarily be best maximized by a default rule that stuck to those preferences. And that would indeed be true if we were asking only which default rule would maximize the enacting government's preference satisfaction for the statutes *it* enacted. But here we are asking what general default rule for filling *all* statutory indeterminancies maximizes the enacting government's

163. See supra Parts I–II.

164. See Calabresi, supra note 139, at 2, 6–7; Dworkin, supra note 27, at 347–54; Eskridge, Dynamic, supra note 139, at 5–7, 9–11, 107–08, 120–21; Sunstein, Interpreting Statutes, supra note 1, at 412, 495. R R R

165. See infra Part V.E.1.

166. See supra note 164.

political satisfaction. In choosing between default rules, the enacting government would realize that a rule that stuck only to enacting preferences would maximize its preference satisfaction in the future over the statutes it enacted. But a rule that tracked current enactable preferences would maximize the enacting government's preference satisfaction during its time in office over all existing statutes, including those enacted by previous legislatures.

For example, an originalist position on default rules may mean the 2000 legislature has the pleasure of foreseeing that its views on the statutes it enacted will fill in statutory ambiguities when those statutes are interpreted in 2100. But a current preferences position on default rules would mean the 2000 legislature would instead have the pleasure of seeing its views fill in the statutory ambiguities for statutes enacted in 1900 but interpreted in 2000, not to mention for all other statutes being interpreted in 2000.

Which would more likely maximize the satisfaction of the political preferences held by the enacting government: (1) an enacting preferences default rule that makes future statutory interpretations of the statutes it enacted correspond to its preferences, or (2) a current preferences default rule that makes present statutory interpretation of all statutes correspond to its preferences? The answer depends on both the accuracy and strength of preference determinations in the present versus the future.

A. *Current Preferences More Reliably Ascertainable*

Consider first the situation where an interpreting court cannot come to any reliable estimate of what the enacting government's enactable preferences would have been for filling in a statutory ambiguity, but can reliably estimate current enactable preferences. This is not a fanciful case, given that current preferences are often better known because contemporaneous, and interpretation often involves issues not thought of in the past, or on which any record of thoughts has been lost. In such situations, even the enacting government's political preferences would clearly be maximized by a general default rule that tracked current preferences. Such a default rule would not lose the enacting government any real influence over future statutory interpretations since its preferences cannot reliably be estimated in the future anyway. But the default rule would increase the satisfaction of the enacting government's preferences with statutory interpretations about older statutes made during the enacting government's time in office. Given this trade-off, the enacting government would plainly prefer to gain influence over present interpretations rather than retain an illusory influence over future interpretations. The answer here depends solely on the relative accuracy of preference-estimation, and is thus independent of whether the enacting government has stronger preferences regarding future or present events.

Consider next the more prevalent situation where a court can estimate both the enacting and current preferences, but can estimate current preferences more accurately. Again, this improved accuracy is a powerful reason why even the enacting government would prefer the court to track current governmental preferences. The enacting government gains more satisfaction from having its preferences accurately estimated during its time in office than from the prospect they will be less accurately estimated in the future. This holds unless the enacting government's preferences about future events are not just stronger than its preferences about the era which it governs, but stronger by a sufficient margin to outweigh the decreased accuracy. But for which era are preferences likely to be stronger? To isolate this issue, let us now consider the case where a court can ascertain either enacting or current preferences with equal accuracy.

B. *Current and Enacting Preferences Equally Ascertainable*

Suppose an enacting government's likelihood of having its preferences accurately ascertained by interpreting courts is equal at present (concerning interpretations of all statutes) and in the future (concerning interpretations of statutes it enacts). Given equal accuracy, whether the government would prefer a current or enacting preferences default rule turns on whether the government is, in the general run of cases, likely to have stronger preferences about the present interpretations or the future ones. Which preferences seem most likely to be stronger?

Generally, governmental preferences will be weaker regarding future events than regarding events during the government's time in office. In the future, only some of those holding the enacting political preferences will still be around. Many statutory interpretations that track current political preferences involve cases where so many decades have passed since enactment that the entire legislative polity that dictates governmental preferences has likely changed. In other cases, there exists some overlap. But as long as a significant percentage of the voting population has turned over, the same polity will no longer exist and the enactable political preferences will have changed. Even without any change in members, the legislative polity may change its political views (and the political representatives it elects) as time passes, perhaps because voters' life-situations have changed in ways that mean they benefit from a different statutory result.

The enacting polity's political preferences for a given statutory result are thus likely to be stronger at the time the enacting government sits because those who hold those preferences are those who experience that result. Accordingly, the enacting polity would generally be willing to trade off having less influence over future interpretation of its statutes for having more influence over current interpretation of past statutes. For example, enactable political preferences that hold sway in 2000 are more

likely to be maximized by statutory results that correspond to those preferences in 2000 than by statutory results that correspond to them in 2100.

Moreover, there are many more pre-2000 statutes being interpreted in 2000 than there are statutes enacted in 2000 that would be interpreted in the future. The set of older statutes that will be applied at the time when the enacting government sits will cover the full range of statutory results that affect the satisfaction of its enactable political preferences. The set of statutes it enacts will be smaller in number and cover a more narrow range of statutory results in the future that might impact on preference satisfaction. Thus, even the enacting polity should (in cases of statutory ambiguity) prefer a general default rule that tracks the enactable preferences of the current polity where reliably ascertainable. Indeed, every polity would prefer such a default since it would maximize the political power of each polity at the point in time when it exists.[167] In addition, a current preferences default rule makes current law more responsive to current democratic wishes and reduces the legislative time that must be devoted to updating statutes.

It bears emphasis that the precise question is which default rule maximizes the satisfaction of enactable political preferences, not which default rule a particular set of governmental officials might prefer. Normally, those amount to the same thing, since a polity's enactable political preferences are manifested in its choice of elected officials.[168] I thus generally use the shorthand phrase "governmental preferences." But sometimes they might differ, a difference that proves relevant in considering various objections to the general proposition that the enacting polity would prefer a current preferences default rule.

Objection 1. A Preference to Have Something to Run Against. — One might hypothesize that some political officials prefer statutory decisions

167. Some have suggested to me that the conclusion that polities would prefer a current preferences default rule is inconsistent with the conclusions in Eric Rasmusen, Judicial Legitimacy as a Repeated Game, 10 J.L. Econ. & Org. 63 (1994). That article concluded that, if judges cared solely about present and future influence, then multiple equilibria are possible, in some of which judges would deviate from prior precedent to gain present influence even though they lose future influence for their own precedent, but in others of which judges would adhere to prior precedent in order to gain future influence for their own precedent. Id. at 67–74. But this article assumes that "[i]f a judge obeys no precedents, and none of his own precedents are obeyed, his payoff is zero." Id. at 69. This assumption is an artifact of the utility function, which ignored the possibility that judges would enjoy a positive utility from making decisions that enhanced their influence during their own time in office. Id. at 68 (expressing utility function in a way that allowed judges at most to experience a reduction in negative utility from deviating from precedent). Judges likely adhere to precedent for reasons that have nothing to do with enhancing their influence. But certainly legislatures experience positive utility from having influence during their time in office and would not experience a zero payoff from maximizing their present influence over all statutes even though that reduced their future influence over the interpretation of the subset of statutes they enacted.

168. Political preferences that a polity holds but fails to reflect in its choice of legislators would not be enactable preferences.

that run contrary to their current political preferences because that gives them something to run against in the next election. This is an intriguing possibility, but the hypothesis is probably untrue, and even if true would not justify a different default rule.

To be sure, some political scientists claim that legislators run for reelection by announcing public positions, not by achieving actual legislative results.[169] However, it is highly rare for statutory interpretations to be of sufficient general interest to make taking a position about them useful in a campaign.[170] After all, the statutory gaps or ambiguities at issue were not sufficiently salient to fill in at the time of enactment, and the statutory decisions that fill them in generally fly below the legislative radar, operating for decades without being legislatively reconsidered. Indeed, if the statutory issue were the sort that were likely to be legislatively reconsidered, that might well counsel instead for a preference-eliciting default rule.[171] And unless having judges adopt contrary statutory interpretations had a significant positive effect on their reelection rates, elected officials would not prefer such interpretations since those interpretations do, after all, run contrary to their own political preferences.

In fact, other political science literature tends to indicate that such contrary interpretations should have a negative effect on reelection rates because voters vote retrospectively based on their somewhat hazy perception of the governmental benefits the voters received in the past rather than based on benefits the candidates promise to deliver in the future.[172] Thus, even if voters would not blame elected officials for the statutory interpretations that run contrary to current preferences, the officials will be negatively affected by the fact the electorate generally has had a worse experience than it otherwise could have had during the past term.

More generally, empirical studies tend to indicate that actual legislative conduct is influenced by both the legislators' ideology and the interests of their constituents.[173] To the extent this conduct reflects the revealed preferences of legislators, these empirical studies undermine the notion that legislators would prefer statutory results that conflict with the

169. See David R. Mayhew, Congress: The Electoral Connection 49–73 (1974) (observing that legislators' desire to maximize their chances of reelection leads them to three main activities: advertising, providing particularized benefits like pork and casework, and position-taking).

170. See Joseph Ignagni et al., Statutory Construction and Congressional Response, 26 Am. Pol. Q. 459, 468–69, 477 (1998) (collecting studies showing that there is no public awareness about vast majority of Supreme Court decisions and conducting new study showing that less than 2% of Supreme Court statutory interpretations even raise enough public awareness to conduct a political poll about them).

171. See Elhauge, Preference-Eliciting, supra note 7, Part II. **R**

172. See Morris P. Fiorina, Retrospective Voting in American National Elections 20–43 (1981); Linda Cohen & Matthew Spitzer, Term Limits, 80 Geo. L.J. 477, 487–88 (1992).

173. See Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 890–901 (1987) (summarizing literature).

preferences of both themselves and their electorate. Legislators may be strategic about reelection, but the ultimate purpose of getting reelected is to accomplish their preferred policy goals.

The hypothesis that legislators would prefer statutory results that contradict their political preferences thus seems empirically dubious. Still, even if dubious, the posited hypothesis may strike some as plausible. If it were empirically accurate, would that mean that courts should instead choose a default rule of conflicting with current preferences to give officials political fodder for their next campaign? The answer remains "no." Officials may have strategic preferences for contrary interpretations, but such preferences would neither be enactable nor political. As I have defined the term, "enactable political preferences" refers to "the political preferences of the polity that are shared among sufficient elected officials . . . that they could and would be enacted into law if the issue were on the legislative agenda."[174] A statutory result that runs *contrary* to governmental preferences—and is preferred precisely because it is so unpopular that it creates an attractive election target—could hardly be said to be enactable. Such a preference would also not correspond to the political preferences that either the polity or officials have regarding certain statutory results.

Nor is there any reason why statutory default rules should try to maximize careerist objectives or strategic private aims that officials may harbor but could not actually enact into law. The polity has no interest in having judges interpret statutes in ways contrary to the polity's current enactable preferences just so individual officials can advance their personal interest in retaining office. Nor would officials have any legitimate interest in having statutory decisions thwart the political preferences of themselves and their constituents just to strategically advance their personal career interests. To argue that statutory default rules should conform to such careerist objectives would be like rejecting efficient default rules in corporate law because imperfections in the market for public offerings or the process of adopting charter amendments mean that the promoter-managers who write the corporate charters prefer inefficient default rules that exacerbate agency costs to profit themselves at the expense of shareholders.

Although judges should serve as honest agents, the principal to whom judges are ultimately responsible is the polity. To be sure, it is the polity as mediated through a particular choice of representatives and political processes necessary for statutory enactments. But the fact of that mediation does not mean that the strategic private interests of those representatives are what should be maximized, any more than a corporate officer with a corrupt board could be said to have a fiduciary duty to aid the board in its corruption.

174. See supra Part I.

Objection 2. Weaker Preferences Regarding Current Experience than Regarding the Future Application of What One Enacted. — One might relatedly hypothesize that government officials have more of a personal stake in the statutes they themselves enacted, and thus care more about seeing ambiguities in those statutes interpreted to match their preferences in the future than they do about seeing present statutory ambiguities interpreted to match the enactable preferences of the current polity that elected them. Again, I doubt this hypothesis is true, and it would not change the conclusion even if it were.

Choosing a current preferences default rule does not, after all, void the statute, and thus would not deprive government officials of any legacy from being associated with the statute in the future. Nor would it deny them the satisfaction of having their preferences followed on any matter they had thought enough about to make clear in the original statute. The default rule would merely cover interstitial matters that were not clearly resolved in the original statute. On such marginal matters, it is doubtful the officials would have strong, enduring preferences that they would prefer to see satisfied in the future more than they would prefer to see their preferences govern all marginal matters resolved during their time in office. In short, officials may have a personal stake in the statutes they enacted, but probably not in the statutory ambiguities they enacted. Even if they did, the fact that officials may have some personal stake or pride of authorship would not justify putting aside the interpretive default rule that would maximize the satisfaction of the current polity's enactable preferences.

The enacting polity itself is unlikely to have any special stake in the future resolution of statutory ambiguities it created that is so large that it transcends the polity's interest in actually experiencing statutory results that conform to its preferences. The mere fact that the polity made certain enactments might be taken by some as proving that the polity has a special interest in the topics covered by those enactments. But, more precisely, what enactment signals is the polity's relative interest in *changing* the preexisting law on that topic, not that it has a greater interest in that topic than other topics, let alone a greater interest in the interpretation of statutory ambiguities about the enacted topic than about other topics.

The topic that provokes enactments may be far less important to the electorate than other topics where the existing (unambiguous) statutory meanings are satisfactory because past polities have addressed them. For example, as I write this, the legislative topic that has commanded the most attention from the U.S. polity in 2002 concerns enactments that aim to correct accounting abuses that led to overvaluations of corporate stock. This may well mean the 2002 polity is more interested in changing accounting law than any other body of law. But that hardly means that the 2002 polity has a greater interest in the topic of accounting law than it has in such subjects as civil rights, antitrust, or environmental law. Even less does it mean that the 2002 polity would trade greater influence over

the future interpretation of accounting statutes for less influence over the current interpretation of statutes on both accounting and all the other statutory topics that affect it in 2002.

Even if the enacting polity did have a greater interest in the topics on which it made enactments, that hardly means it has a greater enactable interest in the particular issues within that topic that led to statutory ambiguities. To the contrary, the existence of a statutory ambiguity generally results either from an unforeseen issue, an intentional failure to decide, or so little interest in the issue that the legislature was unwilling to incur the decisionmaking costs of resolving it. None of those signals that the enacting polity has an especially strong enactable interest in the issue. Whatever special interest the enacting polity had in changing the law would likely be resolved by the statutory meaning, or, if unresolved, indicate the sort of legislative stalemate that signals an absence of enactable preferences.

We must also realize that while certain issues are likely to attract more intense interest than others, that is as likely to be true for future polities as for the enacting one. Statutory interpretations that deviate from future enactable preferences are not likely to stick (and thus really matter) on any issue where the legislative interest is intense. Instead, they are likely to stick mainly for those sets of issues where legislative interest is sufficiently weak that the issue cannot be put on the legislative agenda. Preference-estimating rules thus matter mainly in this marginal area, and issues in this area are unlikely to have provoked strong interest in any legislature, enacting or future.

Consider, for example, the civil rights and voting acts of the 1960s. If ever there were a set of statutes where the enacting legislators and polity might be thought to have a special interest, these would appear to be them. But while the 1960s did finally signal the creation of a political coalition strongly interested in changing civil rights law and this was a topic of intense interest, the truth is that the topic of race relations has been, and will continue to be, of intense interest to every polity. And one must distinguish interest in the topic of civil rights from interest in the issues raised by statutory ambiguities left in the 1960s civil rights statutes. The latter do not necessarily signal an issue in which the 1960s Congress had a particularly strong enactable interest. More likely, the issues that were left ambiguous in its enactments signaled either that its views were not that strong on that issue, that it had not foreseen the issue at all, or that its views were sufficiently divergent that they had no enactable preference on the issue. If there were some issue on which the 1960s Congress had an intense enactable interest that it somehow failed to express, that is likely to be of intense interest to the future polity as well, and a statutory interpretation that deviated from those future enactable preferences would not stick anyway. A preference-estimating default rule is thus likely to matter mainly for issues minor enough not to excite much legislative interest. Would the 1960s Congress really willingly trade future

influence over those minor issues for influence during the 1960s on statutory interpretation concerning all topics? Even if the 1960s Congress were solely interested in race relations that seems dubious, for interpretation of a host of statutes besides the 1960s civil rights acts affected race relations during this era, including statutes on taxation, education, health care, benefits programs, government contracting, criminal law, past statutes on voting and employment, and the Civil War era statutes whose updated interpretation proved crucial.[175] And the 1960s Congress did have many interests other than race relations, including all the nonracial issues in the above list, as well as issues in administrative law, antitrust, banking, securities, intellectual property, and all the other statutory topics that affected its constituency.

Note that the issue is not whether the 1960s Congress would prefer an enacting preferences default rule for its civil rights legislation while preserving a current preferences default rule for all other legislation. *Every* legislature would prefer a enacting preferences default rule for the statutes it enacts (giving it greater influence in the future) while getting the advantage of a current preferences default rule for all older statutes (giving it greater present influence). But allowing a legislature to choose one rule for its statutes and another for the statutes of other legislatures would unfairly aggrandize that legislature's power relative to past and future legislatures. The question instead is what general default rule the legislature would choose for all statutes—past and present.

Thus, even in an era as charged as the 1960s, there is little reason to think Congress would not prefer a current preferences default rule wherever statutory meaning is unclear. Although civil rights legislation provides a good test of this proposition, I should caution that the above analysis does not necessarily mean civil rights statutes are or should be governed by a preference-estimating default rule at all. One might instead read the capacious terms of the most important civil rights and voting acts as indicating a statutory delegation to courts (much as with the antitrust laws) to develop the law in this area in a common law manner.[176] My point here is instead that if courts were to reject this view and instead turn to a preference-estimating default rule, then even the 1960s Congress should prefer a default rule that tracks current preferences where they are reliably ascertainable from official action.

