PREFERENCE-ELICITING STATUTORY DEFAULT RULES

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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-

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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-

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

elicit legislative reactions that more precisely indicate which preferences are enactable.

A. *The Rule of Lenity Re-Explained*

The rule of lenity provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[95] Thus, where criminal statutes are ambiguous, the effective default rule is to select the interpretation that provides the lowest possible penalty for the allegedly criminal act. Now, this hardly seems a plausible reading of likely legislative intent—neither in the hermeneutic sense nor in thinking about what result legislatures would generally prefer. Most legislatures and their polities are hostile to criminal defendants. If there is any serious politician running on a "soft on crime" platform, it has escaped my attention. True, here we are talking about conduct that is ambiguously criminal. But conduct that can reasonably be considered criminal is hardly politically popular, and certainly most criminal defendants are not. In part, this is because criminal defendants are chosen by prosecutors who themselves are politically accountable or appointed. Thus, if one had to make an educated estimate (and given the premise of ambiguity, one must), one might perhaps even conclude that in ambiguous cases the legislature would likely prefer a "rule of severity"—the greater punishment for the criminal defendant. It seems highly unlikely that any legislature is likely to prefer the weakest possible punishment. That is certainly true in most actual cases, where the rule of lenity benefits a criminal defendant who committed heinous acts.

Even if legislatures were not prone to lean against criminal defendants, a canon that always chose the narrow end of the range of possible meanings would systematically thwart legislative preferences compared to a canon that chose a moderate interpretation or whichever interpretation most likely reflects legislative preferences for that particular statute.[96] That is, rejecting a rule of severity could mean a rule of moderation or preference-estimation rather than a rule of lenity. This alternative default rule would seem particularly attractive because statutory ambiguity is often hard to anticipate or unavoidable given limited information and changed circumstances. Legislatures would probably prefer to have judges resolve such ambiguities rather than systematically leave important social problems unregulated whenever the inevitable ambiguities arose.[97]

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95. United States v. Bass, 404 U.S. 336, 347–48 (1971) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

96. See Elhauge, Preference-Estimating, supra note 2, Part IV (proving that when there are three interpretive options, the middle option minimizes political dissatisfaction if neither of the extremes is more than 50% likely to reflect legislative preferences); infra Part VIII.C.3 (showing why any rule other than preference-estimating increases expected political dissatisfaction). **R**

97. Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 354–56, 368–69.

But preference-eliciting analysis provides a ready justification for this counterintuitive canon. By providing the most lenient reading in ambiguous cases, the rule of lenity forces the legislature to define just how anti-criminal they wish to be, and how far to go with the interest in punishing crime when it runs up against other societal interests. If instead courts broadly (or even neutrally) interpreted criminal statutes in cases of ambiguity, this would often produce an overly broad interpretation that would likely stick because there is no effective lobby for narrowing criminal statutes that can generally influence legislative drafting or get on the legislative agenda to get a statutory override. In contrast, an overly narrow interpretation is far more likely to be corrected by statutory interpretation because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and can more readily get on the legislative agenda.

Empirical evidence about ex post correction supports this supposition. Statutory interpretations in criminal law are more likely to be legislatively overturned than any other type of statutory interpretation.[98] But the ability to secure legislative overrides is markedly one-sided. The Department of Justice criminal division has the best record of getting Congress to overturn adverse statutory interpretations, whereas criminal defendants have one of the worst success rates.[99] We would also expect this differential influence over the legislative process to apply ex ante in the initial drafting of legislation.

Consider *Keeler v. Superior Court,* which presented the question whether a murder statute that prohibited the "killing of a human being" covered the intentional killing of a viable fetus that the mother wished to carry to term.[100] The case involved a divorced man who, angry that his ex-wife was pregnant by another man, decided to "stomp it out" of her by

98. Eskridge, Overriding, supra note 25, at 344 tbl.4. Moreover, Eskridge's exhaustive study understated this phenomenon because it missed those legislative overrides of rule of lenity decisions that were not explicitly flagged in the legislative history. See, for example, Hughey v. United States, 495 U.S. 411, 422 (1990) (interpreting statute not to allow restitution for harms caused by conduct for which no conviction was obtained in plea bargain), a case partially overridden by the Crime Control Act of 1990, 104 Stat. 4789, 4863 (codified at 18 U.S.C. § 3663(a)(3) (2000)) (allowing restitution for harms caused by conduct for which no conviction was obtained if agreed to in plea bargain). **R**

99. Eskridge, Overriding, supra note 25, at 348 tbl.7, 362. True, this differential record standing alone could be explained as an effect of the rule of lenity, rather than a justification for it. Criminals might have little success in the legislature because they already had all ambiguities read in their favor, whereas prosecutors did not and are thus seeking legislation more likely to reflect legislative preferences. But in terms of organization and ability to testify before legislatures, criminal defendants are clearly far behind. In part this is because no one wants to identify themselves as likely enough to become indicted that they have an interest in the issue. Consistent with this, the legislative success rate of criminal defendants is far lower than other actors seeking to overcome other adverse statutory presumptions. Id. **R**

100. 470 P.2d 617, 618–19 (Cal. 1970).

kneeing her abdomen and fracturing the fetus's skull.[101] The statutory text was ambiguous: as a legal term, "human being" did not clearly cover or exclude a viable fetus that the mother intended to carry to term. There was some common law predating the statute that limited "murder" to killing a person born alive, but this reflected older medical technology that meant an unborn fetus was not viable; and other common law (without calling it "murder") nonetheless imposed the death penalty on those who killed a "quickened" fetus before birth, thus suggesting no practical difference.[102] Moreover, there was no doubt that the defendant's conduct was undesirable—horrifically so—no matter what views one holds about abortion. And while the abortion issue created substantial uncertainty about precisely which legal treatment of fetuses would best match enactable preferences, it seemed highly unlikely that any legislature—given the choice between letting the defendant get off on mere assault charges and imposing a sentence for murder—would choose the former. Why then interpret the ambiguous murder statute, as the California Supreme Court did, to exclude the defendant's actions?

What may best explain and legitimate the court's decision is that the California legislature responded within months with a statutory amendment overriding the case to make it "murder" to kill a fetus.[103] Because there was consensus that what the defendant did was egregiously wrong, and because prosecutors have ready access to the legislative agenda, it was readily predictable that the court's preference-eliciting default result would be overturned. But the resulting statutory amendment was a nuanced statute that offered a more accurate assessment (than courts could have ascertained or chosen as a legal interpretation) of then-prevailing political preferences in California on the boundaries between murder and abortion. This 1970 (pre-*Roe v. Wade*) amendment provided carefully defined exceptions for abortions to save the mother's life or with her consent, the latter nonetheless remaining punishable as a lesser offense.[104] Consider what likely would have happened if the court had instead ruled that the defendant's conduct constituted murder. The better result would have obtained in the case at hand. But in 1970 it was doubtful that pro-abortion political forces could have gotten on the legislative agenda to exclude abortion from the definition of murder, especially since abortion was a crime at the time (other than in cases to save the mother), albeit one punished less severely than murder.

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101. Id. at 618.

102. Id. at 624; id. at 630–31, 633 (Burke, J., dissenting).

103. Cal. Penal Code § 187 (West 1999) The 1970 amendment added words, italicized herein, to the provision: "Murder is the unlawful killing of a human being, *or a fetus,* with malice aforethought." Id.

104. Id. Consensual abortion was not murder but was then punishable by two to five years in prison under California Penal Code section 274. *Keeler*, 470 P.2d at 627, 631 n.2 (Burke, J., dissenting).

The phenomenon that applications of the rule of lenity often provoke legislative correction is hardly unique to modern times. Way back in 1765, Blackstone's Commentaries cited two cases for the rule of lenity.[105] In both cases, he noted that the rule of lenity decision provoked legislative override: In one case it "procured a new act for that purpose in the following year," and in the other case "the next sessions, it was found necessary to make another statute."[106] In neither case does Blackstone seem to treat the legislative override as a ground for criticizing the court's statutory interpretation. Rather, although Blackstone never explicitly says so, provoking a more precise definition of what the legislature wanted criminalized seems to be the desired effect.

1. *The Weakness of Alternative Justifications for the Rule of Lenity.* — There are alternative, more traditional, justifications for the rule of lenity. But their persuasiveness is dubious. Moreover, even if these alternative justifications were persuasive, they would extend at most to crimes that are mala prohibita (wrong because prohibited) and would exclude crimes that are malum in se (wrong by themself), a distinction that not only fails to fit the doctrine but turns out to be the opposite of how the doctrine is applied. Preference-eliciting theory better fits the pattern of cases, and provides a stronger justification, or at least an important supplemental rationale, that helps illuminate the doctrine.

a. *Legislative Supremacy.* — One alternative traditional theory, based on separation of powers and legislative supremacy, is that legislatures and not courts should define criminal law violations.[107] But this is a dubious argument for the rule of lenity. To interpret a legislatively enacted statute in line with the judge's best reading of what the legislature preferred in ambiguous cases is not the equivalent of creating a common law crime. The legislature has created the statute that effectively authorizes the judge to resolve the ambiguity, just as contracting parties create the contracts that authorize judges to resolve ambiguities in contractual text. No reasonable person thinks that the contract law commonly used to resolve contractual ambiguities means judges can just create contractual duties on their own initiative. Likewise, judicial resolution of statutory ambiguities does not tread on the legislative role, but rather executes the legislative instructions as best as judges can.[108]

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105. 1 William Blackstone, Commentaries *88.

106. Id.

107. E.g., United States v. Lanier, 520 U.S. 259, 265 n.5 (1997); United States v. Aguilar, 515 U.S. 593, 600 (1995); Dowling v. United States, 473 U.S. 207, 213–14 (1985); United States v. Bass, 404 U.S. 336, 348 (1971); *Keeler,* 470 P.2d at 620–22; see also John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 201–05 (1985) (collecting sources and discussing idea).

108. Even if allowing courts to interpret ambiguities in criminal statutes were viewed as a delegation to courts to fashion the details of criminal law, it is hardly clear why an antidelegation doctrine makes sense here when it has been abandoned elsewhere in law. See Jeffries, supra note 107, at 203 n.40; Kahan, supra note 97, at 348–49, 351–56, 367–81. Indeed, even as to crime definition, the antidelegation doctrine does not bar Congress **R**

If anything, legislative supremacy cuts the other way because the rule of lenity causes courts to systematically interpret criminal statutes more narrowly than the legislature likely would have wanted. This is true even if one assumes legislative preferences are probably at some middle point in the ambiguity spectrum, rather than at the pro-prosecution extreme.[109] Unless later overridden by more explicit statutes, rule of lenity interpretations will produce greater frustration of legislative preferences regarding criminal law than a rule of adopting the best estimate of what the legislature likely would have wanted. The rule of lenity thus cannot be justified as required by legislative supremacy. If the lenient interpretation sticks, it probably accomplishes precisely the opposite: thwarting legislative preferences. And the lenient interpretation is particularly likely to run contrary to legislative preferences when the crime is malum in se rather than mala prohibita.

b. *Legislative Under-Representation.* — Another alternative theory concedes that the rule of lenity thwarts legislative preferences, but applauds this, favoring the rule of lenity precisely because it embodies a substantive view contrary to likely legislative preferences. One version of this theory argues that the liberty interest of criminal defendants requires that all doubts be resolved in their favor.[110] This theory necessitates a substantive judgment that, where statutory meaning is ambiguous, the liberty interest of criminal defendants is stronger than the interest of their victims in vindication or of society in deterrence and incapacitation. Another version argues that judges should lean in favor of criminal defendants because they are "under-represented" in the legislative process.[111] Though this version sounds in process, in the end it rests on the same substantive

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from delegating to agencies the power to create rules whose violation then constitutes a crime. See, e.g., 15 U.S.C. §§ 78w(a), 78ff (2000) (giving agencies power to create rules governing securities). If agencies can define crimes out of whole cloth, it is hard to see why judges cannot do so while exercising their traditional interpretative role within the bounds of plausible statutory meanings. Notice concerns may persist, but at most require that any delegated power be exercised prospectively, and are weak on other grounds too, especially in malum in se cases. See infra text accompanying notes 114–120. **R**

109. See infra Part VIII.C.

110. See, e.g., *Bass*, 404 U.S. at 347–48; *Dowling*, 473 U.S. at 213–14 (stating that doctrine rests in part on "tenderness of the law for the rights of individuals" (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820))); Kahan, supra note 97, at **R** 349 n.14 (collecting sources). A variant of this argument might be that the "beyond a reasonable doubt" standard applicable to establishing the facts of a crime should also apply to establishing the law. See Gary Lawson, Legal Theory: Proving the Law, 86 Nw. U. L. Rev. 859, 894–96 (1992); Richard Friedman, Standard of Persuasion and the Distinction Between Fact and Law, 86 Nw. U. L. Rev. 916, 938–42 (1992). But once a court resolves a statutory ambiguity with a given interpretation, there is no longer any doubt about what the law is, just as any legal doubt is removed by a legislative decision resolving its own ambiguous political preferences. The argument must thus rest on a claim that judicial lawmaking to resolve legal doubts is less appropriate than legislative lawmaking, which is a claim I already addressed above.

111. E.g., Eskridge, Overriding, supra note 25, at 413; Kahan, supra note 97, at 349 **R** n.16 (collecting articles).

judgment. If the liberty interest of criminal defendants is given "appropriate" substantive weight by the legislature, then criminal defendants would not be "under-represented" but appropriately represented, and there would be no reason to resolve doubts about the extent of their liberty interest against likely legislative preferences.

Whichever version we stress, positions resting on such independent substantive views are hard to justify generally, and even harder to justify for this specific canon and case. The general problem is the political illegitimacy of imposing substantive judicial views designed to thwart the best estimate of political preferences, even if such thwarting occurs only at the margins of statutory interpretation.[112] To state that criminal defendants (or their liberty interests) are "under-represented" in the political process requires some normative baseline of the appropriate degree to which they (or their interests) should be represented, which in turn is indistinguishable from a normative view of the punishment in question.[113] Whatever the defects of the political process, there is little reason to think the judicial process is generally better at making such normative judgments, and even less reason to think it has been given authority to make them, absent some pertinent constitutional provision.

The more specific problem is even more devastating. Namely, the ambiguously criminal conduct exempted by the rule of lenity is generally undesirable and often heinous. Certainly the conduct in *Keeler* qualifies. Such conduct would presumably be condemned by any political or deliberative process—no matter how ideally everyone's interests were represented. Even if courts are justified in using the rule of lenity to exempt conduct whose undesirability is questionable, how can they possibly be justified in using it to exempt conduct whose undesirability is plain? In short, like the prior rationale, this under-representation theory cannot explain why the rule of lenity is applied not just to mala prohibita cases but to malum in se cases as well.

c. *Advance Specificity*. — A final alternative and traditional explanation is the advance specificity rationale. Ambiguous criminal statutes should be construed narrowly, the theory is, because otherwise criminal defendants will lack fair warning that their conduct is criminal, and suffer arbitrary or discriminatory enforcement.[114] Ehrlich and Posner offer the

112. See Elhauge, Preference-Estimating, supra note 2, Part II; infra Part VIII. One might of course be worried that the estimation is uncertain, which is precisely why preference-eliciting makes sense. R

113. See Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1072–76 (1980); cf. Elhauge, Interest Group Theory, supra note 14, at 48–66 (noting that same is true for arguments that interest groups are "over-represented"). R

114. E.g., United States v. Lanier, 520 U.S. 259, 265–66 (1997); United States v. Aguilar, 515 U.S. 593, 600 (1995); *Bass*, 404 U.S. at 347–48; McBoyle v. United States, 283 U.S. 25, 27 (1931); Keeler v. Superior Court, 470 P.2d 617, 626 (Cal. 1970); Jeffries, supra note 107, at 205–06, 212–15; Kahan, supra note 97, at 349 n.14 (collecting sources and discussing idea). R

related argument that without advance specificity criminal sanctions would excessively deter desirable activity because of the severity of criminal sanctions, the inability to insure against them, and the greater risk aversion of those who engage in desirable conduct within the ambiguous zone.[115] Advance specificity provides the requisite notice, constraints on enforcement, and minimization of uncertainty risks.

In fact, there is probably much more undesirable activity than desirable activity in the zone of ambiguity surrounding any criminal statute, suggesting that Ehrlich and Posner's concerns about ambiguity overdeterring desirable activity are probably less weighty than concerns that clarity might create loopholes that underdeter undesirable activity.[116] This also means that providing fair advance warning and restraining enforcement discretion can only be purchased at the cost of helping wrongdoers circumvent the law by searching for ambiguities they can exploit. But even if Ehrlich and Posner's empirical assumption were correct, or the cost of additional bad behavior were considered worth bearing to vindicate the principles of fair warning and limited enforcement discretion, these advance specificity arguments would not explain the rule of lenity for the following reasons.

To begin with, if advance specificity were really the problem, courts could just apply a non-narrow interpretation prospectively. This could be accomplished by, for example, holding that the non-narrow interpretation is correct for future cases but violates due process under the void-for-vagueness doctrine as applied retroactively. Advance specificity arguments provide no reason to also narrow the statute prospectively, which requires the legislature to correct the narrow interpretation for future cases. Any non-narrow interpretation adopted prospectively by the courts would itself have to be sufficiently definite to provide advance notice, constrain enforcement discretion, and minimize risk aversion. But whether it does so is a matter resolved not by the rule of lenity but by the void-for-vagueness doctrine, which clearly—and correctly—provides that a (prospectively applied) judicial interpretation that itself is not vague cures any vagueness or fair warning problem in the original statute.[117]

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115. Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 262–63 (1974).

116. See Bundy & Elhauge, supra note 43, at 308–09, 323–27. **R**

117. *Lanier*, 520 U.S. at 266–68; Wainwright v. Stone, 414 U.S. 21, 22–23 (1973). For these reasons, I would reject the suggestion by some that the rule of lenity might be required by the due process clause. See William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 600 (1992); Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2093–94 (2002). Any due process concerns would be fully vindicated by a judicial decision that adopts a clear evenhanded interpretation for prospective application (and thus provides the requisite notice to future criminals), but holds that the past statutory ambiguity means the statute cannot be applied to past cases under the void-for-vagueness doctrine. Further, the relevant notice concerns are weak, for reasons discussed in the following text.

Nor can the rationales for advance specificity persuasively justify even the retroactive application of the rule of lenity in *Keeler*, or in malum in se cases generally. The *Keeler* defendant surely never read the California criminal code to ascertain whether his conduct would be treated as murder before he stomped his pregnant ex-wife to kill the child in her womb. Had the code specifically called his conduct murder, he thus still would not have had actual notice about it. This is generally true in malum in se cases—the criminal code is rarely read by criminals, and thus advance specificity in the statutory code cannot normally provide them with notice nor lessen their risk aversion.[118] Moreover, the rule of lenity does not apply if the statutory ambiguity can be resolved by resort to legislative history, contemporaneous practice, prior caselaw, and legal or historical dictionaries—none of which can supply the necessary notice since the average citizen is even less likely to have read and understood such specialized legal materials.[119]

As for the risk of arbitrary and discriminatory enforcement, that would seem equally curbed by the prospect of nonarbitrary and nondiscriminatory judicial interpretation that will be retroactively applied to any enforcement decision. Prosecutors tempted to enforce statutes in an arbitrary or discriminatory manner will be deterred if they anticipate regular and evenhanded judicial interpretations, and juries with similar temptations will be constrained by jury instructions that provide the requisite specificity. Thus, even as applied to retroactive interpretations, concerns about unbridled enforcement discretion justify statutory interpretations that eliminate the ambiguity, but not statutory interpretations that always lean in favor of criminal defendants.[120]

Finally, the *Keeler* defendant knew his conduct was horribly wrongful, as do other defendants in malum in se cases. Why should any defendant have a right to engage in clearly wrongful behavior just because the criminal code's applicable provision was insufficiently clear? Where conduct is clearly wrongful, notice of the obvious is unnecessary, concerns about deterring desirable activity are misplaced, and enforcement discretion re-

118. Even if Keeler and others were in the habit of perusing the criminal code and caselaw before assaulting ex-wives, he would have received clear notice that his conduct was illegal, at a minimum as assault and an illegal abortion. He thus could not claim the law lulled him into thinking his conduct was permissible. Nor could Keeler claim that interpreting the murder statute to cover his conduct would have enlarged the scope of even that statute more than notified individuals could have foreseen. For his hypothetical legal research would have uncovered caselaw holding that murder included the killing of a viable fetus in the process of being born, and suggesting in dicta that it included killing any viable fetus. See, e.g., People v. Chavez, 176 P.2d 92, 94–95 (Cal. Ct. App. 1947). Caselaw at the time also unambiguously provided that the very same conduct Keeler engaged in would have been murder if the fetus had later been born alive and then subsequently died from the cracked skull. See id. Thus, a notified defendant would have known that his conduct was likely murder, and certainly would be murder under circumstances that the defendant should have known were a foreseeable consequence of his conduct.

119. Jeffries, supra note 107, at 205–12; see also infra note 134. **R**

120. A similar point is made by Jeffries, supra note 107, at 220–23. **R**

quires no curbing because of a societal consensus that the conduct is wrongful. Like the other rationales, then, the advance specificity argument is especially weak whenever persons are engaged in conduct that is malum in se.

2. *Explaining the General Pattern of Rule of Lenity Cases.* — In addition to better explaining the rule of lenity generally, preference-eliciting theory helps explain something about its application that is inexplicable under the traditional theories. These traditional theories indicate that the rule of lenity is strongest in mala prohibita cases and weakest in malum in se cases, which has led many scholars to suggest its application should be limited to the former.[121] But the actual doctrine does not draw this distinction. Indeed, the pattern of application is precisely the reverse. The rule of lenity is applied more consistently to malum in se offenses than mala prohibita ones.

Regulatory crimes like antitrust and securities violations are often defined with enormous ambiguity, yet the rule of lenity is rarely applied to them. In antitrust, for example, the Supreme Court has held that defendants can be criminally liable for violating the rule of reason, which is notoriously ambiguous.[122] It had no trouble rejecting a rule of lenity argument. Similarly, securities law has for decades allowed prosecutions for insider trading based on very ambiguous statutory language. Perhaps most strikingly, for one decade defendants were routinely convicted for trading on "misappropriated" information even though the law was sufficiently ambiguous that the only applicable Supreme Court ruling had split four to four on whether misappropriation was covered by the securities statute.[123] At the end of the decade, the Supreme Court interpreted the statute to cover misappropriation, totally ignoring a dissent objection that the rule of lenity should have precluded the result.[124] Why is this? Both crimes are mala prohibita rather than malum in se: scholarship is split on whether either is even wrongful let alone inherently criminal.[125]

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121. See, e.g., Dickerson, supra note 24, at 208–11. **R**

122. See Nash v. United States, 229 U.S. 373, 376–78 (1913). The Department of Justice Manual generally limits enforcement to conduct that is clearly unlawful, known to be unlawful, intended to suppress competition, or a repeat offense. 2 Phillip E. Areeda, Roger D. Blair, & Herbert Hovenkamp, Antitrust Law ¶ 303, at 29 (2d ed. 2000). But even these categories are not so clear. Moreover, the Department does not limit its enforcement to per se violations and reserves the right to prosecute other cases as antitrust violations. Id. ¶303, at 29–30 & n.9. Indictments have even been sustained against agreements that other district courts found legal under the rule of reason. Id. ¶ 303, at 30.

123. Carpenter v. United States, 484 U.S. 19 (1987).

124. See United States v. O'Hagan, 521 U.S. 642, 650 (1997); id. at 680 (Thomas, J., concurring in the judgment in part and dissenting in part).

125. For works arguing that many antitrust rule of reason violations should be legal, see, e.g., Robert H. Bork, The Antitrust Paradox 288–98 (1978); Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 9–14 (1984); Richard A. Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 14–18 (1981). For works arguing that insider trading may be desirable, see, e.g., Stephen M. Bainbridge, Securities Law: Insider Trading 127–39 (1999); Frank H. Easterbrook &

They thus involve the strongest case for applying the rule of lenity under traditional rationales. So these traditional rationales cannot provide the explanation for why in practice they are the sorts of cases in which the rule of lenity is least likely to be applied.

But preference-eliciting analysis can. Recall that the premise of applying the rule of lenity as a preference-eliciting default rule was that those seeking a broader construction could easily obtain legislative correction to avoid an excessively narrow interpretation, whereas those seeking a narrower construction could not obtain legislative correction to avoid an excessively broad interpretation. When business regulation is at issue, such a premise would be misplaced. Businesses often have enough political influence to get involved in legislative drafting or be placed on the legislative agenda, or to block prosecutors from securing legislative language or overrides to correct narrow constructions of business regulations (or resolve initial ambiguities), especially regulations that impose criminal sanctions.[126] As shown in Part II, unless businesses and prosecutors have different odds in procuring a statutory override, a preference-eliciting default rule cannot be justified. Indeed, cases where organized business interests are arrayed against prosecutors generally reflect the sort of conflicted demand that is least likely to lead to legislative action or correction in either direction.[127]

Because in these cases prosecutors are less able to correct any ambiguity or judicial underconstruction, it makes less sense to adopt a default rule that automatically construes statutes against prosecutors, which might well leave society stuck with a likely bad statutory result. Instead,

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Daniel R. Fischel, The Economic Structure of Corporate Law 256–59 (1991); Henry G. Manne, Insider Trading and the Stock Market vii–viii, 80–90, 110, 116–19 (1966); Dennis W. Carlton & Daniel R. Fischel, The Regulation of Insider Trading, 35 Stan. L. Rev. 857, 861, 894–95 (1983); Henry G. Manne, In Defense of Insider Trading, Harv. Bus. Rev., Nov.–Dec. 1966, at 113–22. The federal mail and wire fraud statutes, and thus RICO, have also been given expansive readings in the face of ambiguous statutory language, covering not only misappropriation but a range of other ambiguously defined misconduct. See *Carpenter*, 484 U.S. at 28; Jeffries, supra note 107, at 199 n.26; Kahan, supra note 97, at 373–81. Moreover, although common law fraud seems malum in se, statutory fraud extends far beyond to include all acts by which undue advantage is taken of another, and the particular line to draw about what counts as fraud is highly regulatory and malum prohibitum, extending for example to misuse of confidential information and depriving another of the intangible right of honest services. Kahan, supra note 97, at 374–75. Scholarly opinion is split on whether many forms of statutory fraud should be criminal at all. See, e.g., John C. Coffee, Jr., Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It, 101 Yale L.J. 1875, 1878–79 (1992). R R

126. See Eskridge, Dynamic, supra note 54, at 153 (reporting study showing that business lobbies have more ability than typical criminal defendants to get adverse statutory interpretations reversed in Congress). R

127. See Hayes, supra note 34, at 93–126; Eskridge, Overriding, supra note 25, at 365–67 (noting that such conflicted demand meant both the U.S. Department of Justice and business interests were able to secure considerable legislative attention and support for efforts to overturn adverse interpretations of antitrust or RICO, but conflict between them meant neither could succeed in securing legislative override of adverse decisions). R

courts should adopt the interpretation they think best estimates legislative preferences because any decision the court makes will likely remain uncorrected, and should thus come as close as possible to likely political preferences. Or, the court should do so because errors in either direction are equally likely to be corrected by the legislature, so there is no reason to bias interpretation in either direction. That appears to be what the Supreme Court has largely done by generally declining to apply the rule of lenity to business crimes.

3. *Opting Out of the Rule of Lenity.* — Another explanation for the non-use of the rule of lenity in the areas of antitrust, securities, and federal fraud is that statutory ambiguity in these areas reflects not unintended unclarity, but intentional delegation. Many view antitrust, securities, and federal fraud law as areas where Congress has intentionally delegated to federal courts the power to devise and revise rules of conduct in common law fashion.[128] If so, these are areas where Congress understood the ambiguity and clearly indicated that it wanted courts to resolve it, not to return the matter to Congress. This, Congress has every right to do. For under the theory here put forth, the rule of lenity is merely a default rule, and like all default rules this one should operate only if the relevant actor does not opt out of it. Here, the enacting legislature has by hypothesis effectively opted out by indicating it wanted courts to exercise judgment rather than narrow the statute and return it to the legislature. Of course, such delegation also likely means the criteria for the preference-eliciting default rule are not met because the legislature normally delegates matters it is unlikely to reconsider. On either ground, this is unlike *Keeler* or other cases of unintended unclarity in criminal statutes where there is no reason to think the legislature intended to delegate the issue to courts.[129]

This raises the interesting question: should a legislature be able to opt out of the rule of lenity, not only for its particular statutes, but for criminal statutes generally? Most state legislatures have arguably tried to do that by enacting statutes directing courts to give a "fair" construction rather than a narrow construction of their criminal statutes.[130] This included *Keeler* itself, where California had the typical statute providing:

> The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.[131]

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128. See Kahan, supra note 97, at 371–81 (reviewing Congress's history of delegating criminal fraud law to the courts); supra text accompanying note 17 (collecting sources viewing antitrust laws as delegation to courts). **R**

129. In an illuminating article, Dan Kahan advocates wholesale repudiation of the rule of lenity as an interference with legislative delegation to courts, but this rests on his implicit premise (wrong in my view) that *all* cases of ambiguity in criminal statutes involve intentional delegations. Kahan, supra note 97, at 348–49, 353–54. **R**

130. Jeffries, supra note 107, at 204 & n.41. **R**

131. Cal. Penal Code § 4 (West 1999).

But as *Keeler* suggests, such general statutes have not been much of an obstacle to application of the rule of lenity.[132]

In part this is because what these statutes arguably meant to overturn was something far broader than the rule of lenity: a rule of strict construction that would narrowly interpret any statute whose text was less than crystal clear even if the ambiguity seemed strained or resolvable through extra textual sources. This strict construction doctrine was based on substantive opposition to what courts considered legislatures' excessive willingness to use capital punishment.[133] The rule of lenity, in contrast, does not come into play unless a genuine ambiguity exists,[134] and (properly understood) aims to produce an ultimate set of statutory results that maximize the satisfaction of legislative preferences.

