PREFERENCE-ESTIMATING STATUTORY DEFAULT RULES

Einer Elhauge*

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

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

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I. Introduction

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

I here take a different tack. I will skip the first issue and instead begin wherever hermeneutics leaves off by focusing exclusively on how courts should resolve admitted statutory ambiguities. Further, regardless of the extent to which hermeneutic theory constrains judges to act as honest agents, I will argue that, in resolving any statutory ambiguities left after interpretive inquiry, courts should not exercise judicial judgment
but rather should act as honest agents for the political branches. This may seem impossible since, by definition, this is the set of cases where the legislative instructions are unclear. And so many have thought. But courts can still act as honest agents by adopting a set of statutory default rules designed to minimize political dissatisfaction with statutory results. In fact, I will argue that they largely have done just that, and that this explains various seeming anomalies in statutory interpretation. But, and quite counterintuitively, I will show that the statutory default rules that minimize political dissatisfaction often do not track the most likely meaning or even preferences of the enacting legislature.

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

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


2. I will throughout use the term “meaning” to refer to whatever meaning or range of possible meanings results from the reader’s favored interpretive methodology, which to some turns on the statutory text and linguistic conventions but to others turns on statutory “purpose,” or legislative “intent” or “will.” I mean the term “meaning” to be agnostic on that and all other hermeneutic issues of proper interpretation. I will also be abstracting from subtle hermeneutic distinctions about whether a particular form of statutory indeterminacy is best called a “gap,” an “ambiguity,” “vagueness,” a “conflict,” an “omission,” “uncertainty,” or something else. I will instead use all those terms interchangeably to mean that whatever hermeneutic approach the reader favors has failed to resolve the question of meaning. For example, if one’s favored interpretive method provides that a true statutory “gap” indicates the statute meant to exclude that case, then that person would see no indeterminacy creating the occasion for a default rule. But others might think that at least some gaps (like a failure to specify a statute of limitations) do create indeterminacy that judges must resolve, so I will sometimes refer to gaps as a possible basis for a default rule.
fault rules that resolve those indeterminacies? The importance of this question surely varies with how determinate our methods for divining statutory meaning are. To those who find those methods wholly indeterminate, the choice of default rules actually resolves more cases than the choice of interpretive theory—at the extreme, all cases. But even if one has a high degree of faith in interpretive theory, the choice of statutory default rules will resolve many interesting cases in whatever residual remains unresolved by interpretive theory. In Supreme Court cases, the proportion of such residual cases will be particularly large, and thus default rules particularly important, because cases that do not involve statutory ambiguity are less likely to split the lower courts.

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

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

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

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

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

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

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

6. See, e.g., id. at 461–62.

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

tory ambiguity,9 my analysis provides a recommended content for—and limits on10—the rules the legislature should adopt. In fact, as we will see, although the interpretive rules provided by statute in the United States Code and many state codes are inconsequential, many other states have enacted more substantive codes of construction that provide valuable evidence on the default rules most likely to maximize political satisfaction. Of course, even an interpretive statute must be interpreted, and courts will need default rules to do that, which in my theory should likewise be designed to maximize political satisfaction.

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

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

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

11. Although hypothetical consent and penalty default rules have been popularized and systematized by recent law and economics scholarship, see, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 91 (1989), in fact these notions go back at least to Lon Fuller. See Lon L.
might be applied to statutory interpretation, though often without endorsement, and certainly without yet working out any systematic defense
of this proposition or account of what set of statutory default rules would maximize legislative preference satisfaction. 12 I aim to provide that systematic defense and account. One point the analysis will demonstrate is that, while the contract and corporate law approach of resolving textual gaps or ambiguities with default rules that maximize the preferences of the contracting parties is also fruitful for statutory texts, one must make many modifications because statutes raise unique issues.

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

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

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

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

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

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

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

But my argument also invokes that combination of descriptive and normative claims that is the particular province of law professors. Because one of the tasks of legal scholarship is to explain legal doctrine in a way that can provide guidance to future courts, it has always been important to establish that any proffered theory has both normative attraction and a sufficient fit with extant doctrine. For example, suppose one concluded that my descriptive claim was not as accurate as the contrary claim that judges simply interpret statutes in whatever way furthers their personal ideological preferences. Even if this offered a viable positive account acceptable in political science and rational choice theory, such a normatively corrosive position cannot offer an attractive legal theory for guiding future courts. A valid legal theory must instead have some normative justification to merit adoption. Conversely, a perfectly valid normative argument that has no connection to existing doctrine may offer a useful blueprint for legislative reform, but has no claim to being a theory actions of current legislatures or other governmental actors. See Lee Epstein & Jack Knight, The Choices Justices Make 149–50 (1998). Supporting the preference-eliciting theory explored in the companion paper, 10% of Supreme Court statutory decisions actually expressly invite legislative override. See Elhauge, Preference-Eliciting, supra note 7, Part II.B.3. Statistical evidence about the connection between court outcomes and legislative responses also fits the theories presented in these papers, id., though I will mainly focus on the correspondence between the theory and legal doctrine.
of legal doctrine. Without any grounding in the authority of existing doctrine, such a normative theory cannot offer guidance to an agency, trial court, or intermediate appellate court. Its utility would even be limited before a jurisdiction’s high court, partly because of the presumption in favor of stare decisis, but even more so because that court must rule case by case in reviewing lower courts that will generally be following existing doctrine. This tends to limit high court decisions to altering the margins of existing doctrine and makes it difficult to accomplish a wholesale shift to an entirely different normative foundation. Thus, while legal theory often includes pure positive or normative theory, what distinguishes it from those endeavors is that it also focuses on determining which of the possible normative justifications is most consistent with the descriptive landscape. The best legal theory might thus be neither the most descriptively accurate nor the most normatively attractive, but rather the theory that provides the best combined fit of descriptive explanation and normative justification. As well as making the separate claims, I make precisely such a combined claim on behalf of my legal theory of statutory interpretation.