Even if, contrary to the above, one could identify certain extraordinary legislatures or polities with greater interest in the future resolution of the ambiguities left in their enactments than in the current resolution of statutory ambiguities on all topics, the former interest necessarily

175. See infra Part VI.

176. See supra text accompanying notes 25–26. Consistent with this, one study has shown that Supreme Court decisions interpreting civil rights statutes track the ideological preferences of the Justices and are not affected by the changing preferences of Congress or the President. See Jeffrey A. Segal, Separation-of-Powers Games in the Positive Theory of Congress and Courts, 91 Am. Pol. Sci. Rev. 28, 39-42 (1997).

wanes the further away in time, as less and less of the polity is around to experience the statutory results. At some future point, then, even such extraordinary legislatures and polities would prefer a current preferences default rule. Moreover, I doubt there are administrable criteria for distinguishing such extraordinary cases. The lack of any such criteria will make it hard for courts to resist deciding based on whether they approve of the preferences that existed at the time of enactment, because preferences that one shares are naturally going to seem more "extraordinary" than others. Indeed, once one took this tack, there would be no sharp distinction between ordinary and extraordinary, but rather a continuum in the degree of extraordinariness that, at a different point for each degree, would yield if the statutory interpretation were so far in the future that the discount for the lack of effect on the polity would outweigh the degree of extraordinariness in its interest. Thus, even if such extraordinary cases existed, tailoring the default rule for the degree of extraordinariness seems far less preferable than choosing a general default rule to govern all such cases.

Objection 3. Legislators Prefer Durable Legislation. — A final objection focuses on the durability of legislation. Much rational choice literature assumes that an enacting legislature would want its legislation to be as durable as possible. But most of this literature depends on the assumption that all the legislature cares about is whether the future interpretation of the statutes it enacted reflect its preferences.[177] Once one realizes that the question is instead what general default rule to choose for interpreting all statutes, it becomes plain the legislature would care not just about the future implications this choice has for interpreting the statutes it enacted, but also about how the default rule affects the interpretation of all statutes during the time when the legislature sits. This requires the more nuanced inquiry noted above, rather than any general assumption of a preference for durability.

Landes and Posner have offered a theory about durability that requires a somewhat more complicated response. In their theory, legislators "sell" legislation to the highest bidding interest group, and the willingness of interest groups to bid would be undermined unless the legislators can offer durable legislation.[178] This theory means both the

177. See, e.g., Ferejohn & Weingast, supra note 142, at 266–67 (making argument based on that assumption, and collecting similar literature); Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 248–53 (1987) [hereinafter McNollgast, Administrative Procedures]; McNollgast, Structure and Process, supra note 88, at 445. See generally infra Part V.B (discussing the different assumptions between prior rational choice models and this paper). R

178. William Landes & Richard Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875, 877–79 (1975); see also Terry Moe, The Politics of Bureaucratic Structure, *in* Can the Government Govern? 267, 268–77 (John E. Chubb & Paul E. Peterson eds., 1989) (noting that interest groups demand ex ante protection against ex post political deviations). Bidding in their model should be understood to

future and present effects make the enacting legislature want durability, because the future lack of durability is what leads to the present decrease in interest group bids, which Landes and Posner posit is all legislators try to maximize. One might thus conclude that governmental officials would prefer a durable default rule that tracks enacting preferences rather than a dynamic current preferences default.

But the Landes and Posner theory concludes only that judges should stick to the original statutory *meaning* that reflects the bargain between the legislators and interest groups.[179] Here, by definition, the statutory meaning is ambiguous, and thus a particular resolution of that ambiguity was never bid for, nor resolved by the original bargaining. Because of that ambiguity, the statutory issue can have no durable resolution until a court interprets it. To the contrary, the prospect of future application of a current preferences default rule would seem to increase the incentive of interest groups to bid more at the time of enactment to secure a defined favorable statutory meaning. Moreover, even if a current preferences default rule lowered the effective price that elected officials can charge for new legislation, it would increase the effective price they can charge for official indications of preferences that would alter the interpretation of older (more numerous) statutes.

So the premise is dubious that elected officials who care only about maximizing interest group bids would prefer an enacting preferences default rule. Indeed, even within the Landes and Posner model, their conclusion was heavily dependent on contestable empirical assumptions about, among other things, the costs of securing legislation, effect on durability, and discount rate applied to future benefits.[180] It is also empirically questionable whether judges have any real motive to help legislators maximize interest group bids.[181]

Even if elected officials would prefer an enacting preferences default rule because it maximized interest group bidding, that would hardly settle the societal question of which default rule we should normatively prefer. I have elsewhere argued that interest group theory does not by itself provide any normative grounds for judges to try to dampen interest group influence.[182] But it is equally true that nothing in interest group theory provides any reason to think judges should go out of their way to increase interest group influence or bidding. The goal after all is to maximize not the strategic preferences of legislatures, but the enactable preferences of the polity. And those enactable preferences would overall be

include not just providing money, but providing any means of political support useful to those legislators.

179. Landes & Posner, supra note 178, at 877–79. **R**

180. Id. at 880–85.

181. See Elhauge, Interest Group Theory, supra note 21, at 90; Jonathan R. Macey, Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory, 74 Va. L. Rev. 471, 496–99 (1988). **R**

182. See Elhauge, Interest Group Theory, supra note 21, at 48–66. **R**

maximized by a general default rule that tracks current enactable preferences when enacting and current preferences can be estimated with equal accuracy.

On the other hand, political preferences could not be maximized unless statutory interpretations, once arrived at, were sufficiently durable to induce some behavioral reliance. This helps reinforce the limitation that only a reliable *official* indication of a change in current enactable preferences suffices to change an interpretation under a current preferences default rule.[183] But these concerns provide no reason for a court's *first* interpretation of a statutory ambiguity not to track current enactable preferences, nor a persuasive reason to bar a court from *ever* changing its first interpretation to track reliable official indications of changed enactable preferences.[184]

C. *Enacting Preferences More Reliably Ascertainable*

We have one more case to consider: the situation where the interpreting courts can ascertain enacting legislative preferences more accurately than current ones. Like its converse, this is hardly a fanciful case. The enacting government, after all, actually passed a statute on the subject at issue. Coalitions were built around that topic and discussions about it ensued. The current government may be easier to gauge generally because contemporaneous with the interpreting court, but may also be less revealing on the precise area at issue.

This is an important countervailing concern. Even if each legislative polity has stronger preferences about its present, it can derive little satisfaction from seeing statutory interpretations conform to mistaken estimates of its preferences. Thus, we would expect to see (and do see) that courts follow current preferences only when they can reliably be ascertained, normally because memorialized in some *official* action.[185] Concerns about reliability thus reinforce concerns about stability and reliance in arguing for this limitation—not because these concerns trump the goal of political satisfaction, but because that goal itself requires reliable estimates of political preferences that are sufficiently stable to affect behavior.

We would also expect to see (and do see) that courts are somewhat more prone to using a current preferences default rule—and less demanding about how reliable the evidence of current enactable preferences must be—when enacting legislative preferences are particularly obscure or when the lapse in time since enactment is so great that the

183. See infra Parts V.E, VI.C, VII; Elhauge, Preference-Eliciting, supra note 7, Part VIII.B. R

184. See Elhauge, Preference-Eliciting, supra note 7, Part VIII.B. R

185. See infra Parts V.E, VI.C., VII; Elhauge, Preference-Eliciting, supra note 7, Part VIII.B. R

enacting polity likely has little preference at all about the future event.[186] If enacting preferences are highly unclear, even an uncertain estimate of current preferences is more likely to increase political satisfaction.[187] Likewise, even such an uncertain estimate of current preferences regarding present events the polity experiences and cares about is more likely to maximize political satisfaction than a more accurate estimate of enacting preferences concerning events a century in the future they do not care about at all. This is not because, as some have suggested, an old statute with a defined meaning can be condemned and overruled as obsolete by a court.[188] It is rather based on the more limited ground that, when no defined statutory meaning exists, the enacting polity itself would prefer that enacting preferences, even when more ascertainable, should be discounted in the far distant future in favor of a default rule that tracks the preferences of the current polity, including the enacting polity's own views about more ancient statutes being interpreted during its own era.

In theory, one might adopt a full sliding scale to deal with this issue. Under this approach, interpretations should conform to current preferences if they can be ascertained with no less accuracy than enacting preferences, but if current preferences can only be ascertained less accurately, a court would weigh this greater inaccuracy against an implicit discount rate applied to future events. In practice, such a full sliding scale seems unworkable, and instead courts understandably stick to a general rule of tracking current enactable preferences when official action renders them reliably ascertainable, though with somewhat greater willingness to find current preferences ascertainable the more obscure or ancient the enacting governmental preferences.

One might wonder why courts following a current preference default rule would not instead certify the statutory issue for resolution by the current legislature, much as federal courts now certify state law issues to state supreme courts. Such certifications would require explicit statutory authorization, just as certifications to state Supreme Courts do, but such a scheme is conceivable. Even without such an explicit scheme, the U.S. Supreme Court effectively does "certify" statutory issues by putting them on its docket. This notifies Congress of the need to resolve the issue itself, if it wishes, and when Congress does so, the Supreme Court practice is typically to dismiss the writ of certiorari as improvidently granted.[189] In any event, having such an explicit or implicit certification scheme does not obviate the need to have some default rules specifying what the statutory result will be if the legislature chooses *not* to act. And those default rules should be chosen to maximize political satisfaction.

186. See infra Part VI (discussing cases where enacting legislative preferences are obscure or old).

187. This is essentially the first case considered supra Part V.A.

188. See Calabresi, supra note 139, at 2, 6–7, 100–04. R

189. See Robert L. Stern, et al., Supreme Court Practice 260 (1993).

D. *The Differences From Prior Rational Choice Models*

The conclusions here diverge sharply from those in prior rational choice scholarship. This might seem troubling to those (like me) who have been impressed by the rigor and ingenuity of these models, which have made such great contributions to how we think about statutory interpretation. It thus may help to explain the source of the divergence. As is often the case, differences in conclusion are traceable to differences in assumptions, often assumptions that were asserted with little justification in the prior models.

To begin with, the rational choice models generally ignore any possible limits created by interpretive methods, and instead assume judges always have discretion to reach whatever statutory interpretation they want. They not only assume judges always have an interpretive choice, but generally assume judges make that choice among an infinite policy continuum rather than being restricted by hermeneutic methodology to a limited set of plausible options.[190] My assumptions are to the contrary, and I think more realistic, given the actual nature of legal reasoning. Judges have considerable interpretive choice, but it is not infinite, and any accurate theory of statutory interpretation needs to incorporate that fact. Sometimes the hermeneutic analysis dictates the interpretation and, even when it does not, usually it narrows the interpretive options to a handful.

More important, prior rational choice models virtually all assume that, in exercising whatever discretion they have, courts just try to maximize the satisfaction of judicial views to the extent they can without being overridden.[191] I, in contrast, argue that courts actually try to maximize the satisfaction of enactable political preferences, and in any event should do so, and thus am interested in modeling what it would look like if courts tried to fulfill that goal.

A few rational choice models entertain the alternative assumption that judges try to act as honest agents for the enacting legislature. Normally they leap to the conclusion that this assumption would mean judges should interpret the statute to match enacting legislative preferences when they conflict with current preferences.[192] In an ingenious twist,

190. See supra Part IV and note 142. R

191. See Eskridge, Dynamic, supra note 139, at 167–70; Eskridge, Overriding, supra note 139, at 378–85; Eskridge & Ferejohn, Deal, supra note 142, at 183–86; Eskridge & Ferejohn, Game, supra note 118, at 549–51; Gely & Spiller, supra note 142, at 267–68; Schwartz et al., supra note 142, at 57–58, 72; Spiller, supra note 142, at 187–90; see also Cohen & Spitzer, Puzzle, supra note 142, at 71–76 (assuming judicial views incorporate preferences about both policy and legal process). Although they do not adopt this as their main assumption, Ferejohn and Weingast acknowledge that this is the dominant assumption in rational choice literature, and adopt it as the only alternative assumption to the possibility that judges try to further enacting preferences. Ferejohn & Weingast, supra note 142, at 267–69. They do not consider the possibility that judges might try to maximize *current* legislative preferences. R

192. See, e.g., Eskridge & Ferejohn, Game, supra note 118, at 548; McNollgast, Legislative Intent, supra note 105, at 5–6. The Landes and Posner model discussed above R

Ferejohn and Weingast argue that, while this is what a naive textualist would do, a more politically sophisticated honest agent for the enacting legislature would realize that an interpretation that matches enacting preferences might provoke a statutory override by the current legislature.[193] They then conclude that an honest interpretive agent that seeks to maximize the satisfaction of enacting legislative preferences should first ascertain the range of interpretations that would *not* get overriden by the current legislature, and then choose the option within that range that comes closest to enacting legislative preferences.[194]

Ferejohn and Weingast are led to a conclusion that differs from mine because they share another assumption with other rational choice models, an assumption so taken for granted that it is just left implicit. That assumption is that the only legislative preferences to further are those reflected in the statutes enacted by that legislature, and that thus enacting legislative preferences are maximized by achieving future statutory results that come as close as possible to enacting preferences.[195] If one instead asks which general default rule the enacting legislature would prefer for *both* old and new statutes, the inquiry produces instead the conclusion above: that the enacting legislature itself would want a default rule that tracks current legislative preferences (where reliably ascertainable) because it cares not just about the future but about the present during which it is in office. Thus, in my analysis, unlike the Ferejohn and Weingast model and other prior models, an honest interpretive agent for the enacting legislature would choose a current preferences default rule.[196]

Rational choice models of statutory interpretation also tend to focus on a particular legislative structure—normally the division among presidential, House, and Senate authority in the U.S. system, and sometimes even the particular legislative committee structure.[197] My aim here is in-

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would fit in this category if it were extended to cases of filling in default rules with enacting legislative preferences. See supra notes 178–180 and accompanying text. R

193. Ferejohn & Weingast, supra note 142, at 268–74. R

194. Id. at 269.

195. Id. at 266–67 (collecting sources); Eskridge & Ferejohn, Game, supra note 118, at 548–51. Because Ferejohn and Weingast focus only on future applications of the enacted statutes, and ignore present applications of all statutes, they conclude that durability is what would matter most to the enacting legislature. Ferejohn & Weingast, supra note 142, at 271.

196. Ferejohn and Weingast also never explain why any society would prefer to avoid legislative reconsideration that made clear where current enactable preferences lay. Rather than trying to avoid legislative reconsideration, in my analysis courts can and should sometimes try to provoke such reconsideration when legislative preferences are unclear. See Elhauge, Preference-Eliciting, supra note 7, Parts I–II. R

197. See Eskridge, Dynamic, supra note 139, at 167–70; Cohen & Spitzer, Puzzle, supra note 142, at 69–70, 73–76; Eskridge, Overriding, supra note 139, at 378–85; Eskridge & Ferejohn, Deal, supra note 142, at 167–71; Eskridge & Ferejohn, Game, supra note 118, at 528–51; Ferejohn & Weingast, supra note 142, at 267–76; Gely & Spiller, supra note 142, at 267–83. R R R

stead to develop an interpretive theory for general application across different legislative structures, including parliamentary ones that do not involve a similar separation of legislative powers.

Finally, prior rational choice models assume that executive and legislative preferences are perfectly known.[198] This assumption seems entirely unrealistic. In contrast, I assume that many interpretative canons reflect judicial uncertainty about those preferences and can best be explained as attempts to rely on indirect means to estimate or elicit them. This difference in assumptions will be particularly central in explaining how the *Chevron* doctrine helps courts estimate current legislative preferences,[199] and how other canons help courts elicit legislative preferences when they are uncertain.[200] Indeed, if this assumption of perfectly known legislative preferences were true, most statutory canons and default rules would be unnecessary.

I will argue below that actual doctrine is more consistent with the proposition that courts follow not their own preferences nor just enacting legislative preferences, but instead follow current preferences default rules when that yields reliable estimates of legislative preferences. But there is also some more general empirical evidence that bears on the question.

The rational choice models rely on statistical evidence that statutory interpretations are affected by changing congressional preferences, and that 70% of conference discussions refer to the preferences or likely reactions of current legislatures or other governmental actors.[201] But that evidence is at least equally consistent with this Article's theory that judges sometimes employ a current preferences default rule. Indeed, it fits that theory better because the rational choice assumption that judges who only wanted to maximize their own preferences would track legislative preferences in order to avoid legislative override ignores various theoretical problems. It ignores any preference satisfaction judges would enjoy

198. See Eskridge, Dynamic, supra note 139, at 164–70; Cohen & Spitzer, Puzzle, supra note 142, at 68; Eskridge & Ferejohn, Deal, supra note 142, at 168; Eskridge & Ferejohn, Game, supra note 118, at 549. Often this assumption is not explicit but just an implicit premise of how the model is drawn and applied. See, e.g., Ferejohn & Weingast, supra note 142, at 267–76; Gely & Spiller, supra note 142, at 270–83; Spiller, supra note 142, at 187–90. The one exception is Schwartz et al., supra note 142, but that paper makes various other odd assumptions that limit its utility. It assumes the *only* purpose of textual specificity and legislative history is to signal a likelihood of legislative override. Id. at 55–56, 60–61, 64–69. Further, its assumption that courts just try to maximize judicial preferences leads them to the conclusion that legislatures will want to send *false* signals to the judiciary. Id. at 64–70. These assumptions seem erroneous and are certainly contrary to mine. I address other oddities with their model in Elhauge, Preference-Eliciting, supra note 7, Part II.B.2. R R R R R

199. See infra Part VII.

200. See Elhauge, Preference-Eliciting, supra note 7. R

201. See, e.g., Pablo T. Spiller & Rafael Gely, Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949–1988, 23 RAND J. Econ. 463, 481–82 (1992).

from having their favored result hold in the interim before any statutory override occurs. It ignores the fact that personal preference-maximizing judges could just respond to any statutory override by interpreting the override to fit judicial preferences too.[202] It ignores the fact that, if the Supreme Court just wanted to further its own preferences without being overridden, the easiest way to accomplish that goal would be not to take cases where its preferences conflicted with legislative preferences.[203] Finally, it ignores the fact that, in most areas, legislative override is far less likely than legislative nonresponse,[204] meaning that in most cases judges would best satisfy their preferences by directly interpreting statutes to match those preferences.[205] Nor would pursuing that direct approach harm a personal preference-maximizing judge by much in the minority of cases where override did occur because the alternative would be an interpretation that (to avoid override) also deviated from judicial preferences. The only gain (in this minority of cases) would be that this deviation from judicial preferences might be somewhat smaller than the deviation that would be created by the predicted override, which is unlikely to offset the loss from issuing interpretations that deviate from judicial preferences in most cases, especially given the difficulty of predicting just what an override would produce. A personal preference-maximizing judge would thus have little strategic reason not to simply interpret statutes in ways that furthered judicial preferences rather than following current legislative preferences.