But suppose we do read such a statute as intending to overturn the rule of lenity itself? Even then, the judicial resistance that has occurred is understandable. The problem is that the legislature enacting such a statute would be opting out of the default rule not only on behalf of itself and a particular statute intended to delegate power to courts, but also on behalf of future legislatures and for any statute with unintended unclarity where legislative preferences were uncertain. Further, these are factors that raise problems for any effort to opt out of a preference-eliciting default rule.

Even if we put aside the effect on future legislatures and polities, the problem remains that, given one-sided political access to the legislative agenda, politically favored groups will (without a preference-eliciting default rule) enjoy statutory results that on average exceed their actual political influence and ability to enact favorable legislation. This is because, without the preference-eliciting default rule, when a court resolves ambiguous statutory meaning and uncertain legislative preferences, it will err equally for and against the politically advantaged but the errors that go for them will remain uncorrected. Statutory results will thus on average be skewed in their favor in ways that deviate from actual enactable preferences. Opting out of a preference-eliciting default rule would thus allow the legislature to interfere with the polity's interest in having the statutory results that most precisely correspond to its preferences.

These effects grow even more serious when one considers their implications for future legislatures and polities. They mean future courts would face a choice between applying the preference-eliciting default

132. This phenomenon is not unique to California. By 1985, nineteen states had enacted such legislation without causing courts to abandon the rule of lenity. See Jeffries, supra note 107, at 198 n.25. **R**

133. Id. at 198.

134. Recognizing this distinction was a Senate Report that proposed a statute with similar "fair import" language. See S. Rep. No. 96-553, at 22 (1980). The avowed aim was to repeal whatever vestiges remained of the doctrine of strict construction of criminal statutes. S. Rep. No. 95-605, at 23 (1977). But the Senate Report recognized that this differed sharply from "lenity," which applied only if ambiguity persisted after reference to all extratextual sources of meaning. Id. at 24.

rule that they thought was best calculated to produce maximum satisfaction of enactable preferences, and using the default rule preferred by a past legislature that neither enacted the future statute being interpreted nor represents current legislative preferences. To instruct courts not only about what the legislature means for its own statutory language but how it should interpret future legislatures' statutes would thus interfere with the prerogatives of future legislatures, and the satisfaction of its political preferences. A future legislature could, to be sure, enact legislation to amend the rule of interpretation to restore the preference-eliciting default rule. But the very nature of the one-sided political demand at issue should block that issue from reaching the legislative agenda. Further, the future legislature may never have thought about the matter, may not believe that the benefits to itself outweigh the decisionmaking costs, or may not be able to form sufficient agreement on an alternative rule or to overcome procedural obstacles or effective supermajority requirements.

None of this necessarily dictates a black and white choice that the rule of lenity or other preference-eliciting default rules either are legislatively immutable or not.[135] Interpretive statutes may quite helpfully modify various canons without undermining their preference-eliciting function, and the analysis here would offer no reason to question such legislative opt-outs. Further, before reaching any constitutional issues, the interpretive statute must itself be interpreted, and we need default rules for doing that as well. Since any legislative opt-out of a preference-eliciting default rule would predictably reflect the same sort of one-sided political demand that justifies that rule, the default rule for interpreting the opt-out naturally should also be the preference-eliciting one of interpreting the opt-out narrowly. That appears to be what we have seen in actual practice, as the courts have not outright invalidated legislative efforts to opt out of the rule of lenity, but have universally given them a narrow reading.

Where a legislature does clearly enact an interpretive statute that aims to undermine the preference-eliciting function of a statutory canon like the rule of lenity, however, that type of opt-out arguably violates whatever constitutional clauses in the particular jurisdiction vest legislative authority in each generation's legislature and interpretive authority in the courts.[136] This is not to say that an opt-out of this sort cannot be done. But given the fact that such an opt-out may interfere with the political satisfaction of multiple legislatures and the constitutional power of judges to interpret statutes to advance the enactable interests of the polity, it may not be proper for such an opt-out to be done through legisla-

135. I thus differ from Rosenkranz, who assumes in his rule of lenity analysis that the constitutional issues devolve to such a binary choice. See Rosenkranz, supra note 117, at 2094, 2097–2101. R

136. See Elhauge, Preference-Estimating, supra note 2, Part V.E.5 (discussing possible constitutional limitations on legislative adoption of interpretive rules generally opting out of default rules designed to maximize political satisfaction). R

tion by one legislature. It arguably requires a constitutional amendment that can not only alter the judicial function but bind future legislatures and polities. Even if a single legislature were not constitutionally prohibited from adopting such an opt-out, the theory here would certainly indicate that such an opt-out is inadvisable, and thus recommend against it.

4. *Explaining the Seemingly Inexplicable.* — The above analysis indicates that preference-eliciting analysis can help explain what has been criticized as the notoriously random and inconsistent invocation of the rule of lenity.[137] Not that this, or any theory, can possibly hope to justify every application of the canon. Like all canons, the rule of lenity is often applied formalistically or incorrectly, with an incorrect application for a preference-eliciting default rule being a case where legislative reconsideration seems highly unlikely. Or sometimes the canon is applied (more or less as a makeweight) to confirm a conclusion about statutory meaning or likely legislative preferences that really rests on independent grounds. In such cases, the lenient interpretation can be expected to stick, and must be justified on grounds other than preference-eliciting analysis.[138]

Still, preference-eliciting analysis can help explain otherwise inexplicable patterns and seeming inconsistencies in the rule of lenity's application. Preference-eliciting analysis can also help explain the increasingly tough standard for the ambiguity needed to invoke the rule of lenity. Preference-eliciting default rules depend critically on the supposition that the legislature can correct overly narrow interpretations of criminal laws with relative ease. If the legislature cannot do so, then the rule of lenity is far less persuasive. The increasing burdens on legislatures created by the growing complexity of modern life tend to make it harder and harder to get the legislature's attention. It is thus not surprising that the U.S. Supreme Court has increasingly stressed that a statute must be not just ambiguous to merit the rule of lenity, but so ambiguous that "we can make 'no more than a guess as to what Congress intended.'"[139] As shown in Part II, when legislative preferences are really *that* uncertain, then a preference-eliciting default rule can be justified even when the odds of legislative override are slight, as long as those slight odds favor prosecutors.

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137. E.g., William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1083 (1989); Jeffries, supra note 107, at 198–200, 219; Kahan, supra note 97, at 346 & n.3. R R

138. For example, although the rule of lenity was invoked to conclude that a statute which prohibited "false statement[s]" or "overvalu[ing] property" did not cover writing a check with insufficient funds, Williams v. United States, 458 U.S. 279, 288 (1982), that conclusion was independently supported both by statutory language and by legislative history indicating that this interpretation likely conformed to legislative preferences. Id. at 284–90. This was borne out when Congress amended the statute without overruling this interpretation. Act of Oct. 12, 1982, Pub. L. No. 97-297, § 4(b), 96 Stat. 1317, 1318 (codified as amended at 18 U.S.C. § 1014 (2000)).

139. Reno v. Koray, 515 U.S. 50, 65 (1995) (quoting Ladner v. United States, 358 U.S. 169, 178 (1958)).

B. *Other Canons Favoring the Politically Powerless*

1. *The Presumptions Against Antitrust and Tax Exemptions—And the General Issue of Interest Group Influence.* — Antitrust law features powerful presumptions against interpreting any federal statute to create an antitrust exemption and for narrowly construing any exemption that is created.[140] Likewise, state legislation must clearly authorize any state regulatory action to immunize that action from federal antitrust invalidation.[141] In tax law, statutes are construed not to provide a tax exemption in ambiguous cases.[142] These default rules do not seem to reflect what a legislature would generally want. More likely, the legislature was trying to favor supporting constituencies or interest groups with regulatory protections or tax breaks. Indeed, the antitrust presumption applies even if it appears Congress intended to repeal the antitrust laws unless that intent is "clear."[143] Likewise, the tax default rule applies even against evidence that Congress most likely would have wanted to grant the tax exemption in question, unless such an intent has been "unambiguously" shown.[144]

What could justify such default rules? The best explanation is that the constituencies and interest groups that can obtain antitrust and tax exemptions are likely to be able to have enough influence over initial legislative drafting or future legislative agendas to make that exemption explicit.[145] A preference-eliciting default rule that burdens them is thus likely to result in more explicit legislation that makes sure they would be able to get their exemption through Congress, and that better defines the precise extent of that exemption. A default rule that broadly interpreted antitrust or tax exemptions would, in contrast, put the burden of securing legislative correction on consumers and other taxpayers, who are too numerous and diffusely interested in the question to organize effectively.[146] Such a statutory result is thus unlikely to be corrected even

140. E.g., Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378, 388–89 (1981); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979).

141. See S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57, 60–61, 62–63 (1985).

142. United States v. Wells Fargo Bank, 485 U.S. 351, 354–55 (1988).

143. *Nat'l Gerimedical*, 452 U.S. at 389.

144. *Wells Fargo Bank*, 485 U.S. at 354–59.

145. See Eskridge, Overriding, supra note 25, at 348 (organized business groups are second only to the U.S. Government in their success rate at getting statutory interpretations overridden by Congress); Solimine & Walker, supra note 33, at 446 (cases that interpret taxation and economic regulation against business interest groups are overridden at a higher rate). For example, the decision denying a tax exemption in United States v. Hendler, 303 U.S. 564 (1938), was legislatively overridden in 1939. See Gen. Couns. Mem. 34,483 (Apr. 21, 1971), available at 1971 WL 28973. R R

146. See Elhauge, Interest Group Theory, supra note 14, at 35–39. One might think that the choice of default rule does not matter because the interest groups will win no matter what default rule is chosen. But the empirical literature indicates interest groups are even more effective in blocking government action than in securing it. See Schlozman & Tierney, supra note 36, at 314–15, 395–96, 398. In securing the actual enactment of a statute, the interest group must offer some minimal satisfaction to their less well-organized R R

though the prevailing political preferences would, if put to the test, either not enact the exemption or would narrow its scope.

We might generalize these two canons into a more general preference-eliciting default rule. Namely, where statutory meaning is ambiguous, legislative preferences are unclear (even though they likely favor a special interest group), *and* that special interest group has a significant advantage in commanding the legislative agenda compared to those favored by an alternative interpretation, then the interpretation disfavoring that special interest group should be chosen.

In contrast, when the ambiguity in a tax statute concerns not whether a particular set of taxpayers is entitled to a special exemption but rather the general scope of tax liability for all taxpayers, the default rule is the opposite one of interpreting the statute to favor the taxpayer.[147] This too is justified on preference-eliciting grounds because here the affected taxpayers are a large diffusely interested group less able to command the legislative agenda than the IRS, which is normally closely involved in annual tax legislation.[148] Like other agencies, the IRS can also through proper regulation establish a reliable current preferences default rule under the *Chevron* doctrine, and thus this canon favoring taxpayers on matters of general tax liability is limited to cases where the regulations as well as the statute are ambiguous.[149] But where no clear regulation exists, it makes sense (as with the rule of lenity) to elicit an official government action that provides a more precise measure of the current constellation of political forces.

The approach here differs from prior proposals by many prominent scholars that courts should narrowly interpret all special interest legislation that benefits concentrated (and thus well-organized) interests over diffuse (and thus poorly organized) interests.[150] These proposals were based on the premise that such special interest legislation was normatively undesirable and thus judges should narrow them when they can. I

(but often more numerous) opponents, but in blocking enactment they often need not offer any.

147. United Dominion Indus. v. United States, 532 U.S. 822, 838–39 (2001) (Thomas, J., concurring) (collecting cases); id. at 839–41 & n.1 (Stevens, J., dissenting) (collecting cases).

148. See, e.g., May v. Heiner, 281 U.S. 238, 245 (1930) (applying canon that "doubt must be resolved in favor of the taxpayer"), overridden by Act of Mar. 3, 1931, ch. 454, 46 Stat. 1516 (1931) (codified at 26 U.S.C. § 2036(a) (2000)).

149. *United Dominion*, 532 U.S. at 838–39 (Thomas, J. concurring) (stating that canon favoring taxpayers only applied when the "provision of the Code and the corresponding regulations are ambiguous"); Elhauge, Preference-Estimating, supra note 2, at VII (explaining how *Chevron* doctrine provides a current preferences default rule). R

150. Frank H. Easterbrook, The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 15–18 (1984) [hereinafter Easterbrook, Foreword]; William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 279, 298–99, 303–09, 324–25 (1988); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 407, 471, 486 (1989) [hereinafter Sunstein, Interpreting Statutes].

have previously rejected such proposals as unjustified because they are intended to shift to judges lawmaking power over those cases that the political process cannot overturn quickly,[151] and because nothing in interest group theory justifies normatively disfavoring interest groups or suggests the litigation process would be less susceptible to their influence.[152] These proposals for narrow construction also extend to cases where it was fairly clear what the likely meaning or legislative preference was, but some narrow construction was conceivable.

In contrast, I restrict the application of this preference-eliciting default rule to cases where there is genuine unclarity about what the legislature meant or would prefer, and the legislature is likely to correct the statutory result dictated by the default rule. The point is not to curtail special interest group power, but to test just how powerful the interest groups are (and get more explicit instructions of what the political process wants) by requiring that power to be exercised and weighed against other interests. Nor is the point to shift power from legislatures to judges less susceptible to interest group influence, but to the contrary to get the legislatures to act explicitly because they can more precisely weigh that influence.

Unlike the prior proposals to interpret statutes against interest groups, this preference-eliciting logic does not imply any normative condemnation of interest groups versus other groups. Indeed, the preference-eliciting logic is equally applicable to any other group (special interest or public interest) with enough influence over the legislative agenda that we can feel fairly confident legislative reconsideration will ensue ex ante or ex post. One such public interest group is the anti-criminal lobbying group, whose influence justifies the rule of lenity.[153] Another is the IRS, which represents us all, but whose ability to set the agenda (especially for its own regulations) justifies the canon favoring taxpayers on general issues of tax liability.

In short, the aim of preference-eliciting default rules that disfavor interest groups is not to curtail excess interest group influence, but to accurately measure the degree of that influence. It thus does not rest on any normative claim that interest groups are "over-represented." It rests rather on the notion that their influence over the legislative agenda requires and justifies putting the default burden against them to procure legislative correction. The same would apply to any public interest groups that also enjoy similar advantages in legislative access.

2. *Applications of the Constitutional Doubts Canon That Favor the Politically Powerless.* — The canon against interpretations raising constitutional doubts has long had an attraction that seems to exceed the strength of its justifications. The canon cannot really be justified on constitutional

151. Elhauge, Interest Group Theory, supra note 14, at 46–47. **R**

152. Id. at 48–87.

153. See supra Part III.A.

grounds since it only has bite when the statute is not constitutionally invalid. Nor can the canon generally be justified as reflecting likely legislative preferences.[154] But in some applications the canon favors groups that have had a systematic disadvantage in securing access to the legislative agenda. These applications can be justified as a preference-eliciting default rule.[155]

For example, one recent case concerned whether a statute should be interpreted to preclude habeas corpus review of the deportation of a resident alien.[156] The Court rejected that interpretation, citing the canon against interpretations raising constitutional doubts, as well as a more specific canon requiring a clear statement to repeal habeas review.[157] Even if such a limit on habeas review were not constitutionally invalid, such a decision can, where statutory meaning and legislative preferences are unclear, be justified on preference-eliciting grounds because aliens who might face deportation have poor access to the legislative agenda.[158] This is consistent with a more specific canon that instructs courts to construe statutory ambiguity in favor of aliens in deportation cases.[159]

More generally, many constitutional laws can be understood as intended to protect discrete and insular minorities that have little access to the legislative agenda.[160] The notion that being a discrete and insular minority entitles a group to normative protection from legislation has been criticized because often such a minority deserves to be treated badly, such as with the class of people who are professional burglars.[161] But when the canon against constitutional doubts is used to protect such groups, it serves an important preference-eliciting function without necessarily offering such groups any absolute normative protection from this type of legislation. This can be true for racial or religious minorities that are politically disadvantaged, or marginalized political groups. Even if legislation that burdens them is not unconstitutional under the First or Fourteenth Amendments, using the canon against constitutional doubts to interpret ambiguous legislation not to burden them where legislative preferences are unclear usefully results in more precise legislation. This is also even true for less normatively attractive groups, like burglars, as the above analysis of the rule of lenity explained.

This does not mean that all discrete and insular minorities merit a preference-eliciting rule. As Professor Ackerman has pointed out, being

154. See Elhauge, Preference-Estimating, supra note 2, Part III.A.2. **R**

155. Other applications of this canon can be explained as evidencing a supplemental default rule. See infra Part VII.

156. INS v. St. Cyr, 533 U.S. 289 (2001).

157. Id. at 298–300.

158. See generally Graham v. Richardson, 403 U.S. 365, 372 (1971) (concluding that "[a]liens as a class are a prime example of a 'discrete and insular' minority").

159. Fong Haw Tan v. Phelan, 333 U.S. 6, 9–10 (1948).

160. See United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 75–77 (1980).

161. See Tribe, supra note 113, at 1072–76. **R**

discrete and insular might sometimes confer an advantage in political organization, as with interest groups.[162] Others may not have an advantage but do have enough influence that issues affecting them are better characterized as reflecting conflicted political demand. Some inquiry thus needs to be made into whether the particular sort of group really suffers a significant political disadvantage that creates a differential likelihood of legislative correction that cuts against the group.

Nor does the above analysis mean that all applications of the constitutional doubts canon can be justified in preference-eliciting terms. To begin with, a necessary predicate is uncertainty about legislative preferences.[163] Further, even when legislative preferences are uncertain, a preference-eliciting default rule would be inappropriate (even though constitutional difficulties exist) where the issue is one marked by conflicted political demand. For example, abortion rights certainly raise constitutional difficulties, but legislation on that topic is characterized by highly conflicted demand between pro-life and pro-choice forces. Consistent with this, the Court declined to apply the constitutional doubts canon to a statute it felt was best interpreted to forbid government funding of programs that gave abortion advice.[164] Other applications of the canon must be justified, if at all, as supplemental default rules used in cases where legislative preferences cannot be reliably estimated or elicited.[165]

3. *The Canon Favoring Indian Tribes.* — Another canon that has no roots in constitutional law, but that provides similar protection to a discrete and insular minority, is the canon that ambiguous statutes and treaties should be construed to favor Indian tribes.[166] This canon goes back to 1832,[167] when congressional policy was not exactly pro-Indian, and seems unlikely to generally reflect congressional preferences, which even in modern times would presumably prefer a more neutral interpretive stance. Nor was the canon ever justified as reflecting congressional preferences. Instead, the justification given was that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."[168] This justification seems to directly acknowledge the lack of political influence Indian tribes and their allies have historically had.

This does not mean that Indian tribes are entitled to be normatively favored if Congress has reached a considered judgment to adopt a constitutionally valid statute that burdens them. "The canon of construction

162. Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 722–31 (1985).

163. See Elhauge, Preference-Estimating, supra note 2, Part III.A.2. **R**

164. Rust v. Sullivan, 500 U.S. 173, 190–91 (1991).

165. See infra Part VII.

166. Bryan v. Itasca County, 426 U.S. 373, 392–93 (1976).

167. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552 (1832).

168. Choate v. Trapp, 224 U.S. 665, 675 (1912)

regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."[169] In the terminology of this Article, the statutory meaning and legislative preferences must first be unclear. Where they are unclear, the canon favoring Indians can fulfill its preference-eliciting function. The rationale is not that Indian tribes should always be favored—there are after all competing interests in all these cases. It is rather that, since Indian tribes are unlikely to be able to reverse a statute interpreted to burden them, adopting the opposite interpretation is more likely to lead to legislation that makes it precisely clear the extent to which Congress really intended statutory results that imposed such burdens.

IV. Linguistic Canons of Construction: Patterns in the Use of Canons and Counter-Canons

There are also many linguistic canons of construction whose application can often be explained as a preference-eliciting default rule. Here we must come to grips with Karl Llewellyn, who famously claimed that every canon lies in conflict with a counter-canon, and that courts pick and choose among canons in ways that seem arbitrary under the formal logic of the canons.[170] In fact, the conflict was overstated, since many of Llewellyn's counter-canons merely defined the grounds for rebutting a presumption established by the canon, or defined limits to the scope of that canon.[171] There is nothing inconsistent with adopting a presumption about legislative meaning that is rebuttable by clear evidence of a contrary legislative meaning. But nonetheless, some of the canons do seem to be in formal conflict, and courts sometimes apply a canon in one case and then ignore it in others. What, for example, is one to make of a judge who in some cases applies the canon that a statute that identifies certain applications means to exclude others, and in other cases applies the canon that a statute that identifies certain applications can mean to include analogous unidentified applications that further the same statutory purpose?

Preference-eliciting analysis provides a possible explanation. Applying each linguistic canon sometimes reflects a sensible preference-eliciting default rule, but other times does not. Thus, the fact that the canons are not always applied is not a reasonable ground for criticism. What such nonuniform application means, rather, is that the canons must be supplemented with a better theory of when the canons should be applied. Notwithstanding reductionist characterizations of Llewellyn, this appears

169. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986).

170. Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401–06 (1950).

171. Of the 28 canon pairs that Llewellyn asserted were in conflict, canon pairs 2–11, 13–19, 21, and 23–27 are of this variety, and arguably canon pair 28 is as well, depending on the meaning given to a statute's "equity." Id.

to be what he meant, though his "situation-sense" theory for guiding canon application was certainly vague.[172] Preference-eliciting analysis, I propose, provides a better theory for guiding canon application. The seemingly uneven application of canons is often not a mark of arbitrariness, but of selectively applying the canons when they are most appropriate. Of course, courts often get it wrong, but the canons are not nearly as open-ended and conflicting as might otherwise appear.

A. *Identifying Applications Excludes Additions or Includes Them by Analogy?*

One of the more famous (and frequently employed) linguistic canons of construction is expressio unius est exclusio alterius, or the expression of one thing excludes others.[173] Under this canon, statutory language identifying certain statutory applications excludes the possibility that the statute covers unidentified applications. For example, if a statute lists certain conditions under which an insured loses its right to collect insurance, that excludes other conditions under which an insured might lose its right to collect insurance.[174]

As a hermeneutic theory of statutory meaning, this canon rests on the assumption that, if the legislature meant to include the unidentified applications, it would have listed them with the identified applications. One might be tempted to respond that, if the legislature meant to exclude other applications, it could have added language doing so, but David Shapiro persuasively argues that a legislature changing the law naturally (and by linguistic convention) focuses on what it is changing.[175] Still, a canon that draws sharp implications from silence remains hermeneutically dubious.[176] A legislature may not realize everything it is changing. Any omission may instead reflect simple inadvertence, a failure to focus on details or foresee the issue, or changed circumstances that create new applications of the same statutory concept. Such statutory language may also indicate an intent to identify examples and inclusions rather than limitations and exclusions. Indeed, omissions can be intentional without signaling an intent to exclude. They might instead reflect an unwillingness to incur the legislative costs of drafting for every conceivable contingency and getting agreement on such resolutions, or perhaps even an affirmative legislative desire to sidestep the issue of the statute's precise meaning and delegate it to the courts. For all these reasons,

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172. Id. at 397–401.

173. Id. at 405 (canon 20); 2A Norman J. Singer, Sutherland Statutory Construction § 47.23, at 216–17 (5th ed. 1992) [hereinafter Sutherland].

174. Hawkeye Chem. Co. v. St. Paul Fire & Marine Ins. Co., 510 F.2d 322, 326–27 (7th Cir. 1975).

175. David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. Rev. 921, 928 (1992).

176. For academic critiques on this score, see, e.g., Richard A. Posner, The Federal Courts: Crisis and Reform 282 (1985); Sunstein, Interpreting Statutes, supra note 150, at 455–56. **R**

the canon often will not accurately reflect legislative meaning or purpose. Moreover, the canon seems to lie in formal conflict with a counter-canon: that the identification of certain applications may indicate a statutory purpose that extends by analogy to unidentified applications.[177]

By seeing the canon as a preference-eliciting default rule, one can make more sense of it and its ostensibly uneven application. Where statutory meaning is unclear and the appropriate conditions for a preference-eliciting approach hold, the canon helps elicit a more precise reading of enactable preferences. If the political forces that can or could have included the omitted application have influence over the legislative agenda or drafting, and their opponents do not, then it makes sense for judges to exclude the application. Such exclusion is justifiable even if the court thinks the legislature most likely would have voted for the excluded application, because exclusion forces the legislature to explicitly make that choice and remove all doubt. Such explicit legislative choices will reflect the governing political forces more accurately than judicial guesses about what those choices would have been. They will also make sure that other affected parties have an opportunity to weigh in and deliberate on the matter.

But where the conditions for a preference-eliciting default rule do not hold, the counter-canon makes more sense. Legislative correction (during drafting or after the interpretation) may be unlikely for the type of statute at hand, or unnecessary because the court feels highly confident about what the legislature meant or would have wanted. Or it may be that either side affected by the choice of meaning can equally correct any default rule, so that there is no reason to apply a preference-eliciting default rule that burdens one of the affected sides. If so, the legislature should generally prefer that any gaps or ambiguities created by its failure to statutorily anticipate every contingency be filled in by judicial determinations of which result was most likely to advance legislative preferences. Such judicial determinations will often be wrong, but on balance they are more likely to be right than a blanket assessment that the legislature *always* means to exclude all unidentified possibilities. As the counter-canon suggests, sometimes this inquiry into what the legislature would have wanted will also support excluding the unidentified application, but other times it will not.

Thus, a court is not being inconsistent if it applies the exclusion canon in cases that satisfy the conditions for a preference-eliciting default rule, but applies the opposing canon in other cases that should be resolved by a preference-estimating default rule. If one examines the cases Llewellyn cites for this proposition, it turns out they fit this pattern.

The case Llewellyn cites for the exclusion canon held that a statute giving an annexing municipality a share of a partially annexed municipal-

177. See Llewellyn, supra note 170, at 405 (canon 20); Sutherland, supra note 173, § 47.25, at 234. **R**

ity's "real property" excluded any possibility the annexing municipality was entitled to a share of the annexed municipality's personal property.[178] Since annexing municipalities are highly influential in legislatures, one would expect this result to be reconsidered if it did not reflect legislative preferences. And in fact the legislature overrode it four months later with a statutory amendment entitling the annexing municipality to a share of the partially annexed municipality's "personal property" as well.[179] The court might well have guessed this would be the legislative preference because the statute provided for the division of liabilities and it would be odd to have a regime that divided the liabilities of a partially annexed municipality but not its assets.[180] Such a regime would create an incentive for municipalities to borrow money to fend off annexation. But the matter was in some doubt, as was the precise manner of division the legislature would prefer, for the division of personal property could not be limited to the division of property "in the territory annexed" (as was real property under the statute) because personal property is movable and often intangible.[181] Since municipalities that are the object of successful annexation votes are (almost by definition) politically weak, it was unlikely that a court decision to divide their personal property would have been revisited had it been in error. By instead putting the burden of securing explicit legislative action on annexing municipalities, the court provoked the creation of a statute that eliminated any doubt about legislative preferences and provided a more precise resolution of how the legislature wanted to deal with the complexities raised by the movable and intangible nature of personal property. Thus, here application of the canon admirably served a preference-eliciting purpose.