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

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

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

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

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

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

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

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

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

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

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

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

17. See infra Part V.
actable preferences must be, since the enacting governmental preferences will be weak.

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

II. SHOULD STATUTORY DEFAULT RULES BE DESIGNED TO MAXIMIZE POLITICAL SATISFACTION?

A. Political Satisfaction vs. Judicial Judgment

The guiding principle throughout my analysis will be that statutory default rules should be devised to maximize the satisfaction of political preferences, which necessarily entails that they will, to some extent, constrain judges from imposing their own views or judgments. Some may doubt that these (or any) rules could really constrain judges, especially since many of the default doctrines are not that rule-like, but rather offer guidance whose content will be determined by context. But a doctrine need not be 100% determinate to have a meaningful effect on judicial outcomes. True, clever and dedicated subverters of such default rules can no doubt manipulate them to reach whatever result they personally prefer in most cases. So it is with any legal doctrine or any instruction a principal gives to any agent. But it is hard to see why the political process would want to appoint—the kind of judicial agents who misuse their interpretive powers to pursue their own political views or judgments. To the contrary, the political process would want to commit itself to a strategy of refusing to appoint—and, where feasible, reversing the statutory decisions of—judges who just tried to further their own political views or judgments, for commitment to such a strategy would maximize the expected influence of those in the political process. Some mistaken judicial appointments will no doubt slip through the screening process, but over the entire range of judges and cases, identifying the correct default rules should increase the extent to which statutory results accurately reflect enactable political preferences. If the judiciary is sufficiently wayward, the legislature can also try to reestablish the supremacy of democratic choice.
by enacting statutes that specify statutory default rules that maximize political satisfaction.\textsuperscript{18}

In any event, the aspirational question is worth considering. Whether or not constraining statutory rules or doctrines can be designed, what kind of interpretive practice would citizens of a democracy want judges to follow when filling in statutory defaults? And what kind of practice would honest interpretive agents want to follow? The general answer seems plain. Democratic citizens would want a judicial practice of applying those default rules that maximize the extent to which statutory results accurately reflected those citizens’ political preferences. Some might dispute this even as an aspiration. Why shouldn’t judges do the “right” thing no matter what the legislative polity thinks?\textsuperscript{19} The reasons are several.

To begin with, the whole reason for having a political process for enacting statutes is to determine what the “right” thing is by assuring that, within constitutional bounds, political preferences are reflected in statutory results. If we preferred a judicial process, the enactment of statutes could be constitutionally delegated to judges instead. Absent that or some constitutional constraint, the statutory results that resolve statutory ambiguities should reflect enactable political preferences, as measured by the accepted process for enacting statutes in that society. Nor does the necessary task of statutory interpretation provide any warrant for judges to impose their views of how democracy might be “perfected” by interpreting statutes to reach results that would be enactable only if one lifted certain procedural obstacles that, while constitutional, the judge finds objectionable. If a society has imposed legislative obstacles (like the concurrence of separate legislative houses and an executive) to alter the extent to which political preferences can be translated into statutory enactments, then considering those legislative obstacles should also alter the extent to which political preferences can be translated into statutory interpretations. If there is some unconstitutional defect in the process used to enact statutes, then that process must be invalidated for statutory meaning and ambiguity alike. If the alleged defect is constitutionally valid, then it is up to the society to determine whether it should reform that process to remove the defect. But as long as the enactable preferences measured by the legislative process legitimate compelled obedience

\textsuperscript{18} See supra note 9. See also infra Part V.D (summarizing other means by which the legislature can influence a judiciary that tries to maximize its own preferences rather than the legislature’s).

\textsuperscript{19} For theories that interpretation should follow the underlying “moral reality,” see Heidi M. Hurd, Challenging Authority, 100 Yale L.J. 1611, 1620, 1667–77 (1991); Heidi M. Hurd, Sovereignty in Silence, 99 Yale L.J. 945, 995–97, 1028 (1990); Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. Cal. L. Rev. 279, 353–58, 383–86 (1985). An alternative version of this objection might say that interpretation must vindicate people’s “rights.” But absent some claim of privileged insight into moral reality, to say there is a “right” is to presume we have some defined constitutional constraint or statutory meaning, and this paper assumes we are operating in the realm where we have neither.
to the statute itself, that same set of preferences should govern statutory interpretations that command the same obedience.

We must also realize that statutory interpretation is a collective act, not an individual assessment. The project is to advise interpreters (normally judges) how best to make interpretations that will be collectively binding on us all. The judges who disagree with any scholar’s proffered normative assessment about what “the right thing” is have no reason to adopt that scholar’s advice about the best statutory default rules. The other judges might adopt the advice, but then the question becomes why these judges should be able to impose that contested normative assessment on citizens who disagree with it. And why should statutory interpretation turn on the happenstance of which normative views happen to be held by the judge one draws? Normative theory provides a powerful tool by which each of us can individually decide which statutory results are undesirable. But it cannot usefully provide an independent basis to make collective decisions (through judges) about how to interpret the results of a collective process that itself is supposed to decide what is normatively desirable. Such arguments cannot convince those who claim a privileged insight that means their views should prevail no matter what the polity thinks, but such persons have no business accepting (or being given) the role of a public servant who acts on behalf of us all.

Nor are judges’ normative views about substance and process really separable. No one can determine whether a minority or majority group has too little political influence because of process defects without determining how much influence that group normatively ought to have. Thus, any judicial conclusion to favor a group in statutory interpretation because it is underrepresented by the actual legislative process amounts to judicial imposition of the substantive normative views that led to that conclusion.

The root problem is that we all harbor different conceptions of what the right thing is. Each person’s ideal system would adopt his conception, but everyone cannot be a dictator on conceptions of the social good. The best we can do is join a democracy that accurately and equally weighs our different conceptions. True, a democracy will often want to put limits on what it can do, and even more so on what its political agents can do. But then we are in the realm of constitutional law rather than statutory interpretation, and this Article throughout assumes judges are oper-

20. Perhaps there are some normative assessments that are uncontested, but if they exist, they just represent a special set of interpretations that maximize political satisfaction, so adopting them is entirely consistent with my approach. The more interesting and typical cases involve contested normative assessments.

ating in whatever area is left open by constitutional constraints. In choosing among those statutory results that are constitutional, the legislative polity will want those results that minimize its expected political dissatisfaction.