The rational choice assumption that self-interested judges would just push their own preferences unless they would trigger statutory override also mistakenly fails to consider all the other means a legislature has to influence a judiciary that tried to maximize its own preferences rather than the legislature's. Legislatures can enact codes of statutory construction and take into account during confirmation hearings judges' tendency to privilege their own political preferences over legislative preferences.[206] Further, the political branches can and do influence the judiciary by holding hearings, making public statements, threatening im-

202. See Frank B. Cross & Blake J. Nelson, Strategic Institutional Effects on Supreme Court Decisionmaking, 95 Nw. U. L. Rev. 1437, 1455–57 (2001). In contrast, if courts follow statutory meaning and legislative preferences when they can and provoke statutory overrides only to elicit legislative preferences, see Elhauge, Preference-Eliciting, supra note 7, Part II, that explains why courts do not simply evade statutory overrides with fresh misinterpretations.

203. See Cross & Nelson, supra note 202, at 1476–78.

204. See id. at 1452–55; Elhauge, Preference-Eliciting, supra note 7, at Part II.A.4 (noting that while odds of override are higher in particular areas, the overall odds of statutory override are 6–8%).

205. In some statutory areas a differential likelihood of legislative correction is sufficiently high that judges who are trying to maximize political satisfaction should employ a preference-eliciting default rule where legislative preferences are obscure. See Elhauge, Preference-Eliciting, supra note 7, Part II. But preference-maximizing judges would know their own preferences and have nothing to elicit.

206. See supra Parts I, II.A.

peachment, limiting jurisdiction, cutting budgets, withholding pay raises, denying promotions, expanding courts, and resisting implementation of judicial orders.[207] Thus, even if judges were purely self-interested, it is unlikely they would deviate from current political preferences whenever the risk of statutory override was low.

Other statistical problems also confront the premise in rational choice models that courts will pay attention to current preferences *only* to the extent necessary to avoid legislative override. Given their assumption that courts have perfect knowledge of legislative preferences, these models would predict that judicial interpretations are never overridden.[208] In fact, statutory overrides occur with surprising frequency, which this Article's theory explains on the grounds that courts often follow actual statutory meaning or enacting legislative preferences that might conflict with current preferences, or mistakenly estimate current preferences. Further, when legislative preferences are uncertain and a differential likelihood of legislative correction exists, my companion piece shows that courts trying to maximize political satisfaction should and do affirmatively try to elicit legislative reactions.[209]

If one instead adopts the more realistic assumption that courts have imperfect knowledge and thus sometimes mistakenly overplay their hand, these rational choice models are still inconsistent with the empirical data. For in fact, statutory overrides do not increase with political divergence between judges and legislatures, are usually neither partisan nor controversial, and do not simply decrease the more that intralegislative conflict disables the legislature from overriding the courts.[210] Further, courts knowingly use statutory canons that are especially prone to eliciting statutory overrides, and often even expressly call for statutory overrides.[211]

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207. See Cross & Nelson, supra note 202, at 1459–73; McNollgast, Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law, 68 S. Cal. L. Rev. 1631, 1634–35, 1641–65, 1675–83 (1995) (showing that political branches can and do expand lower courts to make it harder for a politically wayward Supreme Court to obtain lower court compliance with its wayward doctrines).

208. See, e.g., Gely & Spiller, supra note 142, at 266 ("Congressional inaction will follow Supreme Court decisions, as these have already taken the composition of Congress into account."). **R**

209. See Elhauge, Preference-Eliciting, supra note 7, Part II. **R**

210. See id. at Part II.B.3. Some political science literature instead posits the attitudinal (or nonstrategic) model that judges just vote their own preferences without considering congressional preferences or likely legislative reactions. Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 Nw. U. L. Rev. 251, 265–79 (1997) (reviewing literature). But in the general run of statutory cases this model is even less consistent with the facts. Supra note 14; infra Part VII.E; Elhauge, Preference-Eliciting, supra note 7, Part II.B.3; see also Cross, supra, at 285–309 (providing excellent summary of other empirical limitations and problems with attitudinal model). The attitudinal model might, however, accurately describe decisions in those statutory areas where Congress has effectively delegated the matter to development by the courts in common law fashion. See supra text accompanying notes 25–26, 176; infra note 287.

211. See Elhauge, Preference-Eliciting, supra note 7, Parts II.B.3, IV.C.

None of this evidence is consistent with the notion that judges just try to further their own preferences while avoiding override and thus provoke overrides only by mistake.[212] This statistical information is often misinterpreted because the literature presumes that the only alternative to assuming judges directly or strategically further their own (or enacting legislative) preferences is that judges follow mechanistic legal rules that bear no relation to current political preferences.[213] The empirical data look quite different if one considers the hypothesis that those legal rules might themselves call on judges to estimate or elicit current political preferences when that would maximize political satisfaction.

E. *Limits on a Current Preferences Default Rule*

Under my analysis, it seems likely that the political preferences of the enacting government—and a fortiori those of the current government—would be maximized by a general default rule that, in cases of statutory ambiguity, tracked current enactable preferences when those preferences can reliably be ascertained. But some important limitations on this conclusion must be stressed.

1. *Update Ambiguities, Not Statutory Meaning.* — Because this default rule does not rely on the ground that current governmental preferences should take precedence over those of the enacting government, it does not justify the position (taken by various prominent scholars) that current preferences should modify statutory meaning itself.[214] The proposition here rests on the much more supportable ground that—where statutory meaning is unclear—the enacting government itself would agree on a general default rule that maximizes the preference satisfaction of each government during its tenure in office. Moreover, like any default rule, this one only operates within the range of plausible statutory meanings left by the original enactment.

Why not allow courts to change even unambiguous statutory meaning to conform to current political views? Strictly speaking, my thesis permits me to remain agnostic on this question. It suffices to say that, whether or not one views statutory meaning as altered by changed political preferences, the statutory default rule used to resolve statutory ambiguities should be changeable. But if my argument extended to changing statutory meaning itself, then the case of statutory ambiguities would simply be a special case of a more radical thesis, so it bears explanation why I do not take my analysis that far, and why my reasons for stopping short do not extend as well to resolving statutory ambiguities.

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212. For other empirical evidence inconsistent with this assumption, see infra Part VII.E.

213. See Cross & Nelson, supra note 202, at 1438–50 (surveying extant models of judicial decisionmaking).

214. See sources cited supra note 152. **R**

To begin with, my rebuttals to objections to a current preferences default rule depended in part on the existence of a statutory ambiguity to explain why the enacting polity did not have a special interest, or would not prefer greater durability, in the statutes it enacted.[215] Likewise, my response to the argument that reliance interests should bar a current preferences default rule turns critically on the premise that there was no clear statutory meaning on which reasonable reliance could be made.[216]

In addition, an unambiguous statutory meaning embodies the clearest indication of what was actually able to produce legislation. The current government has not in fact enacted a statute. It thus has not gone through the political process necessary to make its pronouncements authoritative—such as, in the United States, either winning a majority in two legislative chambers and presidential approval, or overcoming a presidential veto with a two-thirds vote in two chambers. Only the enacting government has, and thus if we ask what meaning to attach to the statute, we must ask what meaning to ascribe to its authoritative action.

The current government might want to change that meaning, but that proposition should be tested by having it actually do so through the same means that the enacting government used. Every political system has elaborate procedures for enacting statutes to make sure that a considered choice was made that reflected prevailing political preferences. Sometimes these seem inconvenient. But if these procedures have become too cumbersome, then they should be modified to allow more nimble entities to take action, or the legislature should delegate ongoing lawmaking power. Action by the enacting legislature that completed the constitutionally required process cannot be reversed simply because a judge believes the current government would probably be able to complete that same process with a different result. That would circumvent the constitutionally required procedure for enacting statutes, and allow the current government to use a less exacting procedure to undo what the earlier government did.

In contrast, a current preferences default rule does not circumvent legislative procedure because the ambiguity has been left by a duly enacted statute that was nonetheless intended to cover the matter. When resolving statutory ambiguities, traditional and constitutionally authorized means of statutory interpretation often call for courts to refer to extrinsic evidence of legislative preferences, even though that evidence did not itself go through the enactment process.[217] Referring to such evidence regarding the current legislature no more circumvents constitutional enactment procedure than referring to it regarding the enacting legislature. Nor does it permit the current legislature to undo what the enacting legislature did through a less exacting procedure. To the con-

215. See supra Part V.B (discussing objections 2 and 3).

216. See Elhauge, Preference-Eliciting, supra note 7, Part VIII.B. **R**

217. See supra Parts II–III; Elhauge, Preference-Eliciting, supra note 7, Part VIII.C. **R**

trary, as we shall see, courts tend to be more exacting about the reliability of evidence of current preferences they require compared to the evidence typically used to estimate enacting preferences.[218]

Even if we thought courts had authority to deviate from statutory meaning to maximize political satisfaction, the enactable preferences of the current legislature (which enacted no statutory meaning) are necessarily less susceptible of reliable estimation than those of the enacting legislature that actually enacted a statutory meaning to govern the issue. Extending the current preferences approach to statutory meaning would thus introduce far more error because judges will often be wrong about what the current government would enact. A considered definite choice by the enacting government should not be overturned simply because a judge believes the current government probably would do so.

In contrast, using a current preferences default rule to resolve statutory ambiguity introduces no new form of error since the ambiguity already forces judges to estimate what some government would have wanted. Judges' ability to accurately estimate how a government would have wanted to resolve the uncertainty may indeed often be stronger for the current government than for the enacting government. While the enacting government did enact a statute on the subject at hand, by definition it left no clear meaning on the particular issue in dispute. Moreover, any expressions of the current government's views are more easily interpretable because they are contemporaneous with the interpreter and thus not thrown into doubt by changes in factual circumstances or linguistic conventions. In any event, courts tend to restrict themselves to relatively more reliable evidence of current preferences than they use to estimate enacting preferences.

When statutory meaning is discernable, following it is also required by standard rule of law norms. As Lon Fuller observed, the rule of law requires that "in acting upon the citizen . . . a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties."[219] A defined statutory meaning constitutes such a declaration. While statutory ambiguities leave some matters to judicial interpretation, that is no excuse to expand judges' interpretive power to cover all topics, including those resolved by an accepted statutory meaning. To the contrary, cabining judicial discretion at the point of application, when the identity of the parties benefited or hurt is known, is an important part of the rule of law.

In contrast, where the meaning of a duly enacted statute is unclear, then judges have no choice but to make some decision about what default rule to choose to resolve that unclarity. And such interpretation does not violate rule of law norms because there was no unambiguous

218. See infra Parts VI–VII.

219. Lon L. Fuller, The Morality of Law 209–10 (rev. ed. 1969).

statutory meaning which citizens could know to follow.[220] To the contrary, the issue is by definition one that otherwise would be left to judicial judgment, and the default rule here is just a way of cabining that judgment.

Finally, where the enacting government has adopted a defined statutory meaning, it has made clear that it does want its political preferences regarding that meaning followed. In contrast, in deciding on the best statutory default rule, following the preferences of the current government (where they can reliably be determined) does not thwart the choice of the enacting government. Rather, it conforms to the default rule that the enacting government would itself choose.

2. *Relevance Normally Limited to Marginal Area Where Explicit Legislative Action Unlikely.* — Any choice between an enacting and current preferences default rule only matters in the marginal area where explicit action by the current government is unlikely or delayed. If the current government felt strongly enough about the conflict between its enactable preferences and past legislative preferences, it could always enact explicit legislation to that effect. But sometimes this conflict is not strong enough to overcome legislative inertia and the costs of enacting legislation, and thus the default rule sticks permanently; and even if the current legislature would act, any legislation takes time, and in the meanwhile the default rule affects the outcome. In short, it takes a lack of explicit legislation by *both* the enacting and the current government to create the situation in which a current preference default rule governs.

This point reveals the error in the following sort of objection: that the enacting government would not prefer a current preferences default rule because, if it really did not like the interpretation of any past legislation during its time in office, it could always override it. Although it is true that a legislature can always override any interpretation if it is willing to incur the requisite legislative costs, it is also true that the enacting government would realize that sometimes those legislative costs will exceed the benefits of correcting an undesirable result, and that even when they do not, statutory overrides will take time, and in the meanwhile it will be stuck with an undesirable result. Further, the enacting government would realize that any default rule (such as an enacting preferences default rule) can only govern in the future to the extent that future governments are either insufficiently motivated to override it or delayed in doing so. Thus, the real choice at each point in time is what default rule will govern in this marginal area where explicit legislative action is unlikely or delayed by either legislature. In that marginal area, the enacting government would prefer to have its political preferences govern all statutes during its time in office, rather than have old preferences govern all statutes

220. Special issues might be raised when a prior judicial interpretation exists, and are discussed infra Part VI.C, and in Elhauge, Preference-Eliciting, supra note 7, Parts V, VIII.B. **R**

during its time and its preferences govern a subset of statutes in the future. In any event, the analysis so far puts aside the possibility of legislative override, which I consider at length in a companion piece.[221]

3. *Current Preferences Must Be Truly Enactable.* — The political preferences relied upon to provide content to the current preference default rule must be the preferences of a set of political actors who could actually enact legislation. The courts should not use the leeway provided by a current preferences default rule as an excuse to favor the political preferences of one political party over the other, such as when one controls the executive branch and the other the legislature, or each controls a different legislative chamber. In such a case, the political preferences of neither party alone suffices to enact legislation and neither should be taken as an appropriate measure of current *enactable* preferences.

This is an important difference from prior theories of statutory interpretation that argue contemporary values ought to be allowed to update old statutes.[222] Such theories view judges more as partners than as agents, picking among current majority preferences to determine which reflect sound contemporary values that should govern statutory interpretation even if those preferences are not enactable. The theory here, by contrast, views judges interpreting statutes as agents for only those policy preferences that could actually secure enactment.

The enacting legislative polity would not want a default rule that tracked nonenactable political preferences because that would not maximize the preference satisfaction of those political interests that could enact legislation. Governments would not want to empower courts to take sides where political gridlock exists, rather than just serving as honest agents for the political forces that can command enough political agreement to enact statutes. That would just expand the influence of judicial preferences over political ones. Instead, governments would want courts to rely on current enactable preferences. In cases where the two political parties are at loggerheads on the relevant issue—and either one can veto change by the other—the court must rely instead on the most recent indication it had of the political preferences that sufficed to enact legislation.

Even if the legislative polity did want courts to track nonenactable preferences, such an approach would be constitutionally problematic. For example, in the United States, the bicameralism and presentment clauses were meant to bar laws that could not secure sufficient approval under such a system. These clauses give a majority of states a veto over the majority of the population (where the states in the majority are less populated), give the majority of the population a veto over the majority of the states, and give a nationally elected official a veto over legislators elected by district or state. Each political actor can thus insist that laws advance the interest of its constituency. Although we are within the

221. See Elhauge, Preference-Eliciting, supra note 7. **R**

222. See supra text accompanying notes 152–166.

realm of statutory interpretation, where some judicial judgment about the proper default rules is required, for judges to exercise that judgment to further political preferences that could not be enacted would undermine this constitutional structure. It would also create a divergence between the results when statutes have clear meaning, which do track enactable preferences, and the results when statutes are ambiguous, which would instead track some set of unenactable preferences that appeal to judges. There is no warrant for such a divergence.[223]

4. *Current Preferences Must Be Memorialized in Official Action.* — Especially where statutory precedent exists, a change in enactable political preferences can justify a change in interpretation only if the changed preferences are memorialized in some relatively well-defined official political action. It cannot be that every movement up or down in the polls, or changed reading of the political tea leaves, alters statutory interpretation. Such an unstable legal regime would fail to induce the behavioral reliance that is necessary to make interpretations effective enough to advance any political preferences.[224] It might even violate rule of law norms by creating massive uncertainty about legal consequences and making notice and planning impossible.[225]

Moreover, officially indicated changes in current preferences will be necessary to make sure those enactable preferences have reliably been ascertained.[226] Enactors will want fairly high standards of reliability, for they will recognize that judges are agents and that giving judges open-ended interpretative power thus creates not only error costs (good faith errors in guessing about changing legislative preferences) but also agency costs (furthering judges' personal preferences in the guise of following current legislative views). Because often current preferences cannot be estimated as accurately as enacting preferences, a current preferences default rule best reduces error if confined to cases where those current preferences are reliably ascertainable. Even if error costs were the same when making estimates about past and current governments, agency costs are increased by allowing judges to alter interpretations with changing legislative preferences. Under such an approach, statutory precedent would be far less binding, and judges would be tempted to change interpretations as judicial personnel changed.

For all these reasons, statutory precedent should remain binding until any change in enactable political preferences has been memorialized in some official action. As we will see in Parts VI–VII, that limitation on a current preferences default rule largely reflects actual judicial practice.

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223. See supra Part II.A.

224. Elhauge, Preference-Eliciting, supra note 7, Part VIII.B (rejecting claims that reliance interests should trump political preference satisfaction but explaining the extent to which political satisfaction would be advanced by interpretations that are sufficiently stable to induce some reliance). **R**

225. Supra Part V.E.1.

226. Supra Part V.C.

5. *Legislature Can Opt Out, Within Limits.* — As with all default rules, a current preferences default rule is subject to opt-out. That is what makes it a default rule rather than a mandatory rule. This provides another reason why courts should not modify explicit statutory meanings to conform to changes in legislative preferences, for adopting a defined statutory meaning is how governments opt out of statutory default rules. Modifying explicit statutory terms would take away the governmental power to opt out of a current preferences default rule.

True, sticking with an unambiguous statutory meaning will sometimes produce what even the enacting government would regard as an undesirable result. But, by adopting explicit terms that opt out of the judicial process of filling and updating default rules, the enacting government clearly indicated that it viewed the error costs of following an inflexible explicit term as lower than the error costs of judicial adaptation. The enacting government effectively faced a choice between a rule and a standard—requiring a decision about whether the inherent over- and underinclusion of a fixed rule is worse than the over- and underinclusion caused by erroneous application of a less precise standard.[227] This is a choice on which reasonable persons can differ, and adopt different conclusions for different areas, and it is a choice the enacting government is entitled to make. In contrast, a default rule that (where statutory meaning is ambiguous) changes to accommodate changing political preferences does not thwart a government's choice to opt out of judicially set default rules.

But my analysis also suggests limitations on such opt-outs. A government can opt out by adopting defined statutory meanings, and normally by providing general interpretive rules. But plainly a government should not enact a general interpretive statute providing that its preferences govern both the interpretation of ambiguities in older statutes and the interpretation of its enacted statutes in the future. That is, a government should not simultaneously provide that a current preferences default rule governs past statutes and an enacting preferences default rule governs its statutes when interpreted in the future. To do so would be to allow the government at one point in time to aggrandize its power relative to the power of past and future governments. Note that a government in this trans-temporal sense need not be understood as lasting for only a two-year legislative session, and indeed governments will normally have little interest in aggrandizing one session over the next if the constellation of political forces in both are the same. A temporal government or legislature can rather be understood to last for as long as a distinctive political coalition lasts.[228]

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227. See Stephen McG. Bundy & Einer Elhauge, Knowledge About Legal Sanctions, 92 Mich. L. Rev. 261, 270–72 (1993).