In the case Llewellyn cites for the opposing canon, the court held that a congressional statute that constituted the Philippine government did not, by listing the appointments the Governor General had power to make, exclude other appointments from his executive power.[182] Here, a preference-eliciting default rule of excluding the other appointments from the Governor General's power seemed unlikely to provoke congressional correction, for the statute in question was the Organic Act, which filled a role similar to a state constitution and whose structural provisions were never amended.[183] Moreover, the Supreme Court expressly noted that Congress had taken no action in the eleven years since the Philippine executive had been deprived of this appointment authority.[184] This was rejected as inadequate evidence of legislative acquiescence, but it also meant the Court knew it could not rely on Congress to revisit a Supreme

178. City of Detroit v. Township of Redford, 235 N.W. 217, 218–19 (Mich. 1931).

179. Act of May 29, 1931, No. 233, § 2250, 1931 Mich. Pub. Acts 408, 408.

180. Act of June 2, 1909, No. 279, § 14, 1909 Mich. Pub. Acts 509, 509.

181. Id.

182. Springer v. Philippine Islands, 277 U.S. 189, 206–07 (1928).

183. Id. at 200; see Organic Act, ch. 416, 39 Stat. 545 (1916).

184. *Springer*, 277 U.S. at 208.

Court decision approving the exclusion of this appointment power as a preference-eliciting default rule. Thus it was a more appropriate case for the preference-eliciting default rule reflected in the opposing canon.

Certainly, I am not claiming that every case to cite one of these canons fits this pattern. Any effort to derive statistical correlation faces problems. These canons are often used as makeweight, to support conclusions otherwise merited on independent hermeneutic grounds. Other courts use them formalistically or incorrectly, reaching random or unjustifiable conclusions. But preference-eliciting reasoning does offer a theory to explain many results, including those that Llewellyn himself focused on as inconsistent, and can help produce more consistent future results if applied in good faith by the courts.

B. *Does Specific Statutory Language Limit General Language to Applications of the Same Kind or Not?*

Closely related to the last canon is another canon designed to deal with situations where statutory language identifying specific statutory applications is accompanied not by silence but by words of generalization. This canon is ejusdem generis (of the same kind), and it provides that statutory language identifying specific applications limits more general language to applications of the same kind.[185] Thus, in a statute that defined "hotel" to "include inn, rooming house, and eating house, or any structure where rooms or board are furnished," the canon meant that this definition did not include hospitals—even though they are literally "structure[s] where room or board are furnished" —because hospitals are not the same kind of structure as hotels and rooming houses.[186]

This canon is, if anything, more dubious than the last from a hermeneutic point of view. The addition of more general language might instead signal an intent to add something broader than the meaning already conveyed by prior language. After all, one normally adds a word like "such" before "other" if one means to confine the more general language to similar applications. Moreover, all the arguments that applied to the exclusion canon apply here as well, for this canon also seeks to an infer an exclusion—here from generality rather than from silence. Indeed, the addition of general language following specific applications might well reflect an affirmative legislative strategy for coping with problems of inadvertence, unforeseeability, and change, or for defining areas of clear legislative agreement without resolving other areas of possible disagreements about statutory meaning. Not surprisingly, this canon too has its counter-canon: that the more general words can indicate a statutory purpose to broaden the scope of the statute.[187]

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185. Llewellyn, supra note 170, at 405 (canon 22); Sutherland, supra note 173, § 47.17, at 188. R

186. Hull Hosp., Inc. v. Wheeler, 250 N.W. 637, 638 (Iowa 1933).

187. Llewellyn, supra note 170, at 405 (canon 22); Sutherland, supra note 173, § 47.22, at 210. R

But application of the canon can make sense as a preference-eliciting default rule. Using general words after more specific language often creates ambiguity about statutory meaning that requires some default rule. Where the conditions for a preference-eliciting default rule hold, the canon usefully forces the legislature to be explicit about just how far it wants to take any generalization from the specifically resolved statutory applications. The burdened political group can, if the narrow reading of the general language does not meet prevailing political preferences, obtain legislative correction to broaden it, or to at least include the application in question. But if the conditions for a preference-eliciting default rule are not met, then any statutory interpretation out of line with prevailing political preferences will not be revisited. Instead it will likely stick, and thus the Court must do its best to determine how the legislature would have wanted the general language interpreted in the case at hand.

Again, if one examines the cases that Llewellyn cites as indicating opposing canons, they support this preference-eliciting analysis. For the ejusdem generis canon, he cites the case noted above that excludes hospitals from the language "any structure where rooms or board are furnished" because that language follows more specific references to hotel-like structures. The effect was to deny hospitals a lien available to hotels.[188] As one might expect, the hospital lobby did not have great difficulty getting on the legislative agenda, and this decision promptly provoked a legislative reaction creating a hospital lien within a year.[189] And just as one wants with a preference-eliciting default rule, the provocation to legislative action prompted the realization that hotel and hospital liens should differ in their nature, and thus created a statute that recognized this difference (creating a lien on damage recoveries rather than on belongings) and provided statutory detail about how the lien could be enforced. Such nuance would have been difficult for any court to provide through statutory interpretation.

The cases Llewellyn cites for the counter-canon do not seem to involve preference-eliciting situations. One concerned a federal statute that exempted transactions approved by ICC order "from the operation of the antitrust laws . . . and of all other restraints or prohibitions by or imposed under authority of law, State or Federal."[190] The Supreme Court rejected the ejusdem generis canon's implication that the general language exempted the railroad only from statutes similar in kind to antitrust laws, and held that it also exempted the railroad from state regulations that inefficiently required the railroad to keep duplicative offices in that state.[191] The Court seemed right that rejecting the canon better fit the legislative purpose of lowering transportation costs. Nor was applica-

188. *Hull Hospital*, 250 N.W. at 639.

189. Act of Mar. 10, 1934, ch. 131, § 1, 1934 Iowa Acts 255, 255–57 (codified as amended at Iowa Code Ann. § 582.1–582.4 (West 1992)).

190. Texas v. United States, 292 U.S. 522, 534 (1934).

191. Id.

tion of the canon likely to further preference-eliciting purposes, because it is extremely difficult to get on the congressional agenda to protect a large diffuse group (railroad consumers) by eliminating inefficient regulation that benefits a concentrated local group. The other case concerned a state statute that taxed "kerosene," defining it to include various heating, lighting, and motor oils, or any substance that met certain scientific tests.[192] The defendant was a seller of paint solvent that met the scientific test who argued that it nonetheless should be restricted to oils similar in kind to heating, lighting, and motor oils. The court rejected application of the ejusdem generis canon, noting that here the scientific test was not more general but more specific, and that the structure did not suggest a legislative intent to narrow its meaning. It might also have added that a preference-eliciting default rule was not warranted because it is seldom easy to get on the legislative agenda to add a new tax on a concentrated group like paint solvent dealers. Thus, the court could have little confidence that any tax exclusion of paint solvent dealers would be reconsidered by the legislature if it did not meet legislative preferences.

C. *Plain Meaning or Legislative Purpose and History?*

Canons providing that one cannot go beyond the text and its plain meaning are often set against counter-canons providing that one can go beyond the text if the statutory purpose (perhaps indicated by the legislative history) indicates the contrary, or if the literal language would produce an absurd result.[193] This brings us close to a hermeneutic dispute about statutory meaning, but suppose for a moment that (after applying whatever combination of text, purpose, or legislative history you prefer) you find the resulting meaning unclear, and thus need to reach the question of what default rule to employ. The default rule that looks at what the legislature would have wanted is likely to look to legislative purpose or history or absurdities because, even if they do not indicate statutory meaning, they are highly relevant to the underlying political preferences.[194] Where the purpose, history, or absurdity is clear, then the court knows what the legislature would have wanted, and there is little cause to apply a preference-eliciting default rule. But where they are unclear, then a court might well be uncertain about what the legislature would have wanted, and thus have good grounds to use a preference-eliciting default rule of relying only on the plain meaning of the text. This makes sense if the group harmed by such an interpretation has enough legislative influence that it could have put the issue in the text or can easily command the legislative agenda to put it in the text now. But absent such conditions, a preference-eliciting default rule makes little sense, and

192. Grosjean v. Am. Paint Works, 160 So. 449, 452–53 (La. Ct. App. 1935).

193. Llewellyn, supra note 170, at 401–03 (canons 1 & 12). **R**

194. See Elhauge, Preference-Estimating, supra note 2, Part III. **R**

the court might as well rely on all indicia (inside or outside the text) that indicate what the legislature likely would have wanted and make the best estimate it can.

Here, the cases cited by Llewellyn are consistent with this thesis but not so illuminating.[195] Of greater interest are two of the most famous cases for the opposing canons—the snail darter case and the case of the murdering inheritor—which Ronald Dworkin juxtaposed in a famous argument against the plain meaning canon.[196] These cases, which Dworkin persuasively shows are irreconcilable on interpretive grounds, can be both explained and strongly justified by preference-eliciting analysis.

The snail darter case applied the plain meaning canon to interpret the Endangered Species Act, which prohibited carrying out federal projects that "jeopardize[d] the continued existence" of an endangered species or "result[ed] in the destruction or modification of habitat of such species."[197] As a $100 million dollar dam was nearing completion, it was discovered that the dam would do precisely that to the snail darter, an endangered species. The question, in the words of Ronald Dworkin, was whether this Act required halting "a vast, almost finished federal power project to save a small and ecologically uninteresting fish."[198] The Supreme Court held that it did. This result certainly did not indicate the Court's view of sound policy, for it explicitly lamented the result on policy grounds. Nor did it reflect likely political preferences, for Congress had continued massive appropriations for the dam after learning of its impact on the snail darter. But the Court held it was nonetheless warranted by the plain meaning rule, which prevented the Court from creating an ex-

195. One employed the canon that one cannot go beyond statutory text to refuse to add judicial rules for coordinating separate statutes that authorized: (1) judgment lien suits against debtors (who then died) and (2) executor suits to settle the estate. First Nat'l Bank of Webster Springs v. De Berriz, 105 S.E. 900, 901 (W. Va. 1921). The decision did in fact provoke a legislative correction within a couple of years that provided better guidance about how to coordinate such suits, W. Va. Code Ann. § 44-8-7 note (Michie 1997) (noting 1923 amendment was added in response to *De Berriz*), and perhaps creditors were a sufficiently organized group that they could have been expected to command the legislative agenda to clear up the confusion. But the case does not recount enough facts to make that clear. The other case Llewellyn cited for the plain meaning rule in fact concerned the non-plain meaning question whether a statute giving certain "public lands" to railroads included lands held by others under disputed grants from the Mexican government. Newhall v. Sanger, 92 U.S. 761, 761 (1875). The only tangential reference in the case to the plain meaning rule was in a discussion about a statute not subject to litigation that excluded (from a definition of other lands) lands claimed under any foreign grant or title. Id. at 765. The Court rejected the assertion that this analogous statute meant only to exclude lands "lawfully" claimed because "there is no authority to import a word into a statute in order to change its meaning." Id. But this tangential reference did not bear on the statute actually being adjudicated and thus did not invoke a plain meaning rule in any way that might trigger a legislative reaction.

196. Ronald Dworkin, Law's Empire 15–23, 313–54 (1986).

197. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 153 (1978).

198. Dworkin, supra note 196, at 313. **R**

ception for relatively unimportant species who were holding up enormous, nearly completed projects.

Such compunctions about plain meaning did not seem to trouble the court in the case of the murdering inheritor. There the statute provided that a properly executed will transferred the deceased's property to the named beneficiaries.[199] The question was whether this statute governed even when the named beneficiary had murdered the deceased to prevent him from revoking the will. The court conceded that, "if literally construed," the statute dictated giving the murderer the property, for it contained no exception for murdering inheritors.[200] But the court declined to follow the plain meaning rule, and instead applied the countercanon that a literal interpretation would not be followed if contrary to the lawmakers' intention. Here there was no direct evidence of a contrary intention, but the court was confident that "it never could have been their intention" to allow murderers to inherit from their victims, and that "[i]f such a case had been present to their minds, . . . it cannot be doubted that they would have provided for it" by excluding murderers from the statute.[201]

To Dworkin, the murdering inheritor case is a Herculean triumph, the snail darter case a formalistic mistake. Both cases featured plain language that seemed to dictate a bad result for which the statute provided no exception. But in neither case was there any indication that the legislature had thought about the bad result and desired it. The snail darter case seems, if anything, a stronger case for excluding the bad result, for there a subsequent legislative committee had thought about the matter, and decided the project should proceed. But Dworkin is right only if we assume that the court's role is *solely* to determine what statutory result best fits the likely political convictions or preferences of the legislature. Consider instead how the cases look when one takes into account preference-eliciting analysis.

The Supreme Court could have tried to create a (preference-estimating) exception in the snail darter case, but there would have been two problems with this approach. The smaller problem is the Court could be pretty sure, but not 100% sure, that Congress would approve the exception. A congressional appropriations committee had decided to proceed with the project despite the snail darter, but that does not mean that a statutory amendment of the Endangered Species Act could have gotten past the relevant environmental committee or the rest of the enactment process. And while the Court and Dworkin seem convinced the snail darter was "ecologically uninteresting," all endangered species must be ecologically interesting to some extent. One man's snail darter is another man's snow leopard. But this smaller problem pales before the bigger

199. Riggs v. Palmer, 22 N.E. 188, 189 (N.Y. 1889).

200. Id.

201. Id.

one: What exactly would a judicially created exception have looked like? The Court could hardly have interpreted the Endangered Species Act to mean that federal projects cannot jeopardize an endangered species "except the snail darter." It would instead have had to interpret the words of that Act to define some general parameters for when the ecological interest in preserving a species should be deemed outweighed by the cost and size of the project. There seems no way for the Court to have defined such an exception without embroiling the courts in open-ended tradeoffs between project and species importance, which courts lack the budgetary, scientific, and political expertise to make. And any defined exception would have erred to some extent in identifying the precise balance of prevailing political preferences on such tradeoffs. Thus, there was inevitably a great deal of uncertainty about just what rule to choose under a preference-estimating approach.

The case was thus an appropriate one for a preference-eliciting default rule *if* the Court could be confident that application of the plain meaning canon would prompt legislative correction. Here that seemed likely because the project was strongly favored by powerful legislators. Just to be sure, the Court majority and dissent both explicitly called on Congress to override by statute the Court's own ruling.[202] They were not disappointed. Congress immediately did just that, creating both a general exception through a statute authorizing an agency to make exemptions to the Act, and overturning the result in the snail darter case in particular.[203] Thus, the Court's use of a preference-eliciting default rule not only removed all doubt that proceeding with the project satisfied political preferences, but provoked more explicit legislation creating a detailed mechanism for a politically accountable agency to make exceptions. Note also that the Court's default rule allowed Congress to override the particular result and complete the project. Had the Court instead chosen to allow the project to proceed but been mistaken about legislative preferences, it would have left Congress unable to overturn the particular result—for, once extinct, the snail darter could not have been resurrected. Thus, if the interpretation turned out not to match legislative preferences, the interim costs would be much lower for the Court's plain meaning interpretation than for the contrary interpretation.

The case of the murdering inheritor was entirely different. Presumably, any decision allowing the murderer to inherit would also have prompted a quick legislative override. But why bother? Allowing a murderer to inherit from the one he murdered is absurd, and the court could be 100% sure no legislature would want that result. The court applied precisely such a standard in concluding that the legislature "never" would

202. 437 U.S. at 195 (majority); id. at 210 (dissent).

203. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, 3755–60, 3761 (codified as amended at 16 U.S.C. §§ 1531–40 (2000)); Energy and Water Development Appropriation Act, Pub. L. No. 96-69, 93 Stat. 437, 449 (1979) (codified as amended at 16 U.S.C. § 1539 (2000)).

have intended that result and that "it cannot be doubted" the legislature would provide the exception if presented with the question.[204] Nor did the court have any great difficulty defining the exception the legislature would have created since it merely required a holding that murderers cannot inherit from their victims. This was not an issue presenting serious social tradeoffs for which the precise balance of political powers was relevant. In short, while the anti-murder lobby was doubtless influential enough to override any failure to create an exception, there was no earthly reason to stomach the wrong result in the interim. Other potential murders might even be encouraged by the reward of inheritance before the corrective legislation could be enacted. And the legislature could never correct the wrong result in the case at hand, for once the murderer took the property, any legislation stripping him of that property would be an unconstitutional taking of property and ex post facto punishment. The interim costs of an interpretation mistakenly favoring murdering inheritors would thus be high. Accordingly, this was a poor case for any preference-eliciting function that the plain meaning rule might provide, and it is not surprising that the court instead went with a preference-estimating default rule.

More systematic empirical evidence helps support the thesis that the plain meaning canon often serves a preference-eliciting function, though the proposition cannot ultimately be proven statistically. What the empirical evidence shows is that statutory interpretations that rely on the plain meaning canon are the *most* likely to be overriden by Congress, more than three times as likely as interpretations that rely on legislative history or statutory purpose.[205] This suggests the plain meaning canon serves a preference-eliciting function more often than other forms of statutory interpretation. But it is also true that most plain meaning decisions are not overridden by Congress, or even scrutinized. In many cases, this may merely mean that the plain meaning rule successfully produced ex ante precision. But other times it may simply mean the canon was used to correctly derive statutory meaning, employed as a makeweight for interpretations justifiable on other grounds, or involved formalistically and arbitrarily in ways that may or may not serve preference-eliciting functions. The raw numbers do not distinguish among these possibilities, and thus the proposition that the plain meaning canon often serves preference-

204. *Riggs*, 22 N.E. at 189.

205. Eskridge, Overriding, supra note 25, at 350 tbl.8 (showing that from 1978 to 1984, out of 48.5 Supreme Court statutory interpretations resting primarily on plain meaning canon, 6.5, or 13.4%, were overridden by Congress; out of 79.5 interpretations resting primarily on legislative history or statutory purpose, 3.5, or 4.4%, were overridden); Solimine & Walker, supra note 33, at 448 chart 3 (over 60% of overridden cases invoked plain meaning canon, whereas less than 20% of all statutory construction cases did); see also id. at 431 & n.41 (collecting other sources noting that textualist opinions are frequently overturned by Congress). Decisions that relied on other canons of construction were overturned at a rate of 12%, also around three times the rate of opinions resting on legislative history or statutory purpose. Eskridge, Overriding, supra note 25, at 350 tbl.8.

eliciting functions cannot be established by statistics alone. It must rest on careful analysis of actual cases, like those discussed above. While not all uses of the plain meaning canon reflect preference-eliciting default rules, many do, and preference-eliciting default rules can explain some of the most perplexing—and seemingly inconsistent—applications of the canon.[206] Again, the hope is that revealing the preference-eliciting logic that underlies these applications of the canon can produce more consistent statutory interpretations in the future.

D. *Variations Among Jurisdictions*

Not all legislatures are equally responsive and likely to override statutory interpretations. If my preference-eliciting analysis is correct, one would thus expect application of preference-eliciting canons to vary with the responsiveness of the legislature in question. Some evidence is consistent with this prediction, but much more empirical work remains to be done.

Compared to the U.S. Congress, the British Parliament is a highly responsive legislature because parliamentary enactments only require the action of one legislative body, which is not subject to executive veto, is normally dominated by one party, and is marked by party discipline in voting. Conflicts between legislative institutions are thus less likely to block legislative action. The committee system is also more centralized under the Prime Minister, and thus conflicts between particular committees and the legislature as a whole are less likely to block legislative action. Given these lower obstacles to legislative override, and the argument above that many applications of the plain meaning canon reflect a preference-eliciting default rule,[207] one would expect British courts to be more willing to apply the plain meaning canon than U.S. courts. And historically they have been.[208]

It was not until 1993 that the British courts announced that for the first time they would begin considering parliamentary debates when resolving textual ambiguities.[209] This shift toward allowing some inquiry

206. Preference-eliciting analysis seems particularly applicable to those decisions that openly invite legislative override. See, e.g., Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158, 164, 168 (1989) (inviting override of plain meaning interpretation of Age Discrimination in Employment Act); Teleprompter Corp. v. CBS, 415 U.S. 394, 414 & n.16 (1974) (inviting override interpretation of Copyright Act that Court acknowledged did not take into account changes in technology); supra text accompanying notes 81–87. **R**

207. See supra Part IV.C.

208. See, e.g., Robert G. Vaughn, A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation, 7 Ind. Int'l & Comp. L. Rev. 1, 19–20 (1996) (discussing the reliance on plain meaining evidenced in a majority of opinions addressing British race and sex discrimination statutes).

209. See Pepper v. Hart, 1993 App. Cas. 593, 594 (appeal taken from Eng.); T. St. J. N. Bates, The Contemporary Use of Legislative History in the United Kingdom, 54 Cambridge L.J. 127, 127–28 (1995). It should, however, be noted that prior to the 1800s, when the British courts were more intermingled with the British Parliament and Crown, courts often

into legislative history might reflect the fact that as society gets more populous and complex, limited legislative time becomes scarcer, so that even parliamentary systems become less responsive.

In contrast, the United States Supreme Court went through its shift on the topic in 1892, the date of its first important use of legislative history.[210] This difference between Great Britain and the United States suggests that the less responsive the legislative structure, the earlier the historical point at which society becomes too complex to have the sort of general legislative responsiveness that justifies a preference-eliciting default rule against using legislative history. Indeed, even after its recent shift, the British courts remain more likely to rely on plain meaning than their American counterparts,[211] as one would expect given the fact that its legislative structure remains more responsive.

This is not to suggest that these structural factors alone determine the use of legislative history. Intellectual forces and changes in personnel play a role too, as exemplified by the arrival of Justice Scalia to the U.S. Supreme Court. But whether intellectual movements and leaders find willing listeners depends at least in part on whether circumstances render those listeners receptive. So it is hardly surprising that different levels of legislative responsiveness produce different levels of receptivity to plain meaning arguments.

The responsiveness of a legislature turns not only on its structure, but on the frequency with which it meets. For if the legislature meets rarely, it will take longer to override a statutory interpretation that does not reflect its preferences. Further, meeting infrequently makes time on the legislative agenda more scarce and thus increases the cost of requiring legislative corrections. Both these factors mean that the interim costs of using a preference-eliciting default rule will be greater for legislatures that rarely meet, and should be employed less often in such states. One anecdotal piece of evidence supporting this conclusion is the fact that, of the many states that have explicitly enacted statutes authorizing courts to examine legislative history, the only one to do so even when the plain

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relied on an equity of the statute doctrine that allowed them to interpret and even modify statutes to advance the statutory purpose. John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 29–56 (2001) [hereinafter Manning, Textualism and Equity]. But that doctrine apparently never relied on legislative history, and was replaced by the plain meaning rule during the 1800s when it became clear judges should serve as faithful agents for the legislature. Id.

210. See Adrian Vermeule, Legislative History and the Limits of Judicial Competence: The Untold Story of *Holy Trinity Church*, 50 Stan. L. Rev. 1833, 1836 & n.15 (1998).

211. See Vaughn, supra note 208, at 6–7 (noting that the rule announced in *Pepper*, providing for the limited use of legislative history in certain circumstances, "had negligible impact" on the reliance on plain meaning by British courts interpreting race and sex discrimination statutes). R

meaning of the text is clear is Texas,[212] a state whose legislature meets for only one four-and-a-half-month session every two years.[213]

A legislature's responsiveness might also depend on how many legislative staff members it has available to monitor statutory interpretations.[214] The U.S. Congress has sufficient staff to allow routine monitoring of Supreme Court statutory decisions.[215] State legislatures tend to have smaller staff than the U.S. Congress, and are more often not in session, and thus may not be as responsive. Cutting the other way, state legislatures probably have fewer interpretive decisions to monitor and may be more likely to become personally aware of their impact because of their local nature. Future empirical work could usefully study how much state courts vary in their use of preference-eliciting canons, and whether those differences track variations in staff levels or durations of legislative sessions.

Courts at different appellate levels also predictably differ in the likelihood they will provoke a legislative reaction. The Supreme Court is far more likely to provoke congressional overrides than lower courts.[216] One might thus expect that lower courts should use preference-eliciting canons less often.[217] In fact, casual observation does suggest lower courts rely less on plain meaning and more on legislative history than the Supreme Court, though again the topic calls out for more systematic empirical inquiry to test the hypothesis. Similarly, it would be interesting to test whether elected state judges are more or less willing to employ a prefer-

212. Compare Tex. Gov't Code Ann. § 311.023 (Vernon 1998) (stating that courts should examine legislative history "whether or not the statute is considered ambiguous on its face") with Elhauge, Preference-Estimating, supra note 2, at 2057 n.72 (collecting other statutes authorizing courts to examine legislative history only when statutory text is ambiguous). R

213. See Texas Legislature Online, Legislative Dates of Interest, at http://www.capitol.state.tx.us/capitol/legdates.htm (last visited Aug. 14, 2002) (on file with the *Columbia Law Review*).

214. Eskridge, Overriding, supra note 25, at 339–41. R

215. Id. at 339–40; Solimine & Walker, supra note 33, at 438. R

216. Although Congress overrides a greater absolute number of lower court decisions than Supreme Court decisions (220 to 121 from 1967–1990) Eskridge, Overriding, supra note 25, at 338 tbl.1, lower courts issue many more decisions and are thus overridden a smaller percentage of the time. Id. at 337 n.12. One study found that congressional staff were generally unaware of even D.C. Circuit statutory interpretations, see Robert A. Katzmann, Courts and Congress 69–76 (1997), whose importance and proximity would seem to make it the most likely federal appellate court to trigger congressional attention. Of course, this may be because Congress relies on Supreme Court review of lower court decisions for the very narrow set of cases at issue—those where meaning and preferences are unclear, and the other conditions for a preference-eliciting default rule are met—especially since such conditions seem the ones most likely to generate circuit splits necessitating Supreme Court review. R

217. Even if it does not lead to legislative override, a court might sometimes be tempted to employ a preference-eliciting default rule to provoke a Supreme Court decision that will lead to override, but the odds of certiorari are small enough that this seems an unlikely strategy.

ence-estimating or eliciting default rule than judges who presumably are less familiar with prevailing political sentiment.

E. *Conclusion on Linguistic Canons*

Current scholarship on statutory interpretation routinely distinguishes between linguistic or descriptive canons, which are supposed to help interpret the probable meaning of text, and substantive or normative canons, which are supposed to further some substantive policy that judges have found persuasive.[218] One implication of the analysis above is that this standard distinction may not track the underlying difference in default rule approach. Linguistic or textual canons may sometimes be applied to arrive at the best interpretation of meaning or best estimate of legislative preferences. But often they intentionally deviate from those in order to elicit a more precise understanding of legislative priorities. Likewise, substantive canons may sometimes deviate from likely legislative preferences, as with the rule of lenity noted above. But even when this is so, this need not mean they are furthering a judicial policy rather than trying to elicit legislative reactions that will produce more ultimate satisfaction of political preferences. Further, often substantive canons do reflect likely legislative preferences.[219]

V. Statutory Stare Decisis

The blackletter rule is that statutory precedents have especially strong stare decisis effect.[220] Since the principal rationale for this doctrine is that the legislature could always override any statutory precedent it did not like,[221] this doctrine may seem the quintessential preference-eliciting default rule. But this claim has been criticized by countless scholars on the ground that legislatures rarely review statutory interpretations.[222] This critique is overblown because in fact Congress routinely monitors Supreme Court statutory interpretations, holds actual hearings on 50% of them, and overrides 6–8%, with the percentage of overrides

218. See, e.g., William N. Eskridge, Jr. et al., Cases and Materials on Legislation 818 (3d ed. 2001); Ross, supra note 1, at 563–66, 572–74; Stephen F. Ross & Daniel Tranen, The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation, 87 Geo. L.J. 195, 226–27 (1998); Sunstein, Interpreting Statutes, supra note 150, at 454–60. R

219. See Elhauge, Preference-Estimating, supra note 2, Parts II–VII. R

220. E.g., Square D Co. v. Niagra Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 n.34 (1986); William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1362–63 (1988) [hereinafter Eskridge, Overruling]; Edward H. Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 540 (1948).

221. E.g., NLRB v. Int'l Longshoremen's Ass'n, 473 U.S. 61, 84 (1985); City of Oklahoma City v. Tuttle, 471 U.S. 808, 818 n.5 (1985); Williams v. Crickman, 405 N.E.2d 799, 802 (Ill. 1980); City of Boston v. Mac-Gray Co., 359 N.E.2d 946, 948 (Mass. 1977); Higby v. Mahoney, 396 N.E.2d 183, 184–86 (N.Y. 1979); James v. Vernon Calhoun Packing Co., 498 S.W.2d 160, 162–63 (Tex. 1973).

222. See supra note 24 (collecting sources). R

presumably higher for that subset of interpretations that conflicts with enactable congressional preferences.[223] Nonetheless, it remains dubious to think that legislative override is *always* likely when the legislature is displeased. More importantly, the above analysis shows that a preference-eliciting default rule is only justified when the likelihood of legislative correction differs for the two sides affected by an interpretive issue,[224] and it is even more dubious to think that statutory precedent always burdens groups with preferential access to the legislative agenda.