Why should any of us accept the statutory results of such a democracy even when they violate our conception of justice and the social good? Because, in exchange, others accept statutory results we regard as good but they would regard as bad. We might justify such a tradeoff on consequentialist grounds: if everyone accepts this social compact, the expected good consequences outweigh the bad for each of us. After all, the alternative to accepting the statutory results of democratic choices that sometimes violate individual conceptions of the good is to accept the statutory results of a nondemocracy that violates individual conceptions of the good more often. Unless, that is, the society does not accept statutory results as authoritative at all, and that way lies not just chaos but the frustration of our collective ability to pursue anyone’s conception of the good.

Nonconsequentialist arguments about democracy support the same conclusion. Democratic theories that center on respecting the majority’s will would obviously conflict with judges adopting statutory interpretations that correspond with their personal views or judgments rather than majority preferences. But the same follows even if one rejects majority will in favor of democratic theories that instead stress the principle of self-governance. For being a participant in a self-governing democracy necessarily means giving up a claim to privileged insight into what advances the public interest. It means committing instead to having the public interest determined through some political process of preference aggregation or principled deliberation that constitutes the collective means by which the polity governs itself.

What democratic government cannot mean is producing a government where everyone’s conception of the good is furthered, because that is impossible. All it can produce is the best that is possible: a government that minimizes the expected dissatisfaction of the polity’s differing conceptions of the good. But it can only do so if interpretive agents apply default rules that advance this goal rather than misuse their interpretative powers to further their own conceptions of the good. An interpreter that insists her conception of the good must take precedence breaches the

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23. Even if one regards any particular statutory result as only a temporary “institutional settlement” in an ongoing debate about conceptions of justice and the common good, see Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1225 (tentative ed. 1958), the question remains which temporary institutional settlements should be reached, and temporary settlements that track political preferences will minimize the extent to which the polity finds its conceptions of the good violated at each point in time.
fundamental social contract that leaves such matters to be resolved democratically.24

The default rule approach here thus rejects—and should be contrasted with—the alternative default rule (implicit in many theories) that leaves all statutory indeterminacy to be resolved by judicial judgment. Courts should choose not what they regard as wise policy, but should instead choose default rules that on average minimize political dissatisfaction.

To be sure, sometimes it will be clear that what the legislature meant or preferred was to delegate the matter for ongoing judicial resolution.25 The antitrust statutes, for example, are commonly understood to involve such a delegation to courts.26 But in such a case, exercising substantive judicial judgment does satisfy legislative preferences, and thus differs from the exercise of such judgment even when no such delegation was legislatively preferred.

B. Political Satisfaction vs. Statutory Coherence, Stability, or Certainty

Achieving statutory coherence is another goal that might seem different from allowing judges to impose their own judgments and in conflict with the goal of maximizing political satisfaction. Particularly influential has been Ronald Dworkin’s argument that courts should maximize the extent to which legislative results can be justified by a coherent and principled set of general political convictions.27 Certainly, whether a particular interpretation achieves statutory coherence is relevant to determining what result most likely matches legislative preferences. But the cases of interest are those where the interpreter’s views about which interpretation best achieves statutory coherence conflict with her views about which most likely matches enactable political preferences. To choose coherence over political satisfaction in that case is to allow the polity’s preferences to be trumped by a judicial judgment that favors a particular normative view about what constitutes coherence.

On Dworkin’s premise that legislators share his hierarchy of preferences—which makes general political convictions more important than specific ones—the apparent conflict never arises because his approach

24. I do not by this discussion mean to be drawing any sharp distinction between political preferences and conceptions of justice. Both doubtless play a role in the enactment of statutes. I rather mean that whatever one calls the reasons that legitimate compelled obedience to clear statutes (be they conceptions of justice, preferences, opinions, views, or judgment), those same reasons should govern interpretative default rules in cases of statutory unclarity.

25. See Fallon et al., supra note 7, at 754; Elhauge, Preference-Eliciting, supra note 7, Part II.A.4.


would maximize the satisfaction of political preferences. But in fact, the empirical accuracy of Dworkin’s premise seems dubious. Politicians probably have far stronger convictions about concrete results than about abstract principles, and where the two conflict would prefer modification of the latter. Consider the case where a politician believes in the general principle of preserving species even at great national sacrifice, but an interpreter relies instead on the legislator’s more specific conviction that a dam should be completed even though it will endanger a species. Dworkin calls this interpretation a “crude . . . mistake, which no one would be tempted to make,” because this legislator has made a “mistake of fact” about whether the dam will endanger a species, and thus the interpreter should apply the general principle with the corrected “fact.” But it is more plausible that the legislator made a mistake of principle or that the interpreter made a mistake in what principle to attribute to the legislator. The legislator may have accepted an abstract principle without realizing all its consequences, but now that she realizes it would entail a concrete consequence she knows she finds unacceptable, she would modify the general principle. Likewise, where a legislator believes that “reasonable” efforts should be made to preserve a species, is it a “mistake” for an interpreter to rely on the legislator’s specific belief that stopping this dam would be reasonable rather than on the interpreter’s own assessment that in fact stopping the dam would be unreasonable? To Dworkin it would be because this legislator has made a mistake “in fact” about the reasonableness of the dam, but one might well instead say that what must be mistaken (and modified) are any general abstract criteria of reasonableness that failed to fit the legislator’s specific concrete conclusion about this dam’s reasonableness.

One can test this proposition by examining the interpretive codes provided by legislatures within the United States to find out what they indicate should govern in any conflict between general and specific legislative conclusions. Such examination reveals that every legislature to speak on the issue has indicated that it prefers to have courts follow its more specific intent and provisions rather than its general intent and principles. No legislative statute directs courts to rely instead on evi-

28. Id. at 329–37.
29. Id. at 330–31.
30. Id.
31. Id. at 332–33.
32. Id.
dence of the legislature’s general intent. This seems the best available evidence on which default rule legislatures prefer. This default rule is also consistent with U.S. Supreme Court precedent, which adopts the anti-Dworkinian presumption that a conflict between specific and general legislation should be resolved in favor of the specific.34