228. See infra text accompanying notes 341–343 (discussing McNollgast theory that the New Deal Congress wanted judges to defer to agencies as long as its political forces controlled the agencies, but when at the end of the New Deal era it became clear that new

A more problematic case is where a government enacts a general interpretive statute providing that—from now on—all statutory ambiguities should be interpreted to further the preferences of the enacting government. If applied both to older statutes interpreted during its time in office and to the statutes it enacted that are interpreted during the future, such a tradeoff might seem unproblematic. But if such a change in interpretive rules were enacted toward the end of the government's reign, that government would in effect have had the benefit of a current preferences default rule during its time in office, and then be imposing an enacting preferences default rule for the interpretation of its statutes in the future. Moreover, such a statute would also apply to future governments that might have different views about the best default rule for statutes interpreted or enacted during its reign. Courts would then have to decide between applying the current preferences default rule that seems likely to maximize that future government's political preferences, or using the enacting preferences default rule preferred by a past government that did not enact the future (or older) statutes being interpreted and does not represent current legislative preferences during the time of interpretation.

In both cases, the problem is that allowing a single legislature to adopt this general interpretive rule will enhance its political power at the expense of the political satisfaction of future legislatures. One might accordingly predict that such self-aggrandizing legislative opt-outs will be treated with hostility. After all, we need default rules for interpreting even statutes that offer interpretive codes. Given that such a statute would so strongly reflect the political interests of the enacting legislature and polity over future legislatures and polities, it would be an appropriate statute for applying a preference-eliciting default rule to any statutory ambiguity.[229] This, at a minimum, suggests self-aggrandizing legislative opt-outs should be narrowly construed, for which we will see there is some precedent.[230]

Even if clear, such a self-aggrandizing legislative opt-out probably violates the constitutional clauses vesting legislative power in each generation's legislature and interpretive power in the judiciary.[231] A legislature

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political forces were likely to dominate future agencies, the New Deal Congress wanted to change that deference rule in order to constrain those future agencies).

229. See Elhauge, Preference-Eliciting, supra note 7, Part II (explaining conditions for a preference-eliciting default rule). **R**

230. See infra Part VII.B.1 (explaining the effectively narrow construction that the *Chevron* doctrine gives to the Administrative Procedure Act section providing that courts "shall" decide all questions of statutory interpretation when they review agencies).

231. See generally U.S. Const. art. I (vesting all legislative powers in a Congress whose House members face reelection every two years and whose Senators face reelection every six years); id. art. III (vesting the judicial power in the courts); 1 Laurence H. Tribe, American Constitutional Law §§ 2–3 n.1 (3d ed. 2000) (concluding that interpretive statutes that apply to future statutes raise serious constitutional questions because they restrict future legislatures); Elhauge, Preference-Eliciting, supra note 7, Part VIII.C **R**

may not make its acts non-repealable or bind future legislatures,[232] nor even impose additional procedural requirements on the future legislature.[233] An interpretive code that gives the enacting legislature the benefit of a current preferences default rule during its time in office, but deprives a future legislature of the benefit of that sort of default rule, effectively imposes on that future legislature greater procedural requirements to have its political will effectuated. It also impinges on the judicial power to interpret statutes on behalf of the polity. True, not every congressional statute that restricts judicial discretion can violate the Constitution since every statute that modifies the common law does so.[234] To the contrary, such enactments of explicit statutory meaning normally constitute the best possible indication of the polity's enactable preferences. But interpretive statutes that further a particular legislature's interests by restricting the judicial power of interpretation in ways that reduce the satisfaction of the enactable preferences of future polities are an entirely different story. Article III should not be understood to preserve the maximum power for judges as such, but rather to assure their independence in acting (within constitutional bounds) as an agent for the polity when interpreting statutes.

To be sure, if a legislature enacts an interpretive rule that favors itself over future legislatures, a future legislature could always repeal it. But although some have thought this a dispositive answer,[235] it is not for several reasons. First, the issue may never reach the agenda of the future legislature, or the decisionmaking costs of adopting a new statute may outweigh the benefits. With all default rule issues, after all, judicial interpretation mainly matters only in that marginal area where legislative ac-

(discussing possible relevance of fact that power of interpretation is vested by Article III in courts); Rosenkranz, supra note 9, at 2098–99, 2102–40 (arguing that legislature can constitutionally adopt some interpretive rules but not others); Vermeule, Interpretive Choice, supra note 12, at 97 n.91 ("[T]he scope of legislative authority to prescribe interpretive rules is not clear in a system of separated powers."). R R

232. See Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932) (finding that a statute "expressed no more than the will of a particular Congress which does not impose itself upon those to follow in succeeding years"); Newton v. Comm'rs, 100 U.S. 548, 559 (1879) ("Every succeeding legislature possesses the same jurisdiction and power with respect to [legislative acts] as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality."); 1 Blackstone, supra note 56, at *90 ("Acts of parliament derogatory from the power of subsequent parliaments bind not."); Thomas M. Cooley, Constitutional Limitations 125–26 (Boston, Little, Brown, and Co. 1868) (stating that one legislature cannot constitutionally bind a subsequent one by its enactments); Earl T. Crawford, The Construction of Statutes 171, 193 (1940) (collecting state court cases holding the same). R

233. See Manigault v. Springs, 199 U.S. 473, 487 (1905) (stating that a procedural requirement enacted by one legislature "is not binding upon any subsequent legislature, nor does a noncompliance with it impair or nullify the provisions of an act passed without the requirement").

234. Rosenkranz, supra note 9, at 2104–05. R

235. See id. at 2116–18 (arguing that it is).

tion is unlikely.[236] Or the future legislature may not be able to form sufficient agreement on an alternative rule or overcome procedural obstacles or effective supermajority requirements. One thus cannot deduce that the failure of the future legislature to override the prior interpretive statute itself indicates correspondence with its enactable preferences. Second, enactments take time, and in the meantime future legislatures will have suffered a diminished influence that was effectively stolen by the legislature that enacted the interpretive rule. Such delays seem particularly likely if, as noted above, a temporal legislature is better understood as a legislature with a distinctive political coalition, for it will not always be clear when the political coalition has shifted. And during the transition to the new governing coalition, the old coalition favored by the interpretive rule may have enough political influence to block or delay change.

But the third problem is the most important. If and when the future legislature does get around to amending the interpretive rule, it would have little incentive to simply restore an evenhanded current preferences default rule if (by hypothesis) it were permissible to instead enact one-sided interpretive statutes favoring the legislatures that enacted them over legislatures at other times. Instead, under such a regime, the future legislature would as soon as possible enact an interpretive statute that gave it a current preferences default rule during its remaining time in office and tried to impose an enacting preferences default rule on legislatures even further in the future. That legislature farther in the future would then be forced to do the same thing.

A regime that permitted such self-aggrandizing interpretive statutes would thus effectively give legislatures a trans-temporal collective action problem.[237] Given that legislatures at other times could enact such self-aggrandizing interpretive statutes, each legislature individually has incentives to do the same when its time comes around. But the collective effect of all of them doing so is that each legislature would lose the benefit of its current preferences default rule in the period before it gets around to changing the interpretive rule, and gain an enacting preferences default rule in the future for only a similarly limited time. This would make each legislature worse off, given the analysis above,[238] than it would be if instead they collectively agreed to refrain from enacting such self-aggrandizing interpretive rules, or were constitutionally prohibited from doing so. Curbing such governmental collective action problems is one important reason to have constitutional laws that put certain matters off limits as a matter of social contract.

Notice that a conclusion that such a self-aggrandizing interpretive statute would be unconstitutional does not mean a polity cannot opt out

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236. See supra Part V.E.2.

237. For the seminal work on collective action problems, see Mancur Olson, The Logic of Collective Action 2, 11–16, 21 (2d ed. 1971).

238. See supra Part V.B (explaining why each legislature would be better off by trading future influence over its enactments for present influence over all enactments).

of a current preferences default rule at all. Rather, it simply means it cannot be effectuated by one legislature in a way biased toward itself, and should instead be done through a constitutional amendment that can bind future legislatures and polities and modify the constitutional interpretive power of judges, a power that, without amendment, judges should wield on behalf of the enactable political interests of the polity. In any event, even if such a self-aggrandizing legislative opt-out were constitutionally permissible, it would remain inadvisable and thus outside the limits of this Article's recommendations.

VI. Tracking Current Legislative Preferences in Practice

Many judicial doctrines have long seemed unjustifiable if designed to inquire into the enacting legislature's meaning, intent, or preferences. But the next sections show that many of these doctrines can readily be justified as current preferences default rules. Moreover, the theoretical limits on current preferences default rules may help explain what has often been criticized as the inconsistent application of these doctrines.

A. *Subsequent Legislative Action Retaining or Relying on Otherwise Nonbinding Interpretations*

When a higher court has interpreted a statute, lower courts are bound by that interpretation until the higher court changes its mind. When a court has itself interpreted the statutory provision, that precedent might be considered binding under stare decisis.[239] But often courts face the question whether to fill in statutory ambiguities with interpretations by lower or coordinate courts that subsequent legislatures affirmatively decided to let stand.[240] Should courts follow those interpretations even if they do not seem the best reading of the enacting legislature's preferences?

Under the prevailing law, the mere fact of subsequent legislative inaction in the face of a prevailing interpretation is not sufficient to make the outstanding interpretation persuasive to a coordinate or higher court.[241] But once the interpretation "has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects," then that interpretation is presumptively correct.[242] The same

239. See infra Part VI.C; Elhauge, Preference-Eliciting, supra note 7, Part V. **R**

240. This would also apply to legislative decisions to let stand agency interpretations that either were decided before *Chevron* or fall outside its scope. See infra Part VII (discussing *Chevron* deference).

241. See United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381 n.11 (1969).

242. *Rutherford*, 442 U.S. at 554 n.10; North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 (1982); see also Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional

PREFERENCE-ELICITING STATUTORY DEFAULT RULES

*Einer Elhauge**

One puzzlement about statutory interpretation is that so many statutory canons run contrary to likely legislative preferences, sound policy, or even the judicial self-interest in avoiding being legislatively overridden. This puzzlement is deepened by the commonplace observation that judges do not consistently apply these canons but often ignore them or apply counter-canons. This article argues that the solution to these puzzles is to understand many canons as preference-eliciting statutory default rules, which maximize the satisfaction of enactable political preferences by eliciting a legislative reaction that eliminates uncertainty about what those preferences are. A preference-eliciting default rule will, however, enhance political satisfaction only when it is sufficiently more likely to elicit a legislative response than another interpretation that better estimates uncertain enactable preferences. This explains the seemingly inconsistent application of these canons because this theory indicates these canons should not be applied uniformly but rather should be (and generally are) applied when these limited conditions hold. Where the preferences of neither the enacting nor current legislatures can be reliably estimated or elicited, courts should and do use default rules that track the preferences of political subunits or, where that is unavailing, that limit the variance of judicial judgment. Various alternative default rules—like interpreting all statutory ambiguities to disfavor interest groups, protect reliance interests, or reduce the effect or change caused by the statute—should be rejected because they are not limited to cases where they satisfy the conditions for maximizing political satisfaction, but rather advance one view concerning substantive controversies that should be resolved by the political process.

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I. Introduction

Why do courts so often employ canons of statutory construction that seem to have nothing to do with likely legislative preferences? The common intuition is that they do so to further judicial preferences or values.[1] This conflicts with ordinary understanding of hermeneutic practice, but might seem consistent with the traditional legal position that, where statutory meaning remains ambiguous after hermeneutic inquiry, judges must exercise their own substantive judgment.[2] It might also seem consistent with the assumption in rational choice theory that judges choose whatever statutory interpretation comes closest to their ideological view-

1. See, e.g., Frederick Pollock, Essays in Jurisprudence and Ethics 85 (1882); Stephen F. Ross, Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?, 45 Vand. L. Rev. 561, 563–66 (1992); Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892, 910–12 (1982).

2. See Einer Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum. L. Rev. 2027, Part I (2002) [hereinafter Elhauge, Preference-Estimating].

point without provoking a legislative override.[3] But both positions sit uneasily in a democracy, or with any conception of the judicial role as an honest interpretive agent.[4] Both also run against the reality that many of these canons do not reflect wise policy or sensible values, or are applied too inconsistently to advance any coherent set of judicial preferences or values. The traditional legal position raises the additional problem that many of these canons are supposed to be hermeneutic tools for divining statutory meaning, making it illegitimate to use them to deviate from legislative preferences. And the rational choice assumption conflicts with the fact that judges often apply canons known to be more likely to provoke legislative overrides, and indeed frequently invite such overrides, which runs contrary to their supposed judicial self-interest.[5]

The solution lies in understanding that many of these canons reflect neither efforts to divine statutory meaning nor attempts to further judicial or legislative preferences, but rather reflect default rules designed to elicit legislative preferences under conditions of uncertainty. When statutory meaning is unclear, a court must decide which of the plausible meanings the statute should be deemed to have. But this does not mean judges must exercise their own judgment about what interpretation is substantively best. Instead, judges can and should still serve as honest agents for a democratic polity by responding to unclear legislative instructions with the use of statutory default rules that maximize the extent to which statutory results accurately reflect enactable political preferences.[6] Normally, this will (and does) dictate applying some form of default rule that estimates the preferences of the enacting or current government.[7] But not always. Rather, when enactable preferences are unclear, often the best choice is instead a preference-eliciting default rule that is more likely to provoke a legislative reaction that resolves the statutory indeterminacy and thus creates an ultimate statutory result that reflects enactable political preferences more accurately than any judicial estimate possibly could. That legislative reaction might be ex ante through more precise legislative drafting to avoid the prospect of the default rule, or ex post through subsequent legislative override of the interpretation imposed by the default rule.

The justification for preference-eliciting canons thus need not rest in their correspondence to either legislative preferences or sound policy. The justification—and necessary predicate—is rather that the default result is more likely to be reconsidered (and deliberated) by the legislature because it burdens some politically powerful group with ready access to the legislative agenda. Where this is true, and courts cannot ascertain

3. See infra Part II.B.2–3.

4. See Elhauge, Preference-Estimating, supra note 2, Parts I–II. **R**

5. Infra Part II.B.3.

6. See Elhauge, Preference-Estimating, supra note 2, Parts I–II (elaborating this argument). **R**

7. Id. Parts III–VII.

statutory meaning or reasonably estimate legislative preferences, a preference-eliciting default rule can make sense. Even though the preference-eliciting default rule does not itself reflect likely legislative preferences, the statutory results it produces will maximize the accurate measurement of political preferences.

By the same token, the theory should be distinguished from the claim that courts should always interpret statutes in ways that are most likely to elicit or require legislative action to resolve statutory ambiguities.[8] That would argue for the misguided position that courts should always adopt the most numbskulled interpretation they can think of. If the goal is maximizing political satisfaction, a preference-eliciting default rule should instead be used, as explained in Part II, to choose only among plausible interpretive options, and only when three conditions are met: estimated enactable preferences are unclear, significant differential odds of legislative correction exist, and any interim costs inflicted by a rule with less expected political satisfaction are acceptable.

This preference-eliciting analysis explains and justifies many common canons of statutory construction better than existing interpretive theories. To begin with, as Part III discusses, it generally explains canons of statutory construction that favor the politically powerless. This provides a more satisfactory justification for the rule of lenity in criminal law, which burdens a public interest group, namely public prosecutors and the anti-crime lobby, who generally have privileged access to the legislative agenda compared to those likely to find themselves criminal defendants. Existing justifications fail to persuasively justify the rule of lenity and indicate it should be applied at most to regulatory crimes but not to crimes that involve conduct everyone knows is wrongful. In fact, the actual pattern of application is the opposite. The preference-eliciting framework can explain this pattern because, while street criminals lack political access, the businesses burdened by regulatory statutes (like antitrust and securities laws) have enough access to the legislative agenda to make the issue one of conflicted political demand, and thus a poor candidate for a preference-eliciting rule like the rule of lenity. Preference-eliciting also explains the presumption against antitrust and tax exemptions and other statutes likely to benefit special interest groups. The point is not that the groups disfavored by these default rules normatively deserve to be disfavored, but rather that disfavoring them (where legislative meaning and preferences are uncertain) leads to a legislative response that more precisely identifies the extent of their political influence. Finally, preference-eliciting theory can explain the canon interpreting statutes to avoid constitutional doubts applying statutes that burden discrete and insular minorities that lack political power, as well as the canon construing statutes to benefit Indian tribes.

8. See infra Part VIII.C (rejecting such an alternative).

Perhaps nowhere have judges been more accused of incoherence and manipulating canons to further their own views than in the use of linguistic canons of construction. Since Llewellyn first argued that for every such canon there is a counter-canon, scholars have condemned their haphazard application. But as Part IV shows, the seeming incoherence can be reconciled by preference-eliciting analysis. The relevant canons are applied when the appropriate conditions exist for a preference-eliciting default rule, and when those conditions do not exist, a counter-canon embodying a preference-estimating default rule is instead used. Further, different political structures and circumstances in different jurisdictions also help explain some of the variation among courts that we see in the use of canons with a preference-eliciting function.

Next, I address the additional complications that arise when the issue is whether to stick with a preference-eliciting default rule over time or in the international context. Part V demonstrates that the doctrine of strong statutory stare decisis cannot generally be justified as a preference-eliciting default rule, but can be justified as the best preference-estimating rule when legislative conditions have not changed. This is true even though the precedent reflected a preference-eliciting default rule that failed to provoke any legislative correction and even if legislative correction were generally unlikely. But the analysis also points out that sometimes intervening events (including a complete absence of legislative reconsideration) will indicate that the court misestimated the advisability of a preference-eliciting default rule, and thus justifies abandoning statutory precedent that reflected a preference-eliciting default rule. This helps explain what otherwise seems an inconsistent practice on statutory stare decisis. Part VI shows that preference-eliciting analysis can make sense of seemingly inconsistent applications of the canon against extraterritorial application of federal statutes, by explaining it as the product of two different preference-eliciting default rules—a statute-eliciting one and a treaty-eliciting one—depending on whether the legislative action sought to be provoked is domestic or international.

A theme throughout will be that what is commonly bemoaned as the inconsistent application of statutory canons can often be explained by preference-eliciting analysis. That is, the reason that cases look inconsistent (in all the above categories) is often that the baseline for measuring consistency is assumed to be conformance to legislative preferences or some substantive policy. But once it is recognized that these canons often serve a preference-eliciting function, then the seeming inconsistency often goes away, for the pattern of canon use can frequently be explained by whether or not the conditions for using a preference-eliciting default rule are met. This improved understanding of the reasons underlying these canons, and the justifiable grounds for their seemingly inconsistent application, should render them more determinate, and thus more constraining of judges.