Thus, across-the-board application of a doctrine of super-strong stare decisis for statutory precedent seems misguided given the limited conditions that justify a preference-eliciting default rule.[225] Instead, the goal of maximizing political satisfaction suggests that (as is actually the case) the super-strong rule of stare decisis will often not be honored when it conflicts with other reliable evidence either that enactable preferences have changed or were misestimated or that changed circumstances mean that initial enactable preferences dictate a different result.[226] Further, when the legislative preference is to delegate the issue to the courts for ongoing development in a common law fashion, it would thwart that preference if courts did not feel free to overturn their own statutory precedent.[227]

The rule of super-strong statutory stare decisis is thus not itself generally a preference-eliciting default rule. However, absent a change in legislative conditions, it can be shown that the absence of any legislative override (however unlikely it was) provides a strong reason to stick to that precedent, and thus indirectly supports the presumption of statutory stare decisis doctrine. This is hardly surprising when the precedent initially reflected the best estimate of enactable preferences, since (absent any independent change in legislative conditions) the lack of a legislative override can only increase the confidence of any initial estimate that the precedent reflects enactable preferences. But it may seem counterintuitive when the precedent itself was meant to be preference-eliciting. When a statutory precedent reflected the imposition of a preference-eliciting default rule, why wouldn't any case where the precedent failed to

223. See supra Part II.A.4.

224. See supra Parts II.A.5, II.B.1.

225. See supra Part II. This is the reason for rejecting Professor Marshall's argument that the rule of statutory stare decisis should be made irrebuttable to encourage Congress to revisit statutes. Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 177, 183 (1989). His position would essentially adopt a preference-elicting approach in all cases, whether or not the statutory precedent fulfills the limited conditions necessary to elicit legislative preferences in a way that increases political satisfaction.

226. See Elhauge, Preference-Estimating, supra note 2, Parts III.C, V–VII. Reliance arguments might be relevant, but turn out not to provide a strong general argument for refusing to change statutory precedent. Infra Part VIII.B. **R**

227. See Elhauge, Preference-Estimating, supra note 2, at 2044 nn.25–26, 2122 n.287; supra Part II.A.3. **R**

elicit a legislative override mean that the default rule failed in its mission and thus justify abandoning it?

Part of the reason is that preference-eliciting default rules also aim to elicit ex ante correction.[228] This goal could not be achieved if courts were willing to abandon a preference-eliciting default rule every time the legislature failed to override it. Instead, such a judicial practice of abandonment, if sufficiently quick, would give politically influential groups incentives not to spend any effort on securing legislative overrides since an easier judicial override will be forthcoming. It could even give them incentives to affirmatively block legislative action that might lead to compromise measures less advantageous to the political group than a judicial override would be.[229]

Sticking to the preference-eliciting default rule generally makes sense even if (as in the case of an unforeseeable ambiguity) no ex ante correction seemed plausible, so that the only purpose of imposing the default rule was to provoke ex post correction. Part of the reason is the same as for the ex ante case: if rapid judicial correction were in the offing, then politically influential groups would have incentives to avoid or even block efforts at achieving ex post legislative overrides that are more costly to secure or that may entail more damaging compromises.

But we can go further. Assuming no other change in conditions, it turns out to be desirable to stick to the preference-eliciting default rule even if the judiciary has a practice of waiting long enough after the initial statutory precedent that politically influential groups would prefer to seek quick ex post legislative correction. This is because one reason to impose a preference-eliciting default rule is precisely to test an uncertain probabilistic estimate about which interpretive option is more enactable. For example, part of the reason for choosing interpretive option B in my initial illustration was that it would stick in the 40% of cases where B reflected actual legislative preferences.[230] That advantage would be lost if option B were judicially reversed because the legislature failed to overturn it. More generally, any legislative failure to override a preference-eliciting default rule signals that the court was probably incorrect to presume its initial choice did not reflect likely legislative preferences.

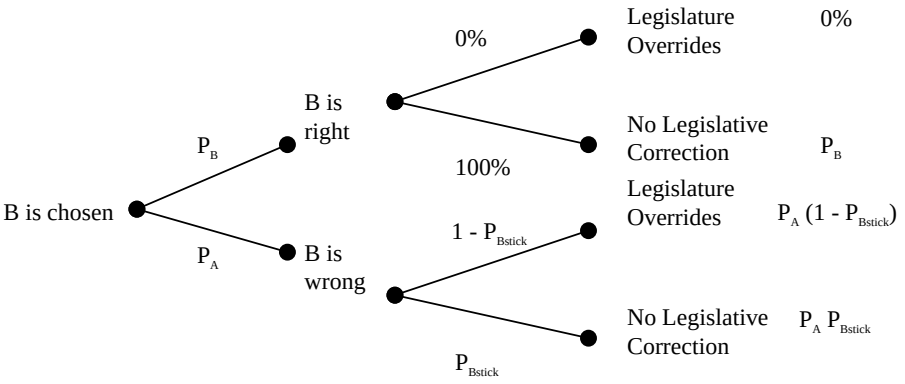
Indeed, one can prove that if the legislature has failed to correct a statutory precedent that met the conditions for a preference-eliciting default rule, that precedent will now reflect the best available estimate of legislative preferences even though it did not seem so at the time the precedent was handed down. This will require some inquiry into the mathematics of conditional probabilities. Call option B the statutory pre-

228. See supra Part II.A.4.

229. See supra Part II.A (noting that one reason for preference-eliciting default rules is that the available interpretive options seem unlikely to reflect nuanced political preferences and the court wants to ascertain just what intermediate and more precise result would come out of legislative action); infra Appendix (modeling this possibility).

230. Supra Part II.A.

cedent that reflects a preference-eliciting default rule. Given the mathematical analysis above,[231] we can describe the decision tree with the following notation.



In the left branches of the decision tree, P_B and P_A reflect the relative probabilities that (between the two interpretive options) B and A, respectively, reflect enactable legislative preferences. Thus, with probability P_B, statutory precedent reflecting option B correctly reflects enactable preferences. With probability P_A, option A correctly reflects enactable preferences and thus precedent B is incorrect. The right branches then reflect the conditional probabilities that legislative override will occur if B is, respectively, right or wrong. If B correctly reflects enactable preferences, then the probability of a legislative override is 0% and the probability that there will be no legislative correction is 100%.[232] If B does not correctly reflect enactable preferences, then the probability that B will stick uncorrected is P_{Bstick} and the probability that B will be overriden is $1 - P_{Bstick}$. The probabilities at the far right are then derived from multiplying the probabilities in the decision tree necessary to get to that point.

The key point is that the fact that there was no legislative correction provides valuable information that can alter initial estimates of whether B accurately reflects legislative preferences. It means we can exclude the far right probabilities of legislative override and focus solely on the two cases involving no legislative correction. The decision tree reveals that, in

231. See supra Part II.B.1.

232. I here put aside the possibility that cycling problems may mean both A and B are enactable, so that either might be overturned in favor of the other. See Elhauge, Preference-Estimating, supra note 2, Part III.B. If that is the case, a preference-eliciting default rule still makes sense since the enactability of either option means there is no reliable ground for a preference-estimating default rule, and putting the burden on the party that can best command the legislative agenda helps test the proposition that either is enactable or that a third option is no more enactable than either. Moreover, if such cycling actually occurred in the legislative process, then the issue about sticking to precedent that has not been overridden would not arise since any precedent would have been subject to legislative override already. R

the set of cases without any legislative correction the probability is P_B that this reflects a case where B actually does accurately reflect legislative preferences, and $P_A P_{Bstick}$ that this reflects a case where B does not. Thus, even if it did not initially seem the option most likely to match legislative preferences, the information that option B was chosen and was not legislatively corrected now means that option B will be the option most likely to match legislative preferences if $P_B > P_A P_{Bstick}$. But we know from the fact that option B was initially chosen as the default rule that (absent some intervening change in circumstances) $P_B > P_A P_{Bstick}/P_{Astick}$.[233] Since P_{Astick} cannot be greater than 1, this means that P_B must be greater than $P_A P_{Bstick}$ and that B has now become the option most likely to match legislative preferences.[234]

This is a rather striking conclusion: *whenever* a preference-eliciting default rule is used and fails to elicit a legislative correction, then (absent some change in conditions) it now represents the best preference-estimating default rule even though it was initially chosen despite its lack of correspondence to likely legislative preferences.[235] Importantly, this is true even if we assume, as the critique of strong statutory stare decisis doctrine does, that legislative correction is infrequent and that legislative inaction does not affirmatively indicate enactable preferences.[236] For nothing in the above analysis depends on the proposition that legislative correction happens frequently, nor that it affirmatively indicates enactable preferences. It suffices that it occurs sometimes and that its absence provides a statistical signal. This helps explain why statutory stare decisis remains a strong presumptive doctrine, and why courts and commenta-

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233. See supra Part II.B.1.

234. I am indebted to Fred Link for pointing out that this proposition can be established using Bayes's Rule. Call the conditional probability that B is correct given no legislative action $P_{B/-}$, the probability of no legislative action given that B is correct $P_{-/B}$, the initial probability that B is correct P_B, the probability of no action given B is incorrect P_{Bstick}, and the probability that B is incorrect P_A. Then from Bayes's Rule we know:

$$P_{B/-} = P_{-/B}P_B \;/\; (P_{-/B}P_B + P_{Bstick}P_A).$$

See David S. Moore & George P. McCabe, Introduction to the Practice of Statistics 356 (3d ed. 1999) (setting forth Bayes's Rule). Presumably the legislature would never overturn a result that reflected its actual enactable preferences, see supra Part II.A, so the probability of no legislative action given that B is correct, $P_{-/B}$, should equal 1. The equation thus becomes:

$$P_{B/-} = P_B \;/\; (P_B + P_{Bstick}P_A).$$

This means that the conditional probability that B is correct will be greater than 50% (given the information that no legislative action occurred) when: $P_B / (P_B + P_{Bstick}P_A) > 0.5$, which can be rearranged as $P_B > P_{Bstick}P_A$, which is precisely the inequality noted in text.

235. Since a preference-estimating rule must satisfy the same inequality a preference-eliciting rule must satisfy, this conclusion will apply to precedents under that rule as well. But that is not too surprising since those precedents initially reflected the best estimate of enactable preferences and, absent a change in conditions or independent reason to think the first estimate was mistaken, there is no reason to think that conclusion would have been changed by a legislative failure to override that result.

236. See Solimine & Walker, supra note 33, at 429–30 (collecting sources). **R**

tors continue to intuitively rely on the possibility of legislative override despite its infrequency.

This analysis also helps explain the case that has become the poster boy for critique of the strong statutory stare decisis doctrine, *Flood v. Kuhn*, which invoked that doctrine to refuse to overrule statutory precedent holding that professional baseball was not "commerce" subject to antitrust scrutiny even though all other sports are.[237] I have elsewhere argued that this result was sensible because the baseball exemption when initially adopted reflected an accurate preference-estimating default rule, and Congress's rejection of bills to overturn it rebutted any claim that enactable preferences had shifted.[238] The analysis above allows us to extend the conclusion to say that, whether the initial precedent reflected an estimating or eliciting default rule, the absence of legislative action to overturn it made retaining the precedent desirable, absent any other change in legislative conditions.

Now, the astute reader will not have missed my repeated qualification that all this is true only if conditions have not changed. And this proves to be a very important qualification indeed. For the above analysis holds only if we hold constant the initial estimates both of (1) how likely it was (absent a lack of legislative correction) to think that the various interpretive options would reflect enactable preferences, and (2) the likelihood that, if incorrect, a statutory precedent would be overturned. To put it mathematically, the above proof depends on the point that the adoption of a preference-eliciting option B would not have been justified unless the court believed that $P_B > P_A P_{Bstick}/P_{Astick}$,[239] which necessarily implies $P_B > P_A P_{Bstick}$, which is the condition necessary to prove option B now best estimates enactable preferences. But new information may have arisen—other than the mere lack of legislative override—that justifies a new estimate of these variables.

Suppose that a court is presented not just with evidence of legislative inaction, but evidence of affirmative enactments on related topics that indicate sharply changed enactable preferences.[240] For example, suppose the initial choice of preference-eliciting option B was based on the estimate that B was 40% likely to reflect legislative preferences, and A was 60% likely, but B when wrong was 50% likely to stick uncorrected whereas A when wrong was 90% likely to stick uncorrected. Then option B should initially be chosen because $0.4 > (0.6)(0.5)/0.9 = 0.333$. Further, the lack of a legislative override implies that option B is now the option more likely to reflect enactable preferences because $0.4 > (0.6)(0.5) = 0.30$. But now suppose that, however accurate those estimates were when made, the current legislature has made enactments that convince the court that the

237. 407 U.S. 258, 283 (1972); see, e.g., Eskridge, Overruling, supra note 220, at 1381, 1385 (calling the decision "almost comical" and "silly"). R

238. Elhauge, Preference-Estimating, supra note 2, 2124–25 nn.295–301. R

239. Supra Part II.B.1.

240. See Elhauge, Preference-Estimating, supra note 2, Part VI.A–C. R

probability that option B reflects enactable preferences has fallen to 0.25. Then changing the precedent would make sense because it would no longer satisfy the conditions for a preference-eliciting or estimating default rule.[241]

More interestingly, while the fact of legislative inaction may not justify a change, the way in which the legislature fails to act may. Suppose, for example, that the legislature not only failed to override option B, but failed to even examine the question or introduce a bill about it. While one cannot entirely discount the possibility that the legislature did not want to waste its time on what would ultimately be a losing issue, such evidence would tend to reduce any initial estimate about the relative ability of opponents of option B to command attention on the legislative agenda, which would increase the court's estimate of P_{Bstick}. Suppose, given this new information, the court concluded that the likelihood that B would (even though wrong) stick uncorrected was actually 80%. Then it would no longer make sense to stick with precedent B even if there were no other evidence to suggest a change in the odds that it accurately reflected legislative preferences. Option B would no longer be a desirable preference-eliciting default rule because $0.4 < (0.6)(0.8)/0.9 = 0.5333$, meaning that option B no longer is predicted to have sufficiently desirable ex ante or ex post consequences on legislative correction to infer that option B increases political satisfaction. Nor would the absence of legislative override allow one to infer that option B now reflected a good preference-estimating default rule because $0.4 < (0.6)(0.8) = 0.48$. Similarly, a court might reassess the desirability of a preference-eliciting precedent if that precedent was mainly meant to elicit a third nuanced option and the intervening events have persuaded the court that it misestimated the odds that the precedent would do so.[242]

Given the considerations noted above, the courts would have to be careful not to change the precedent too quickly, since to do so would give political opponents of option B an affirmative incentive to refrain from asking for any legislative inquiry. But if a sufficiently long time has passed, then the fact that this group has had to live with an adverse interpretation for that long a period should provide them with sufficient incentives to seek ex ante or ex post legislative correction. We would thus expect to see that courts sometimes abandon a longstanding precedent that was initially preference-eliciting when it has failed to elicit any legislative interest at all. To do so means admitting that the court initially misestimated the likelihood of such legislative correction. But such errors are inevitable, for no analysis is perfect, and predicting legislative responsiveness under preference-eliciting analysis is certainly no exception. The important point is that the harm from errors can be reduced if courts are

241. In contrast, in the *Flood* case, the actual congressional enactments if anything suggested the odds that Congress preferred a baseball exemption had increased. Id. Part VI.C.

242. See supra Part II.A; infra Appendix Part 1.

willing to abandon the preference-eliciting default rule judiciously when it has proven misbegotten. Preference-eliciting analysis thus predicts that, where the legal materials permit,[243] courts will often abandon a longstanding precedent that no longer seems sufficiently preference-eliciting in favor of either a better preference-eliciting default rule (more likely to provoke legislative action) or a default rule that corresponds better to likely legislative preferences.[244]

Further, intervening events may also persuade a court that it misestimated the interim costs of using a preference-eliciting default rule.[245] Again, a court must be careful because the mere fact that a preference-eliciting default rule has stuck for a long time may instead mean that it turned out to reflect legislative preferences more accurately than the alternative interpretation. But the nature of the intervening events might persuade the court that the legislature takes much longer to get around to these issues than previously thought, that having the wrong interpretation in the meantime is more harmful, or that the costs of legislative override are higher. If so, that may be a reason to overrule a statutory precedent that reflected the imposition of a preference-eliciting default rule.

The last few paragraphs have an interesting implication. Namely, when statutory precedent reflects a preference-eliciting default rule, the fact that the precedent is of long standing may support, rather than undermine, the argument for overruling it. Even for a current preferences default rule, a court will not want to overrule precedent too quickly, or it becomes meaningless,[246] so that to some extent the age of the statutory precedent correlates positively with overruling it for all default rules. But in the preference-estimating case, the age of the precedent is not an *affirmative* reason for overruling it. In the case of a preference-eliciting precedent, in contrast, the length of time the precedent has stood may well be an affirmative reason for overruling when combined with other factors

243. Just as some ambiguity in statutory meaning is the requisite for judicial authority to fill the gap, so too some ambiguity in the meaning or scope of statutory precedent may be necessary before courts can deviate from it, in part because courts and legislatures will want to induce some party reliance on that precedent. See infra Part VIII.B (addressing reliance theory). Preference-eliciting default theory cannot define the legal limits on such judicial discretion, but can provide a theory as to how courts do and should exercise the discretion they appear to assume they have. While courts have no authority to overrule statutes (other than on constitutional grounds), courts certainly have some power to overrule statutory precedent, and do so surprisingly often. Elhauge, Preference-Estimating, supra note 2, Part VI.C; infra text accompanying note 249. R

244. It may sometimes be the case that the intervening events persuade the court that the precedent is no longer a good preference-eliciting default rule, but also persuade the court that the precedent is now more likely to match legislative preferences than the other interpretive options. In such a case, the court might stick to the precedent even though the rationale for it has shifted.

245. See supra Part II.A.6 (exploring factors influencing degree of interim costs before legislative correction); infra Appendix Part 2 (mathematically modeling interim cost calculations).

246. See infra Part VIII.B.

indicating the initial court misestimated the likelihood of legislative correction or level of interim costs.

Finally, it may simply be that the first court applied a preference-eliciting default rule in the wrong circumstances. For example, the first court may have adopted the mistaken view that *all* statutory ambiguities should be interpreted narrowly to elicit a legislative response.[247] That view should be rejected because it is unlikely to correctly estimate enactable preferences, and it vastly overstates the possibility that statutory precedent deviating from likely preferences can helpfully elicit legislative corrections that maximize political satisfaction by extending the approach to cases that do not meet the criteria for a preference-eliciting default rule.[248] A later court that as an honest agent wants to maximize political satisfaction will thus want to overrule such statutory precedent.

All these possibilities explain why the presumption of statutory stare decisis, while strong, is not conclusive even when the precedent reflects a preference-eliciting default rule. Instead, it will often be the case within that approach that a court properly chooses to abandon statutory precedent. Consistent with the above analysis, the supposedly super-strong rule of stare decisis for statutory precedent is in fact often honored in the breach. From 1961–1991, the Supreme Court overruled no less than ninety statutory precedents under this supposed super-strong rule.[249] Some of these cases no doubt reflect the abandonment of failed preference-eliciting default rules. Indeed, when the Court abandons statutory precedent, it frequently determines that the enacting legislative preferences do not support the precedent in question.[250] While sometimes this indicates a simple judicial error in assessing legislative preferences the first time around, other times the situation arises because the initial statutory precedent was a preference-eliciting default rule that was not designed to track legislative preferences. In such cases, we would often expect the courts to abandon the failed preference-eliciting default rule, which they do by overruling their statutory precedent.

But the analysis above also indicates that a preference-eliciting precedent should not be abandoned when the lack of legislative override reflects a deliberate legislative decision, rather than a failure to consider the question. This is because one important objective of preference-eliciting default rules is to resolve uncertainty about which interpretation the legislature prefers by choosing the one that is the most easily correctable and allowing it to stick when legislative reconsideration indicates that, although it had seemed less likely to satisfy legislative preferences, it actually did. In these cases, the statutory precedent reflects a successful preference-eliciting default rule, not an unsuccessful one. Again, consistent

247. See infra Part VIII.C.

248. See infra Part VIII.C; see also supra Part II.A (stating the criteria for preference-eliciting default rules).

249. Eskridge, Dynamic, supra note 54, at 253, 316–22. R

250. See, e.g., Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–96, 700–01 (1978).

with this prediction, the Court does not overrule statutory precedent when the legislature has affirmatively let that precedent stand after reconsidering it.[251]

Often statutory precedent does not reflect a preference-eliciting default rule, and a decision to overrule or retain it is justifiable on independent grounds.[252] And many decisions on whether to retain or overrule statutory precedent are in fact unjustifiable or based on arbitrary or ideological factors. But at least some of the apparent inconsistency in applying the special statutory stare decisis doctrine seems explicable by reference to default rule analysis. To this extent, the extensive complaints about the inconsistent application of statutory stare decisis are overblown.

VI. The Presumption Against Extraterritorial Application and Other Interpretations That Create International Conflict: Statute-Eliciting vs. Treaty-Eliciting Default Rules

An important traditional canon provides that, in cases of doubt, a statute does not govern conduct occurring outside the nation that enacted it.[253] This canon has been strongly critiqued both normatively and for its inconsistent application. The normative critique is that a nation has powerful interests in extraterritorial conduct that has effects within its boundaries or on its citizens abroad.[254] Where such effects exist, critics argue, the national legislature probably would want to regulate the extraterritorial conduct to further its legislative policy.[255] The inconsistency complaint is that courts tend to apply the canon to nonmarket statutes

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251. See, e.g., N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530–35 (1982); United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979); see also Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 237–38 (1987); Bob Jones Univ. v. United States, 461 U.S. 574, 599–602 (1983); Herman & MacLean v. Huddleston, 459 U.S. 375, 384–86 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379–82 (1982); Haig v. Agee, 453 U.S. 280, 300–01 (1981); Cannon v. Univ. of Chi., 441 U.S. 677, 686 n.7, 702–03 (1979); United States v. Bd. of Comm'rs, 435 U.S. 110, 134–35 (1978); Lorillard, Inc. v. Pons, 434 U.S. 575, 580 (1978); Apex Hosiery Co. v. Leader, 310 U.S. 469, 488–89 (1940) (Roberts, J., dissenting).

252. The court might determine that the precedent simply erred in estimating legislative preferences, that those same preferences dictate a different result given changed circumstances, that current legislative preferences have changed, or that the only legislative preference was for judicial lawmaking in a common law process that implies correction of mistaken decisions. See Elhauge, Preference-Estimating, supra note 2, Parts II, III.C, V–VII; supra Part II.A. R

253. EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

254. See Larry Kramer, Vestiges of Beale: Extraterritorial Application of American Law, 1991 Sup. Ct. Rev. 179, 208–13 [hereinafter Kramer, Vestiges]; Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598, 657–59 (1990).

255. See William S. Dodge, Understanding the Presumption Against Extraterritoriality, 16 Berkeley J. Int'l L. 85, 116–20 (1998) [hereinafter Dodge, Presumption]; Kramer, Vestiges, supra note 254, at 211, 213–14; Phillip R. Trimble, The R

(like nondiscrimination, labor, or environmental law) but not to market statutes (like antitrust, securities, or trademark law), which instead are interpreted to extend to extraterritorial conduct having substantial effects within the enacting nation.[256]

Professor Kramer advocates replacing the canon with a statute-by-statute interest analysis that identifies the domestic and foreign nations' legislative policy interests in the conduct, determines whether those interests actually conflict, and (in cases of conflict) decides which nation cares most about the issue, in order to arrive at a general construction of each statute.[257] Professor Turley would replace the current canon with the opposite rule: that all statutes apply to extraterritorial conduct affecting the nation or its citizens unless the legislature explicitly indicates otherwise.[258] Both are persuasive positions if one grants their premise that the purpose of any canon should be to choose a rule or standard that identifies what the legislature most likely would have wanted.[259] The choice between them as a preference-estimating default rule depends on whether one believes the errors caused by the facial overinclusiveness of Turley's rule exceed the errors caused by the less precise application of Kramer's standard.[260]

But what if the canon serves a preference-eliciting function? A default rule that provoked explicit political correction would be useful because it is highly difficult to determine what legislatures would want regarding the extraterritorial application of their statutes. Courts could apply a conflicts of interest approach like Kramer's to arrive at a reasona-

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Supreme Court and International Law: The Demise of *Restatement* Section 403, 89 Am. J. Int'l Law 53, 57 (1995); Turley, supra note 254, at 660–61. R

256. Larry Kramer, Extraterritorial Application of American Law after the *Insurance Antitrust* Case: A Reply to Professors Lowenfeld and Trimble, 89 Am. J. Int'l Law 750, 752–53 (1995) [hereinafter Kramer, Extraterritorial]; Turley, supra note 254, at 601–02, 608–55. R

257. Kramer, Extraterritorial, supra note 256, at 758; Kramer, Vestiges, supra note 254, at 213–23; see also Andreas F. Lowenfeld, Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the *Insurance Antitrust* Case, 89 Am. J. Int'l L. 42 (1995) (arguing for case-by-case balancing of national interests). R R

258. Turley, supra note 254, at 659–60; see also Trimble, supra note 255, at 57 (agreeing with Turley); Dodge, Presumption, supra note 255, at 90–100, 117–19 (same though excluding conduct that affects U.S. citizens while they are abroad). R R

259. Dodge, Presumption, supra note 255, at 112, 116–20; Kramer, Vestiges, supra note 254, at 213; Turley, supra note 254, at 660–61. R R

260. It is an empirical question whether any bright-line rule that is facially over- and underinclusive (relative to standards of social desirability) produces more or less error than a standard that has no facial over- and underinclusiveness (because it correlates perfectly to the underlying norm of social desirability) but whose greater imprecision means it is more likely to be erroneously applied. See Bundy & Elhauge, supra note 43, at 267–72. Kramer stresses the facial overinclusion of a rule favoring extraterritorial application because it covers many cases the legislature probably would not have wanted to cover. Kramer, Extraterritorial, supra note 256, at 755–57. Turley stresses the error costs from inconsistent applications of a nebulous standard that varies from case to case. Turley, supra note 254, at 655, 660–61. R R R

ble guess, but the general political preferences will typically be unclear because legislatures (and certainly Congress) rarely think about the extraterritorial application of their statutes.[261] The details of how legislatures would like to resolve conflicts will be even less clear, for that decision involves not just the usual complications in divining legislative policy preferences, but an open-ended political judgment about how far to push the legislative policy when it conflicts with foreign governmental policy. A national legislature's willingness to inflict extraterritorial effects that annoy foreign governments does not turn only on a neutral balancing of interests. It turns as well on a realpolitik assessment of that nation's bargaining power in the international arena and the importance it places on this matter among others at issue in international affairs. One must also weigh the likelihood that affected nations will respond with blocking statutes or their own claims of extraterritorial regulation on the first nation. Courts will thus often guess wrong about what the legislature would have wanted to do about the extraterritoriality issue.

Replacing a place of conduct test with a place of effects test does not eliminate international conflicts, for while conduct generally occurs within one nation, conduct within one nation frequently has effects on persons in (or from) multiple countries. Indeed, given the global nature of markets, any effect on market output in any nation is bound to have effects on every other nation that consumes the same product. Professor Dodge makes a noble effort to rationalize the caselaw based on whether the effects of the conduct occur "within" the United States.[262] But when conduct has effects on many nations, the distinction between those effects that lie "within" and outside the United States is problematic. For example, Dodge concludes that torts or working conditions harmful to a citizen while abroad do not have effects "within" the nation of enactment.[263] But if likely legislative concern is the relevant metric, as Dodge argues,[264] it is not clear why harm to citizens abroad would not concern the legislature more than harm to a noncitizen physically residing in the nation. And if physical location is the key, it is not clear why the harm abroad does not have effects "within" the United States as soon as the harmed individual moves back. Likewise, Dodge would conclude that neither pollution in Antarctic land that lies outside every nation's boundaries nor species elimination outside U.S. boundaries have effects "within" the United States.[265] But if the goal is preserving the biosphere or species, such harmful effects are felt within every nation. And certainly many environmental harms whose first effect is in one nation have spillover or indirect effects on other nations, yet Dodge would treat those as having effects "outside" the United States. In contrast, Dodge treats anti-

261. Kramer, Extraterritorial, supra note 256, at 757. **R**

262. See Dodge, Presumption, supra note 255, at 89–91, 94–96, 100, 112. **R**

263. Id. at 94, 96.

264. Id. at 112, 117–19.

265. Id. at 95–96, 119.

trust, securities, or trademark violations that first cause harm abroad as having effects "within" the United States if they then lead to harm in U.S. markets.[266] For example, Dodge deems there to be harmful effects "within" the United States: (1) from selling watches in violation of U.S. trademark law to American tourists in Mexico because the tourists brought the watches back to the United States with them, and (2) from refusing to provide reinsurance in London in violation of U.S. antitrust law because the denied buyers were from the United States.[267] In all the above market and nonmarket cases, there is a chain of events leading to harm felt within the United States—the question is when one chooses to cut off the chain, a decision for which the formalistic theory provides no real guidance or justification. And any consistent application of such formalisms about which effects are "within" the United States cannot explain the actual doctrinal distinction between the extraterritorial interpretations of market and nonmarket regulations.