Dworkin’s preference for abstract general principles over concrete specific legislative conclusions thus, as he himself applies it, seems to both deviate from actual legislative preferences and allow judges to interject their own value-laden judgments. But the problem is not limited to his particular methodology for determining statutory coherence. Legislation is often produced by political compromise or interest group pressures that do not reflect a common policy.35 Even without interest group influence, Arrow’s Theorem shows that collective choices can make decisions that do not make a rational pattern.36 And even without either problem, separate enactments can simply reflect different concrete political reactions to distinct events at varying points in time that do not fit into one overarching policy. All this means that a series of statutes will often reflect legislative preferences that fail to manifest a single coherent policy.37 More important, efforts to impose such a coherent policy on a set of enactments will inevitably require judicial value judgments about which reading makes the statutes work “best” together.38

None of this means it is irrelevant whether various pieces of legislation form a coherent policy. All other things being equal, presumably legislators normally prefer a policy that is coherent to one that is not.39 But the issue of statutory coherence must be subordinated to the general issue of what maximizes political satisfaction. A judicial or scholarly preference for coherence should not be permitted to trump evidence that legislators have different views about the desirability of coherence, or are more willing to trade it off against other goals. Nor, if legislators do prefer coherence, should their standards for what constitutes a coherent policy be replaced by different judicial or scholarly standards on policy co-

§ 311.026 (Vernon 1998) (same); N.Y. Stat. Law § 238 (McKinney 1971) ("Whenever there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular enactment is inapplicable.").


35. Elhauge, Interest Group Theory, supra note 21, at 32–46 (summarizing literature).

36. Id. at 101–09.

37. Both conservative and liberal judges knowledgeable about the legislative process have accepted this point. See, e.g., Heath v. Varity Corp., 71 F.3d 256, 258 (7th Cir. 1995) (Easterbrook, J.); Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1158–59 (D.C. Cir. 1988) (Mikva, J., dissenting).

38. See Sunstein, Interpreting Statutes, supra note 1, at 426.

39. See generally Elhauge, Preference-Eliciting, supra note 7, Part VII (discussing supplemental default rules that operate where legislative preferences do not lend themselves to any reliable estimate).
herence. More generally, coherence arguments do not justify resolving statutory ambiguities in a way that conflicts with conclusions about what, given all the evidence (including coherence with other statutes), is most likely to maximize the satisfaction of enactable preferences. In short, while statutory coherence is sometimes relevant to determining what maximizes political satisfaction, the latter remains the ultimate standard and should determine both what counts as coherence and how much coherence counts.

One can generalize this response to all sorts of related claims that might be made, such as claims that statutory interpretation should advance the goal of stability or certainty or reliance. There are two possibilities regarding such claims. One is that they reflect norms that would maximize political satisfaction. If so, these claims offer no grounds for deviating from the approach offered here. The other possibility is that they deviate from the norms that maximize political satisfaction. If so, my argument remains that judges have no warrant (absent a constitutional limitation) for imposing substantive norms that increase political dissatisfaction. Norms like stability or certainty or reliance should not be permitted to trump the goal of political satisfaction, but should be considered to the extent relevant to determining how best to further that goal.40

C. Preference Satisfaction vs. Fostering Deliberation

Another view to consider is that what judges should do is foster legislative deliberation, not preference satisfaction.41 This could form the basis for its own alternative statutory default rule, but in practice is normally invoked at the margins to justify certain exercises of judicial judgment over others.

A primary focus on political deliberation in my view overestimates both its capacity to mold preferences and the likelihood that any molding will improve rather than worsen preferences. While individual preferences are no doubt molded by the surrounding society, governmental efforts to mold preferences are less successful, and the molding of preferences through political discussion is rarer still.

Even when it occurs, molding preferences through deliberation often proves unsalutary. Political discussion frequently divides rather than joins us in seeing a common view of the public interest. Consider common laments about the mean-spirited nature of political discourse—or, if you are an academic, consider certain faculty meetings. Even when

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

deliberation unites, that may be harmful because social dynamics often lead people to become more polarized. Indeed, one of the initial proponents of deliberation-based theory, Cass Sunstein, has acknowledged that empirical tests show that deliberation makes groups more erratic and extreme in their judgments.\textsuperscript{42} Aggregating independent votes not only produces results that are more consistent and moderate, but (assuming each voter is more likely than not to be right) their collective judgment is more accurate the greater the number of independent votes aggregated.\textsuperscript{43}

In any event, a focus on deliberation is not inconsistent with the approach taken here, for my analysis does not depend on any assumption that the preferences being satisfied are exogenous to the process of political deliberation. If deliberation helps reveal truer or deeper preferences, it is likely to produce more ultimate preference satisfaction. Those who favor such an approach should also favor reliance on deliberated political preferences as indicia of what the enacting or current legislature would have wanted, and should favor preference-eliciting default rules even more strongly since they encourage explicit deliberation.\textsuperscript{44} A deliberative model is thus broadly consistent with the approach taken here, although the terminology differs as would some applications.

D. At Least An Important Goal

Suppose you are unconvinced by this Section and persist in thinking that the goal of maximizing political satisfaction must sometimes be trumped by judicial judgment or at least the goals of statutory coherence or fostering deliberation. Nonetheless, the analysis that follows cannot be escaped, for even such interpretive theories do not deny that political preferences should play some role in resolving statutory ambiguities. Those who admit any weight to political preferences must thus consider which statutory default rules would maximize satisfaction of those preferences. To such persons, those default rules would not be dispositive, but they would merit whatever weight is given to political preferences within their own interpretive framework. To those who are convinced by this Section, the default rules that follow will be even more important—resolving all the indeterminacies where statutory meaning and constitutional constraints do not bind.