Part VII considers what a court should do when it cannot meaningfully estimate or elicit the preferences of the relevant government. In some of these cases, the political preferences of a *subordinate* government will be clear, and political satisfaction can thus be maximized by following them. This explains many canons that interpret ambiguous federal statutes to incorporate state law or protect state autonomy. In other cases, the judiciary must resolve the statutory ambiguity with the default rule that (within the politically plausible range) the judiciary deems best. But this does not mean every judge should be left to her own devices. Instead, canons of construction in such cases serve to limit judicial variance by requiring judges to follow common law or constitutional principles. Limiting such variance is desirable because it minimizes uncertainty even if it does not reduce the magnitude of likely judicial error in estimating enactable preferences.

Part VIII considers alternative default rules, such as the default rules that statutory ambiguities should be interpreted against special interest groups, to protect reliance interests, or to minimize the effect or change caused by the statute. These alternatives have much to be said for them but are not preferable to default rules designed to instead estimate or elicit enactable preferences. Indeed, they often amount to an effort to elicit legislative preferences that is not limited to the conditions where such an effort is likely to enhance the satisfaction of enactable political preferences. Nor are they constitutionally mandated, contrary to what some other scholars have argued. Finally, Part IX addresses and rejects various operational and jurisprudential objections to an approach that requires judges to estimate or elicit enactable preferences.

II. The General Theory of Preference-Eliciting Canons

Many canons of statutory construction cannot plausibly be justified as best reflecting what the enacting legislature probably intended, nor what the current legislature would want, nor what might be deemed a desirable tempering of legislative outcomes. Rather, they can best be understood as preference-eliciting default rules that encourage a deliberate legislative decision or more explicit statute, and thus ultimately lead to statutory results that overall more accurately reflect political preferences. This proposition will be demonstrated concretely for specific canons in the sections that follow. But let us begin by laying out the general theory for such canons, in order to better understand their attraction—and their limits.[9]

9. The parallel theory of penalty default rules for contract law that inspires this paper was first developed in the seminal work of Ian Ayres and Robert Gertner, who in a brief aside were also the first to suggest that it might be extended to statutory interpretation. See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 129–30 (1989). Lucian Bebchuk was apparently the first to articulate a similar theory for corporate default rules. See Lucian Arye Bebchuk, The Debate on Contractual Freedom in Corporate Law, 89 Colum. L. Rev. 1395,

A. *The Theory and Its Limits*

A statutory default rule that provokes a legislative reaction can increase expected legislative satisfaction in two basic ways. It can eliminate uncertainty about which interpretative option best matches legislative preferences. Or it can elicit a more nuanced or precise statute that satisfies legislative preferences more exactly than any interpretation could. Sometimes it does a bit of both. But one can intellectually separate the two phenomena.

A more deliberate legislative decision can increase the accuracy of statutory results even when it does not result in a more explicit statute. Suppose the range of possible statutory meanings suggests two possible default rules available to courts: interpretive option A is estimated by the court to be 60% likely to reflect what the legislature would have wanted, whereas option B is estimated to be only 40% likely to reflect what the legislature would have wanted. Now suppose the court also estimates there is 0% probability the legislature would correct option A if it turned out not to conform to legislative preferences, but 100% probability the legislature would correct option B if it turned out to be nonconforming. (Actual cases are not likely to involve such precise or extreme estimates, but the example helps illustrate the point.) If the court chooses option A as the statutory default rule, then the expected resulting legislative preference satisfaction will be 60%, because in the 40% of cases where this default rule did not match legislative preferences, the legislature will not correct it. But if the court chooses option B as the statutory default rule, then the expected resulting legislative preference satisfaction will be 100%, because in the 40% of cases where the default rule does turn out to match legislative preferences, the legislature will leave it in place, whereas in the 60% of cases where the default rule does not match legislative preferences, the legislature will replace it with option A. Choosing preference-eliciting option B will thus increase the expected preference satisfaction of the legislature even if it seems less likely to reflect legislative preferences than A, and even if the legislature cannot come up with any statutory option more nuanced or precise than the two interpretive options considered by the court.

1412 (1989) (arguing that corporate default rules should lean against corporate management where efficiency is unclear because that is more likely to elicit correction); see also Ian Ayres, Making a Difference: The Contractual Contributions of Easterbrook & Fischel, 59 U. Chi. L. Rev. 1391, 1397–1400 (1992) (applying his penalty default theory to corporate law). Others have also suggested (without endorsing) possible application of penalty default rules to statutory interpretation, but so far have not developed any systematic account of what such a set of default rules might look like or when courts should employ default rules that elicit legislative reactions and when they shouldn't. See, e.g., Elizabeth Garrett, Legal Scholarship in the Age of Legislation, 34 Tulsa L.J. 679, 685–88 (1999); Cass R. Sunstein, Must Formalism Be Defended Empirically?, 66 U. Chi. L. Rev. 636, 645–46 (1999).

Other times it may be worth eliciting a legislative reaction because it will produce a more nuanced or precise result that more accurately reflects the polity's enactable preferences. This can occur in at least three possible ways. First, more explicit phrasing can offer a more precise statutory resolution, often one that is unavailable as a legal interpretation, and thus reflect political preferences more accurately than judicial guesses of what the legislature would have done. Second, inserting the explicit terms in bills can help alert opposing groups to become involved, thus producing legislation that calibrates and trades off the relevant political interests more precisely than courts could. The latter can be analogized to the correct "pricing" of contract and corporate terms, with the price here exacted in political capital or compromise. But the same will be true under a deliberation model, where the legislature does not merely aggregate interests but deliberates to ascertain the public interest.[10] Greater explicitness will produce more focused deliberation and include more of the affected parties, and thus produce better and more accurate deliberation. Third, when a legislature responds to a preference-eliciting default rule by enacting more explicit legislation, it helpfully updates the statute to take account of any changes in circumstances or political preferences. The political preferences of the enacting legislature (as well as the current legislature) would be maximized by default rules that generally encourage such updating, for reasons explained in a companion piece.[11] For all three reasons, instead of just choosing between interpretive options A or B, the legislature may chose a more nuanced option C that maximizes legislative preference satisfaction more than any interpretive option could.

But preference-eliciting default rules also have important conditions and limits, which are best to lay out at the outset.

1. *Within Range of Plausible Meanings.* — Any preference-eliciting interpretation must be within the range of plausible statutory meanings. This follows from the fact that our topic is limited to default rules or canons for resolving statutory uncertainty, but is worth emphasizing lest the theory here be confused with the claim that courts should always interpret statutes in whatever way legislatures like least. No default rule theory, including preference-eliciting theory, can justify adopting an interpretation that has been rejected by a statute that has been enacted through whatever process the society deems authoritative. Any meaning enacted by statute opts out of the default rule. Nor does preference-eliciting theory justify adopting interpretations that parties were entitled to assume lay outside the range of possible statute meanings.[12]

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10. See Elhauge, Preference-Estimating, supra note 2, Part II.C (summarizing deliberation model). R

11. Id. Parts III.C, V.

12. This restriction might be a null set to those who think hermenuetic theory cannot produce such a meaning and entitlement, but will be meaningful to others. See Elhauge, Preference-Estimating, supra note 2, Part I. One might alternatively claim that, where R

2. *Uncertainty About Enactable Preferences.* — Even if it lies within the range of plausible statutory meanings, a preference-eliciting default rule should not be chosen unless the interpreting court is uncertain which meaning within that range the legislature would prefer. For example, suppose statutory meaning seems unclear under a particular hermeneutic theory, yet one of the two plausible meanings would clearly match legislative preferences. Then, a preference-eliciting default rule should not be imposed because the point of preference-eliciting default rules is to procure explicit legislation that avoids inaccurate judicial guesses about legislative preferences, and there is no reason to endure the costs of incorrect results in the interim if the court can avoid any inaccuracy because it already knows what the legislature would want.[13] In the hypothetical noted above, if the court is 100% sure that the legislature would want option A, then there is no point in adopting option B because, while it will ultimately result in the same 100% preference satisfaction, it will (in the interim before override) produce clear preference dissatisfaction. Further, because A is 100% likely to match legislative preferences, there is no prospect that option B will induce the legislature to enact a more nuanced option C that matches enactable preferences more precisely.

In many cases, though, there will be great uncertainty about what will turn out to be enactable by the legislature. In part, this is because information is limited, especially if we are asking what the current legislature would do with an issue it has never faced. Further, even if courts have great information about the preferences of each individual legislator, the way the legislature aggregates its preferences will turn heavily on the vagaries of how its agenda is ordered.[14] This does not mean some estima-

meaning is ambiguous, parties are nonetheless entitled to rely on the interpretation that most likely reflects legislative preferences. But the conditions for using a preference-eliciting default rule also require that legislative preferences are uncertain, and such a claim would beg the question whether statutory doctrine does or should entitle parties to the interpretation that most likely reflects legislative preferences in such a case even when those preferences are uncertain and that interpretation ultimately results in less overall legislative preference satisfaction. If I am right that current statutory canons already adopt a preference-eliciting approach, parties cannot claim that current doctrine entitles them to assume the contrary. If I am wrong in this descriptive claim, then the normative claim would remain that such preference-eliciting default rules should be adopted prospectively, where they would affect what future parties are entitled to assume. While parties may have made interpretation-specific investments relying on another interpretation, such reliance investments should only affect future doctrine when they are the sorts of investments we want parties to make. See infra Part VIII.B (concluding that although reliance should not trump political preference satisfaction, such satisfaction is advanced by making interpretations sufficiently stable to induce some behavioral reliance).

13. See infra Part IV.C (discussing case of the murdering inheritor).

14. See Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 101 (1991) [hereinafter Elhauge, Interest Group Theory] (collecting and explaining literature on the legislative cycling problem and Arrow's Theorem).

tion of probabilities is impossible, but it does create uncertainty.[15] The more uncertainty one believes such problems create, the more attractive preference-eliciting default rules will be.

Also, a court might believe the legislature is more likely to prefer option A to B, but is uncertain whether the legislature would instead prefer some moderate option C, which is unavailable as an interpretive option and whose precise contours the court cannot divine. If so, a court might use option B as a default rule in order to elicit a legislative reaction that more precisely matches legislative preferences, if B is significantly more likely to elicit such a reaction than A.[16]

3. *Uncertainty About Preferences vs. Preference to Delegate.* — The uncertainty necessary to merit a preference-eliciting default rule does not exist when it is clear as a matter of statutory meaning or legislative preferences that what the legislature wanted to do is delegate the issue to be resolved by agencies or courts according to their own judgment. The content of the antitrust liability rules are, for example, commonly understood to involve such a delegation to courts to develop the rule of reason in a common law fashion.[17] Perhaps some constitutional doctrine of nondelegation might be invoked in some such cases, though that seems unlikely given that doctrine's lack of bite.[18] In any event, preference-eliciting default rules would provide no warrant for rejecting such a delegation. Such rules aim to maximize the satisfaction of legislative preferences, and one such legislative preference may well be to delegate the matter to be decided by others it deems more fit to decide the matter.

This is yet one more important way in which statutory default rules differ from contractual and corporate default rules. In the contractual or corporate context, courts may impose preference-eliciting rules in order to prevent parties from shifting the costs of resolving gaps onto a publicly subsidized judicial system.[19] Such concerns about cost-shifting have no applicability to statutes, because the public subsidizes the legislatures who leave the gaps as well as the courts or agencies who might fill them, and absent a constitutionally imposed nondelegation constraint, the legislature has the authority to decide which publicly-subsidized method it believes is more effective.

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15. See Elhauge, Preference-Estimating, supra note 2, Part III.B.2 (summarizing literature on problem of determining legislative intent given aggregation problems). R

16. See supra pp. 2170–71; infra Part III.A (discussing *Keeler* case); infra Part IV.C (discussing snail darter case); infra Appendix (mathematically analyzing appropriate cases for using a preference-eliciting default rule to elicit moderate precise reactions unavailable as an interpretive option).

17. See Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988); Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 544 (1983) [hereinafter Easterbrook, Statutes' Domains].

18. See John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 727–28 (1997) [hereinafter Manning, Textualism as Nondelegation] (collecting sources).

19. Ayres & Gertner, supra note 9, at 93, 97–98, 127–28. R

4. *Correction Likely Ex Ante or Ex Post.* — It does not make sense to have a preference-eliciting default rule if one believes the default rule will stick, unmodified, even when it does not match prevailing political preferences. Preference-eliciting default rules only make sense when one believes they might elicit legislative correction, either in the initial drafting (ex ante) or after the interpretation (ex post). As explored below, this is more true in some legislative areas than others.[20]

For contracts and corporate charters, any correction made in response to a default rule of interpretation must come ex ante, in the initial contract, before persons develop vested rights in that contract. But for statutes, the correction can come either ex ante, in the initial statutory drafting, or ex post, through subsequent statutory amendments or overrides that can overturn the vested rights created by statutory interpretations. This is another important way in which statutory default rules differ from contractual default rules.

Where the statutory issue is foreseeable at the time of enactment, the knowledge that a preference-eliciting default rule exists can induce the legislature to enact more explicit language in the original statute to eliminate the ambiguity ex ante, thus providing a more precise resolution and test of what was in fact enactable. But many legislative corrections can only be ex post. Gaps or ambiguities in statutory meaning often arise from unanticipated applications or unforeseen changes in circumstances, which are unlikely to be amenable to ex ante correction in drafting because the legislature (by definition) was unaware of them. In such cases, preference-eliciting rules can still be salutary because they elicit ex post correction.

If the enacting legislators understood that there was a statutory gap or ambiguity but nonetheless enacted the statute without resolving it, this may sometimes signal an intentional delegation of lawmaking power to the courts, not an occasion for a default rule aimed at eliciting more precise preferences ex ante.[21] But one cannot always determine that intentionally leaving a gap or ambiguity undisturbed reveals an intention to delegate to courts the power to make substantive policy. The legislature may instead have been willing to leave the gap or ambiguity precisely because it was confident the courts would apply statutory default rules that try to maximize the satisfaction of political preferences. Or perhaps the legislature saw the issue, but did not think it was as ambiguous as the courts later did, and thus did not realize it was worth the cost of ex ante correction.[22] Or maybe the legislature thought that leaving the gap or

20. See infra Parts III–VI.

21. Supra Part II.A.3; cf. William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 677 (1990) (concluding that textualism is unlikely to affect legislative drafting because the vast majority of ambiguities are unforeseeable or reflect intentional delegations).

22. This should be distinguished from the case where the legislature correctly understood the degree of ambiguity but did not think the cost of legislative resolution was

ambiguity unresolved would make the statute inapplicable to the issue, rather than delegating to courts the power to exercise common lawmaking powers.[23] Thus, even an intentional ambiguity can have an ambiguous meaning whose ex ante clarification can be encouraged by a preference-eliciting default rule.

Ex ante correction can also happen even when the legislators themselves were unaware of the ambiguity because that ambiguity may be known or foreseeable to a political group that is in a position to either draft or correct the drafting of legislation. If so, a preference-eliciting default rule that cuts against such a group can have the requisite ex ante effect by encouraging the group to raise the issue with the legislature and have it resolved. This ex ante effect of more precise drafting and definitive resolution is an important benefit of a preference-eliciting default rule. In essence, applying a preference-eliciting default rule helps the legislature strike an informed bargain with the group in these cases by encouraging the group to reveal information to the legislature.

Even if ex ante correction fails, ex post legislative reaction remains possible. One might mistakenly dismiss this possibility of ex post legislative reaction given the old bromide that legislatures rarely know about, let alone correct, statutory interpretations.[24] But a remarkable study by Professor Eskridge showed that in fact congressional staffers routinely monitor Supreme Court statutory decisions, that Congress holds legislative hearings on nearly 50% of these interpretations, and that at least 6–8% are legislatively overridden.[25] This 6–8% statistic is alone significant and likely somewhat understates the general incidence of legislative overrides because it excluded cases where Congress did not explicitly state it was seeking to override an interpretation, or cases where Congress only partially codified an interpretation and thus implicitly rejected the rest.[26] More importantly, the percentage of statutory interpretations overridden understates the effectiveness of preference-eliciting default rules for several reasons.

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worthwhile. In such a case, a preference-eliciting default rule is not merited because it would impose costs on the legislature that, in the legislature's own judgment, exceed the benefits of resolving the ambiguity. Supra Part II.A.3. Such a legislature would thus prefer to have the ambiguity resolved by courts or agencies, preferably the latter since they are more responsive to prevailing political preferences. See Elhauge, Preference-Estimating, supra note 2, Part VII. R

23. Easterbrook, Statutes' Domains, supra note 17, at 540–43. R

24. See Reed Dickerson, The Interpretation and Application of Statutes 181 (1975); Frank H. Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L. Rev. 422, 426–29 (1988); Earl Maltz, The Nature of Precedent, 66 N.C. L. Rev. 367, 388–90 (1988).

25. See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 334–36, 338–40, 344–45, 397 (1991) [hereinafter Eskridge, Overriding]. Congress overrode 121 Supreme Court statutory interpretations from 1967–1990, and 98 from 1975–1990. Id. at 338. This amounts to five to six decisions a year, which is 6–8% of the eighty statutory interpretations the Court issued a year on average during this period. Id. at 339 n.15.

26. Id. at 336 n.7.

First, if one wants to measure ex post legislative responsiveness, the percentage of all interpretations that are overridden is less relevant than the percentage of interpretations that conflict with enactable preferences that are overridden. One would expect the percentage of such conflicting interpretations to be relatively low if, as I have shown, the Court normally employs preference-estimating default rules that track, where reliably ascertainable, the enactable preferences of the *current* legislature.[27] For example, if only 10% of Supreme Court interpretations conflict with current enactable preferences, then this 6–8% statistic reflects a 60–80% rate of reversal of such conflicting cases.

Second, the odds of legislative override are far higher for selected areas and interpretations, which are those in which preference-eliciting canons are most merited and actually used.[28] Thus the odds of ex post legislative correction in these selected areas should predictably be higher than revealed by the general statistics. For example, if the percentage of all conflicting interpretations that are overridden is 60–80%, that will partly reflect preference-estimating default rule interpretations that either mistakenly estimated current legislative preferences or tracked statutory meaning or the enacting legislature's preferences even though they conflicted with current preferences.[29] The percentage of conflicting preference-*eliciting* default rules that are overridden should be higher than this, maybe 80–90%, because those reflect cases where the default rule was deliberately chosen in part because of its special propensity to provoke legislative reactions. (One would also expect legislative overrides to be even more plentiful in parliamentary systems, which need not secure approval by separate chambers (and committees) and the executive, which would suggest preference-eliciting default rules should be even more attractive in those jurisdictions.)[30] Since the argument here is not that preference-eliciting default rules should always be used, but only that they should be used in these selected circumstances, this higher likelihood of legislative override in these areas is more relevant.