Because there appears no principled way to limit an effects test to one nation, an effects test exacerbates international discord by giving each nation potentially conflicting regulatory power over the same conduct, often contrary to what the legislature would have wanted. The courts are thus right to be concerned that, without the canon against applying statutes to extraterritorial conduct, they might wrongly estimate legislative intent on extraterritorial coverage, and thus create "*unintended* clashes between our laws and those of other nations which could result in international discord."[268]

What makes extraterritoriality particularly interesting from a preference-eliciting perspective is that courts might wish to provoke two different sorts of explicit political action: (1) unilateral legislative action by the enacting nation, and (2) international agreements between nations with conflicting interests in the relevant conduct. Each is appropriate in a different set of circumstances, and each calls for a different sort of preference-eliciting default rule.

A. *Provoking Unilateral Legislative Action*

Where the issue seems amenable to unilateral legislative correction, then a preference-eliciting default rule against extraterritorial coverage usefully requires the legislature to specify just how much international discord it is willing to incur to advance the substantive purpose of its statutes. If the national government wants the default rule reversed, it can likely do so because it has the best access to the legislative agenda.[269]

266. Id. at 94, 100–04.

267. Id. at 94, 100.

268. EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) (emphasis added).

269. See Eskridge, Overriding, supra note 25, at 348 tbl.7 (showing that the U.S. Government has best record of securing legislative override of adverse statutory interpretations). In fact, the government frequently does successfully override judicial **R**

Moreover, the political forces arrayed against extraterritorial application are generally weak in the legislature that enacted the statute. The main opposing interest is that of other nations in seeing their laws implemented, but they have little influence in the U.S. legislative process. Their principal means of exerting pressure will be on the U.S. Department of State and executive branch generally, which are better placed than the judiciary to decide how strongly to weigh their interests, and which as a unitary branch will not be paralyzed by conflicted political demand if foreign interests conflict with U.S. interests.

True, in such cases, courts could instead choose the opposite preference-eliciting default rule by adopting Turley's proposal that all statutes apply extraterritorially unless the legislature explicitly indicates otherwise. But that would often involve the unacceptable interim cost of unintended international discord and would put the burden of legislative correction on the political actors less able to command the legislative agenda.[270] It thus makes little sense as a preference-eliciting default rule, which is not the basis on which Turley defends his rule.[271]

Consider the cases applying the canon to deny extraterritorial application of anti-discrimination laws in foreign workplaces, a major target of criticism by Professors Turley and Kramer. The main case is *EEOC v. Aramco,* which concerned the question whether Title VII applied to discrimination in Saudi Arabia by an American corporation against an American citizen.[272] The Court found the statutory language "ambiguous" and thus applied the canon against extraterritorial regulation.[273] Turley and Kramer both critique this result for failing to correspond to likely legislative preferences.[274] Turley would reach the opposite result under his general presumption favoring extraterritorial application. Kramer would do likewise on the case-specific grounds that any conflict between American antidiscrimination law and Saudi law was a false one.[275] But the Court had to arrive at some general statutory interpreta-

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applications of the canon against extraterritorial application. Trimble, supra note 255, at 57. **R**

270. See Andrew T. Guzman, Choice of Law: New Foundations, 90 Geo. L.J. 883, 925–27 (2002).

271. Indeed, Turley argues quite the opposite: that it is unlikely lobbyists could successfully procure legislation narrowing an extraterritorial interpretation of a statute. See Turley, supra note 254, at 662. Rather, he normatively favors having this result stick because it reduces the political influence of interest groups. Id. For a rejection of the argument that statutes should be interpreted to diminish the influence of interest groups, see supra text accompanying notes 124–127; infra Part VIII.A. **R**

272. 499 U.S. at 248.

273. Id. at 250–51.

274. Turley, supra note 254, at 618–27; Kramer, Vestiges, supra note 254, at 201–02. **R**

275. He reasons that no Saudi law affirmatively encouraged discrimination based on race or religion, and Saudis would presumably also object to the type of discrimination at issue—discrimination against Arabs and Muslims. Kramer, Vestiges, supra note 254, at 216–17 & n.136. Both grounds strike me as problematic even if the statutory construction were limited to the case at hand, and thus indicate enough uncertainty to merit a **R**

tion, rather than just issue a judgment in the case at hand, and this raised tricky issues of international relations that could be resolved more accurately by explicit legislative decision if one could be provoked. The Court expressly pointed to one such issue: absent the canon, a statutory interpretation covering discrimination in foreign workplaces against American citizens would apply not just to American employers operating abroad but to foreign employers as well, raising "difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce."[276] Moreover, if the *Aramco* situation should be governed by U.S. law rather than Saudi law when the conduct occurred in Saudi Arabia, parallelism would suggest that Title VII should not apply to discrimination by a foreign employer against an foreign employee in the United States itself. Could the United States consistently take the position that its statutes apply to interaction between its firms and employees abroad, but that foreign statutes do not apply to interaction between foreign firms and employees in the United States?

One can understand the Court's fears that, if it entered this thicket of international complications, it might well get major elements wrong, and would thus strongly benefit from the explicit legislative guidance that a preference-eliciting default rule would provide. Which is precisely what happened. Congress promptly overrode *Aramco* less than nine months later.[277] But it did not simply codify a general conflicts of interests bal-

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preference-eliciting default rule. The latter point would, if it really had bite, mean that in Saudi Arabia, Title VII would prohibit discrimination against Arabs and Muslims but not against, say, Jews or Latinos, which would perversely make Title VII itself discriminatory. And the former sort of conflicts reasoning allows any regulatory regime to trump a deregulatory one, and thus carries with it an implicit bias in favor of regulation that is hard to justify. Kramer recognizes that sometimes a nation might affirmatively desire conduct that it neither prohibits nor allows, but he sees no conflict if the government has a policy of indifference to the activity in question. Id. at 217 n.136. But indifference is just a deregulatory policy of allowing private actors or society to determine whether the conduct occurs. It does not mean the nation would be just as happy if a foreign government decided whether the conduct would occur instead. For example, a religious state might allow religious discrimination (at least by the favored religion) because it thinks religious decisionmaking is holy. It may be indifferent about whether the religion chooses to discriminate or not, but that certainly does not make it indifferent to interference in religious discrimination by a foreign secular state. Its policy is about who decides, not what is decided, but that does not make the policy any less important to the state.

276. *Aramco*, 499 U.S. at 255. The other two possible foreign-domestic mixes for discrimination in a foreign workplace had already been resolved by 42 U.S.C. § 2000e-1 (2000), which excluded discrimination in a foreign workplace against an alien by a domestic or foreign employer.

277. Civil Rights Act of 1991 § 109(a), 105 Stat. 1071, 1077 (codified at 42 U.S.C. §§ 2000e(f), 2000e-1 (2000)). The Court had good reason to expect this result because when courts previously used the canon to deny extraterritorial application of the Age Discrimination in Employment Act, Congress had quickly overridden that result. See Older Americans Act Amendments of 1984 § 802, 98 Stat. 1767, 1792 (codified at 29 U.S.C. § 623(f)-(h) (2000)) (overriding Cleary v. United States Lines, Inc., 728 F.2d 607, 610 (3d Cir. 1984) and Thomas v. Brown & Root, Inc., 745 F.2d 279, 281 (4th Cir. 1984)).

ancing approach. Rather, it limited extraterritorial application to discrimination in foreign workplaces by American employers against American citizens, excluding discrimination in foreign workplaces by foreign employers against American citizens as well as by American employers against foreign nationals.[278] Congress also provided that the statute did not apply to extraterritorial conduct that was required by foreign law, and added provisions specifying how to treat foreign firms controlled by American firms.[279] In short, the preference-eliciting default rule provoked Congress into providing just the sort of nuanced specificity and limitations that the Court would have had difficulty divining.[280]

One might generalize this into the general default rule that, for issues that seem amenable to unilateral correction by a nation's legislature, its laws should be interpreted to avoid international conflict. In addition to the canon against extraterritorial application, other doctrines seem consistent with this default rule, including the doctrine that interprets

278. 42 U.S.C. §§ 2000e(f), 2000e-1(a), 2000e-1(c) (2000).

279. Id. § 2000e-1(b)–(c).

280. A similar argument about *Aramco* can be found in Curtis A. Bradley, Territorial Intellectual Property Rights in an Age of Globalism, 37 Va. J. Int'l L. 505, 552–53 (1997). But Professor Bradley bases his argument on separation of powers grounds rather than preference-eliciting analysis, and thus does not limit the argument to issues likely to be resolvable by provoking unilateral legislative action. An excellent recent article by Professor Goldsmith also argues generally for information-forcing default rules in a host of doctrines affecting foreign relations. Jack L. Goldsmith, The New Formalism in United States Foreign Relations Law, 70 U. Colo. L. Rev. 1395, 1397 (1999). But his justification for *Aramco* is precisely the opposite: that it reflected the best preference-estimating default rule. Id. at 1433–35. This seems difficult to square with the facts that prior cases interpreting antidiscrimination statutes to lack extraterritorial application had been immediately overridden by Congress, see supra note 277, that the decision in *Aramco* in fact provoked immediate legislative override, and that the canon generally eschews inquiry into legislative preferences regarding extraterritoriality for the statute at hand. Goldsmith considers but rejects a preference-eliciting function for *Aramco*, arguing that decisions that mistakenly provoke international conflict increase the likelihood of legislative reaction more than decisions that mistakenly do not. Id. at 1414, 1419–20, 1433–36. This is true, but an opposite preference-eliciting default rule that provoked international conflict by interpreting all statutes to operate extraterritorially would normally impose excessive interim costs. See supra text accompanying note 270–271 (discussing Professor Turley's proposal). Such a default rule is thus better limited, as discussed in the next section, to cases where what courts are trying to provoke is not a congressional reaction but an international agreement, a possibility the Goldsmith article does not consider. In the *Aramco* context, then, the canon against extraterritoriality is the better of the two possible preference-eliciting rules, and it remains the case that it is more likely to provoke a legislative reaction than a default rule that estimates legislative preferences about extraterritoriality for each statute. In any event, Professor Goldsmith does not in the end argue for preference-eliciting default rules as such. Rather he argues for majoritarian default rules that interpret laws affecting foreign relations according to their meaning (rather than invalidating or narrowing them based on a judicial concern that it will raise an international conflict) based in part on the notion that provoking such international conflict has useful information-forcing features. Goldsmith, supra, at 1417 n.87, 1435–36.

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statutes not to apply to foreign acts of state,[281] nor to conflict with international law.[282]

B. *Provoking International Agreements*

Other sorts of issues require international agreements that courts certainly cannot negotiate, but that the national government cannot unilaterally dictate either. This is especially true when the issue involves international collective action problems like the regulation of market behavior that confers net benefits within the nation where the conduct occurs (and profits are earned), but net harms on the world because most of the harm is externalized onto other regions. Each nation acting individually has incentives to allow or encourage such conduct,[283] but all are worse off collectively if every nation acts on these individual incentives.[284] A court that fills the statutory gap with what its legislature would likely have wanted will not solve the problem, for what each legislature unilaterally would have wanted would perpetuate the international race to the bottom. Nor would using a preference-eliciting default rule that provokes an actual unilateral legislative response solve the problem for the same reason. A court could try to fill the gap with what it predicts would have been produced by international agreement, but the collective action problem means that other nations would still have incentives to allow conduct that externalizes its harm onto other nations.

No, the only solution to such a collective action problem is an international agreement that can bind multiple nations. One thus needs a preference-eliciting default rule that is likely to provoke not unilateral legislative action, but collective international agreement. And the default rule that is most likely to provoke international agreement is one that *creates* international discord requiring resolution. This may explain why

281. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), which elicited congressional override in the "Hickenlooper Amendment," now codified at 22 U.S.C. § 2370(e)(2) (2000).

282. Curtis A. Bradley, The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Geo. L.J. 479, 488–90 (1998). This is hard to explain as a categorical estimate of legislative preferences because it often appears that the legislature wants to breach international law. Id. at 517–23. But it does make sense as a means of eliciting from the legislature precisely when and to what extent it wishes to violate international law. Id. at 524–36 (making a similar point but basing it on a separation of powers claim rather than preference-eliciting analysis).

283. See Andrew T. Guzman, Antitrust and International Regulatory Federalism, 76 N.Y.U. L. Rev. 1142, 1151–62 (2001) (arguing that net exporters have incentives to seek unduly lax antitrust laws and net importers unduly strict ones, and that antitrust issues should thus be resolved through international negotiations in the World Trade Organization). The OPEC oil cartel and DeBeers diamond cartel are infamous, but the United States, Europe, Japan, and Canada all immunize export cartels that harm foreign consumers as well. Michael Trebilcock & Robert Howse, Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competition Politics, 6 Eur. J.L. & Econ. 5, 12 (1998).

284. See Mancur Olson, The Logic of Collective Action 2, 11–16, 21 (2d ed. 1971).

in market cases the canon against extraterritorial application is de facto replaced by its opposite—that statutes do apply to any extraterritorial conduct that has substantial effects within the enacting nation.[285] Two things distinguish the market cases for which this opposing presumption is applied. First, they involve serious collective action problems that require international agreement for resolution. Second, international agreement seems likely because trade issues are subject to ongoing negotiation between nations. There is thus a ready forum for addressing such issues.

This is precisely what has happened in antitrust. Extending antitrust enforcement to extraterritorial conduct has created great international discord, including diplomatic protests and foreign blocking statutes that seek to impede U.S. antitrust discovery, bar collection of U.S. antitrust judgments, and "clawback" any damages paid in satisfaction of U.S. antitrust judgments.[286] But this international discord has in turn provoked international negotiations and agreements to resolve conflicts in the application of antitrust law.[287] The result is hardly perfect, but better than one could have expected from uncoordinated decisions by different nations' courts, each pursuing individual national interests.

Preference-eliciting analysis also helps explain some of the nuances in extraterritorial application of antitrust law. Although antitrust law is generally said to apply to extraterritorial conduct that affects the United States, the rule is really bifurcated. Antitrust law applies extraterritorially when conduct abroad harms U.S. markets.[288] But antitrust law does *not* apply extraterritorially when conduct abroad forecloses another nation's markets to U.S. producers.[289] In both cases, there are effects within the

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285. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); Dodge, Presumption, supra note 255, at 98–103; Kramer, Extraterritorial, supra note 256, at 752; Turley, supra note 254, at 608–18. This has been true not only in the United States, but in Europe as well. See Trimble, supra note 255, at 55 & n.15. R R R

286. Joseph P. Griffin, Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction, 6 Geo. Mason L. Rev. 505, 505–06 (1998).

287. See William S. Dodge, Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism, 39 Harv. Int'l L.J. 101, 163–68 (1998); Trimble, supra note 255, at 57 & n.24; Russell J. Weintraub, The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach, 70 Tex. L. Rev. 1799, 1817 (1992). Although noting this salutary effect, Dodge rejects any preference-eliciting default rule. See Dodge, Presumption, supra note 255, at 121. But it seems to me that if courts were really trying to do what the legislature would have wanted for each statute, which is Dodge's approach, id. at 116–19, 123, they would adopt some sort of conflicts approach like Kramer's, that considers not only the effects on the enacting nation, but the effects on other nations' interests as well. For what a legislature would want to do depends in part on other nations' reactions to the extraterritorial legislation. Instead, antitrust courts ignore conflicts other than the extreme case of a foreign law that compels the defendant to act in a way prohibited by U.S. law. See id. at 99–100. R R

288. See *Hartford*, 509 U.S. at 796.

289. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) ("[American producers] cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the

United States on U.S. citizens; in the latter case, the effects just happen to be suffered by U.S. producers disabled from doing business in another nation. What accounts for the difference in treatment?

The key is that the former case inflicts any net costs outside the nation that allows the conduct (typically on foreign buyers), whereas the latter case imposes any net costs within the nation allowing the conduct (typically on domestic consumers). In the former case, then, allowing the conduct might reflect an international collective action dilemma, where each nation individually has incentives to permit anticompetitive practices that enrich it at the expense of other nations, but if every nation allows such anticompetitive practices the collective result is to impoverish the world. In that case, international agreement might resolve the problem, for each foreign nation would be motivated to reach agreement to avoid the imposition of net costs on itself by other nations. A preference-eliciting default rule provoking international agreement here might thus do some good.

In the latter case, however, the nation allowing the conduct suffers any net costs if the conduct is anticompetitive. That nation has thus either reached a different conclusion about the competitive significance of the conduct, or decided for political reasons that it is willing to impose net costs on itself (and domestic consumers) in order to benefit domestic producers. The problem is not an international collective action problem, but rather either a disagreement about antitrust policy or an internal political issue about the relative influence of domestic consumers and domestic producers.[290] It is thus less likely to be amenable to international agreement, for if other nations disagree about what is anticompetitive or have similar internal political motives, none may want an international agreement ending their own decisions to allow conduct in their markets that other nations deem anticompetitive.[291] A preference-elicit-

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competitive conditions of other nations' economies.") Antitrust law, however, likely applies to foreign conduct that directly restrains exports from the United States. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 113–14 (1969) (not considering extraterritoriality issue, but reinstating district court decision that invalidated an agreement between foreign and domestic firms that prevented exports by a domestic firm); see also 15 U.S.C. § 6a (2000) (providing that antitrust laws do not apply to commerce with foreign nations unless it has direct, substantial, and reasonably foreseeable effect on domestic commerce, or import or export commerce). In an increasingly global market, this distinction between foreclosing another nation's market to U.S. producers and restraining U.S. exporters seems substantively thin. But it may make sense if it refers to the likelihood that those U.S. firms will be galvanized into supporting international agreements because they are mainly affected as exporters. See infra note 291. R

290. See Elhauge, Interest Group Theory, supra note 14, at 35–44 (describing interest group theory). R

291. See generally Alan O. Sykes, Regulatory Protectionism and the Law of International Trade, 66 U. Chi. L. Rev. 1, 31–33 (1999) (observing that political cost-benefit calculus may well favor protectionism that fails economic cost-benefit test). Less likely does not mean impossible, for domestic exporters probably exert less lobbying effort against statutes that exclude foreign exporters from domestic markets than they exert in

ing default rule here is thus less likely to provoke international agreement. Not surprisingly, no preference-eliciting default rule is used.

What are we to make of the extraterritorial application of environmental statutes? These have not been given nearly the extraterritorial effect of antitrust, securities, or trademark statutes, yet they too raise international collective action problems when they create spillovers or affect the global environmental commons.[292] Why, then, aren't environmental laws generally interpreted to extend to extraterritorial conduct that has effects in the enacting nation? There are two answers, each of which is more true historically than at present. First, environmental issues have tended to present fewer collective action problems than market issues. Global markets are thoroughly beset with collective action problems because so much market behavior imposes net externalities. But most environmental problems historically were local in the sense that the nation in which the conduct occurs normally suffers any net costs of allowing environmental harm and thus has proper incentives to address it.[293] Second, and more important, while environmental treaties have recently been forged, they are not a regular item of international negotiation. Thus, a preference-eliciting default rule that creates international discord in this area is less likely to lead to international agreement than in market areas, which are routinely subject to international trade negotiations.

Both answers are, as I said, less true today than they used to be. Our environmental problems are increasingly interdependent, and science increasingly reveals the environmental interdependence that existed all

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favor of international agreements that open both domestic and foreign markets to exports. See id. at 25 & n.66 (requiring only the assumption that exporters consider the domestic statute would be less likely or less certain to affect foreign laws excluding their exports than a binding international agreement would). For international agreements, then, domestic exporters are more likely to combine with domestic consumers to overcome the objections of domestic producers who prefer to exclude foreign competition. But domestic producers remain a formidable obstacle to such agreements. Id. at 26. Indeed, one obstacle that Sykes misses in his brilliant article is that the domestic exporters may generally be the same firms as the domestic producers who want protection from foreign exports. If so, each nation's firms would prefer to be protected from competition from other nations' firms, and thus achieve a global market division by forgoing exports in exchange for greater market exploitation of domestic consumers. The above helps explain why foreign conduct that directly harms exporters is probably covered by antitrust law, but with less certainty than foreign conduct that harms domestic buyers. See supra note 289. **R** It may also explain the exclusion of foreign conduct harming firms that seek to do business in foreign nations, if that is taken to mean firms that are not primarily exporters, and are thus likely to favor a regime of bilateral domestic protectionism.

292. Turley, supra note 254, at 640–42. **R**

293. See Trebilcock & Howse, supra note 283, at 13–14 (rejecting race-to-bottom argument when jurisdictions internalize the relevant environmental cost); Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1210–12 (1992) (same). **R**

along.[294] And we increasingly have ongoing environmental negotiations to deal with these problems, sometimes as part of trade talks. So preference-eliciting analysis would suggest that we should see a decline in application of the canon against extraterritorial application for environmental statutes. The caselaw, while scanty, does indeed seem to indicate a tendency in this direction.[295]

This history of declining use of the canon against extraterritorial interpretation in environmental law indeed parallels a similar history in antitrust law, both of which also support the theoretical prediction that courts will abandon failed preference-eliciting default rules. In 1909, *American Banana Co. v. United Fruit Co.* relied on the canon to hold that antitrust law does not apply to conduct occurring on foreign soil even though it had, and was intended to have, an anticompetitive effect on American consumers and an American firm.[296] One might have thought this would be a preference-eliciting default rule that, as in *Aramco*, would usefully provoke an explicit legislative decision. But in fact *American Banana* failed to provoke any legislative decision that made clear the extent to which Congress wished to regulate foreign restraints of trade that affected American commerce. Congress's only arguable response was a February 1913 amendment that extended the ban on import conspiracies to include defendants acting as importers either directly or through agents, but that amendment was at best oblique and did not address anticompetitive conduct that did not involve importers or conspiracies.[297]

What was the Supreme Court's reaction when this preference-eliciting default rule failed to elicit any legislative clarification? Two months after the 1913 amendment failed to clarify the issue, the Supreme Court began slowly cutting back on *American Banana*. The early cases involved the monopolization of transportation to the United States, and were thus relatively limited and marginal.[298] But, as the Court became increasingly confident Congress was not going to act, later cases extended the antitrust laws to just about any extraterritorial conduct having a substantial intended effect on American commerce.[299] At present, this new test probably reflects a treaty-eliciting default rule for the reasons noted

294. See Jonathan Baert Wiener, Global Environmental Regulation: Instrument Choice in Legal Context, 108 Yale L.J. 677, 686 (1999).

295. Compare Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1347–48 (D.C. Cir. 1981) (refusing to give National Environmental Policy Act (NEPA) extraterritorial application), with Envtl. Def. Fund v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993) (giving NEPA broad extraterritorial effect).

296. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

297. 15 U.S.C. § 8 (2000). This may have been an indirect response to the plaintiff's argument in *American Banana* that the defendant's conduct should be covered based on principal-agent theory, Am. Banana Co. v. United Fruit Co., 166 F. 261, 266 (2d Cir. 1908), though the plaintiff in *American Banana* oddly never raised a § 8 claim.

298. Turley, supra note 254, at 608–13; Kramer, Vestiges, supra note 254, at 190–93. Because these early cases were limited to transportation, they were not covered by the § 8 prohibition on restraints on imports. Id. at 190–91. **R**

299. See supra note 288 and accompanying text. **R**

above. But in its earlier history, the new test probably reflected a preference-estimating default rule because international markets were less interdependent,[300] most antitrust courts added questions of international comity to the basic effects test,[301] and forums for international negotiation of market disputes were less well-established than now. Some think even the current approach corresponds relatively well to likely legislative preferences given the international conflicts at issue.[302]

Whichever interpretation one gives to the new default rule, this is a concrete example of a case where the Supreme Court abandoned an initial preference-eliciting default rule that failed to provoke any explicit legislative action over a long period. As noted above, this can be an entirely sensible reaction when intervening events convince the court that the failure to overrule the precedent does not reflect any legislative consideration, but rather reflects the court's own misestimate of the likelihood the precedent would be reconsidered.[303] In such cases, it makes sense to replace the preference-eliciting precedent with either a better preference-eliciting default rule—that is, one more likely to provoke the legislative action in question—or a default rule that reflects the courts' best estimate of legislative preferences or sound policy. This offers an alternate theory for reconciling the different extraterritorial interpretations of antitrust statutes and antidiscrimination statutes. *Aramco* was a preference-eliciting default rule that succeeded in provoking legislative reconsideration; *American Banana* was a preference-eliciting default rule that never did and eventually was thus properly abandoned.

None of this means that *all* applications of the extraterritoriality canon constitute (successful or abandoned) preference-eliciting default rules. For, like every canon, sometimes this canon is applied formalistically or incorrectly, or as a makeweight to confirm a decision that really reflects the judge's ideological preferences or an independently justifiable conclusion about statutory meaning or likely legislative preferences. In such cases, we would expect that the canon would stick undisturbed by the national legislature. Judicial refusal to apply its labor laws extraterritorially, for example, seems to reflect political preferences and thus has never been overturned. *Foley Bros. v. Filardo* relied mainly on indicia of the likely preferences of Congress and the executive branch to rule that

300. Lea Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, Law & Contemp. Probs., Summer 1987, at 11, 18.

301. Turley, supra note 254, at 612–13. Such inquiry has been practically eliminated by *Hartford Fire Insurance Co. v. California*, which limited it to the rare case where a foreign law affirmatively compels the defendant to violate U.S. antitrust law. 509 U.S. 764, 797–98 (1993). **R**

302. Kramer, Extraterritorial, supra note 256, at 757–58; Turley, supra note 254, at 656. **R**

303. Supra text accompanying notes 240–251. **R**

U.S. labor laws do not apply to foreign workplaces,[304] and that prediction was borne out when Congress reenacted a modified version of that statute without altering its extraterritorial application.[305] But preference-eliciting analysis should offer a means of explaining at least some of the seeming inconsistencies in the canon's application by sorting out applications that reflect (successful or abandoned) preference-eliciting default rules from those whose justification must rest on other grounds.

VII. Supplemental Default Rules Applicable When Enactable Preferences Cannot Be Estimated or Elicited

What should an interpreter do in the residual case where he can neither ascertain statutory meaning nor reliably estimate enactable preferences, and the conditions for a preference-eliciting default rule are not met?[306] For example, in a case where the interpreter really has no idea whether the legislature would prefer one interpretation or the other, a preference-eliciting default rule will still not make sense if there is no reason to think one interpretation is more likely to provoke legislative correction than the other. What then should the interpreter do?

One tempting answer is that the interpreter should just make the best guesstimate she can, on the ground that unless the interpreter's guesses are actually worse than random, making some guess about enactable preferences will tend to lead to somewhat greater political satisfaction than the alternative. And that might well be the answer if there were just one government and one interpreting court. But in fact there are often subordinate political units and courts. As we shall see, their existence helps explain certain default rules we in fact see. Because these default rules apply only when a preference-estimating default rule provides no answer and a preference-eliciting default rule is inappropriate, I will call these supplemental default rules. They are the rules that apply by default when the other default rules don't.

304. 336 U.S. 281, 286–90 (1949). Congress had also explicitly indicated a decade before that it did not want the Fair Labor Standards Act of 1938 to apply extraterritorially, 29 U.S.C. § 213(f) (2000), which would suggest the same legislative preference for other labor laws. In addition, domestic labor standards do not raise collective action problems, see Trebilcock & Howse, supra note 283, at 14, thus a preference-eliciting default rule here would not likely trigger an international agreement that would have been unavailable to the nations acting unilaterally. R

305. 40 U.S.C. § 329 (2000); see also Turley, supra note 254, at 618 (collecting cases interpreting five other labor law statutes to have no application in foreign workplaces, none of which were legislatively overridden despite frequent legislative tinkering with the statutes). R

306. See supra Part II (specifying conditions).

A. *Interpreting Federal Statutory Gaps or Ambiguities to Incorporate State Law and Protect State Autonomy*

In a federal system, often courts face a statutory gap on which federal political preferences are utterly unclear. For example, what should courts do when a federal statute fails to specify any statute of limitations? One could imagine the courts assuming in such cases that Congress meant the cause of action to be unlimited in time, but that has not been the standard interpretive practice. Instead, courts have assumed the gap was inadvertent and that Congress would want some statute of limitations. But what period, among the infinite possibilities, should federal judges choose? Their normal practice has not been to make the choice themselves at all, but rather has been to incorporate by reference whatever limitations period had been chosen by states for similar causes of action.[307] As a hermeneutic matter, this seems somewhat dubious. Why would one assume Congress intended the same limitations period as states when it is enacting a federal cause of action that by definition is intended to provide a remedy additional to state remedies and thus must implicitly deem those state remedies inadequate? The truth is we have no grounds here to assume anything about congressional meaning or intent. Nor does this default rule seem likely to reflect congressional preferences for any particular limitations period or well-calculated to elicit a congressional reaction.