\textsuperscript{44} See generally Elhauge, Preference-Eliciting, supra note 7.
III. Enacting Preference-Estimating Statutory Default Rules

Where statutory meaning is unclear, and provoking explicit legislative action is unrealistic, then the default rule that maximizes enactable political preferences will track the interpreter’s best estimate of what the legislative government would have chosen given its political preferences had it thought about the issue. This core concept has a long and distinguished pedigree. Aristotle himself urged that when faced with a statutory gap, the interpreter’s role is “to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known.”45 Justice Cardozo stated that to resolve a statutory ambiguity, “we have therefore to put to ourselves the question, which choice is it the more likely that Congress would have made?”46 Judge Learned Hand likewise reasoned that “what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion.”47 More recently, Judge Posner concluded, “judges should ask themselves, when the message imparted by a statute is unclear, what the legislature would have wanted them to do in such a case of failed communication.”48

But because these illustrious authors and judges all focused on what they presumed was a statute-specific inquiry, none focused on what general default rules to adopt about (1) what one can assume any legislature would want, (2) how to determine what specific legislatures would want, and (3) which legislature (the enacting or current legislature) to ask the question about. Their approaches also seem problematic in the many cases where there is no single interpretation that seems more likely than not to be what the legislature would have wanted. Framing the issue as a default rule helps deal with this problem, and with the more general problem that the legislature often has no common intent or purpose or desire, and that estimates of what it would have enacted are often highly uncertain. Our task will be to choose those default rules that minimize the dissatisfaction of enactable preferences, not to pretend that there is one clear legislative intent or purpose or desire when there is none or, rather, there are multiple ones.

The contracts and corporate literature has done far more to develop a series of specific default rules. But we immediately come to a big difference between statutes and business contracts or corporate charters—one that indicates that while the general default rule framework of contract

47. United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952), aff’d per curiam, 345 U.S. 979 (1953).
and corporate law is useful, particular conclusions under it often are not. For business contracts and corporations, the normal assumption is that the participants would prefer the default rule that maximizes the economic pie, on the assumption that any distributional effects would be reflected in (and thus offset by) the price of the contract or corporate securities. This permits the general assumption that all parties share a preference for the most efficient default rules, though, to be sure, which default rules are efficient may turn on personal characteristics of the parties, such as their aversion to risk. With statutes, we have no warrant for assuming that the legislative participants share the same set of preferences, and certainly no general grounds for assuming they prefer the most efficient default rules. One point of the political process is precisely to decide how much to pursue efficiency versus other social goals. We thus need to inquire into the set of political preferences possessed by a particular set of legislative participants to devise the appropriate default rules. In short, compared to corporate and contract law default rules, statutory default rules are more likely to be tailored to the preferences of the particular set of legislative participants in question. The key question will thus be how to do such tailoring, and how to deal with the inevitable uncertainty about what preferences are enactable.

For non-business contracts, people may care about things other than their economic gain, so choosing efficient default rules is more questionable, and the contracting parties’ preferences about default rules may show a variability similar to those of legislative polities. But now we come to a second big difference between contracts and statutes. Persons normally are not bound by old contracts they did not enter into, so in contract law there is no question that the contracting parties would want the default rule that tracks their own preferences. In contrast, governments represent constituencies that are governed not only by the statutes they enact but also (indeed mainly) by old statutes enacted by prior governments. Statutory analysis (unlike contracts) thus raises the question: should courts track the preferences of the enacting or current government?

For purposes of this section, however, I will assume that the relevant governmental preferences are static, or at least that the court has no reliable indication that they have changed from the time of enactment. As we will see, a default rule based on static governmental preferences is not

49. In some cases, there are reasons to think distributional effects or externalities are not priced into the contract or securities, generally because of informational problems or because third parties are affected. In those cases, there is good reason not to adopt the default rule that maximizes the economic pie of the contracting parties. But absent some special reason like this, the default rule on default rules is to adopt the one that maximizes the total economic pie for those who form contracts and corporate charters.

50. There may be some question about whether the contracting parties’ preferences have changed over time. This likely explains the different contractual rules for long-term contracts and contracts about life-changing events, like surrogate motherhood. But most contract cases are not of this sort.
necessarily a static default rule. For even static preferences may require updating a default rule to take into account changed circumstances. But putting aside the possibility that the governmental preferences themselves have changed allows us to isolate the issues raised in ascertaining any government’s legislative preferences.

A. Universal Default Rules Fitting Any Governmental Preference

Statutory default rules generally need to be tailored for specific legislative polities. But many canons of statutory construction are general default rules that reflect what any legislative polity would want, given the plausible range of political preferences.

1. Interpreting Statutes to Avoid Absurd Results. — Many universal default rules cover particular recurring situations. For example, criminal statutes generally contain unqualified prohibitions on misconduct like taking another’s life, and do not specify what to do when the person taking another’s life is a policeman stopping a terrorist or assassin from killing others. Even strong textualists do not conclude that the statute contains no exception and then put the policeman on trial for murder. Instead, they and courts generally treat all such criminal statutes as having a gap that is filled with the doctrine that all criminal statutes include the defense of justification or necessity or self-defense.51 Likewise, statutes of limitations typically fail to specify what to do when the defendant has fraudulently concealed her wrongdoing in a way that disabled the plaintiff from suing within the limitations period. Again, even strong textualists treat the statute as having a gap, which they and the courts fill with the doctrine that any statute of limitations is tolled during a period of fraudulent concealment.52

The textualist defense of such cases is generally that the legislature acts with the understanding that there exist background rules of interpretation like these exceptions.53 But the truth is that these rulings do not rest on any evidence that the enacting legislature actually knew about these background interpretive rules, and in any event this justification begs the question of which background interpretive rules the courts


should choose. Indeed, this doctrinal defense would suggest that courts are free to adopt any interpretive rule they want as long as they publicize it sufficiently and make it generally applicable to all statutes.

Understanding these doctrines as preference-estimating default rules provides a more persuasive justification and limitation on the creation of such doctrines. These doctrines are appropriate default rules only because courts can be confident that, if any legislature did think about the issue, it would prefer not to punish criminally those trying to stop others from committing crimes or to let off defendants who fraudulently concealed their wrongdoing. Doctrines that do not conform to legislative preferences could also form "background" interpretive rules, but cannot be justified as preference-estimating default rules.54

The above examples could be understood as specific instances of the more general canon that statutes should be interpreted to avoid absurd results.55 To take a famous example, a statute in Bologna that punished residents who "drew blood in the streets" was read not to prohibit a surgeon from drawing blood in a medical emergency but rather to prohibit swordplay.56 An interpretation is considered absurd not only when it violates common sense, but also when it conflicts with the statute's purpose.57

The absurdity canon is sometimes criticized on the ground that it invites judges to substitute their own preferences for statutory meaning. Using the canon to impose judicial preferences would certainly be improper. But the canon is more commonly applied to cases like the Bologna statute, where common sense indicates that any government would prefer to avoid a certain statutory result. In such a case, the court can feel confident that rejecting this interpretation furthers enactable

54. They should accordingly be adopted only in the limited conditions justifying a preference-eliciting or supplemental default rule. See Elhauge, Preference-Eliciting, supra note 7.

55. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 68–69 (1994); Pub. Citizen v. Dep’t of Justice, 491 U.S. 440, 454 (1989); Church of The Holy Trinity v. United States, 143 U.S. 457, 459 (1892). These cases suggest that this doctrine also has a hermeneutic counterpart: that absurdity is a reason for finding ambiguous a meaning that would otherwise follow from a "literal" or "most natural grammatical reading" of a statute. I leave that hermeneutic question to one side since my focus here is on the default rule that applies once ambiguity is admitted. See generally Manning, Textualism and Equity, supra note 51, at 55 n.227, 115–19 (collecting conflicting authority on whether plain meaning governs even when it leads to absurd results); John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. (forthcoming 2003) (distinguishing literal from textual interpretation and arguing that the absurdity doctrine does not justify deviating from the latter).

56. Kirby, 74 U.S. (7 Wall.) at 487; 1 William Blackstone, Commentaries *60.

preferences, even though the court has no concrete indication that the particular enactors ever thought about the matter or expressed preferences on it. Explicitly supporting this notion was Chief Justice Marshall’s test that the absurdity must be “so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”

In other cases, the interpretation rejected as “absurd” does not conflict with common sense, but rather with the preferences reflected in the general statutory purpose. But what are judicial findings of “purpose”? Although courts use the term in varying ways, the most common usage is restricted to a purpose inferred from the general statute that contains the provision being interpreted. Under my terminology, this can be seen as a special case of a preference-estimating default rule: the case where the enactable preferences can be estimated from the best possible source of information, the actual enactment of the statute.

In either case, the justification for rejecting the absurd interpretation is not that it conflicts with judicial preferences. An “absurd” interpretation should thus not be understood to mean an interpretation that the judge believes reflects a highly unwise policy. It is rather a statutory result that the court is confident either that the actual enacting government would not want or that no government (within the range of plausible political preferences in that jurisdiction) would ever want.

One might object that, although in theory a canon against absurd interpretations would advance political satisfaction, in practice judges would abuse the discretion conferred by that canon in ways that thwart legislative preferences. If so, one might expect to see legislatures opting out of this default rule. But in fact every legislature within the United States has enacted a code of construction that leaves the well-known canon against absurd interpretations undisturbed. Further, those legislatures that have considered the matter expressly have all adopted the canon against absurd interpretations. No legislature directs courts to follow the plain meaning of a statute even when it leads to absurd results. This evidence tends to confirm the analysis above that this canon reflects a general default rule that maximizes political satisfaction.

2. *Interpreting Statutes to Avoid Constitutional Invalidity.* — Another example of a universal default rule is the canon against interpreting statutes

to create constitutional invalidity.\(^{60}\) Again, any government would want such a default because it would want to preserve as much of its statute as possible to maximize the satisfaction of the political preferences that led to the enactment. Likewise, it would want a canon of severability to preserve as much of any partially invalidated statute as can be preserved without undermining the statutory scheme.

The canon interpreting statutes to avoid constitutional questions or difficulties,\(^{61}\) on the other hand, cannot be explained as a preference-estimating default rule. This canon has no bite in cases of actual constitutional invalidity because the first default rule already governs those cases. Thus this default rule only matters when used to reject an interpretation that likely reflects governmental preferences even though that interpretation is not, in fact, constitutionally invalid. This cannot be justified on constitutional grounds. Nor is it likely to reflect the preferences of any government, which prefers to maximize the satisfaction of its political preferences.

Again, the evidence from the actual legislative codes of statutory interpretation is consistent with this analysis. Every legislature in the United States to enact a statute on the subject has directed courts to construe statutes to avoid constitutional invalidity.\(^{62}\) And every state legislature has a provision providing for severability of invalidated provisions. But no legislature directs courts to avoid constitutional doubts that do not result in actual invalidity. Further, courts do not permit application of the canon where legislative preferences are clearly to the contrary,\(^{63}\) which arguably restricts the canon to cases where the initial preference-estimating inquiry fails.

This does not mean that all applications of the canon against interpretations raising constitutional doubts are misguided. Rather, it means that this canon cannot be justified as a universal default rule reflecting likely legislative preferences about how to deal with ambiguous statutory meaning. While not having such a universal justification, this proves to be an interesting canon because it has varying justifications in different

60. See Hooper v. California, 155 U.S. 648, 657 (1895).


63. 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) (“Avoidance 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 . . . .”).
applications. When estimated legislative preferences are unclear, some applications of this canon can be justified as a preference-eliciting default rule if the dubious interpretation burdens a politically powerless group. And when neither estimating nor eliciting legislative preferences is feasible, many applications can be understood as a supplemental default rule to advance state autonomy (where the constitutional doubt concerns federalism), to protect under-enforced constitutional norms (where intelligible rules cannot be devised), or to constrain judicial variance (in residual cases). But these alternative justifications suggest that application of this canon should be carefully limited to such cases, rather than applied across the board to all legislation.

3. Private Rights of Actions and the Limited Prospects for Universal Statutory Default Rules. — Given the variety of political preferences, the occasions for universal default rules are rather limited. Consider, for example, a statute that defines a violation without specifying whether or not it means to authorize a private remedy for violations. At one point, under the slogan that every right must have a remedy, courts applied the general default rule of providing a private remedy since that would further the statutory purpose of deterring the violation. But this one-sided understanding of legislative preferences properly came under critique. Legislative preferences may reflect a compromise between competing political interests, a tradeoff that balances the benefits of enforcement against over-deterrence of desirable conduct, or a belief that agencies can be trusted with enforcement discretion better than private parties. This briefly led courts to the opposite default rule that the legislature does not mean to provide for a private right of action. But (if one accepts the premise that the statute is indeterminate) this too is incorrect. Rather, the correct conclusion to draw is that enactable preferences on the topic are too variable to assume that any sort of universal legislative preference exists. Instead, resolving the statutory indeterminacy requires examination of the specific preferences of the legislature in question. This corresponds to the position on which modern law has finally settled.