Third, what matters is really not the probability of legislative override itself, but of serious legislative reconsideration. In the illustrative example above, in 40% of the cases the legislature does not override interpretation B, the preference-eliciting default rule. Such confirmation of a preference-eliciting default rule should happen less than 50% of the time since (by hypothesis) that rule does not reflect likely legislative preferences, but it will happen often, and when it occurs it provides an important benefit. Otherwise, interpretation A would not have been reconsidered and thus the legislature would not have enacted option B in this 40% of cases when it matches its preferences. Indeed, I will show below that (absent some other change in likely legislative preferences) the fail-

27. See Elhauge, Preference-Estimating, supra note 2, Parts V–VI. **R**

28. See infra Parts III–VI.

29. See generally Elhauge, Preference-Estimating, supra note 2. **R**

30. See infra Part IV.D.

ure to override a preference-eliciting interpretation after legislative reconsideration itself means that interpretation now most likely reflects legislative preferences.[31] Congress holds hearings on 50% of all Supreme Court interpretations, and presumably holds hearings on an even higher percentage of interpretations that conflict with enactable preferences, and on an even higher percentage of preference-eliciting interpretations that were chosen for their propensity to provoke legislative reaction. Provoking such ex post legislative reconsideration can achieve the benefits of a preference-eliciting default rule even when it does not provoke a legislative override.

Fourth, preference-eliciting default rules do not exist solely to provoke ex post legislative reconsideration. They also have the important benefit of provoking ex ante legislative considerations that will not show up in statistics about ex post overrides. Thus any benefits from ex post correction must be multiplied by all the cases where the preference-eliciting default rule elicits an ex ante clarification that means the ambiguity and dispute never reaches any court. Unfortunately, data are not available on the extent to which an interpretive rule has in fact increased ex ante resolution of statutory ambiguities since that occurs in the murky world of legislative drafting. It may be that for every case actually applying a preference-eliciting default rule (because no ex ante clarification was made), there are nine where it successfully induces an ex ante correction. If so, then even a preference-eliciting default rule that only provoked ex post legislative reconsideration 20% of the time would actually be 92% successful at provoking legislative reconsideration of all kinds.

Since data on ex ante corrections are unavailable, this Article will rely only on the assumption that the groups who have the sort of differential access to the legislative agenda that allows them to procure ex post legislative correction of interpretations that disfavor them probably also have the sort of differential access that enables them to procure ex ante correction where they can foresee the ambiguous issue. Thus, this Article will recount mainly examples of ex post legislative corrections as a proxy for a differential likelihood of both ex ante and ex post correction, and use that to help determine when to adopt a preference-eliciting default rule and which group it should disfavor.[32] But the fact that mainly ex post examples will be cited should not be allowed to obscure the fact that much (and perhaps most) of the benefit of the preference-eliciting default rules being considered will come in the form of ex ante legislative clarification.

By the same token, the existence of preference-eliciting default rules means that an ex post statutory override does not prove that the judicial interpretation was mistaken, as is often supposed.[33] To the contrary,

31. See infra Part V.

32. See infra Parts III–VI.

33. See, e.g., W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 113–15 (1991) (Stevens, J., dissenting) (supposing so); Michael E. Solimine & James L. Walker, The Next Word:

such statutory overrides mean the preference-eliciting default rule achieved its purpose of forcing explicit decisionmaking by the political process. A successful preference-eliciting default rule need not always provoke an ex post override. Sometimes, the correction will have come ex ante, and other times, as in the 40% of cases for Option B above, the explicit ex post legislative decision may be not to change the preference-eliciting default rule after reconsideration. But often a successful preference-eliciting default rule will provoke legislative override since it was (by definition) not chosen for its correspondence with likely political preferences. Indeed, it is the very fact that it is more likely to provoke legislative correction that makes a preference-eliciting default rule preferable to a default rule that is more likely to reflect legislative preferences. Absent legislative correction, for example, there would be no reason to choose option B over A in the above hypothetical.

5. *Differential Odds of Correction.* — When there are politically influential groups on both sides of a statutory issue, a preference-eliciting default rule generally does not make sense. Such cases of conflicted demand for legislation are the least likely to produce legislative action in general, and quick legislative overrides in particular.[34] Moreover, if whichever side loses the interpretative issue is equally capable of commanding legislative attention and procuring at least a partial override of the default rule (ex ante or ex post), then there is not much call for employing a preference-eliciting default rule that disfavors one side. The court might as well apply the best estimate it can make of likely legislative preferences, confident that any error is equally subject to correction by the losing group, and that in any interim when the default rule is imposed, the court will have come closer to maximizing likely political satisfaction.

Instead, a crucial premise for adopting a preference-eliciting default rule is that some statutory results that turn out to inaccurately estimate legislative preferences are more likely to elicit a legislative reaction than others. Generally, this is because the political forces on one side of the interpretative issue have greater ability to command time on the legislative agenda, raise issues, and/or influence statutory drafting.[35] Or it

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Congressional Response to Supreme Court Statutory Decisions, 65 Temp. L. Rev. 425, 431–33 (1992) (collecting legal scholarship asserting that existence of statutory overrides shows plain meaning canon is mistaken); infra note 53 and accompanying text (noting that prior rational choice scholarship has tended to share this assumption). **R**

34. See Michael T. Hayes, Lobbyists and Legislators 93–126 (1981); Eskridge, Overriding, supra note 25, at 365–67, 377; Harry P. Stumpf, Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics, 14 J. Pub. L. 377, 391–92 (1965) (collecting data showing that Congress rarely overrides or changes Supreme Court decisions that provoke interest group activity on both sides). **R**

35. Empirical evidence indicates that there are political asymmetries in the ability of different groups to command time on the legislative agenda. See Eskridge, Overriding, supra note 25, at 348, 351, 410; see also Stumpf, supra note 34, at 391–92 (collecting data showing that Congress overrides Supreme Court decisions when interest groups are on only one side of the issue). **R**

might be because politically influential groups have greater ability to block than enact legislative change.[36] Whatever the cause, preference-eliciting analysis provides a reason for favoring the politically powerless that has nothing to do with whether their claims are attractive on policy grounds or correspond to prevailing political wishes. The point of favoring the politically powerless (in resolving a statutory ambiguity) is not that their interests are more meritorious; it is that doing so will produce a precise legislative appraisal of the weight the political process wishes to give those interests.

The argument for preference-eliciting default rules thus differs entirely from Professor Macey's influential argument that courts should adopt public-regarding interpretations to force interest groups that want to further private-regarding purposes to make that explicit.[37] Although Macey in a sense takes an information-forcing approach, the difference is that in his approach the burden of clarification is placed on parties pursuing the substantive results he disfavors, mainly those that are not "public-regarding," measured by such controversial criteria as whether or not they constitute a derogation from the common law.[38] The problem is that this presupposes just what is in doubt—that we know which interpretations are public-regarding—and leaves that question to judicial judgment.[39] Yet some of the groups who are most influential in the legislature, and are thus burdened by a preference-eliciting default rule, may well be the most "public-regarding" under ordinary conceptions. For example, we shall see that the rule of lenity can be explained as a preference-eliciting default rule that burdens public prosecutors, whose crime-fighting purposes would seem public-regarding under most conceptions.[40]

Nor is a preference-eliciting default rule necessarily the most narrow construction of a statute.[41] The groups most influential in the legislature sometimes benefit from broad constructions and sometimes benefit from

36. See Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy 314–15, 395–96, 398 (1986). One reason for this is that legislative committees generally have greater power to block than enact legislation, and politically influential groups often have greater influence over the committees than the general legislature.

37. Jonathan Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 236–40 (1986).

38. Id. at 228 n.29, 252. For the much more limited role the canon against derogations from the common law has under an approach that maximizes political satisfaction, see infra Part VII.B.

39. See also infra Parts III.B.1, VIII.A (distinguishing preference-eliciting default rule from theory that interpretations should lean against normatively undesirable interest group influence); Elhauge, Preference-Estimating, supra note 2, Part II (arguing against having statutory default rules turn on substantive judicial judgment). R

40. See infra Part III.A.

41. See generally infra Part VIII.C (discussing and rejecting alternative default rule that ambiguous interpretations should be resolved in favor of the most narrow statutory construction).

narrow constructions. It may thus be a broad construction that burdens the more politically influential group.

Rather, in order for a preference-eliciting approach to be helpful, the issue must involve a persistent one-sided political demand for legislation. Whether this is true should not vary with the political vagaries of the moment, such as whether Democrats or Republicans are in power. Nor should it turn on fine-tuned assessments of the ebbs and flows of relative power among various groups within different Congresses. If there is conflicted demand for legislation, then no matter who is in office, Republicans or Democrats, and no matter which side of the conflict each favors, a court cannot have confidence about legislative correction and thus should not employ a preference-eliciting default rule.

6. *Acceptable Interim Cost.* — Where ex ante correction does not seem likely, as when the issue was not foreseeable, the advisability of a preference-eliciting default rule may well depend on how much damage it will cause before the ex post legislative override can happen. Even for ex post correction, the interim costs are often not large because the interim is short. The two most exhaustive empirical studies indicate that half or more of statutory overrides occur within two years of a statutory decision.[42]

Another factor influencing the degree of interim costs is how amenable the statutory result is to correction after the fact. For example, a statutory result that mistakenly creates property rights is harder to correct, given the takings clause, than one that denies property rights. Likewise, a statutory result that endangers a species is harder to correct than one that preserves the species in the interim. Large uncorrectable interim costs will sometimes call for a default rule that is the best estimate of legislative preferences even though it will not procure the more explicit legislative decision that a preference-eliciting default rule would have.

Another interim cost of legislative correction is the cost of taking up legislative time that might be better spent developing new statutory solutions to social problems. This is likely to be much smaller ex ante, when the legislature is already enacting a statute on the topic, than ex post, when the legislature has to gear up the process for enacting a statute from beginning to end. But the ex post costs (and thus difference in costs) are not always large because legislatures can attach specific ex post corrections to other bills. The major cost may thus be the cost of getting agreement on the issue, and its magnitude will depend on how productive the alternative legislative efforts would be.

7. *Summary.* — In short, a statutory preference-eliciting default rule is merited only when statutory meaning is unclear and: (1) courts are sufficiently uncertain what the legislature would have preferred; (2) the

42. Eskridge, Overriding, supra note 25, at 345 (finding that almost half the statutory overrides were within two years); Solimine & Walker, supra note 33, at 445 (finding that 56% were within two years). R R

preference-eliciting default rule is more likely to provoke legislative correction (ex ante or ex post) than the default rule that better matches likely legislative preferences; and (3) where the correction is not ex ante, any interim costs from not employing the statutory default rule the legislature would more likely prefer are not unduly large or uncorrectable. When these conditions are not met, the preference-eliciting default rule should not be employed. These are not "on-off" conditions, but rather involve implicit tradeoffs. The less certain legislative preferences are, the smaller the advantage in provoking legislative correction need be to justify applying a preference-eliciting default rule. The more certain legislative preferences, the greater the advantage in legislative correction must be. And so forth.

But that does not mean the choice whether to apply a preference-eliciting default rule should be left to the vagaries of an open-ended case-by-case balancing test. Although sometimes that is the best approach, better results often follow from using rules that, although not directly correlated to the underlying norms of social desirability, have a greater precision that renders them less over- and underinclusive in actual application than open-ended standards.[43] Judges would, for example, probably have a hard time determining relative political influence in particular cases, and thus would achieve more accurate results overall by instead using rules based on whether the case fits a category where differential political advantage is likely.[44] Further, in the choice between a rule and a standard, one often needs to consider other factors, like the ability of legal clarity to increase the likelihood of behavioral compliance, decrease the costs of ascertaining the law, and provide fair warning.[45] These factors further argue in favor of preference-eliciting default rules based on certain categories of cases rather than case-by-case measurements of relative political influence, which is largely the approach the courts have actually taken.[46] But even under a rule-based approach, the factors identified above are crucial for deciding how best to define both the rules and their exceptions.

One might wonder whether a more straightforward approach would not simply be to have courts elicit legislative reactions by certifying cases where statutory meaning and legislative preferences are unclear to the current legislature, much as federal courts certify issues of state law to state supreme courts. But that would not alone have the helpful feature of eliciting ex ante clarification in the original statute. In any event, the U.S. Supreme Court does, in a sense, "certify" statutory issues to Congress by the mere act of putting them on the Supreme Court docket. This

43. See Stephen McG. Bundy & Einer Elhauge, Knowledge About Legal Sanctions, 92 Mich. L. Rev. 261, 267–79 (1993).

44. See generally infra Part IX (considering operational and jurisprudential objections).

45. See Elhauge, Preference-Estimating, supra note 2, Part V.E; infra Part VIII.B. **R**

46. See infra Parts III–VII.

notifies Congress that the Supreme Court will resolve the issue if Congress does not, and if Congress does resolve the issue, the normal practice is for the Supreme Court to dismiss the writ of certiorari as improvidently granted, thus allowing the elicited congressional response to stand.[47] In any event, the possibility of such certification—whether explicit or implicit—does not eliminate the need to have some default rule making clear what statutory result will govern if Congress does not act. One thus still needs a theory for specifying those default rules, and the theory here indicates that, in the appropriate case, the default rule should be chosen to increase the odds of legislative action.

B. *Modeling The Theory*

1. *A Mathematical Model.* — Those with an allergy to math may wish to skip the next few pages and proceed to the following section since the points have already been developed through exposition. For others, it will be useful to establish the above points somewhat more rigorously with a bit of mathematical modeling, especially since doing so helps set up some later analysis.

To start simply, suppose there are only two interpretative options, A and B. Let P_A stand for the relative probability that A matches legislative preferences, and P_B stand for the relative probability that B matches. Then, $P_A + P_B = 1$ since they are assumed to be the only two interpretive options and we are interested in their relative rather than absolute probabilities of reflecting legislative preferences.[48] Let D_{AB} stand for the legislative dissatisfaction resulting from a difference between options A and B if the wrong interpretation prevails. Finally, define P_{Astick} as the conditional probability that the legislature will fail (either ex ante or ex post) to correct default choice A to statutory result B if option A does not accurately reflect legislative preferences, and define P_{Bstick} as the conditional probability that the legislature will fail to correct default choice B to statutory result A if option B does not accurately reflect legislative preferences. For now, ignore any interim costs by assuming the legislative correction occurs either ex ante (and thus inflicts no interim costs) or so quickly ex post that interim costs are trivial.

We can then express the expected legislative dissatisfaction from choosing either option as:

If A is chosen: $P_B P_{Astick} D_{AB}$

47. See Robert L. Stern et al., Supreme Court Practice 260 (7th ed. 1993).

48. For example, suppose a court thinks there is a 20% probability that option A would be enactable and a 30% probability that option B would be enactable, with a 50% probability that nothing would be enactable or that some other option unknown to the courts would be enactable. Then the *relative* probabilities would be 40% for option A and 60% for option B. Of course, whether an option is enactable will turn in part on what the status quo is before any enactment effort is made. Here, the probabilities should be determined by assessing how relatively likely it is that the legislature would have chosen to replace a status quo of ambiguity with, respectively, option A or B.

If B is chosen: $P_A P_{Bstick} D_{AB}$

The court should choose option A if:

$P_A P_{Bstick} D_{AB} > P_B P_{Astick} D_{AB}$, which can be expressed as:

$P_A > P_B P_{Astick} / P_{Bstick}$[49]

If there were no uncertainty that A was what the legislature should prefer, then $P_A = 1$ and $P_B = 0$, which plugged into the above equation means option A should be chosen if $1 > 0$, that is, option A should be chosen no matter what the likelihood of legislative correction. This confirms points 1–3 above that uncertainty about legislative preferences is a basic requirement for a preference-eliciting default rule. If there were no possibility of legislative correction, then P_{Astick} and P_{Bstick} would both = 1, and option A should be chosen as long as $P_A > P_B$. This confirms point 4 above that some likelihood of legislative correction is necessary to justify choosing a default rule that is not the most likely to match legislative preferences. If there were no differential possibility of legislative correction, then $P_{Astick} = P_{Bstick,}$ which again means option A should be chosen as long as $P_A > P_B$. This establishes point 5 that differential odds of correction are necessary to justify a preference-eliciting default rule.

Once we introduce differential correction odds and uncertainty about legislative preferences, it can be proven that a preference-eliciting default rule can maximize expected legislative preference satisfaction better than the default rule most likely to match legislative preferences. To take one extreme case, suppose the probability that A will stick uncorrected is 100%, but the probability that B will stick uncorrected is 0%. A court should choose option A only if $P_A P_{Bstick} > P_B P_{Astick}$, but plugging in these figures produces the inequality $0 > P_B$, which is never true because by hypothesis there is uncertainty about legislative preferences, meaning $P_B > 0$. Thus, where one mistaken interpretation will never be corrected and the other one always will be, the preference-eliciting default rule should always be chosen as long as there is any uncertainty about which interpretation the legislature would prefer.

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49. Because P_{Astick} or P_{Bstick} are conditional probabilities, and are assumed to vary with factors other than inertia or transaction costs equally applicable to all parties, it is not clear whether they will be greater than (or increasing functions of) P_A or P_B. For example, if an unanticipated ambiguity arises in a regime of vigorous legislative reactions to statutory interpretations, it might be that there is complete uncertainty about which interpretation best matches legislative preferences ($P_A = P_B = 50\%$), and yet both P_{Astick} and P_{Bstick} could be near zero. This would occur when the legislature is expected to overrule the adoption of any incorrect interpretation. Or because of differential override odds, it might be that one option more likely matches legislative preferences (so $P_A > P_B$) but the group favored by B is much more influential and able to block legislative change (so $P_{Bstick} > P_{Astick}$), which would be a case where the preference-estimating and preference-eliciting default rules produce the same result. P_{Astick} and P_{Bstick} should both be decreasing functions of D_{AB} because the more dissatisfactory a result would be, the more likely a legislative correction. But, as shown in text, D_{AB} drops out of the analysis anyway, and the key factor turns out to be the ratio of P_{Astick} to P_{Bstick}, a ratio that bears no necessary relation to the magnitude of D_{AB}.

More generally, the choice will turn on the ratio between the relevant probabilities. Thus, even if option A is more likely to match legislative preferences, it should not be chosen if:

$P_A/P_B < P_{Astick}/P_{Bstick}$

That is, whether to choose the preference-eliciting option B turns on a comparison of how certain the court is that the legislature would prefer A over B, (that is, P_A/P_B) to how great an advantage B has in provoking legislative correction (P_{Astick}/P_{Bstick}). This confirms the above conclusion about tradeoffs.