We can, however, explain this rule as a supplemental preference-estimating default rule. The courts can be confident that national political preferences would support *some* limitations period. Unfortunately, they have no indication about *which* limitations period those national preferences would favor. Further, the choice of any particular time period reflects an open-ended and largely arbitrary political judgment about how to weigh conflicting interests on which some reading of prevailing political preferences is vital. Given a lack of reliable information about enacting or current congressional preferences, the default rule best calculated to minimize political dissatisfaction is to track local democratic choice. Because national preferences are unknown, this default rule improves the political satisfaction of each state polity without any expense to the national polity. To be sure, the political preferences being followed in these cases do not really provide an accurate indicator of the enactable preferences of the national legislature. But since those enactable preferences are unclear, the next best means of satisfying political preferences is to track the clear preferences of political subunits.[308] These are far more

307. See Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 820–23 (4th ed. 1996) (noting that this default rule governs all statutes enacted before 1990, at which time Congress finally provided by statute for a general four year statute of limitations on all new statutes that failed to specify a different limitations period).

308. Another alternative would have been borrowing from the limitations period of other federal statutes. But normally such analogies are more strained since by definition

likely to comport with political preferences than having judges exercise their own judgment about what the best limitations period would be.

More generally, federal courts often define ambiguous terms in federal statutes (like "real property" or "children") by incorporating state law on the topic.[309] This practice seems to be in considerable tension with the general default rule articulated by federal courts that Congress does not intend to make federal statutes dependent on state law.[310] The approach here provides a way of reconciling these diverging doctrinal strands. The federal statute should ordinarily not be read to incorporate state law unless no congressional preference can be reliably estimated or elicited, in which case state law incorporation is the best courts can do.

A similar argument can be made about the plethora of canons that protect state autonomy. These canons provide that, where federal intent is not clear, federal statutes should be interpreted not to regulate states, preempt state statutes, impose conditions on federal grants to states, or waive state sovereign immunity.[311] In such situations, the cases make clear that the courts should not just make their best guess about federal intent, but should apply the canons unless the congressional purpose to the contrary is "clear." Because framed as clear statement rules, it is tempting to regard these as preference-eliciting default rules.[312] Reinforcing that temptation is the fact that cases that apply these canons are, like preference-eliciting default rules, often overridden quickly by Congress.[313] But these canons cannot truly be justified on preference-eliciting grounds for they favor a set of parties—the states—that has unusually strong, not weak, access to the congressional agenda to get statutes overridden.[314] Given the logic of preference-eliciting default rules, this would if anything justify a default rule of resolving ambiguities against the states.

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the federal statutes differ in their topics. There are some cases where applying a state law limitations period would result in claim splitting or excessive variation and uncertainty that Congress would presumably prefer to avoid, and in such exceptional cases the courts have instead borrowed the limitations period of other federal statutes. Id. at 823–26.

309. Id. at 769–70.

310. Id. at 768, 770.

311. See N. Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654–55 (1995); Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991); Dellmuth v. Muth, 491 U.S. 223, 228 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 (1985); Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 16–17 (1981); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146–52 (1963).

312. See, e.g., Garrett, supra note 9, at 685–86 (assuming clear statement rules are preference-eliciting); cf. Eskridge, Overriding, supra note 25, at 389 (indicating that such canons may be designed to invite legislative overrides). R R

313. See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 103, 104 Stat. 1103, 1106 (1990) (overriding *Dellmuth*); Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986) (overriding *Atascadero*); Copyright Remedy Clarification Act, Pub. L. No. 101-553, § 2, 104 Stat. 2749, 2749 (1990) (overriding case that applied *Atascadero*, BV Eng'g v. UCLA, 858 F.2d 1394 (9th Cir. 1988)).

314. Eskridge, Dynamic, supra note 54, at 153, 288; Eskridge, Overriding, supra note 25, at 348. Another study (which examined a smaller set of cases) reached the more R R

A more promising explanation is to see the canons protecting state autonomy as supplemental preference-estimating default rules. One might reframe these canons as raising the following question. What should an interpreting court do when national political preferences are unclear, but the state action that one party seeks to limit does provide a reliable indication of regional political preferences? If national preferences are truly unknown, then tracking state political preferences seems best calculated to maximize political satisfaction for the reasons noted above. Indeed, even if the best estimate about national political preferences suggests a position that conflicts with state political preferences, political preference satisfaction might be advanced by tracking the latter when this estimate of national preferences is uncertain and state political preferences are not just clear, but actually reflected in state political action or legislative enactments.[315]

This preference-estimating analysis probably does not explain the full extent of the clear statement rules protecting state autonomy. Those rules are sometimes applied with such ferocity that courts decline to follow not just guesstimates of federal intent, but fairly reliable indications of federal preferences that were not made crystal clear in the federal statute. One time the Court applied its pro-federalism canons in a way that required Congress to enact a statute three times in order to make plain its intent to abrogate state immunity.[316] More generally, these canons are often applied notwithstanding an agency interpretation that would otherwise merit *Chevron* deference as the best indicator of current enactable preferences.[317] Such examples go well beyond a default rule approach and instead embrace a substantive protection of federalism values *against* political preferences by increasing the legislative costs of infringing on those federalism values. Such an aggressive approach must be justified

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neutral conclusion that state and federal interests seem equally represented because five of twelve statutory overrides that purported to alter federal-state relations would have enhanced state power. See Solimine & Walker, supra note 33, at 449–50. But this would at best justify a neutral preference-estimating rule, rather than a preference-eliciting rule favoring the states over federal interests. **R**

315. One might arguably distinguish state law that does not reflect state legislative action but rather state court common law because the latter does not reflect an enactable preference at any level. Cf. Alan Schwartz, Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense, 2 Am. L. & Econ. Rev. 1, 9 (arguing that federal regulatory statutes that explicitly preempt state legislation that sets a higher regulatory standard should also be interpreted to preempt state common law, reasoning that federalism norms are "weak" for state courts because they are "poor regulators" compared to other local institutions). But the fact is that most state constitutions or statutes explicitly delegate the power to make common law to state courts, thus indicating that the enactable state preference is to have state courts exercise substantive judgment. See supra Part II.A.3 (noting that legislative preference is sometimes to delegate power to courts).

316. Eskridge, Overriding, supra note 25, at 409–10. **R**

317. See, e.g., Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 670 (1985); Cal. State Bd. of Optometry v. FTC, 910 F.2d 976, 981–82 (D.C. Cir. 1990); Amalgamated Transit Union v. Skinner, 894 F.2d 1362, 1368 (D.C. Cir. 1990).

not on interpretative grounds but on a substantive constitutional theory, the most promising theory being that federalism is an underenforced constitutional norm because the Supreme Court has so far been unable to develop intelligible rules to provide content to the Tenth Amendment.[318]

But the above analysis indicates that a canon favoring the autonomy of political subunits need not depend on the persuasiveness of this constitutional argument, nor even on the particularities of the U.S. Constitution. Default rule analysis would also support a presumption that unclear state legislative action does not preempt or abridge local municipal action. Such a presumption is in fact consistent with the home rule doctrine of local government law.[319] Likewise, it would justify a presumption that unclear laws of the European Union do not preempt or limit contrary action by European nations. This would support European application of the "principle of subsidiarity" to statutory interpretation. Further, it would indicate that where European law leaves a gap that courts feel confident the European Community would want filled but has given no indication of precisely how to fill it, then courts should, where possible, incorporate the law of European nation-states into European law, just as U.S. law incorporates state law on questions like the proper limitations period.

B. *Turning to Substantive Judicial Doctrines*

What should courts do in cases where there is no reliable indication of political preferences held by either the enacting or current government or any political subunit, and a preference-eliciting default rule is inappropriate? The interpreting court should estimate the ambiguous preferences as best as it can, but where no reasonable estimate exists, the premise that underlies much of the current hermeneutic debate finally seems to hold: the only thing the judge can do is to exercise her own judgment about which rule would be most desirable. This is not because it is desirable for judges to ignore legislative preferences. It is, rather, because what the legislature would have wanted the interpreter to do in such cases is to choose the option that makes the most policy sense, and the only source the interpreter has to rely on in this individual case is her own judgment, informed by briefing on what the best legislative policy would be.

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318. See Eskridge, Dynamic, supra note 54, at 287–88; Eskridge & Frickey, Quasi-Constitutional Law, supra note 117, at 630–32; Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213–28 (1978); Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2112–14 (1990) [hereinafter Sunstein, Chevron]. R R

319. Though that doctrine is generally based on state constitutional provisions. See Gerald E. Frug, Cases and Materials on Local Government Law 87–91 (2d ed. 1995) (discussing state constitutional home rule provisions).

In applying her own judgment, however, the interpreter should exclude those policy preferences she is confident could not command a majority in the current political process. There remains the worrisome concern under democratic theory that the interpreter will be imposing policy preferences that, while not clearly rejected by the political process, have not procured clear assent either. But one should not exaggerate the worries. We are after all talking of the judiciary making a choice only when a statute is enacted through a legislative process that leaves an ambiguous range of statutory meaning, no reliable estimate of legislative preferences for resolving that ambiguity, no conflict with the political preferences of a political subunit, *and* little possibility of eliciting an indication of legislative preferences. The range of choice is small, and implicitly authorized by the legislative process itself. Choice by the interpreter is unavoidable because any choice within that range, even the choice of the most narrow option,[320] would remain a choice that requires justification.

Moreover, if (within this limited range) each judge applies her political preferences, the judiciary collectively is likely to come close to the aggregate political preferences of the old political processes that appointed them. This may not be ideal, but given a situation that does not permit any more precise accounting of legislative preferences, correspondence to the preferences of the appointing political process is the best the judiciary can do.

That might be the end of the story if there were only one court. But in fact most interpretive regimes have multiple courts that are subordinate (through some chain of appeals) to a high court. Even if the average statutory result in each interpreting court comes out fine, the variance among them means that many specific statutory results will reflect the idiosyncratic judgment or policy views of the individual judge that happens to have been assigned the particular statutory interpretation.

The judiciary as a whole, as an honest interpretive agent, would want to reduce this variance through some set of substantive default rules. For even if greater variance does not increase the magnitude of judicial error in estimating enactable preferences, it increases legal uncertainty and the costs of ascertaining what the law says. Both of those would undermine planning by individuals in society. They also undermine the statute's effectiveness at influencing behavior for two reasons. First, uncertainty about what a court will do reduces the effective difference in sanctions between compliance and noncompliance. Second, a higher cost of ascertaining the law will deter some individuals from investigating the law enough to know whether their conduct complies or not.

320. See supra notes 150–153 and accompanying text; infra Part VIII.C (rejecting argument that ambiguous statutes should always be interpreted narrowly). **R**

Moreover, the highest court in the jurisdiction would have its own incentives to control discretionary choices by lower courts by adopting general substantive default rules to guide them in cases where legislative preferences are unknown. Not only will this reduce the variance among interpretative decisions, it will also likely correspond better to the preferences of the appointing political process because the political views of high court justices are far more likely to be considered seriously during their appointment.

This provides a fresh way of understanding many canons of construction: not as likely reflections of legislative preferences, but as the means by which high courts constrain lower courts and limit variance when legislative preferences are unknown. It also provides strong limits on the use of such canons. These canons are appropriate but, unless justified on constitutional grounds, their use should be limited to cases where legislative preferences really do not lend themselves to reasonable estimation or elicitation.

1. *Interpret Consistent with Common Law.* — The canon that statutes should be interpreted to be consistent with common law has been greatly maligned as thwarting legislative preferences to further judicial policy views.[321] And so it does when used to adopt more narrow statutory constructions than would be indicated from a judicial estimate of legislative preferences. Thus, it is not surprising that all but one of the state legislatures to consider the question have rejected the canon narrowly construing statutes that are in derogation of the common law.[322]

But when statutory meaning is unclear, and legislative preferences are unknown and difficult to elicit, the canon makes a great deal of sense as a supplemental default rule. The point missed by prior commentators is that the canon helps constrain wayward lower courts in such cases. If each judge instead resolved such cases based on what struck him as wise policy, the results would be highly variable and less within the control of the high court. What the common law provides is an articulated body of law, common to all the courts in the jurisdiction, that presumably reflects the judiciary's own considered judgment of wise policy. For common law is by definition judge-made law in those areas where statutes have not provided any answer, and thus policy arguments are made freely in reaching common law conclusions. Further, such common law decisions are made in a hierarchical appellate system and thus ultimately reflect the supervision of the highest court in the jurisdiction, whose members' political views are the most likely to have been considered by the political branches during the appointment process.

But the canon must be limited to the sorts of cases that justify this sort of judicial discretion. And in fact application of the canon has been

321. Shapiro, supra note 175, at 936 & n.74 (collecting sources). **R**

322. Infra note 359 (collecting sources). **R**

more limited than its phrasing might suggest.[323] In particular, the canon has not been applied to ambiguities created by "remedial" statutes, that is, to statutes that try to cure a substantive problem with common law doctrine or provide a remedy for a legal wrong that was previously left unremedied.[324] In such cases, the courts may not know what legislative preferences are, but they know what they are not—what such a legislature was against was the prior application of judge-made common law or remedial decisions. It thus makes sense for courts to desist from application of the canon in such cases since they remain bound by the general goal of maximizing political satisfaction.

Illustrating this supplemental approach is the code of construction adopted by New York, the one state legislature to expressly retain the canon narrowly construing statutes in derogation of the common law.[325] Although retaining this canon, the New York code does so only after first stressing, repeatedly and at length, that the "primary" consideration in statutory construction is furthering legislative purposes.[326] The implication seems plain that the legislature regards this canon as only a supplemental default rule to be employed when the primary default rule of estimating legislative preferences has failed. Also consistent with the above analysis, the New York legislature has cabined this supplemental canon by providing that remedial statutes must be liberally construed.[327] The various state statutes that have rejected the canon against interpretations in derogation of the common law are probably best read as rejecting a primary role for this canon that could trump estimates of legislative preferences rather than a supplemental role when no such estimate can be divined.

2. *Interpret to Avoid Constitutional Difficulties.* — I argue in a companion piece that the canon interpreting statutes to avoid constitutional difficulties cannot be justified as a preference-estimating default rule.[328] Nor does it make sense as a preference-eliciting default rule other than in cases where the interpretation raising constitutional difficulties burdens a politically powerless group.[329] But if the court cannot otherwise estimate or elicit legislative preferences, then the canon makes a great deal of sense as a supplemental default rule. For "constitutional difficulties" generally refer to cases where some interpretations of the statute would con-

323. See Shapiro, supra note 175, at 938. **R**

324. Id. As with many canons, the canon for liberally construing remedial statutes is justifiable only if applied selectively. Applying it to identify appropriate cases for negating the canon against interpretations in derogation of the common law makes sense. Applying it to adopt the broadest plausible interpretation of any civil statute does not. See Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 583–86 (1990).

325. N.Y. Stat. Law § 301 (McKinney 2001).

326. Id. §§ 91–92, 95–96, 111, 120, 124, 191.

327. Id. § 321.

328. See Elhauge, Preference-Estimating, supra note 2, Part III.A. **R**

329. See supra Part III.B.

flict with deeply held national principles, even though it is unclear that those principles are embodied in binding constitutional doctrine. Absent any contrary indication about legislative preferences, it makes general sense to assume the political branches would prefer to resolve their statutory gaps or ambiguities with something consistent with fundamental national principles.

Moreover, to the extent general constitutional principles are elaborated in U.S. Supreme Court decisions, this canon plays much the role of the canon construing ambiguous statutes to conform to the common law. It affords the Supreme Court a way to guide lower courts to adopt more uniform interpretations. Because the Court regularly promulgates constitutional decisions, an interpretive rule to avoid constitutional difficulties (when all else fails) is a way of reducing lower court variance and bringing it closer into line with Supreme Court views. Because the U.S. Supreme Court does not itself render common law decisions, one would expect it to invoke this canon somewhat more often than state courts, which can instead invoke the canon against deviations from common law to reduce and police lower court variance.

At least one line of cases is consistent with this limitation, suggesting that the canon against constitutional doubts should be applied only when legislative preferences are unclear.[330] This might be read to relegate the canon to a supplemental role once the preference-estimating inquiry has failed.

Still, one cannot oversell this explanation. Courts often invoke this canon even when they do have a fairly reliable contrary indication about enactable preferences, such as an agency interpretation that would otherwise merit *Chevron* deference.[331] And often they invoke the canon when the court seemingly has little doubt that the objectionable interpretation would be unconstitutional. In such cases, the main purpose of the canon may well be to avoid, if possible, an open constitutional conflict with the legislative branch.[332] Such a prudential application of the canon aims not at maximizing legislative preference satisfaction, but at preserving the court's political capital to enforce constitutional judgments. If so, though, the canon should be restricted to cases where the statute would actually be deemed unconstitutional. Otherwise the canon would be cre-

330. See United States v. Monsanto, 491 U.S. 600, 611 (1989) (describing the canon against constitutional doubts as "useful in close cases, *or* when statutory language is ambiguous" (emphasis added)); George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) ("[A]voidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion" by applying the canon where "the intention of the Congress is revealed . . . distinctly.").

331. Sunstein, Chevron, supra note 318, at 2113. **R**

332. See Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 343 (1999) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." (quoting Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944))).

ating additional court-legislative conflict and thus undermining the supposed purpose. Accordingly, if this theory were really pursued, the constitutional doubts canon would merely offer a means of *phrasing* a constitutional holding in a less confrontational way, but would add no difference in substantive result to the constitutional invalidity canon.

An alternative theory is that the constitutional doubts canon aims to force legislative deliberation to make up for underenforced constitutional norms, such as the nondelegation doctrine.[333] This theory has some force. But if pursued, then the canon should be confined to cases where the relevant constitutional norms are in fact underenforced, and would not justify applying the canon indiscriminately to all constitutional doubts.

In any event, under either explanation, the justification for applying the constitutional doubts canon so broadly must rest on substantive constitutional principles beyond the scope of this Article, rather than on any effort to interpret statutes or satisfy political preferences. To the extent substantive constitutional principles do not justify application of the canon,[334] it should be applied only when the court feels it cannot otherwise sensibly estimate or elicit legislative preferences.

VIII. Alternative Default Rules

One can certainly imagine alternative default rules designed to constrain judges. Indeed, what amount to such default rules have often been offered, though usually not termed as such. The problem with all of them is that they are designed to further a particular substantive result regardless of whether that maximizes the satisfaction of enactable preferences. The three dominant alternatives have been that ambiguities should be interpreted against interest groups, to protect reliance interests, or to reduce the effect or change caused by the statute.

A. *When In Doubt, Rule Against Special Interest Groups*

Many scholars have proposed the default rule that any statutory ambiguity should be resolved against special interest groups. Most argue that, when a statute favors a small number of persons with a concentrated interest at the expense of a large group of persons with a diffuse interest, the statute should be interpreted narrowly.[335] Others add the point that when a statute favors the large diffuse group over the small concentrated

333. Sunstein, Chevron, supra note 318, at 2111–13. For a discussion of underenforced constitutional norms, see supra note 318 and accompanying text. R R

334. For critiques of the canon, see Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 816 (1983); Frederick Schauer, Ashwander Revisited, 1995 Sup. Ct. Rev. 71.

335. See, e.g., Easterbrook, Foreword, supra note 150, at 15–18; Jerry L. Mashaw, The Economics of Politics and the Understanding of Public Law, 65 Chi.-Kent L. Rev. 123, 134–35 (1989) (arguing that, under the interest group theory view, judges should narrowly construe statutes); Sunstein, Interpreting Statutes, supra note 150, at 471, 486–87. R R

group, it should be broadly interpreted.[336] Some simply state that statutes should be interpreted to further "public-regarding" purposes that conflict with the aims of special interest groups.[337]

Because I have elsewhere rebutted this argument at length,[338] I just summarize the grounds for rebuttal here. The most fundamental problem with this argument is that, while it sounds in process, it cannot help but turn on controversial substantive views. In particular, because the theory depends on the premise that special interest groups have "disproportionate" influence, it requires some theory about what level of influence would be "proportionate" to the interests of that group. And the latter necessarily requires a substantive theory to specify what the group deserves and would get if it had a proportionate influence. Likewise, the default rule against statutory interpretations that fail to advance "public-regarding" purposes requires a controversial normative assessment of which purposes are public-regarding and why they are more desirable than other purposes. Such default rules would thus properly empower judges to impose disputed substantive views on a political process that is *itself* supposed to define what (within constitutional boundaries) is substantively desirable.

B. *When in Doubt, Protect Reliance*

One important objection to a current preferences default rule is that courts should instead protect reliance interests. Such reliance interests indeed help confirm the limitation that a current preferences default rule should only be used in cases where there is reliable official indication of changed enactable preferences. Still, some have gone further to propose the general default rule that all statutory ambiguities be resolved to protect reliance interests.[339] This alternative default rule has intuitive appeal, but looks far worse on closer examination.

To begin with, one cannot really rely on an ambiguity.[340] One can rely on someone's statutory interpretation that purports to resolve that ambiguity, but should such reliance be considered reasonable? One must be careful to avoid the tendency to circularity in reliance arguments. Whether people will rely on a statutory interpretation depends on whether the law tells them they can rely. Likewise, reliance on an interpretation cannot be considered reasonable if the law had made plain that

336. See Eskridge, Politics Without Romance, supra note 150, at 279, 298–99, 303–09, 324–25. R

337. Macey, supra note 37, at 226–27. R

338. Elhauge, Interest Group Theory, supra note 14, at 48–101. R

339. See Eskridge, Dynamic, supra note 54, at 138–40 (considering this possibility). R

340. One might, on the other hand, rely on the law that pre-existed the new statute in undertaking conduct or transactions prior to enactment. This form of reliance is reasonably protected by the more limited default rule against retroactive interpretations of statutes. Landgraf v. USI Film Prods., 511 U.S. 244, 270–73 (1994). This default rule also serves important preference-eliciting functions, described infra Part VIII.C.5.

the interpretation was subject to change. In the end, then, the question is what degree of reliance we want people to place in initial statutory interpretations. Generally, there are powerful reasons to conclude that the law should *not* encourage people to believe that their reliance will bar any change in interpretation.

FIRST, every initial statutory interpretation triggers some form of private reliance. Thus, if any reliance sufficed, a default rule of protecting reliance would change the interpretation that is legally binding from whichever one is authoritative under the current system to whichever interpretation comes first. Indeed, the very first interpretation parties are likely to receive will be from their own attorney. Unless each attorney's interpretations are to become binding on the legal system, clients must rely on them at their own risk. The same goes for lower court interpretations. If the first court interpretation became binding because parties relied on it, then ordinary notions of appellate review would be turned upside down by making the lower court rulings binding on the upper courts. Further, statutory interpretation would turn on whatever happenstance (or party strategy) produced the first decision. This would exacerbate incentives for manipulation and bias the process towards the groups organized and wealthy enough to game the process by forum shopping and settling cases that begin in a bad forum.[341] Accordingly, parties who must rely on lower court or agency interpretations must do so recognizing that they are taking the risk that they will be overturned by higher courts.

SECOND, any decision to reward reliance by freezing statutory interpretation whenever someone relied on statutory precedent would come at the cost of reducing the interpreter's flexibility to change that interpretation not only when political preferences change but also when circumstances change in a way that means static preferences imply a new interpretation.[342] This problem applies even when the interpreter considers whether it should follow its own statutory precedent. Freezing interpretation in this way would reduce the satisfaction of enactable political preferences for everyone. And it would do so to reward a reliance that might have been avoided if the interpreter instead signaled that party reliance must take into account the risk that the interpreter will change its own interpretation in the future.

THIRD, a default rule that protected any significant reliance on an initial statutory interpretation would encourage excessive reliance on interpretations that parties should know can be overturned. In many cases where a default rule of protecting reliance has bite, we know that the reliance was actually mistaken because it differs from what the higher or later authority would have ruled absent the default rule. Such excessive

341. Elhauge, Interest Group Theory, supra note 14, at 77–79. **R**

342. See Elhauge, Preference-Estimating, supra note 2, Part III.C (noting importance of changed circumstances). **R**

reliance on initial mistaken interpretations should be discouraged, not encouraged. And no matter how correct the initial interpretation, parties know that it may be overturned by a later legislature that can normally enact a retroactive statute.[343] More generally, as Professor Kaplow so powerfully demonstrated, the degree of reliance parties place on any status quo will normally be more efficient if the relying parties bear the risk that the status quo will change.[344] Thus, the reliance that parties can reasonably put on any initial interpretation should reflect the risk the initial interpretation will be overturned by a higher authority or later in time. And any reliance that took account of such a risk cannot be said to be disappointed by the fact that the risk in fact materialized.

FOURTH, subsequent legislative or agency action that would justify a new reading of political preferences can alter the reasonableness of relying on judicial precedent. It could not, for example, be said to be reasonable to rely on statutory precedent that Congress had overridden by statute. Likewise, subsequent legislative or agency action that rebuts the stare decisis presumption indicates that it is unreasonable to continue relying on an old judicial interpretation. True, it is hardly as clear as fresh legislation directly on the topic. But when judicial precedent conflicts with reasonable inferences drawn from the official action of the current legislature empowered to enact corrective legislation or the agency empowered to administer the statute, reliance on the precedent is less reasonable.

FIFTH, it seems quite plausible that citizens rely *more* on the inferences drawn from subsequent legislative and agency action than they do on judicial precedent. Ronald Dworkin, for example, argues that political fairness supports interpretations that track current political statements about policy because citizens are more likely to rely on them even though they do not take the form of new enactments.[345] If so, then reliance interests may on balance be protected more by changing the interpretation than by sticking to the precedent. Whether citizens rely more on judicial precedent or subsequent legislative or agency action is an empirical question, but the likely answer seems clear if one considers the two possible classes of citizens. One class of citizens will not have sought legal advice before engaging in conduct. It seems likely they will be more influenced by public political statements than by judicial precedent. Another class of citizens will have received legal advice before acting. Whether they rely more on precedent or subsequent official action will turn on whether (and how clearly) the law tells citizens to rely on the former or latter in cases of conflict. Certainly if, as indicated above, interpretations are in fact changing with subsequent legislative or agency ac-

343. See generally infra Part VIII.C.5 (noting that there is a default rule against retroactive statutes but little constitutional restriction on them).

344. Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509, 522–36 (1986).

345. Dworkin, supra note 196, at 349–50. **R**

tion, it would respect reliance interests far more to make that practice explicit rather than mislead people into relying on the precedent. Further, if reliance interests can be protected at least as well by telling citizens to rely on subsequent official action instead of judicial precedent, then the reliance argument drops out, and the legal system might as well choose to explicitly make interpretation (and thus reliance) follow the subsequent official action if, as I have argued, such dynamic interpretation is more socially desirable.

BUT an important limitation must be emphasized. The fact that reliance should not itself dictate sticking with statutory precedent when statutory meaning is unclear does not mean that precedent should be irrelevant. If an interpreting authority told everyone that they should *never* rely on its interpretations, then that interpretation would cease to govern anyone's conduct. And it obviously cannot further any conception of political preferences to have interpretations that lack any behavioral consequences. Thus, an approach that changed interpretations daily would not maximize political satisfaction, even if every interpretation precisely reflected enactable preferences, because none of them would have any effect. The point is *not* that reliance and stability offer independent normative grounds for deviating from the default rules that best maximize political satisfaction. The point is rather that the legislature itself would want some degree of stability and reliance because it makes the interpretations that reflect its estimated preferences more effective. That is, the goal of maximizing political satisfaction itself requires statutory interpretations sufficiently stable to induce behavioral reliance, so that those factors should be considered, although subordinated to the larger goal of maximizing the satisfaction of enactable preferences.[346] For an interpretation to have any bite, and thus any ability to maximize political satisfaction, the interpreter must signal that, while it reserves the right to change its interpretations, it will exercise this power either rarely or only prospectively.

This provides another reason why the enacting and current legislatures would prefer a current preferences default rule that included the limitation requiring reliable official indications of changed enactable preferences: It helps assure sufficient stability in interpretations to make them meaningful.[347] This approach further predicts that interpreters who render prospective interpretations will change those interpretations more freely than those who cannot, and that lower court interpreters will act more bound by their statutory precedent than higher courts who visit interpretive issues less often.

This seems to fit fairly well the contours of modern doctrine. The *Chevron* doctrine has established the position that agencies must have the flexibility to change regulatory policy by altering their statutory interpre-

346. See Elhauge, Preference-Estimating, supra note 2, Part II.B. **R**

347. Id.

tations over time.[348] Any private party who reads *Chevron* thus knows not to put too much reliance on any given agency interpretation because it may change. Because agencies are much more likely to render prospective interpretations than courts, which mainly adjudicate disputes about the legality of past conduct, it makes sense that the Court has signaled that agencies are especially free to alter their interpretations over time. Such freedom to change interpretations will have a less dampening effect on reliance when parties know that the changes will be announced well in advance.