64. See Elhauge, Preference-Eliciting, supra note 7, Part III.B.
65. See id., Part VII.
66. See Fallon et al., supra note 7, at 829–30, 839.
67. Id. at 841–42. Others take the position that the courts should not fill this gap, in order to force the legislature to decide the question. Id. at 842–43. But since the question whether to provide a private right of action is unlikely to involve one-sided political demand for legislative correction of mistaken judicial estimates, this is a poor topic for what (if this argument were credited) amounts to a preference-eliciting default rule. See Elhauge, Preference-Eliciting, supra note 7, Part II.
68. See Fallon et al., supra note 7, at 840–41.
69. Id. at 840, 843–44 (noting that recent cases rely on the specific legislative intent indicated by the text or legislative history rather than a general default rule one way or the other).
The question whether to imply private rights of action is just one illustration of the general proposition that the default rules for resolving statutory indeterminacy normally must be tailored to take into account the variety of governmental preferences. I turn next to the topic of how to conduct such a tailored analysis.

B. Tailored Default Rules Inferring Enactable Preferences from Legislative Action and History

In discussing how courts should tailor default rules to inquire into what the enacting legislature would have wanted, we risk treading on hermeneutic theory, and in particular a voluminous debate about whether legislative history is or is not an accurate reflection of statutory meaning. Let me avoid this thicket by simply saying this: whether or not one invites legislative history into the initial inquiry as to a statute’s meaning, a separate question is whether legislative history should be used to resolve indeterminacy when the interpreter is left genuinely uncertain as to the statute’s meaning after employing her favorite hermeneutic techniques. The posited use of legislative history would not be to divine what the statute actually meant, nor what the legislature subjectively intended, as to the specific matter in question. The question would instead be whether, in cases where the interpretive inquiry is inconclusive, to use legislative history to make frankly probabilistic estimates about which stat-


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...utter interpretations are most likely to reflect enactable political preferences.

My answer is that it should. Legislative history may not alter statutory meaning under certain hermeneutic theories, which stress that what the legislature enacts is the statutory text, not the legislative history. But legislative history certainly helps estimate the general political preferences that motivated the enacting government at the time. And those estimates of political preferences are all we have, where statutory meaning is unclear, to determine which interpretation is least likely to produce political dissatisfaction. The enacting government itself would want a default rule whereby courts refer to legislative history to resolve gaps and ambiguities in statutory meaning because that would increase the extent to which its political preferences are satisfied by statutory interpretation.

We might test this proposition by inquiring about what legislatures have actually provided in their codes of construction. Since it has long been the practice of judges to inquire into legislative history, one would think that, if this practice increased political dissatisfaction, then legislatures would try to outlaw it when they enact codes of statutory construction. In fact, although every state legislature and Congress have enacted such a construction code, none has outlawed reliance on legislative history. We should hesitate before relying too heavily on this fact standing alone, because Congress and many states have enacted construction codes that are largely inconsequential, and thus may have never considered the issue. But there is more telling evidence. The ten state legislatures to enact statutes that do consider the issue all expressly authorize courts to look at legislative history. Further, thirty other state legislatures have enacted such statutes, even where the issue was explicitly considered by the legislature.

71. See, e.g., Radin, supra note 70, at 871; see also sources cited supra note 70.

72. Colo. Rev. Stat. Ann. § 2-4-201 (West 2000) ("If a statute is ambiguous, the court . . . may consider . . . [t]he circumstances under which the statute was enacted [and t]he legislative history . . . ."); Iowa Code Ann. § 4.6 (West 2001) (same); N.D. Cent. Code § 1-02-39 (1987) (same); Ohio Rev. Code Ann. § 1.49 (West 1994) (same); Minn. Stat. Ann. § 645.16 (West 1946) ("When the words of a law are not explicit, the intention of the legislature may be ascertained by considering . . . [t]he circumstances under which it was enacted [and t]he contemporaneous legislative history . . . ."); N.J. Stat. Ann. § 2A:58C-1 (West Supp. 2002) ("The Legislature further finds that sponsors’ or committee statements that may be adopted or included in the legislative history of this act shall be consulted in the interpretation and construction of this act."); N.M. Stat. Ann. § 12-2A-20 (Michie 1998) ("If . . . the meaning of the text . . . is uncertain, the following . . . may be considered . . .: (1) the circumstances that prompted the enactment . . .; (2) the purpose of a statute or rule as determined from the legislative or administrative history . . .; and (3) the history of other legislation on the same subject"); N.Y. Stat. Law §§ 124–25 (McKinney 1971) ("[I]t is proper to consider the legislative history of the act, the circumstances surrounding the statute’s passage, and the history of the times. . . . If the interpretation to be attached to a statute is doubtful, the courts may utilize legislative proceedings to ascertain the legislative intent."); 1 Pa. Cons. Stat. Ann. § 1921 (West 1995) ("When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering . . . [t]he circumstances under which it was enacted [and t]he contemporaneous legislative history . . . ."); Tex. Gov’t Code Ann. § 311.023 (Vernon 1998) ("In construing a statute,
tures have directed judges to consider legislative intent or purpose.\textsuperscript{73} Given that the prevailing methods for ascertaining such intent and purpose included judicial inquiry into legislative history, these statutes would seem to authorize such inquiry implicitly. All told then, forty of the fifty state legislatures have enacted statutes that explicitly or implicitly authorize judicial inquiry into legislative history and intent. Coupled with the fact that no legislature has enacted a statute directing courts generally to ignore legislative history,\textsuperscript{74} this helps confirm the conclusion that it maximizes political satisfaction to adopt the general default rule that, where the statute is ambiguous, courts should examine legislative history in order to estimate legislative preferences.