To return to the prior illustration, assume that the probability that A matches legislative preferences is 60% and the probability that B matches is 40%. Then $P_A/P_B = 1.5$ and the inequality tells us that option B should be chosen not only in the extreme case where the probability that A will stick uncorrected is 100% and the probability that B will stick uncorrected is 0%, but in any case where the ratio (P_{Astick}/P_{Bstick}) of the probabilities of being uncorrectable is greater than 1.5. Note that $P_{Astick} + P_{Bstick}$ need not equal 1. For example, even if the legislature is relatively vigorous about correcting all mistaken interpretations or default rules either ex ante or ex post, option B should still be chosen if the probability that A would stick uncorrected were 5% and the probability that B would stick uncorrected were only 1%.

However, if the legislature is unlikely to correct any interpretative choice, either ex ante or ex post, then a preference-eliciting default rule generally will not make sense if the court has a strong reason to think the legislature would prefer another default rule. Suppose, for example, that the likelihood that option B will stick uncorrected even when it does not match legislative preferences is 50% or greater (i.e., legislative correction is unlikely). Then the maximum that P_{Astick}/P_{Bstick} can equal is 2, and P_A should be chosen as long as $P_A > 2(1 - P_A)$, or $P_A > 2/3$. Thus, where the court is at least 67% confident that the legislature would prefer option A, it never makes sense to instead adopt preference-eliciting default rule B unless it is more than 50% likely to provoke a legislative correction.

Still, great uncertainty about which interpretative option the legislature would prefer can justify a preference-eliciting default rule *even when legislative correction is highly unlikely*. To take the extreme case, suppose a court is completely uncertain about whether the legislature would prefer option A over option B, assigning the same odds to either. A court should choose option A only if $P_A P_{Bstick} > P_B P_{Astick}$, but since $P_A = P_B$, this means that option A should not be chosen whenever $P_{Astick} > P_{Bstick}$, that is whenever A is more likely to stick uncorrected than option B. Thus, where a court is completely uncertain about whether a legislature would prefer option A or B, then a preference-eliciting default rule makes sense as long as the legislature is to *any* extent more likely to correct B than A. Even if the odds that B will stick uncorrected are 99%, and the odds that A will stick uncorrected are 100%, option B should be chosen when the court has no reason to think the legislature might prefer option A over B.

More generally, when there is great uncertainty about which interpretation a legislature would prefer, it only takes a slight advantage in provoking legislative correction to choose a preference-eliciting default rule even when the overall odds of legislative correction are very small.[50]

2. *The Differences From Prior Models.* — The above is hardly the first model of court-legislature interaction, and many may wonder what implications prior rational choice models have for my analysis. Unfortunately, the answer is very little because prior models rest on assumptions utterly contrary to mine. Thus, while these prior models have made enormous contributions to modeling the interaction between courts and the political branches, they offer little help in understanding that interaction under my different assumptions.

In particular, contrary to this Article, prior rational choice models tend to ignore any distinction between hermeneutics and default rule choice and assume that: (1) courts can make any interpretive choice in an infinite policy continuum; (2) courts make whatever choice furthers judicial views; and (3) the preferences of every political actor are perfectly knowable.[51] On the second assumption, a few articles instead assume (also contrary to my analysis) that courts further the preferences of the enacting legislature at the expense of the current legislature's preferences.[52] The third assumption is crucial because, if political preferences were perfectly knowable, then a preference-eliciting default rule would *never* be justifiable. It is only the fact that political preferences are uncertain that justifies using a preference-eliciting rule at all.

Prior rational choice models also virtually all make various assumptions about legislative reactions to statutory opinions that are precisely opposite to mine. These models assume that any statutory overrides mean the court incorrectly interpreted the statute, and that courts try to further their own preferences as much as they can without being legislatively overturned.[53] In contrast, in my analysis courts often should and do try to elicit statutory overrides. Such overrides do not reflect a mis-

50. For those interested in more mathematical exposition, the Appendix extends the mathematical analysis to cases involving third options and interim costs. Part V also extends the mathematical analysis to the question whether and when a preference-eliciting default rule should be abandoned because it failed to elicit a legislative override.

51. See Elhauge, Preference-Estimating, supra note 2, Part V.D (describing assumptions in prior rational choice models). Prior models also assume that legislative structure tracks the one that happens to govern the U.S. Congress. Id. R

52. Id.

53. See Linda R. Cohen & Matthew L. Spitzer, Solving the *Chevron* Puzzle, Law & Contemp. Probs., Spring 1994, at 65, 69; Rafael Gely & Pablo T. Spiller, A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases, 6 J.L. Econ. & Org. 263, 268 & n.15 (1990); Edward P. Schwartz et al., A Positive Theory of Legislative Intent, Law & Contemp. Probs., Winter 1994, at 51, 55, 59, 72. The political science literature has also offered the "attitudinal model," which posits judges just vote their own preferences without taking into account possible legislative reactions, but in statutory cases this is even less consistent with the available evidence. See infra at notes 74, 83, 89. R R

take, but a successful effort both to obtain ex post legislative instructions in the face of uncertainty about legislative preferences and to encourage the provision of ex ante legislative clarity in similar future cases.

Prior models also assume that legislative reactions to statutory interpretations turn only on the existence of legislative preference dissatisfaction[54] and (in the more sophisticated models) the degree of dissatisfaction compared to the costs of making a fresh enactment.[55] They thus exclude the possibility of differential odds of legislative correction. In reality, whether and how the legislature reacts to a statutory interpretation turns not just on benefits and costs equally applicable to all political groups, but also on asymmetries in the abilities of political forces to command time on the legislative agenda.[56] This Article thus assumes this political asymmetry exists on some set of issues. Indeed, if this asymmetry did not exist, a preference-eliciting default rule would never be warranted for the reasons noted above.[57]

Finally, almost all prior rational choice models implicitly assume that any legislative reaction comes only ex post, after the statutory interpretation, rather than ex ante in the initial promulgation of statutes. Generally they do so by simply modeling only the ex post reactions, without considering whether ex ante legislative reactions might alter the extent and nature of statutory ambiguities created.[58] In contrast, this paper assumes that there are both ex ante and ex post legislative reactions to any default rule of statutory interpretation.

There are two exceptions to the above, each of which modifies some (but not all) of these standard rational choice assumptions and thus provide the prior models closest to mine. One is an ingenious article by Spiller and Tiller that drops the assumption that judges choose among an infinite policy space and always aim to avoid being overridden, but other-

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54. The following papers all assume statutory reaction turns only on the existence of a deviation from the preferences that are enactable when one considers the views of the multiple political actors whose consent is necessary for enactment. William N. Eskridge, Jr., Dynamic Statutory Interpretation 164–70 (1994) [hereinafter Eskridge, Dynamic]; Cohen & Spitzer, supra note 53, at 69–70, 73–76; Eskridge, Overriding, supra note 25, at 378–85; William N. Eskridge Jr. & John Ferejohn, Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State, 8 J.L. Econ. & Org. 165, 182–85 (1992) [hereinafter Eskridge & Ferejohn, Deal]; William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 549–51 (1992) [hereinafter Eskridge & Ferejohn, Game]; John A. Ferejohn & Barry R. Weingast, A Positive Theory of Statutory Interpretation, 12 Int'l Rev. L. & Econ. 263, 267–76 (1992); Gely & Spiller, supra note 53, at 269–83. They thus do not consider the costs of enactment or degree of legislative dissatisfaction, let alone the possibility of political asymmetry. R R

55. Schwartz et al., supra note 53, at 56–57. R

56. See supra Part II.A.5.

57. See supra Part II.A.5.

58. See Eskridge, Dynamic, supra note 54, at 164–70; Cohen & Spitzer, supra note 53, at 69–70, 73–76; Eskridge, Overriding, supra note 25, at 378–85; Eskridge & Ferejohn, Game, supra note 54, at 549–51; Ferejohn & Weingast, supra note 54, at 267–76; Gely & Spiller, supra note 53, at 269–83. R R R R

wise tracks all the standard assumptions and indeed adopts an even more extreme assumption that courts not only perfectly know the preferences of each political actor but also know precisely what will result from bargaining between them to override any given statutory interpretation.[59] This leads them to conclude that judges constrained to choose between two interpretive options will not choose the one that is closer to judicial preferences when they know both that it cannot be legislatively overridden and that the other interpretation will be overridden in a way that achieves a final result that corresponds better to judicial preferences.[60] Those judicial preferences are assumed to include preferences not just about "policy" but about the best "rules" of statutory construction, thus inducing judges to apply what they regard as the best rule even when it leads to a policy outcome they disfavor because they expect the legislature to override the bad policy outcome and leave them with their optimal result: the best combination of judicial rule and policy outcome.[61]

While this is an intriguing advance over prior models, my assumptions are decidedly different. Their extreme assumption that judges can with perfect accuracy predict the result of any future legislative bargaining seems implausible and inconsistent with their own bargaining model.[62] Nor, if judges could make such predictions, would it be legitimate within my theory for judges to deliberately choose an interpretation that did not fit legislative preferences because the judges knew the final outcome would correspond better to their own personal preferences. The Spiller-Tiller model is instead driven by the rational choice premise that anything judges do must be advancing their personal preferences, which causes them to conflate all views about the best canons of construction into judicial preferences. This excludes from the outset the possibility that courts choose those canons that maximize political satisfaction. Indeed, it leads Spiller and Tiller to the odd conclusion that the judges who are behaving "strategically" are those who follow the best rule of statutory construction even when it leads to policy outcomes they disfavor, whereas the "nonstrategic" judges allows their policy views to overcome their views about the best legal rule.[63] This amounts to trying to jam the

59. Pablo T. Spiller & Emerson H. Tiller, Invitations to Override: Congressional Reversals of Supreme Court Decisions, 16 Int'l Rev. L. & Econ. 503, 503–07 (1996).

60. Id. at 506–11.

61. Id. at 504–05, 509–19.

62. Given their model, any result between H and S is a possible result since all are in the core of the legislative bargaining game, id. at 506–07 & n.18, and they give no explanation of how judges could ascertain which one of those possible results will actually occur.

63. Id. at 510–11. They also ignore ex ante effects or the possibility that interpretations that do not reflect enactable preferences might have differential likelihoods of override, but within their driving assumption of judicial preference satisfaction it is not clear those factors would cause any change in their analysis. They also implicitly assume that all results that deviate from enactable legislative preferences are reversed and that, although judges vote to advance personal preferences, they have no preference regarding the interpretations that prevail in the interim before reversal.

round peg of judicial views about legal theory into the square hole of the assumption that judges maximize the satisfaction of personal preferences.

More importantly, the Spiller-Tiller assumption that judges have preferences for certain rules of statutory construction renders their analysis tautological because they provide no theory of what generates judicial preferences for those particular statutory default rules. The task of my project is precisely to explain what should and does motivate judges to adopt particular statutory default rules because they maximize political satisfaction—which also explains what default rules legislatures should impose if judges fail to do so. On this last point, Spiller and Tiller mistakenly make the crucial explicit assumption that legislatures can override policy outcomes but not rules of statutory construction.[64] Had they understood that in fact legislatures can (and do) adopt codes of statutory construction, they might have realized that this can constrain judges to adopt statutory default rules that tend to maximize political satisfaction.[65] In any event, the empirical evidence—including the evidence presented by Spiller and Tiller themselves—is more consistent with my model than their model, as discussed in the next section.

The second exception is a paper by Schwartz, Spiller, and Urbiztondo, which adopts all the standard rational choice assumptions except that it assumes incomplete knowledge and admits the possibility of ex ante legislative correction. But that paper makes many other dubious assumptions that lead it to conclusions vastly different from mine. It assumes that more specific legislative language increases rather than decreases the flexibility of courts to interpret statutes however they want, and that the only purpose of ex ante statutory specificity or legislative history is thus to signal a willingness to legislatively override the judiciary ex post.[66] This effectively eliminates the possibility that ex ante specification can be a benefit of a statutory default rule, and indeed would seem to make it unclear why even ex post override would have any influence on the court since a court could ignore the specificity in any statutory override too. It also leads them to the odd conclusion that the legislature is less likely to be specific ex ante when the costs of ex post override are high,[67] which seems precisely contrary to reality. Further, the paper's analysis and model implicitly assume that no interim costs result ex post from having the wrong rule,[68] which effectively underestimates both the costs of ex post override and the benefits of ex ante specification. Finally, the combination of the above assumptions with their assumption that courts just try to maximize judicial preferences leads the paper to the

64. Id. at 510.

65. This model also implicitly ignores a vast array of other means by which legislatures can influence a judiciary that favored judicial preferences over legislative preferences. See Elhauge, Preference-Estimating, supra note 2, at V.D. **R**

66. Schwartz et al., supra note 53, at 55–56, 60–61, 64–70. **R**

67. Id. at 71.

68. See id. at 55, 57–59, 70.

conclusion that legislatures will want to send the judiciary *false* signals, whose inaccuracy they apparently assume judges cannot gauge.[69] I, in contrast, assume that courts are in a cooperative agency relationship with legislatures, and try to adopt default rules that best estimate or elicit legislative preferences. Given these contrary assumptions, including the exclusion of the possibility of differential correction odds, it is not surprising that this prior piece failed to consider the possibility of preference-estimating or preference-eliciting default rules.

Even if the above assumptions of the rational actor models were realistic, any theory that assumes judges just maximize their own preferences cannot offer normatively acceptable guidance for future cases. This makes these models a poor choice for a legal theory to undergird current interpretation doctrine. They cannot offer that combination of descriptive accuracy and normative acceptability necessary to provide a viable legal theory.[70]

3. *The Inconsistency of Prior Models with Statistical Evidence.* — Still, one might wonder whether, even if not offering a normatively attractive legal theory, prior rational actor models are nonetheless descriptively the most accurate. I do not believe so, and the rest of this Article (coupled with the companion piece) provides a detailed account of the statutory doctrines to demonstrate the contrary: that instead these doctrines adopt either preference-estimating or eliciting default rules depending on which the conditions indicate would best maximize political satisfaction. But before delving into these concrete illustrations, it is worth pointing to some general statistical evidence that these alternative models are not descriptively accurate.

Most of these models essentially conclude that courts are either to the political left or right of the median legislator, ascertain how far they can push their own views without triggering a statutory override, and then come as close as possible to that line. A few others assume courts act as agents for an enacting legislature that is either to the right or left of the median current legislator and advance its views right up to the line in the same way. If either were true, and the models were also correct that courts can perfectly ascertain the preferences of political actors, then statutory construction cases should never be overridden.[71] Instead, they are overridden with surprising frequency.[72]

Of course, this invites the natural modification that courts try to maximize their own ideological preference satisfaction (or that of the enacting legislature) by coming close to the line that triggers override, but

69. Id. at 64–70.

70. See Elhauge, Preference-Estimating, supra note 2, Part I. **R**

71. See, e.g., Gely & Spiller, supra note 53, at 266 ("Congressional inaction will follow Supreme Court decisions, as these have already taken the composition of Congress into account."). **R**

72. See supra Part II.A.4.

sometimes they step over the line by mistake.[73] But even if this were the case, one would expect that, when the political views of judges and Congress coincide, the judges will not have to come even close to the line and are thus less likely to trigger override. But in fact conflicts between the ideological views of the court majority and Congress do not increase the likelihood of even congressional interest in considering overrides, let alone the likelihood of successful overrides.[74] This is consistent with the model here that judges are not following their own political preferences but are either following statutory meaning where ascertainable (which may sometimes provoke overrides because legislative views have changed), estimating political preferences (which may provoke overrides when current preferences cannot reliably be estimated or the reliable estimate proves mistaken), or are trying to elicit a legislative reaction (where meaning and preferences are unclear and a differential likelihood of legislative correction exists). In all these cases, the likelihood of override would not be expected to vary with political differences between the judges and legislature. Further, since the rational choice models posit that judges are at least trying to interpret statutes in ways that would be favored by a sufficient legislative faction to block override, these models should predict that, when judges err, the resulting statutory overrides would be partisan and controversial. In fact, one study shows that statutory overrides decrease during times of divided government and increase when the President and Congress agree,[75] and another study shows that only 26% of statutory overrides are on party-line votes, and "many (perhaps most) responsive statutes are not highly controversial."[76] The theory offered here is, in contrast, entirely consistent with the existence of bipartisan and noncontroversial statutory overrides.

Alternatively, some rational actor models would predict statutory overrides would always be led by interest groups, especially if judicial interpretations leaned against interest groups or reflected judicial preferences for advancing their conception of the public interest. Instead, only 44% of statutory overrides seem to involve the sort of concentrated benefits and diffuse costs taken to define interest group legislation.[77] The theory offered here can explain why courts choose not only statutory inter-

73. Another possibility is that courts try to make interpretations that avoid override, but legislative views later drift. However, half or more of statutory overrides occur within only two years of a Supreme Court decision. See supra note 42. **R**

74. Joseph Ignagni et al., Statutory Construction and Congressional Response, 26 Am. Pol. Q. 459, 473–77 (1998). Indeed, ideological divergence between the Supreme Court and the House actually decreased the likelihood of congressional response. Id. at 475. This evidence conflicts even more with the attitudinal hypothesis that judges just vote their own political preferences without considering legislative views, for that model would definitely predict that statutory overrides should increase with increased political divergence between the judges and legislature.

75. Id. at 478.

76. Solimine & Walker, supra note 33, at 449, 453. **R**

77. Id. at 449.

pretations that trigger overrides by interest groups, but also those that trigger the other 56% of statutory overrides by public interest groups.

Further, if statutory overrides resulted from judges mistakenly overreaching, one would think courts would avoid using canons of construction that predictably are more likely to trigger overrides. But, as we will see below, judges routinely employ canons—such as the rule of lenity, the rule favoring narrow constructions of antitrust or tax legislation, or the plain meaning rule—even though they are statistically more likely to trigger overrides.[78] And they continue to do so even after this tendency has been pointed out to them. In one famous case, the Court used the plain meaning canon to decide a case despite a dissent pointing out that six past uses of the plain meaning canon had led to statutory overrides.[79] Congress then overrode that case within a few months.[80] It seems very difficult to ascribe such practices to judicial mistakes.