As for judicial interpretations, the U.S. Supreme Court has encouraged reliance by private parties by often citing reliance as a reason for giving statutory precedent special stare decisis effect.[349] But in the U.S. Supreme Court's own practice, this statutory stare decisis rule tends to be trumped when it conflicts with reliable evidence that current enactable preferences have changed.[350] This has opened the Court up to charges of hypocrisy and inconsistency because it has not lived up to the principles it itself has espoused. However, because the Supreme Court visits any particular interpretive issue infrequently, rarely more than once a decade, it makes sense for the high court to have more freedom to change statutory precedent than it is willing to give the lower courts. Thus, it can be consistent, rather than hypocritical, for the Court to announce a strong norm of following statutory precedent to guide lower courts even though the high court's own practice does not conform with that norm. But since the Court tends to act retroactively, it also makes sense that the Court gives itself less freedom to change interpretations—by adopting a fairly strong presumption against change[351]—than it is willing to give agencies.

What happens when the agency changes an interpretation that was announced in judicial precedent? Although the agency should normally be free to change interpretations, the problem here is that the judicial precedent signaled to parties that they could reasonably place the greater degree of reliance appropriate for judicial cases on the interpretation. One would accordingly expect that the courts would not allow alterations of that interpretation unless the grounds for rebutting the statutory stare decisis presumption were met. Consistent with this, the *Chevron* doctrine of deference to agency interpretations does not apply when the agency deviates from a court's own precedent interpreting the statute.[352] On the other hand, if the court's prior decision merely indicated that it was de-

348. See id. Part VII (explaining *Chevron* as a current preferences default rule).

349. See, e.g., Helvering v. Griffiths, 318 U.S. 371, 402 (1943); Eskridge, Overruling, supra note 220, at 1367–69, 1382–84. R

350. See Elhauge, Preference-Estimating, supra note 2, Part VI.C. R

351. Id.

352. See Neal v. United States, 516 U.S. 284, 295 (1996); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536–37 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990); Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, 915–20 (2001).

ferring to the agency's interpretation under *Chevron*, then the signal would have been sent that the interpretation is subject to change, and *Chevron* deference would thus apply to a future change in agency interpretation. As time goes on, this problem should largely phase out because more and more judicial precedent will incorporate *Chevron* deference.

C. *When in Doubt, Interpret Narrowly or Against Change*

An alternative default rule posited by Judge Easterbrook and others is that, where its meaning cannot be determined, a statute should have no effect.[353] Where there is such an ambiguity or gap, one argument goes, we do not have a sufficiently considered legislative judgment to qualify as a binding statute. We should instead force the legislature to explicitly address the question to test the proposition of what could pass the legislature. Moreover, this "no effect" default rule is said to helpfully maximize private freedom from government legislation, and (for congressional statutes) furthers federalism by maximizing the extent to which matters are left to states.

My colleague David Shapiro advocates the related default rule that "close questions of construction should be resolved in favor of continuity and against change."[354] This will generally mean giving a statute its minimal effect, but need not always mean that because sometimes continuity may require giving the statute greater effect. To distinguish it from a "no effect" default rule, I will call Shapiro's approach the "anti-change" default rule.

Any position advocated by scholars as learned as Frank Easterbrook and David Shapiro commands our utmost attention. But careful attention, I think, reveals that their positions are ultimately unpersuasive. Several reasons follow.

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353. See Easterbrook, Statutes' Domains, supra note 17, at 544–51; Earl M. Maltz, Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy, 71 B.U. L. Rev. 767, 788–89 (1991). Easterbrook is actually somewhat ambiguous. At points he suggests his no-effect default rule applies to both gaps and ambiguities, Easterbrook, Statutes' Domains, supra note 17, at 544 (domain of statute should be restricted to "cases anticipated . . . and expressly resolved in the legislative process"), but elsewhere he suggests that his no-effect default rule applies to statutory gaps but not ambiguities. Id. at 551–52. He also emphasizes that no gap or ambiguity exists when the legislature has delegated to courts the power to develop law in the area. Id. at 544. **R** **R**

354. Shapiro, supra note 175, at 925. Professor Shapiro links this to the hermeneutic argument that legislatures enacting statutes are likely to focus on what is being changed and by linguistic convention expect others to understand that everything else remains unchanged. Id. at 928, 942. This might indeed be relevant to hermeneutic interpretation of the statute, and be one factor relevant to the percentages used in assessing various possibilities about where enactable preferences lie. But there are other factors relevant to meaning and legislative purpose, as Professor Shapiro himself acknowledges, and when the complex of factors relevant to hermeneutic theory leaves us in genuine doubt about the legislature's meaning, a default rule against change would have the problems noted in text. **R**

1. *Hidden Uncertainties and Baseline Problems.* — Since much of the attraction of these default rules rests in their apparent ease of application, it is worth noting that the seeming clarity of either the no-effect or anti-change default rule dissolves on close examination. Often the option of giving no effect or creating no change will not be available, or will lie outside the range of plausible meanings produced by our interpretive methods. If a statute has a gap because it failed to set its statute of limitations explicitly, just what would it mean to give the statute no effect or to minimize change on the statute of limitations issue? Most interpretive choices are about *which* effect or change to attribute to an ambiguous term or statutory gap, not about whether the statute will cause any effect or change at all. A court applying this default rule approach would thus have to ascertain what is meant by giving a statute "less effect" or causing "less change" among two different sorts of effects or changes the statute might have. But there is no way to rank different sorts of effects or changes without some normative framework that these default rules do not provide.

Indeed, these default rules provide no clear baseline from which to measure an effect or change at all. If the baseline is (in the no-effect default rule) the common law free from regulation, then one needs to ask which precise version of the common law (from what era, and which state or nation) and what to do with many seemingly regulatory features of the common law. Do aggressive modern impositions of tort liabilities or affirmative duties become part of the common law baseline even though they themselves may be regulatory or impinge on state autonomy? Likewise, what does one do with a deregulatory statute: should it be construed narrowly (to give as little effect as possible) or broadly (to give as much effect as possible to nonstatutory law)?

If the baseline is (in the anti-change default) the prior status quo, then one needs to know at what precise time to measure the status quo. Does an erroneous interpretation of a statute, if it lasts for ten years, become the new status quo or should it be overruled to bring us back to the status quo before the statute was enacted? If the line is not ten years, is it more or less, and just where should courts draw it? Worse, according to David Shapiro, the baseline against which to measure change need not be any particular point in time but can be a conceptual state of affairs that never actually existed. In particular, he argues that the baseline can be what the statute would have provided without an exemption (meaning his default rule provides reason to narrowly interpret the exemption) even though the statute sans exemption *never* existed prior to enactment of the uncertain provision.[355] One might have thought this a case where narrow construction would exacerbate change. Likewise, Shapiro favors the canon that statutory language expressing one thing excludes others, but the narrow construction called for by that canon would seem to increase

355. Id. at 928 n.33.

change if, say, a statute was meant to codify the common law but used an incomplete list to itemize the codification and thus was taken by canon to exclude unlisted applications.

2. *Changed or Unforeseen Circumstances.* — Neither the no-effect nor the anti-change default rule deals well with the problem of changed or unforeseen circumstances or unlikely legislative override. Changed and unforeseen circumstances are ubiquitous and create ambiguities in statutory meaning that require judgment about how best to give effect to legislative purpose or preferences given the change.[356] A commitment to always narrowly interpret statutes in the face of changed or narrowed circumstances would be a commitment to consistently thwart legislative purposes and preferences. Yet this is what the no-effect default rule would do.

Changed circumstances also create definition problems for the anti-change default rule. What best promotes continuity when changed circumstances indicate that a statutory purpose would be thwarted unless the meaning of the statute changes with it? One approach would be to continue the statutory purpose, but that requires a change in the scope of statutory interpretation and covered conduct. Another approach would be to continue the statutory interpretation and covered conduct, but that requires a change in the effectuation of the statutory purpose. A canon that favors continuity over change cannot tell us which approach to favor, for it favors a status quo that is irretrievably lost as soon as circumstances change.

The scrupulous scholar that he is, David Shapiro acknowledges that his approach does not take into account changed circumstances.[357] But the problem is deeper than he acknowledges because changed circumstances are probably the main cause of ambiguity in statutory meaning. If nothing has changed since the time of legislative enactment, so that the problem being addressed is precisely the same problem that the legislature thought it was addressing, statutory ambiguity is unlikely. Changes in circumstances are generally what create ambiguity about statutory meaning because those changed circumstances might present the same problem in different guise, or indicate the opposite solution to the same problem.

3. *Dubious Policy Bias.* — The more fundamental problem is that these alternative default rules, by definition, decline to embrace the default rule that maximizes political satisfaction. Thus, judges must be imposing interpretations that increase deviations from likely political preferences, which can only be justified on some implicit policy view unrelated to those political preferences. Absent some constitutional argument,

356. E.g., Eskridge, Dynamic, supra note 54, at 9–11, 48–55, 107–08, 111–12, 120–21, 124–30; Richard A. Posner, Overcoming Law 231 (1995). R

357. Shapiro, supra note 175, at 926 n.17. R

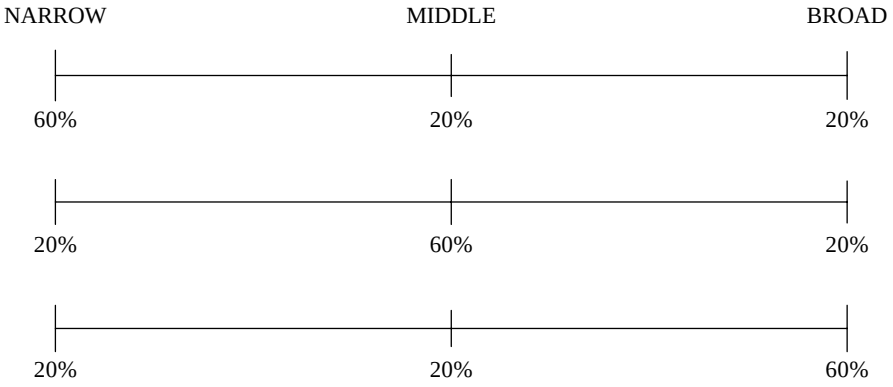
which I address below, judges have no justification for imposing policy views that contradict political preferences.

Neither the no-effect nor anti-change default rule is politically neutral. To the contrary, each enforces a political preference for a particular set of laws. To give a statutory provision no effect is not to render a decision with no effect; it is to give effect instead to whatever other statute or common law would otherwise govern the issue. Likewise, interpreting against change just gives effect to whatever statute or common law happened to predate the legislation in question. There is no general reason for believing that the effect of these other or prior laws will be preferable to the court's best estimate of the political preferences for the statute at hand. The statute whose ambiguity is narrowly interpreted might even, as noted above, be a deregulatory or codifying statute, with the result that a narrow interpretation actually increases (respectively) regulation or change.

Nor is there any warrant for judges to further their own policy views by biasing statutory interpretation against regulation or change. Whether to favor regulation over common law, or change over the status quo, are fundamental questions of policy best left to the political process. Indeed, under all but the most simplistic policy views, it would seem that there would be no general preference: everyone is likely to think, on at least some occasions, that change from the status quo or from the common law is precisely what is called for to address some new or previously unsolved problem. We often do and should oppose regulation or change, but there is no reason to impose that judgment when, by definition, it conflicts with our reading of political preferences given the reasons for regulation or change.

For parallel reasons, the default rule of giving no effect or minimizing change is not the approach taken in contract or corporate law. If the matter at issue is within the contractual or corporate relationship, courts adopt (and scholars argue for) either hypothetical consent default rules or penalty (preference-eliciting) default rules. They do not blindly adopt or favor whatever rule minimizes the restrictive effect of the contract or charter, or lessens the change in legal relations. For such a rule would systematically underenforce contracts and charters relative to our best estimate of the contracting parties' preferences.

Indeed, where the narrow conditions for a preference-eliciting default rule are not met, both the no-effect and anti-change default rule systematically thwart legislative preferences compared to a default rule that reflects the interpreter's best estimate of how to maximize the satisfaction of legislative preferences. 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 legislature desiring one option would be dissatisfied with the other option. Let's call the interpretive options Narrow, Middle, and Broad, with each separated by 10 units of legislative preference dissatisfaction from each other. Suppose the narrow interpretation is the one that best fits the no-effect and anti-change default rules. Suppose further that, while courts cannot be sure which option best matches legislative preferences, courts can identify one option as 60% likely, with the others each 20% likely. Further, no judicial interpretation is likely to be revisited by the legislature, so a preference-eliciting default is unwarranted.

There are three cases, depending on which option the courts find 60% likely to match legislative preferences. If it is the narrow option, then that choice will be made under either a preference-estimating or narrow-interpreting default rule and there is no difference in legislative preference dissatisfaction. If it is the middle option, then a narrow-interpreting default rule will produce an expected preference dissatisfaction of $(0.2)(0) + (0.6)(10) + (0.2)(20) = 10$. A preference-estimating default rule would produce an expected preference dissatisfaction of $(0.2)(10) + (0.6)(0) + (0.2)(10) = 4$. If the 60% option is the broad option, then a narrow-interpreting default rule will produce an expected preference dissatisfaction of $(0.2)(0) + (0.2)(10) + (0.6)(20) = 14$. The preference-estimating default rule will, in contrast, produce an expected preference dissatisfaction of only $(0.2)(20) + (0.2)(10) + (0.6)(0) = 6$. Thus, over the full range of cases, a narrow-interpreting default rule will systematically produce more legislative preference dissatisfaction than a preference-estimating default rule. Note that I am *not* saying that judges when deciding cases should try to measure units of expected political dissatisfaction. I am rather using this analysis to explain why adopting the interpretation that most likely reflects legislative preferences will naturally lead to less political dissatisfaction than adopting the most narrow interpretation in all cases.

None of this is to deny that one factor to consider in estimating likely legislative preferences is that legislatures generally like to retain control over big social changes, and are unlikely as a hermeneutic matter to make what would be a large change at the time of enactment without ever having adverted to it.[358] But this is merely one factor to consider in the hermeneutic and default rule inquiry, and should be subordinated to the larger questions of (and broader set of evidence on) what the enacting legislature meant and, where that is unclear, what the most recent manifestation of enactable preferences is.

To confirm that an anti-change or no-effect default rule would not maximize political satisfaction, we might look to the interpretive codes that legislatures promulgate. Given that courts have long interpreted ambiguous statutes to further the perceived legislative intent or purpose, one might have thought that a legislature that preferred that judges instead interpret all statutory ambiguity narrowly would have enacted an interpretive statute saying so. In fact, none of the codes of construction enacted by legislatures within the United States directs a narrow construction of statutory ambiguities. To the contrary, the state legislatures that have addressed the issue have expressly rejected the canon providing for narrow construction of statutes in derogation of the common law.[359] Likewise, New York nominally seems to have adopted the no-change default rule by providing that "[a] change in long established rules of law is not deemed to have been intended by the Legislature in the absence of a clear manifestation of such intention."[360] However, this rule is limited by other statutory provisions that specify that legislative intent is the primary consideration, meaning that this rule is probably best viewed as supplying the supplemental rule where legislative preferences cannot be esti-

358. The Supreme Court often relies on "the dog that did not bark," Chisom v. Roemer, 501 U.S. 380, 396 & n.23 (1991), which is the unlikelihood that Congress intended a major change without ever discussing it. Id.; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000); Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 342–43 (1999) (O'Connor, J., plurality opinion as to III.B, joined by Rehnquist, C.J. & Kennedy, J.).

359. Ariz. Rev. Stat. Ann. § 1-211 (West 1995); Cal. Civ. Proc. Code § 4 (West 1982); Idaho Code § 73-102 (Michie 1999); Iowa Code Ann. § 4.2 (West 2001); Ky. Rev. Stat. Ann. § 446.080 (Michie 1999); Mo. Ann. Stat. § 1.010 (West 2000); Mont. Code Ann. § 1-2-103 (2001); N.M. Stat. Ann. § 12-2A-18 (Michie 1998); N.D. Cent. Code § 1-02-01 (1987); Okla. Stat. Ann. tit. 25, § 29 (West 1987); 1 Pa. Cons. Stat. Ann. § 1928 (West 1995); S.C. Code Ann. §§ 14-1-60, 15-1-10, 18-1-170, 19-1-10 (Law. Co-op. 1977); S.D. Codified Laws § 2-14-12 (Michie 1992); Tex. Gov't Code Ann. § 312.006 (Vernon 1998); Utah Code Ann. § 68-3-2 (2000); Wash. Rev. Code Ann. § 1.12.010 (West 2001). Only one state, New York, has enacted a statute that nominally retains this canon, but in practice that state has limited this canon to cases where no legislative preference could be estimated. See supra notes 325–327 and accompanying text. The New York statutory scheme expressly seems to rule out the no-effect default rule not only by stressing the "primary" importance of advancing the legislative intent, supra notes 325–327 and accompanying text, but also by specifying "[s]tatutes will not be construed as to render them ineffective." N.Y. Stat. Law § 144 (McKinney 1971). R R

360. N.Y. Stat. Law § 153.

mated.[361] Indeed, opposing any anti-change default rule is a provision that when the legislature enacts a change in statutory language, it intends "a material change in the law."[362] Further, the New York legislature has specified that statutory ambiguities should be construed not narrowly but to further the legislative purpose or intent.[363] Thus, whatever grounds there might be for a no-effect or anti-change default rule, political satisfaction or legislative supremacy do not appear to be among them.

4. *Imposing a Preference-Eliciting Rule Regardless of Conditions.* — We come now to a more general problem with the no-effect or anti-change default rules. Their underlying theory is that, rather than try to reflect likely legislative preferences, the default rule should force the legislature itself to fill any statutory ambiguity. The effect is to make *all* statutory ambiguities an occasion for a preference-eliciting default rule regardless of whether the proper conditions for imposing such a default rule are met.

But as explained above, such a legislation-forcing default rule makes sense only in limited circumstances where significant differential odds of legislative correction exist, legislative preferences are unclear, and any interim costs are acceptable.[364] To instead expand preference-eliciting default rules wholesale to all legislation would be to have statutory results stick in a large range of cases where they would likely be contrary to legislative preferences. The no-effect or anti-change default rules would, in particular, often put the burden of action on the political forces least able to get the issue on the legislative agenda. Such narrow interpretations will thus generally stick, with undesirable results.

Even when they do not stick, application of general legislation-forcing default rules will also be harmful. It will force legislatures to take up their scarce time through costly ex ante efforts to identify every conceivable contingency and specify a solution or ex post efforts to enact override statutes, even when eliciting such a legislative reaction was unnecessary to estimate legislative preferences. This needless ongoing burden to preempt or correct wayward judicial interpretations will take up legislative time that could have been better spent developing new statutory solutions to social problems. Indeed, sometimes the costs of either providing the necessary specification or living with judicial interpretations that needlessly increase political dissatisfaction will dissuade the legislature from enacting the relevant statute at all, even though the polity would have considered the statute desirable if the judiciary were to take a more cooperative approach to its interpretation.[365] Further, where (as often) the ambiguity was not anticipated by the enacting legislature, it could not

361. See supra Part VII.B.1.

362. N.Y. Stat. Law § 193.

363. See supra Part III.B.

364. Supra Part II.

365. McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 Geo. L.J. 705, 715–16 (1992)

have been corrected in the original statute, but will have to be corrected after the fact. This means that the result that likely conflicts with estimable legislative preferences will needlessly stick for at least the interim before any statutory override.

5. *The Presumption Against Retroactivity*. — Although a general no-effect or anti-change default rule fails to meet the conditions for a preference-estimating or preference-eliciting default rule, there is one canon that reduces statutory effects or change that can be justified on such grounds. That exception is the one such canon that the U.S. Supreme Court has consistently applied (indeed explicitly called a "default rule"): the canon that ambiguous statutes should be interpreted to be prospective.[366]

The Court has in part justified this canon against retroactivity on the grounds that "[b]ecause it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations."[367] Consistent with this, every state legislature to enact an interpretive statute on the subject has adopted a presumption against retroactive interpretations unless a contrary legislative meaning or intent is clear.[368] In most applications, then, this canon against retroactive interpretations probably reflects a preference-estimating default rule.

But the U.S. Supreme Court has also been willing to brush aside indications that the political preferences of the particular enacting Congress did favor retroactive application, which suggests that this is more than just a preference-estimating default rule.[369] One might try to ground this approach in a constitutional norm disfavoring retroactive statutes.[370] But the strength of this rationale was limited because the Court recognized that "[r]etroactivity provisions often serve entirely benign and legitimate purposes," and that "the constitutional impediments to retroactive civil litigation are now modest."[371] Moreover, the canon does not seem to further any legitimate constitutional purpose that is not already served by the canon of construing statutes to avoid constitutional difficulties, which

366. Landgraf v. USI Film Prods., 511 U.S. 244, 261, 272–73, 280 (1994).

367. Id. at 272.

368. Alaska Stat. § 01.10.090 (Michie 2000); Ariz. Rev. Stat. Ann. § 1-244 (West 1995); Cal. Civ. Proc. Code § 3 (West 1982); Colo. Rev. Stat. § 2-4-202 (2000); Ga. Code Ann. § 1-3-5 (2000); Haw. Rev. Stat. Ann. § 1-3 (Michie 1998); Idaho Code § 73-101 (Michie 1999); Iowa Code Ann. § 4.5 (West 2001); Ky. Rev. Stat. Ann. § 446.080 (Michie 1999); Minn. Stat. Ann. § 645.21 (West 1946); Mont. Code Ann. § 1-2-109 (2001); N.M. Stat. Ann. § 12-2A-8 (Michie 1998); N.D. Cent. Code § 1-02-10 (1987); Ohio Rev. Code Ann. § 1.48 (West 1994); 1 Pa. Cons. Stat. Ann. § 1926 (West 1995); S.D. Codified Laws §2-14-21 (Michie 1992); Tex. Gov't Code Ann. § 311.022 (Vernon 1998); Utah Code Ann. § 68-3-3 (2000); W. Va. Code Ann. § 2-2-10(bb) (Michie 2002).

369. *Landgraf,* 511 U.S. at 263.

370. Id. at 265–68.

371. Id. at 267–68, 272.

is more tailored to those retroactive applications that actually raise constitutional problems.[372]

Another rationale cited by the Court suggests it viewed its aggressive application of the canon as a preference-eliciting default rule. It stressed that the canon "helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[373] The Court elaborated:

> Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.[374]

The emphasis on providing a "predictable background rule against which to legislate" suggests that this default rule is aimed at eliciting legislative preferences ex ante, in the original statutory drafting, rather than ex post, through a statutory override. This makes sense because the likelihood of statutory override for a judicial ruling that a statute applies only prospectively is fairly small. The stakes are generally too small for a legislature that will know its statute applies to current conduct. By the time the retroactivity issue has been definitively resolved by the relevant supreme court, the old conduct will be in the relatively distant past and probably hard to reach with a new statute without running into constitutional difficulties.

As a default rule to elicit preferences ex ante in the original statute, however, a strong presumption against retroactivity seems entirely sensible. To begin with, even with a legislative preference that generally favors retroactivity, a preference-estimating default rule will normally fail to provide a clear answer. This is because there is not just one form of retroactivity, but a myriad of possibilities.[375] A statute might retroactively apply to pre-enactment conduct, or even further to litigation already initiated. Or it might not apply to pre-enactment conduct at all, but only to future conduct flowing from past transactions or vested rights. Or the statute might retroactively apply to pre-enactment conduct only if it does not upset justifiable reliance. Or it might apply to pre-enactment conduct as regards to procedural rules, but not substantive rules; or as to prospective injunctive relief but not retroactive relief like damages. And there is always the tricky question of what to do with conduct that begins before

372. Id. at 267 n.21. For an analysis of the canon construing statutes to avoid constitutional difficulties, see Elhauge, Preference-Estimating, supra note *2*, Part III.A; supra Parts III.B.2, VII.B.2. **R**

373. *Landgraf,* 511 U.S. at 268.

374. Id. at 272–73.

375. Id. at 268–69.

enactment but is completed (or inflicts harm) after enactment. Preference-estimating analysis will thus rarely provide a confident answer. A preference-eliciting default rule can better ascertain precisely what sort of retroactivity a legislature desires, if it desires retroactivity at all.

Moreover, this is not the typical sort of statutory ambiguity that arises because of unanticipated or changed circumstances. Political actors can anticipate that the question of retroactive application will arise in every statute. The issue is not some surprising future issue legislators could not have anticipated, but rather concerns how to deal with concrete past cases that they (or political participants) know about, and that indeed probably prompted the legislation. Further, in the ex ante stage, those who are supporting a statute that is about to be enacted have sufficient control over the legislative drafting process to introduce statutory text on retroactivity if they think they can (and want to) get it enacted. The normal reason statutory supporters would not introduce a retroactivity provision is because it seems unwise or they lack the votes.[376] A preference-eliciting default rule against retroactivity thus helps make sure that the statutory result more accurately reflects enactable political preferences.

6. *The U.S. Constitution Does Not Require a No-Effect or Anti-Change Default Rule.* — One might of course argue that, whether or not they are desirable or advance political satisfaction, the U.S. Constitution requires a no-effect or anti-change default rule. This argument would have no applicability outside the United States, and has so far been rejected by U.S. courts, which do not even recognize a constitutional basis for the one such canon they do apply—the one against retroactivity. Nonetheless, it is a serious argument that requires attention.

One prominent textualist argument has been that, unless some clear meaning is provided by the text that satisfied the constitutional process for statutory enactments (in the U.S., bicameralism and presentment), we have no authoritative legislative command that has satisfied constitutional requirements.[377] Thus, ambiguous statutory text cannot be given effect, or be allowed to change the status quo, however desirable that might be. Although generally focused on the U.S. Constitution, the main argument is that the constitutional specification of a particular procedure for enacting statutes bars courts from relying on sources that have not gone through that procedure, an argument that presumably could be extended to most systems of constitutional government.

One problem with this argument is that it is not really possible to rely solely on text. Although we often experience our interpretation of text as not requiring any resort to extrinsic evidence, the truth is that it always does. No interpretation of words can rely solely on the squiggles on the

376. The seminal *Landgraf* case in fact recited evidence that explicit retroactivity provisions were dropped during the drafting process, thus indicating that any preference for retroactivity was not enactable. Id. at 262. Neither was any preference for prospectivity. Id. at 262 n.14.

377. See Easterbrook, Statutes' Domains, supra note 17, at 537–39, 548–49. **R**

page because even then we are relying on what our parents and teachers (or general experience and education) told us about how to decode the meaning of written squiggles. And the outside education and experience that produce our understanding of how to best interpret squiggles and words never satisfied bicameralism and presentment. Indeed, even the purest of textualists rely on more concrete forms of extrinsic aids to interpret words, such as dictionaries, treatises, caselaw, and agency interpretations, and none of those have satisfied bicameralism and presentment either.[378] It thus seems plain that the bicameralism and presentment clauses cannot by themselves exclude reliance on all outside information that (because it was not part of the enacted text) never satisfied bicameralism and presentment.

Moreover, for a textualist argument, this one has surprisingly little support in the constitutional text. In the U.S. Constitution, the bicameralism and presentment clauses do not speak to statutory interpretation. The only constitutional clause that comes close to doing so simply says that Article III courts have the "judicial Power," which tells us nothing about how judges are supposed to conduct statutory interpretation.[379] If we take a consistent textualist approach, we cannot examine the legislative history of the U.S. Constitution itself to resolve its own textual ambiguity, since the constitutional history never went through the ratification process and is not part of the constitutional text. If we do examine the legislative history of the Constitution, then we are instead logically conceding that texts should be interpreted according to their legislative history, which is contrary to the very point this textualist argument tries to establish.

Even if we can avoid this logical difficulty with examining legislative history to prove that examining legislative history is improper, the legislative history of the U.S. Constitution does not support prohibiting the use of nontextualist sources in statutory interpretation. To the contrary, many have cited evidence that the original understanding of "judicial Power" included various English equitable doctrines that gave judges discretion to modify statutory terms to better serve the statutory purpose.[380] This notion was part of the English law background relevant to the framers' understanding of what "the judicial Power" meant, was expressly cited in the ratification debates, and was applied by American state and federal courts shortly after ratification.[381] Professor Manning skillfully argues that the U.S. Constitution should be understood to have changed

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378. See Manning, Textualism as Nondelegation, supra note 18, at 702–05. **R**

379. U.S. Const. art. III, § 1; see Eskridge, Overriding, supra note 25, at 407–08. **R**

380. See Eskridge, Overriding, supra note 25, at 408 & n.27; William N. Eskridge, Jr., Textualism, The Unknown Ideal?, 96 Mich. L. Rev. 1509, 1522–32 (1998) [hereinafter Eskridge, Textualism]; Manning, Textualism and Equity, supra note 209, at 7–8, 22–36 (collecting and summarizing literature). **R** **R**

381. Eskridge, Textualism, supra note 380, at 1522–32; Manning, Textualism and Equity, supra note 209, at 25–26, 80–102 (collecting sources). **R** **R**

English law by separating the legislative and judicial powers more clearly than English law had, that there was no longer a consensus supporting these doctrines by the time of the framing, and that in the 1800s both English and American law evolved away from these doctrines toward the theory that courts should act as faithful agents of the legislature when interpreting statutes.[382] But we need not take sides in this dispute, for even Manning's showing falls well short of proving that judicial interpretation cannot consider nontextual sources, especially when the text by itself is ambiguous and when one considers the long line of American precedent relying on nontextual sources to resolve statutory ambiguities.[383] Rather, Manning's argument supports only a conclusion that the Constitution requires courts to be faithful interpretive agents, which is not only consistent with my claim that such an agent should adopt those statutory default rules that maximize the satisfaction of enactable preferences, but makes it constitutionally compulsory.

If one instead disagrees with Manning's conclusion that the Constitution rejects these doctrines of equitable interpretation, that would still not justify rejecting statutory default rules that maximize political satisfaction. These equitable doctrines did not purport to authorize courts to interpret statutes in whatever way judges found best but "to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present."[384] Nor would it matter if the U.S. Constitution incorporated equitable doctrines that did give courts a common law power to interpret statutes in whatever way the judge finds best. It would remain the case that the courts should choose to exercise that power to resolve statutory ambiguities in ways that maximize political satisfaction.[385]

But, the argument might continue, although judges have the interpretative power and need not limit themselves to the text, judges should

382. Manning, Textualism and Equity, supra note 209, at 8–9, 36–105. **R**

383. Manning's analysis consciously excludes the case of statutory ambiguities. Id. at 3 n.3. Indeed, the passages of the Federalist Papers that he cites in support of the faithful agent theory include statements that in cases of statutory ambiguity courts should follow the "pleasure" or "will" of the legislature, or "sense" of its provisions "apart from any technical rules." Id. at 82–84 & n.325.

384. Eyston v. Studd, 75 Eng. Rep. 688, 699 (K.B. 1574) (Plowden's note); see also 1 Blackstone, supra note 105, at *62 (noting that equity of statute conferred a "power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed"). **R** This differs from the notion (on which I do not rely) that some shared legislative intent creates a fixed certain meaning, see Elhauge, Preference-Estimating, supra note 2, Part III.B, but does limit judges to narrowing or broadening statutory text only when that advances legislative preferences. **R** So do other quotes which stress that the equity of the statute doctrine must be used to further the statutory "purpose," "cause," "sense," "reason," "spirit," "motive," "object," or "intentions." Manning, Textualism and Equity, supra note 209, at 8, 32–36, 101 nn.390–392 (collecting sources). **R**

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

adopt a bias against change or regulation because that was the U.S. framers' intent in specifying burdensome procedures for enacting statutes. Professor Manning, for example, argues that the U.S. framers thought the risk of ill-advised governmental action exceeded the risk of ill-advised inaction.[386] This theory does not explain why interpretation should (as Manning argues) turn on judicial or agency views that seem equally likely to be ill-advised. But if valid, it would provide a legal basis for what I above denied was warranted: a substantive bias against change or regulation. Further, a no-effect or anti-change default rule would decrease the benefits of enacting legislation (since less political satisfaction would result) and increase costs (because greater decisionmaking costs would be incurred to specify more in text). Such a default rule would thus necessarily generally decrease the volume of legislation as well as narrow the scope of any legislation that is enacted, both of which would be substantively justified by the theory that action is generally worse than inaction.

An intriguing possibility, but ultimately unpersuasive. The framers indeed set up certain obstacles to legislative action, but they did not impose those same obstacles on the interpretation of statutes. Nor, at the time of the framing or since, have judges adopted the philosophy that each statute must be given its most narrow possible interpretation. Nothing in the constitutional text, history, or precedent thus suggests that, once legislation has gone through the hoops imposed for enactment, it should not, where ambiguous, be given the fairest reading of what would maximize the political satisfaction of the enactors. Just because the framers had a sufficient bias against change to impose certain obstacles to legislative action does not mean they wanted judges to impose any *additional* obstacles to legislative action the judges could imagine. To the contrary, the framers made a particular tradeoff when they decided to impose only specified obstacles on legislative action (such as bicameralism and presentment) and not additional ones like mandating narrow interpretations of whatever was wrought by this legislative process. Likewise, the fact that contracts require consent of the contracting parties has never meant that courts should impose additional obstacles to advancing contracting party preferences, like narrowly interpreting whatever they wrote.

True, the Constitution specified a certain process for enacting legislative text because that process was thought desirable.[387] But the argument that courts should thus do what they can to encourage specification in legislative text has no natural stopping point. In particular, it is hard to see why one would stop with a rejection of evidence regarding enactable preferences. Under this argument, interpreters should generally try

386. Manning, Textualism as Nondelegation, supra note 18, at 710. **R**

387. For an excellent summary of the reasons for the U.S. process of bicameralism and presentment, see id. at 707–10, but the point seems likely to be generalizable to other nations since presumably every nation has its own set of reasons for adopting its particular legislative process.

to interpret statutory ambiguities in the most numbskulled way possible because that is more likely to deviate from legislative preferences and provoke textual specification. No one would agree to such an approach, but the problem is that the goal of encouraging specification in legislative text by itself provides no self-limiting principle, especially if such encouragement is viewed as a constitutional requirement. Using preference-eliciting default rules only under conditions where they enhance legislative preference-satisfaction, in contrast, provides the necessary self-limiting principle.

To refrain from using those default rules best calculated to maximize the satisfaction of enactable preferences is necessarily to produce greater dissatisfaction of the legislative preferences that could satisfy the constitutional requirements of bicameralism and presentment. It is hard to see how the clauses requiring bicameralism and presentment, or vesting Congress with legislative powers, could dictate a judicial doctrine that would predictably thwart enactable legislative preferences more often than the alternative. For judges to thwart enactable legislative preferences in the name of legislative supremacy or separation of powers seems more perverse than persuasive. Nor does anything in the U.S. Constitution dictate such an undesirable result. While the Constitution surely leaves the power of interpretation to courts rather than Congress, nothing in it suggests courts should adopt interpretations that are more likely to thwart legislative preferences, and that has never been the judicial practice.

IX. Operational and Jurisprudential Objections

I have so far argued that preference-estimating and preference-eliciting analysis offers a positive theory of how courts actually use statutory canons, as well as a normative theory of why this pattern of judicial interpretation desirably maximizes the satisfaction of legislative preferences. But how would judges operationalize this theory? One might doubt that judges could practically estimate the enactable preferences of any government, or could determine whether current political influence produces the differential odds of legislative correction necessary to justify a preference-eliciting default rule.

To some extent, operationalization would be easy, for these theories largely offer a fuller explanation and justification for the statutory doctrines and distinctions that courts already employ, as with the presumption against antitrust and tax exemptions and extraterritorial application of law. For such doctrines, courts need not do anything different than they already do. This does not mean that understanding the underlying theory is unimportant. An improved understanding can rebut common critiques that, viewed in this new light, turn out to be unjustified. This might help reduce some of the prevailing cynicism about statutory interpretation, and avoid harmful reforms. Further, a better underlying theory can help courts resolve cases at the margins of current categories in statutory construction doctrine.

But part of the goal is also to get courts to apply canons of statutory construction more consistently. This raises the question: should courts explicitly rely on estimates of political preferences or the likelihood of eliciting a legislative reaction in explaining why these canons are sometimes applied and sometimes ignored? My answer is affirmative. If judges are differentially applying canons based on intuitions about legislative preferences or a differential likelihood of legislative correction, then making these intuitions explicit helpfully makes their decisions more transparent and predictable. This suggestion must meet the usual trio of jurisprudential objections made whenever judges make their interstitial policymaking explicit: inappropriateness, inadministrability, and incompetence.

A. *Appropriateness*

One question is whether any political assessments required by my approach would be inappropriate because they do not reflect "law" or ordinary legal practice. I do not believe so. Political satisfaction analysis is merely a way of understanding the basis and application of traditional legal canons long employed by courts. Seventy percent of Supreme Court conference discussions in nonconstitutional cases explicitly refer to the preferences or likely actions of current legislatures or other governmental actors, and 10% of their opinions openly invite legislative override.[388] Even if courts are not explicit about their basis, Justice Holmes was right that law is a prediction of what judges will do.[389] If political satisfaction theory offers a sound prediction of judicial behavior, it should be understood as law. The decision does not, after all, become more appropriate just because it is implicit rather than explicit.[390] And even if judges never admitted to using it in their opinions (as they generally downplay their interstitial policymaking in interpreting legal ambiguities), lawyers advising clients should employ whatever theory helps them best predict to clients the likely outcome of statutory interpretations.

What we consider acceptable judicial practice has clearly changed over time. In the formalist age, it may have seemed unthinkable that courts would ever openly admit that formal legal materials were ambiguous and openly explain their policy grounds for resolving that ambiguity. But now that happens all the time. The once unthinkable became routine because it was recognized that—whether they wanted to or not—formalist courts were making substantive judgments about policy in

388. See Lee Epstein & Jack Knight, The Choices Justices Make 149–50 (1998); supra Part II.B.3.

389. Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 457–58 (1897).

390. Nor can one say that (whether implicit or explicit) preference-eliciting default rules are not law because they take away the entitlement of parties to an interpretation that conforms to likely legislative preferences, for that begs the question of what entitlements parties do and should have. See supra note 12. **R**

resolving inevitable legal ambiguities and it was better for them to do so explicitly with reasoning than implicitly by seat-of-the-pants judgments. The interpretation of antitrust statutes has, for example, been markedly improved by just such a shift, which has made antitrust doctrine correspond far better to economic realities.

Likewise, whether they want to or not, courts that interpret statutes necessarily have an impact on the political process, the satisfaction of political preferences, and the likelihood of explicit legislative decision. Recognizing the preference-estimating or eliciting effects and analysis implicit in their cases merely requires courts to become as postformalist about legislative process as they are about legislative policy and common law.

Dworkin insists that all statutory decisions involve interpretation rather than the resolution of indeterminacy on other grounds. He reasons that disputes about statutory interpretation are about what the law *is*, rather than what it *should* be, because judges often argue for statutory results that conflict with what they regard as wise policy in the case at hand.[391] But this merely means that the criteria judges use to decide what the law should be are more general than deciding on the best policy for the case at hand, not that judges are not resolving gaps and ambiguities about what the law should be. The statutory default rules I propose to resolve statutory indeterminancies often lead to results that the judge (and often the legislature) would not regard as wise policy in the case at hand. Yet these statutory default rules are not mere interpretations about what the statutory law "is," other than in the sense that they describe what the statutory law will be after the judge applies them. In any event, it makes little difference whether we call such disputes, as Dworkin does, theoretical disagreement about what the law is or, as others do, theoretical disagreement about what the law should be.[392] The disagreements about the proper legal criteria to use remain the same no matter what the label, as does the need for general default rules for resolving such disagreements.

A quite different concern of inappropriateness would be that preference-eliciting default rules violate Kantian norms because they treat people as means rather than ends by subjecting them to a result that likely deviates from legislative preferences in order to achieve the greater good of eliciting more precise legislative instructions. If valid, this concern would suggest courts should instead always prefer a preference-estimating reading of the statute to make justice in the particular case more likely. But the objection that persons are being used as means presumes precisely what is uncertain—that they deserve to be treated differently—and would block the default rule that is most likely to lead to statutory results that treat each person as they deserve. When the correction occurs ex

391. Dworkin, supra note 196, at 38. **R**

392. See id. at 37–43.

ante, no person is ever treated other than they deserve, including in the short run. When the only correction occurs ex post, there is an unavoidable tradeoff even on grounds of Kantian desert. Given actual uncertainty about enactable preferences, the alternative to subjecting the politically powerful side to a rule that may be wrong will be subjecting the politically powerless side to a rule that may be wrong. The former choice is more likely to inflict adverse ex post short term consequences on the politically powerful side, but it can avoid any adverse long term effects. The latter choice will inflict adverse effects less often on the politically powerless side, but those adverse effects will be inflicted in both the short and long run. Assuming the long run is sufficiently longer than the short run, the latter choice will, even if all correction is ex post, overall result in persons being treated as they deserve more often. And taking into account ex ante correction makes this even more true, because such ex ante correction treats everyone as they deserve in both the short and long run.

Moreover, if taken seriously, such a Kantian objection would apply far beyond preference-eliciting default rules. It would indeed apply *whenever* a legal doctrine is justified on institutional grounds rather than based purely on the merits of the individual case. In particular, it would suggest that similar Kantian objections should prohibit the application of rules to any overinclusive case because such cases are used as means to the end of preserving the precision of the rule. In the end, then, this is not an objection to preference-eliciting rules per se, but to rules generally. And there is no doubt that rules have long been considered appropriate in the law. Indeed, rules are generally favored by rule of law norms.[393]

B. *Administrability*

Wouldn't it be inadministrable for courts to take case-by-case testimony on the extent to which certain official action reflects enactable preferences or on the differing political influence or preferences of various groups? Perhaps, but nothing in political satisfaction analysis requires that approach. Rather, assessments could continue to be made categorically in a rule-like fashion for a given class of cases. Requiring particularized assessments of the influence of specific groups (rather than a general assessment for a given category of law) would prove unduly burdensome to courts and invite self-serving and unreliable testimony.

True, there will surely be hard decisions at the margins of any category. For example, should gun control laws benefit from the rule of lenity? While this seems a form of criminal law, gun enthusiasts are hardly an isolated group with little political influence but rather are strongly represented through such groups as the NRA. A case-specific analysis thus suggests that applying preference-eliciting default rule against prose-

393. See Elhauge, Preference-Estimating, supra note 2, 2104 n.219. **R**

cutors may well be inappropriate in many gun control cases.[394] It might thus be desirable to define a standard-like exception given the tension between the formal applicability of the rule of lenity and the underlying policy basis for the rule. Alternatively, one could consider the specific case just an overinclusive application of a generally sound rule, and apply the rule anyway. Or one could instead define some sort of exception that refines the rule rather than shift to case-by-case analysis.

But these are the same sorts of issues that courts always face when defining rules or choosing between rules and standards. The decision basically turns on whether the error costs of the facial over- and underinclusiveness of the rule are greater than the error costs of less precise application of a case-by-case standard.[395] Other relevant factors include the extent to which legal uncertainty might fail to provide fair warning, encourage behavioral compliance, or lower the costs of ascertaining the law. Such decisions will tend to be made at the highest court level for any jurisdiction, just as they are for other interstitial lawmaking that courts perform. Here, that is even more appropriate because Supreme Court decisions are much more likely, when they erroneously estimate legislative preferences, to invite a legislative reaction. Such decisions are not made any less administrable because they are made explicitly.

C. *Competence*

Would it be impossible for courts to acquire the expertise or information necessary to employ preference-estimating or eliciting analysis? I think not. After all, judicial use of these canons already implicitly follows such analysis, and does a fairly good job of it. If judges can be this accurate based on unspoken (and perhaps not even self-understood) intuition, then making such judgments expressly does not seem beyond their ability. Making such decisions is not inherently more difficult or information-intensive than the sort of interstitial policy decisions courts now recognize they make all the time.

One must be careful not to overestimate the difficulties. While estimating what would have been enactable in an old legislature is often an uncertain task (for anyone, judges or political scientists alike), in some

394. Courts often define the conduct that gun control statutes criminalize without adverting to the rule of lenity because the issue is whether to revoke a gun dealer's license, see, for example, Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983), but the statutory definition applies when imposing criminal punishment as well. This can produce expansive statutory interpretations that themselves are subject to legislative override because the gun lobby has far more influence than those burdened by ordinary criminal law. See Firearm Owners' Protection Act, 100 Stat. 449, 459 (1986) (codified at 18 U.S.C. § 921 (2001)) (overriding *Dickerson*). In another case, the Supreme Court applied the rule of lenity to a gun control statute, but that case involved the effect of the statute on the politically isolated group of convicted drug dealers who wanted to possess guns, and was strongly influenced by constitutional federalism issues. United States v. Bass, 404 U.S. 336, 338 & n.2, 347–51 (1971).

395. See Bundy & Elhauge, supra note 43, at 267–72. **R**

cases it is obvious, and in closer cases it mainly requires inquiry into the same sort of legislative materials already examined. In addition, these inquiries need only produce a probabilistic estimate that is better than random in order to reduce political dissatisfaction.[396] Indeed, this understanding helps rebut the otherwise persuasive objection that no shared legislative intent can be divined.[397] Likewise, current preferences default rules describe doctrinal categories that must generally fit suppositions of what sorts of evidence do or do not provide reliable evidence of current enactable preferences. This generally requires evidence of certain kinds of official action, especially inferences from recent legislative action or by agencies accountable to the political branches.[398]

Preference-eliciting default rules might seem more problematic because they require determining when differential odds of legislative correction exist. But, as noted above, these judgments will generally be categorical for the class of cases governed by a given statutory canon, and thus need not turn on case-by-case assessments of relative political influence. Further, to be a good candidate for a preference-eliciting default rule, the category of statutory interpretation must involve a persistent one-sided political demand for legislation.[399] So, far from requiring nuanced political judgments and close monitoring over time, preference-eliciting analysis depends on a one-sidedness of political demand that tends to be structural and last a long time. Thus, the questions are not that hard or frequent, nor do they vary greatly over time.

One must also be careful not to implicitly judge this—or any other legal doctrine—by a Nirvana standard. An excellent recent article by Adrian Vermeule argues that judges will face serious empirical uncertainty in applying not just a political satisfaction theory like mine but any of the modern tools of interpretive theory. He thus advocates instead choosing whatever rules minimize decisionmaking and uncertainty costs because such costs are the only factors susceptible to accurate judicial estimate.[400] But this critique really applies to almost all judicial decisionmaking, which generally rests on some empirical judgment that is made under conditions of uncertainty.[401] Thus, if pursued to its logical conclusion, the critique suggests that the optimal rule would be to dismiss all cases, since that would minimize uncertainty and decisionmaking costs. I

396. Elhauge, Preference-Estimating, supra note 2, Part III. **R**

397. See id. Part III.B.

398. Id. Parts VI–VII.

399. Supra Part II.A.5.

400. Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74, 81 (2000) [hereinafter Vermeule, Interpretive Choice].

401. Professor Vermeule himself acknowledges this is true for contract and constitutional law, id. at 79 & n.25, but it seems equally true for just about every other area of law. To take just one reason: almost every legal issue to some extent involves a choice between rules and standards, and thus requires some empirical judgment about the relative incidence of over- and underinclusion under each. See Bundy & Elhauge, supra note 43, at 267–72. **R**

assume Vermeule would not take it that far, but such a limitation—as well as his general assumption that more socially desirable results would follow from an approach where judges eschew empirical assessments other than the costs of uncertainty and decisionmaking—must itself rest on an empirical judgment about the relative magnitude of judicial inaccuracy and the decision/uncertainty costs that could be saved, a judgment that is empirically uncertain under Professor Vermeule's own analysis.[402] In the end, we must make some relative judgment, despite the irreducible empirical uncertainty that besets this and all legal questions, about which approach seems more likely to advance social welfare.

It may not take great certainty to make a legal approach advisable: it need only be more accurate than the alternatives. In particular, it need not take a great deal of certainty—or much of a likelihood of legislative reaction—to form the predicate for a default rule. Uncertainty may even be the justification, as in the case of supplemental or preference-eliciting default rules.[403] Suppose courts have great uncertainty about which interpretation best matches legislative preferences. Then, a very slight expected advantage in provoking legislative reaction can justify choosing a preference-eliciting default rule even when the overall odds of legislative reaction are small.[404] That is, great uncertainty in estimating enactable preferences does not justify abandoning the goal of maximizing political satisfaction but rather alters which default rules are most likely to do so. In any event, Vermeule's appropriate concerns about the costs of decisionmaking and uncertainty could be taken into account by choosing more rule-like methods of implementing a political satisfaction approach, as suggested in the last section. Preference-estimating or eliciting analysis would remain a useful tool for deciding *which* of the rule-like canons that lower decision and uncertainty costs should be chosen.

Errors will be inevitable, as they are in any legal or policy standard applied by courts. But they are likely to be smaller if the courts are at least thinking about the right questions. For example, the costs of erroneous estimates of enactable preferences or the likelihood of legislative reconsideration can greatly be ameliorated if judges are willing to change

402. Professor Vermeule concludes, for example, "it is essentially useless to know only 5% of the information necessary to choose between alternative rules," Vermeule, Interpretive Choice, supra note 400, at 106, but it seems plausible to suppose that decision and uncertainty costs form less than five percent of the relevant information on a choice between rules. Nor can one assume judges are so great at assessing the costs of decisionmaking or uncertainty. Many judges seem oblivious or insensitive to the costs they impose on lawyers and parties by how judges conduct cases, or to the uncertainty costs created by their decisions, costs which generally occur outside judges' observation and do not directly affect them. And while judges may know more about adjudicative decision costs than they know about the likelihood of legislative reaction, judges may be more biased in measuring the magnitude of decision costs, overweighing the advantage of rules that save themselves time. R

403. Supra Parts II, VII.

404. Supra Part II.B.

the default rule results when reliable evidence arises that enactable preferences have changed or that eliciting legislative reconsideration is unlikely. In fact, this is what courts are often willing to do.[405] That willingness should helpfully be increased if judges are more aware of the basis for the canons they apply. If canons that embody current preferences or preference-eliciting default rules are instead wrongly understood as the best basis for divining the enacting legislature's intent, then the wayward statutory precedent becomes hard to abandon, for nothing about the enacting legislature's intent or preferences will have changed in the meantime.

We are likely to find, as with interstitial policy making by judges, that being explicit about the underlying political analysis itself provokes the creation of better information for undertaking such analysis. For example, while cases overruling other cases are well-reported and easy to find through traditional legal research tools, legislative overrides are not systematically collected in any source.[406] Good empirical studies of the issue are thus highly labor intensive and few and far between.[407] But if judges were being explicit about the extent to which application of their canons varied with the likelihood of legislative override, that would likely generate a far better database of information for use in the future. There seems no reason that Shepard's or Westlaw Keycite could not make finding overriding statutes as easy as finding overruling cases. Likewise, both could easily be modified to turn up cites to the case not only in subsequent cases but in subsequent legislative history.

In the final analysis, though, claims of judicial incompetence requires us to answer the question: compared to what? Courts are the ones making decisions about how to resolve ambiguities in statutory interpretations. If courts ignore the consequences of their decisions for the likelihood of override and ultimate satisfaction of political preferences, that does not mean those consequences will not follow. It merely means courts are making decisions that have those consequences without thinking about them. There is no reason to think that judicial incompetence is so great that judges make worse decisions when they estimate the consequences than when they ignore them; i.e., that judicial estimations are actually worse than random.

Claims of judicial incompetence can be persuasive only if it is possible for courts to shift the relevant decision to a more competent branch.

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405. Elhauge, Preference-Estimating, supra note 2, Part VI.C; supra Parts V, VI.B. **R**

406. See Solimine & Walker, supra note 33, at 439. **R**

407. For two rare examples, see id.; Eskridge, Overriding, supra note 25. The variability of the results depending on how much labor one devotes is striking. Solimine and Walker examined the Congressional Quarterly Almanac for each year from 1968–1988, and found fifty-six statutory overrides. Solimine & Walker, supra note 33, at 439–40. Eskridge added an examination of the legislative history for all enacted legislation from 1967–1990, and found 121 statutory overrides. Eskridge, Overriding, supra note 25, at 421, app. 3. **R** **R** **R**

But that is not a claim that can be made against political satisfaction canons, for their aim is precisely to either estimate political preferences where enacted clarification has not yet occurred, sometimes by deference to agencies that are generally more competent at estimating current preferences, or (with preference-eliciting canons) to shift the decision to the legislative branch that can best maximize the satisfaction of enactable political preferences by identifying what they are.[408] Nor can the legislature itself be left to make decisions about when a preference-eliciting default rule is likely to cause it to act, for the same political structure that creates one-sided legislative demand would make sure it never imposes a preference-eliciting default rule.

X. Conclusion

Canons of statutory construction are often criticized as seeming to thwart legislative preferences, thus reflecting an illegitimate imposition of judicial preferences. But often these canons can be justified as preference-eliciting default rules that ultimately maximize the satisfaction of legislative preferences by procuring more explicit legislative action. Where the conditions for a preference-eliciting default rule are met, these canons do not thwart political preferences—they further them.

There might seem to be a superficial tension with political preferences because application of a preference-eliciting default rule deviates from the interpretation most likely to reflect legislative desires in the short run. But in all the cases where the default rule elicits legislative preferences ex ante in the original statute, this deviation never materializes. Where the preferences are elicited ex post, a deviation does result in the short run. But even if one were only trying to identify the right cases for ex ante eliciting, evidence about what elicits an ex post legislative reaction will provide some evidence of which ambiguities, if foreseen, would elicit an ex ante reaction and against which group to put the burden.

Further, even if preference-eliciting default rules elicited only ex post legislative reactions, that would not make them anti-majoritarian since they produce statutory results that better reflect majoritarian preferences in the long run. By definition, preference-eliciting default rules are limited to cases where the statutory meaning is ambiguous and an honest interpretive agent is not sure about legislative preferences. In such cases, employing a preference-eliciting default rule to elicit an ex post legisla-

408. Vermeule acknowledges that "[b]urdens of proof are perhaps most successful when used to generate information," but assumes that "[i]n situations of interpretative choice, however, the central problem is not that the information necessary for the choice must be elicited from some other actor, but that the information either is costly to generate or simply unavailable." Vermeule, Interpretive Choice, supra note 400, at 123. **R** Where preference-eliciting default rules are used, however, the very matter that is uncertain is what enactable legislative preferences are, and a default that effectively puts the burden on the legislature is designed to elicit precisely that information.

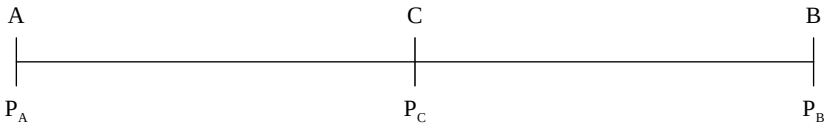
tive reaction is basically the equivalent of having the agent ask the principal for clearer instructions in those few cases where that approach is feasible.[409] Further, as established above, when a legislature fails to correct a preference-eliciting default rule, then absent any other new evidence bearing on the conditions that led to imposition of the default rule, a court can conclude that the default rule turns out to be the best estimate of enactable preferences even though legislative correction is generally unlikely.

Thus, while hardly occupying the field, preference-eliciting default rules may take their proper place in the constellation of statutory default rules that maximize political satisfaction, whose prioritization we can now summarize. When statutory meaning is ambiguous, courts should first determine whether current enactable preferences can be reliably inferred from official action. If so, courts should apply a current preferences default rule. If not, then courts should apply an enacting preferences default rule, whose content may vary with changing factual circumstances. If neither enacting nor current preferences seem very certain, a preference-eliciting default rule should be used in those categories of cases that meet the necessary condition, including most importantly a significant differential likelihood of legislative correction. Where neither estimating nor eliciting preferences is feasible, then supplemental default rules should be used that track the preferences of political subunits or (where those are unavailable) that reduce judicial variance by reducing constitutional difficulties or deviations from common law principles. Our existing set of statutory canons can all be explained as different parts of this system of default rules that maximize political satisfaction. But understanding the underlying theory allows one to better prioritize the canons and understand their pattern of application.

409. Cf. Restatement (Second) of Agency § 44 cmt. c (where a principal's instructions are ambiguous, the agent should if feasible ask for more definite instructions).

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: $P_BP_{Astick}D_{AB} + P_CP_{Astick}D_{AC}$

If B is chosen: $P_AP_{Bstick}D_{AB} + P_CP_{Bstick}D_{BC}$

The court should thus choose A only if:

$P_AP_{Bstick}D_{AB} + P_CP_{Bstick}D_{BC} > P_BP_{Astick}D_{AB} + P_CP_{Astick}D_{AC}$, that is, if:

$P_{Bstick}(P_AD_{AB} + P_CD_{BC}) > P_{Astick}(P_BD_{AB} + P_CD_{AC})$, or

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

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

$P_{Bstick}/P_{Astick} > (P_BD_{AB} + (1 - P_A - P_B)\,D_{AC})/(P_AD_{AB} + (1 - P_A - P_B)\,D_{BC})$, or $P_{Bstick}/P_{Astick} > (P_BD_{AB} + D_{AC} - P_AD_{AC} - P_BD_{AC})/(P_AD_{AB} + D_{BC} - P_AD_{BC} - P_BD_{BC})$. 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.