Indeed, one study found that ten percent of Supreme Court statutory interpretations expressly invite congressional override—with seven percent of the invitations categorized as strong.[81] Such invitations appeared in the opinions of all the justices.[82] And opinions that invited congressional override were in fact twice as likely to be overridden.[83] To be sure, not all such invitations may reflect preference-eliciting default rules. A willingness to expressly call for override may also reflect the fact that the Court's interpretation was dictated by hermeneutic meaning, and that it wants to make clear to Congress that this does not mean any policy agreement with the conclusion. Hausegger and Baum present statistical evidence that such invitations are four times as likely when the interpretation conflicts with the ideological view of the majority coalition (but interestingly not when they conflict with the views of the majority opinion writer).[84] This study provides strong evidence that the justices feel constrained by the law.[85] Further, this study also shows such invitations to override are twice as likely when the case involves a legal area in

78. Infra Parts III–IV.

79. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 113–15 (1991) (Stevens, J., dissenting).

80. Solimine & Walker, supra note 33, at 432. Congress overruled *Casey* with the Civil Rights Act of 1991 § 113, 42 U.S.C. §§ 1988, 2000e-5(k) (2000). R

81. Lori Hausegger & Lawrence Baum, Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation, 43 Am. J. Pol. Sci. 162, 164 n.4, 165–66, 178 n.21 (1999). The figures in text only include invitations in majority opinions. If one includes invitations to override in concurring or dissenting opinions as well, then eleven percent of Supreme Court statutory interpretations contained strong invitations for Congressional override. Id.

82. Id. at 166.

83. Id. at 167. In addition to being inconsistent with the model in which judges vote to minimize the possibility of override, such invitations to override are also inconsistent with the attitudinal model that judges just vote to further their own preferences without considering the possibility of legislative reaction. Id. at 168, 181–82.

84. Id. at 174–77, 180–82.

85. Id. at 182.

which most cases involve circuit conflicts or when amicus briefs indicate a lot of political opposition to the Court's ruling.[86] These two variables both correlate to the advisability of a preference-eliciting default rule because the existence of a circuit conflict suggests uncertainty about meaning and preference-estimation and the opposition by amicus briefs suggests a greater likelihood that a group exists that can command the legislative agenda to secure override.[87] Since, as this study points out, 97% of statutory overrides go in the political direction opposite to that of the interpretation, the fact that invitations are more often issued when the interpretation conflicts with that of the majority coalition may (at least partly) reflect cases where the majority expected override because they realized Congress shared their general political views but were uncertain about the specifics and thus used a preference-eliciting default rule. Unfortunately, Hausegger and Baum do not measure the parallel political views of Congress so their study does not allow one to test that possibility.

A study that does measure congressional political views comes from Spiller and Tiller. As they note, the more politically divergent the House and Senate are, the more difficult it should be for them to override judicial interpretations. Thus, if judges were just adopting interpretations that reflected their own views, one would expect to see statutory overrides decline as political divergence between the House and Senate increased.[88] Instead, what the data shows is an inverted U curve whereby statutory overrides are low when political divergence is low, at first increase when divergence increases but after a point then decrease with further divergence.[89] Spiller and Tiller think this confirms their own thesis that judges maximize their own preferences but do so by strategically taking into account the predicted outcome of statutory override. But that conclusion rests on their mistaken premise that, when the House and Senate are not divergent, strategic preference-maximizing judges would never adopt an interpretation they know will be overridden because that cannot influence the final outcome.[90] In fact, a preference-maximizing court would in such a case realize that, since it cannot affect the final outcome, it should focus only on the interim outcome, which it can determine by choosing the interpretation that best matches judicial prefer-

86. Id. at 170–74, 180–81.

87. Hausegger and Baum themselves interpret the fact that most cases in the area involve circuit conflicts as meaning that the Court takes the cases out of duty rather than interest and thus has less interest in these cases. Id. at 170–72. But the evidence alone does not necessarily dictate that conclusion, and their reasoning that these are areas where the issue requires a complex technical response that judges are uncertain about fits well with a preference-eliciting model. Id.

88. Spiller & Tiller, supra note 59, at 509. **R**

89. Id. at 519–20. This data is thus inconsistent with the attitudinal (or nonstrategic) model that judges just vote their own preferences without considering the possibility of legislative reaction. Id. at 509, 519–20.

90. Id. at 509.

ences. Thus, under Spiller and Tiller's assumptions, one would not have expected to see the inverted U curve but to see overrides increase steadily with lower political divergence.

In contrast, the inverted U curve fits very well the model offered in this Article. Where political divergence between legislative chambers is low, courts will have less uncertainty about enactable preferences, and thus one would expect them to use preference-estimating default rules that do not trigger many statutory overrides.[91] Where political divergence within the legislature is higher but not great, then it is more likely that enactable preferences are uncertain but statutory overrides remain possible, so one would expect courts to be more likely to use preference-eliciting default rules that trigger more statutory overrides.[92] But once political divergence is great between legislative chambers that are required to act bicamerally, then legislative correction is too unlikely to merit use of a preference-eliciting default rule.[93] One would thus expect statutory overrides to be low again. All this is consistent with the inverted U curve we in fact see.

Prior interpretations of these statistics have been colored by the presumption that the only alternative to assuming that judges mechanistically apply legal rules is assuming that judges further their own political preferences either directly or strategically.[94] The question thus becomes which of those judicial models the data fits best. But those same statistics support a quite different conclusion when one also entertains the theory that in ambiguous cases legal default rules themselves provide for estimating or eliciting current political preferences when that would maximize political satisfaction.

III. Canons That Favor the Politically Powerless

If one's goal were solely to further the likelihood that the legislature preferred the interpretations being made, it would not make much sense to employ canons that favored the politically powerless. Legislative preferences are more likely to be furthered by favoring the politically powerful forces that most influence where enactable preferences lie. But in fact many statutory canons do favor the politically powerless, including the rule of lenity, presumptions against antitrust and tax exemptions, many applications of the constitutional doubts canon, and the canon favoring Indian tribes. While inexplicable as preference-estimating default rules, these canons can (where legislative preferences are uncertain) be explained as preference-eliciting default rules because they are likely to

91. See supra Part II.A.2.

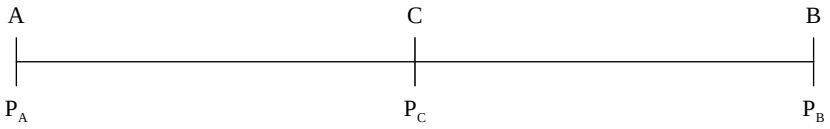
92. See supra Part II.A.4.

93. See supra Part II.A.4.

94. See Hausegger & Baum, supra note 81, at 168–77; Spiller & Tiller, supra note 59, at 507–11, 519–20. R

APPENDIX

1. *Only Two of Three Options Available to Interpreter.* — To extend the mathematical modeling of Part II to include a third option, suppose three interpretative options, A, B, and C, each of which represents a point along a policy continuum so that the further the point is away from the legislature's ideal point the more dissatisfied it is, and with C signifying some point between A and B. Suppose further that the probability of A matching legislative preferences is P_A, for B it is P_B, and for C it is P_C.



Let D_{AB} stand for (the absolute value of) the dissatisfaction resulting from a difference between the options A and B, with D_{AC} and D_{BC} meaning the same for the differences between options A and C, and B and C. Assume also that option C cannot be chosen by a court—normally because it involves a level of explicitly detailed lawmaking that cannot plausibly be deemed statutory interpretation.[410] For simplicity, assume that the odds that an option will stick uncorrected depend only on the starting point, so that P_{Astick} equals the probability that the legislature will fail to correct default choice A to statutory result B if B matches legislative preferences, and also equals the probability that the legislature will fail to correct default choice A to statutory result C if C matches legislative preferences.[411] Likewise, define P_{Bstick} as the probability that the legislature will fail to correct default choice B to either A or C when the latter match legislative preferences.

We can then express the expected legislative dissatisfaction from choosing either option as:

If A is chosen: $P_B P_{Astick} D_{AB} + P_C P_{Astick} D_{AC}$

If B is chosen: $P_A P_{Bstick} D_{AB} + P_C P_{Bstick} D_{BC}$

The court should thus choose A only if:

$P_A P_{Bstick} D_{AB} + P_C P_{Bstick} D_{BC} > P_B P_{Astick} D_{AB} + P_C P_{Astick} D_{AC}$, that is, if:

$P_{Bstick}(P_A D_{AB} + P_C D_{BC}) > P_{Astick}(P_B D_{AB} + P_C D_{AC})$, or

$P_{Bstick}/P_{Astick} > (P_B D_{AB} + P_C D_{AC})/(P_A D_{AB} + P_C D_{BC})$.

Since $P_A + P_B + P_C = 1$, we know that $P_C = 1 - P_A - P_B$. Thus this can be expressed as:

$P_{Bstick}/P_{Astick} > (P_B D_{AB} + (1 - P_A - P_B) D_{AC})/(P_A D_{AB} + (1 - P_A - P_B) D_{BC})$, or $P_{Bstick}/P_{Astick} > (P_B D_{AB} + D_{AC} - P_A D_{AC} - P_B D_{AC})/(P_A D_{AB} + D_{BC} - P_A D_{BC} - P_B D_{BC})$. Moreover, since C is some point between A and B, the distance from A to C, plus the distance from C to B, must add up to the distance

410. See, e.g., supra Part III (discussing *Keeler v. Superior Court*).

411. The analysis is more complicated mathematically, but qualitatively the same, if we assume that the odds of correcting A to B differ from the odds of correcting A to C.

between A and B. Thus, $D_{AB} = D_{AC} + D_{BC}$, and the above inequality is the same as:

$P_{Bstick}/P_{Astick} > (P_BD_{BC} + D_{AC} - P_AD_{AC})/(P_AD_{AC} + D_{BC} - P_BD_{BC})$.

For illustrative purposes, suppose C is some (unknown) point halfway between A and B, so $D_{AC} = D_{BC}$. Then the above inequality would be:

$P_{Bstick}/P_{Astick} > (P_B + 1 - P_A)/(P_A + 1 - P_B)$.

Say, for example, B were twice as likely to provoke legislative correction as A, this means A should be chosen only if:

$1/2 > (P_B + 1 - P_A)/(P_A + 1 - P_B)$, or

$P_A + 1 - P_B > 2P_B + 2 - 2P_A$, or

$3P_A > 3P_B + 1$, or

$P_A > (3P_B + 1)/3 = P_B + 1/3$.

Option B should be chosen if:

$P_A < P_B + 1/3$.

Can this be true even if $P_A > P_B$, so that B is a preference-eliciting default rule? Yes, as long as P_B (although less than P_A) is not more than 33% less likely to reflect legislative preferences. For example, if P_A = 60%, then any $P_B > 27\%$ suffices to choose B as a preference-eliciting default rule. Since $P_A + P_B$ cannot exceed 1, there is a cap to this. P_A must be less than 67%, or else there is no P_B that will suffice to justify the preference-eliciting default rule. Likewise, there is also a floor. Since P_B cannot be less than 0%, the inequality is always satisfied if $P_A < 1/3$. Thus, as long as the probability that A matches legislative preferences is less than 33%, the fact that A is half as correctable as B (coupled with the belief that some halfway option between A and B exists) means that B should be chosen no matter how much less likely than A it is that B matches legislative preferences.

2. *Modeling Interim Costs.* — To extend the mathematical modeling of Part II to include interim costs, suppose again two interpretative options, A and B, with P_A and P_B signifying the relative probabilities that each matches legislative preferences, P_{Astick} and P_{Bstick} equal to the probabilities that either would stick uncorrected, and D_{AB} meaning the legislative dissatisfaction that results when the wrong interpretation prevails. Let $P_{Acorrect}$ and $P_{Bcorrect}$ equal the respective probabilities that either option A or B will be corrected when they do not match legislative preferences, with $P_{Astick} + P_{Acorrect} = 1$, and $P_{Bstick} + P_{Bcorrect} = 1$. Let T be the proportion of legislative dissatisfaction that will be realized as a consequence of choosing the incorrect interpretive option. In general T will be an increasing function of time; that is, the longer it takes the legislature to correct the problem, the greater the damage the incorrect interpretation will be able to do. Thus if the legislature is able to preempt an incorrect interpretation before it has any effect, we will have T = 0. At the extreme, if by the time the legislature fixes the problem all of the damage

has been done (and cannot be undone through applying the fix retroactively), then T = 1.[412]

We can then express the expected legislative dissatisfaction from choosing either option as:

If A is chosen: $P_B P_{Astick} D_{AB} + P_B P_{Acorrect} D_{AB} T$

If B is chosen: $P_A P_{Bstick} D_{AB} + P_A P_{Bcorrect} D_{AB} T$

The court should choose option A if:

$P_A P_{Bstick} D_{AB} + P_A P_{Bcorrect} D_{AB} T > P_B P_{Astick} D_{AB} + P_B P_{Acorrect} D_{AB} T$, which can be rearranged as:

$P_A/P_B > (P_{Astick} + P_{Acorrect} T)/(P_{Bstick} + P_{Bcorrect} T)$

If T = 0, as with ex ante correction, this is the same as the inequality discussed in Part II: $P_A/P_B > P_{Astick}/P_{Bstick}$. But if the reaction is ex post, there will be some interim costs, and the inclusion of them into this equation allows us to see that they might dictate a different result. The greater T is, the easier the above inequality is to satisfy, which means the harder it is to justify a preference-eliciting default rule.

For example, suppose T = 0.5. Then the inequality becomes $P_A/P_B > (P_{Astick} + (0.5)P_{Acorrect})/(P_{Bstick} + (0.5)P_{Bcorrect})$. Since $P_{Acorrect} = 1 - P_{Astick}$, and $P_{Bcorrect} = 1 - P_{Bstick,}$ this is the same as:

$P_A/P_B > (P_{Astick} + (0.5)(1 - P_{Astick})) / (P_{Bstick} + (0.5)(1 - P_{Bstick}))$, or

$P_A/P_B > (P_{Astick} + 1)/(P_{Bstick} + 1)$

This inequality might be satisfied even though $P_A/P_B < P_{Astick}/P_{Bstick}$, which would satisfy a preference-eliciting default rule if interim costs were not considered. Suppose, for example, that the odds that A will stick uncorrected are 80% and the odds that B will stick uncorrected are 20%. Then, without interim costs preference-eliciting option B should be chosen whenever the confidence that A matches legislative preferences is less than 80%. But if one considers interim costs, then option A should be chosen if:

$P_A/P_B > (1.8)/(1.2) = 1.5$, or since $P_B = 1 - P_A$, whenever,

$P_A > 1.5 - 1.5\ P_A$, or

$2.5P_A > 1.5$, or

$P_A > 1.5/2.5 = 0.60$.

Thus, once interim costs are considered, the confidence that A matches legislative preferences would have to be less than 60% (rather than 80%) to justify a preference-eliciting default rule given B's advantage in eliciting a legislative reaction of 80% to 20%. Thus, for P_A's in the range of 60–80%, the preference-eliciting default rule makes sense without interim costs but not with them.

Indeed, one can show that (no matter what B's eliciting advantage) there will always be some set of cases where a preference-eliciting default rule makes sense without interim costs but not with them. Since $P_{Acorrect}$ =

412. At each point in time, T reflects the legislative discount rate for future events. T also reflects the extent to which the problem is retroactively correctable.

$1 - P_{Astick}$, and $P_{Bcorrect} = 1 - P_{Bstick,}$ the above inequality for choosing option A can be expressed as:

$P_A/P_B > (P_{Astick} + (1 - P_{Astick})\ T)/(P_{Bstick} + (1 - P_{Bstick})\ T)$, or

$P_A/P_B > (P_{Astick} + T - P_{Astick}\ T)/(P_{Bstick} + T - P_{Bstick}\ T)$.

There are values of P_A and P_B that satisfy both this inequality (and thus reject a preference-eliciting default rule given interim costs) and the inequality for a preference-eliciting default rule without interim costs as long as: $P_{Astick}/P_{Bstick} > P_A/P_B > (P_{Astick} + T - P_{Astick}\ T)/(P_{Bstick} + T - P_{Bstick}\ T)$, or as long as:

$P_{Astick}/P_{Bstick} > (P_{Astick} + T - P_{Astick}\ T)/(P_{Bstick} + T - P_{Bstick}\ T)$, which is:

$P_{Astick}\ (P_{Bstick} + T - P_{Bstick}\ T) > P_{Bstick}\ (P_{Astick} + T - P_{Astick}\ T)$, or:

$P_{Astick}P_{Bstick} + T\ P_{Astick} - P_{Bstick}\ P_{Astick}\ T > P_{Bstick}P_{Astick} + T\ P_{Bstick} - P_{Astick}\ P_{Bstick}\ T$, or:

$T\ P_{Astick} > T\ P_{Bstick}$, which is:

$P_{Astick} > P_{Bstick}$.

Since a greater likelihood that A will stick uncorrected than B is a necessary condition for a preference-eliciting default rule without any interim costs, as discussed above in Part II, there will always be a set of cases where the interim costs justify a switch from the preference-eliciting default rule B to the preference-estimating default rule A.

It is also the case that the greater T is, the harder it is to justify a preference-eliciting default rule. Suppose T = 0.2. Then the inequality becomes $P_A/P_B > (P_{Astick} + (0.2)P_{Acorrect})/(P_{Bstick} + (0.2)P_{Bcorrect})$, or:

$P_A/P_B > (P_{Astick} + (0.2)(1 - P_{Astick})) / (P_{Bstick} + (0.2)(1 - P_{Bstick}))$, or

$P_A/P_B > (4P_{Astick} + 1)/ (4P_{Bstick} + 1)$.

Then, if we again assume B's advantage in eliciting a legislative reaction is 80% to 20%, this indicates that a preference-eliciting default rule makes sense if:

$P_A/P_B > (4(0.8) + 1)/ (4(0.2) + 1) = 4.2/1.8 = 2.33$, or since $P_B = 1 - P_A$, whenever,

$P_A > 2.33 - 2.33\ P_A$, or

$3.33P_A > 2.33$, or

$P_A > 2.33/3.33 = 70\%$.

With lower interim costs of T = 0.2, then, the confidence that A matches legislative preferences need only be less than 70% to justify a preference-eliciting default rule rather than less than 80% (if T = 0) or less than 60% (if T = 0.5).

This confirms that the greater the interim costs, the greater the uncertainty about which option the legislature prefers that is necessary to justify choosing a preference-eliciting default rule. It can likewise be shown (if one keeps constant the odds of A matching legislative preferences) that the greater the interim costs, the greater the advantage in legislative override that will be necessary to justify choosing the preference-eliciting default rule.

The analysis so far has assumed that the interim costs are the same for either option. But in fact the interim costs may be higher for some options than others.[413] To the extent the preference-eliciting option can be corrected more quickly, or it imposes fewer interim costs that cannot retroactively be corrected, then the grounds for imposing the preference-eliciting default rule are stronger. Indeed, any advantage in the interim costs of correction can conceptually be treated the same as an advantage in the likelihood of legislative correction, with similar conclusions to those derived in Part II.

413. See supra Part V.