It might justifiably be doubted that any theory could explain the pattern of uses of legislative history by the courts, which often seems highly inconsistent from case to case. But the distinction between hermeneutic and default rule theory may explain at least some of the seeming inconsistency. A judge might ignore legislative history in one case because she considers it irrelevant to understanding a statutory meaning that can independently be established. The same judge might then use legislative history in the next case because meaning is ambiguous and the history


\textsuperscript{74} There has, however, been one statute-specific opt-out discussed infra note 115.
helps in estimating governmental preferences. It thus is not necessarily inconsistent for a judge to reject legislative history in some cases but not others. Other judges may have no general aversion to using legislative history to figure out statutory meaning, but in one case might decline to look at post-enactment legislative history because they consider that irrelevant to statutory meaning. The same judges might then consistently consider such post-enactment legislative history in the next case because statutory meaning is unclear and the court finds the post-enactment history sufficiently close in time to help estimate the enacting governmental preferences. Again, the mere fact that post-enactment legislative history is sometimes used and sometimes rejected does not prove inconsistency.

The phrase “legislative history” is sometimes read too literally to include only statements or actions by legislators. But in a system like that of the United States, which gives executives the power to veto legislation, one must consider executive views since they strongly influence what preferences are actually enactable. Default rule analysis also suggests that, where justified by ambiguous statutory meaning, inquiry into likely governmental preferences should be broader than legislative or executive deliberations about the particular ambiguity at issue. The inquiry should include any legislative history that helps estimate the general enactable preferences of the government, whether or not that legislative history involves specific answers to the specific question of meaning. It should include consideration of other provisions enacted in the same statute from which legislative preferences might be inferred, as judges generally do under the rubric of considering “statutory purpose.” Indeed, because such statutory text was enacted at the same time, it provides the best body of evidence for inferring what legislative preferences were actually enactable. The inquiry should also—and in actual legal practice does—even include general information about the events that provoked the enactment or about which political forces are most influential during the particular historical period.

76. John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 733–37 & n.253 (1997) [hereinafter Manning, Textualism as Nondelegation] (collecting cases that rely on such evidence when interpreting statutes); see also supra note 72 (noting that state statutes that address the issue direct courts to consider the circumstances that provoked the statute).
77. Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 389 (1939) (stating that statutory interpretation draws “significance from dominant contemporaneous opinion”); Archibald Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv. L. Rev. 370, 379 (1947) (“[T]he courts have never had serious difficulty in using the history of the times as well as the committee reports and debates in Congress to ascertain the evil which the legislation was designed to remedy.”); Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 539 (1947) (“Statutes cannot be read intelligently if the eye is closed to . . . the known temper of legislative opinion.”); supra note 72 (collecting state statutes that direct courts to examine the “circumstances surrounding the statute’s passage” and the “history of the times”).
The inquiry should also include legislative history regarding entirely different statutes. Such debates can provide information bearing on those political preferences that are relevant to determining how the enacting government would have wanted to resolve the statutory indeterminacy in question. Even more revealing is the pattern of statutes actually enacted before or after the statute in question, which indicates the political preferences that can actually command legislative action. Again, this is often used in actual statutory interpretation.78 Indeed, it provides an alternative basis for the statutory canon that, where ambiguous, statutes should be interpreted to be consistent with other enactments on the same subject.79 Consistent with this analysis, every legislature to advert to the question has also agreed that its statutes should be interpreted to be consistent with other statutes on the same subject whether enacted before or after the statute in question.80 Legislative history of this form, that consists of actual legislative action, or widespread political forces, is in fact likely to be a more accurate indicator of enactable preferences than those forms of legislative history that consist of statements by individual legislators or committees.

Re-describing many uses of legislative history as a matter of default rule theory, rather than of hermeneutics or legislative intent, helps put to rest three objections commonly made to the use of legislative history.

78. See, e.g., Keifer, 306 U.S. at 389 (“The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute . . . but in a series of statutes . . . .”); Frankfurter, supra note 77, at 539 (intelligent statutory interpretation requires examining “considerations evidenced in affiliated statutes”).

79. See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132±33 (2000); Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989); United States v. Monsanto, 491 U.S. 600 (1989); United States v. Fausto, 484 U.S. 439, 453 (1988); see also Dworkin, supra note 27, at 176±84, 190±92, 217, 225. Unlike Dworkin, however, the theory here (and doctrine just cited) is supplementary: it would not justify interpreting a statute contrary to legislative preferences in order to avoid an inconsistency that apparently did not bother the legislature. See also supra Part II.A.


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Objection 1. There Is No Legislative Intent. — Max Radin long ago argued that it made no sense to speak of a common legislative intent or purpose when legislative action was the product of combined action by multiple actors, each with different motives. More recently, scholars have relied on rational choice theory to argue that legislative preferences often cycle, so that one cannot speak of what the legislature intended or would have wanted because its desires are often intransitive, which means what it chooses may depend solely on how its agenda is structured.

These may well be valid objections to a hermeneutic theory that depends on the proposition that interpreters can determine with certainty one common legislative intent or purpose that would establish a fixed statutory meaning. Radin himself assumed the need for great certainty, demanding evidence that “several hundred [legislators] each will have exactly the same determinate situations in mind” and that “the litigated issue, will not only be within the minds of all these [legislators], but will be certain to be selected by all of them . . . .” But statutory default rules need not depend on any such proposition. Instead, the only proposition I will be relying on is that interpreters can make some, perhaps rough, probabilistic assessment of the relative enactability of the various interpretive options that seem plausible after hermeneutic analysis.

Suppose, for example, a court concludes that there are two plausible interpretations and that the relative probabilities that the legislature would have enacted the interpretations given a choice between the two are 60% for the first, and 40% for the second. The court need not be under any illusion that the first interpretation was in the minds of all the

81. Radin, supra note 70, at 870–71.
82. See Easterbrook, Statutes’ Domains, supra note 26, at 533, 547–48; Manning, Textualism and Equity, supra note 51, at 19 (collecting sources); Kenneth A. Shepsle, Congress is a ‘They’, Not an ‘It’: Legislative Intent as Oxymoron, 12 Int’l Rev. L. & Econ. 239, 239 (1992). See generally Elhauge, Interest Group Theory, supra note 21, at 101 (collecting and explaining literature on the legislative cycling problem and Arrow’s Theorem).
83. Radin, supra note 70, at 870.
84. There might also be positive odds that legislative deadlock or preferences would have prevented either interpretation from being enacted. In that event, though, minimizing the dissatisfaction of enactable preferences would involve figuring out the relative likelihood of each interpretive option being enacted if the government had made a choice. For example, if the first option is 30% likely to be what the legislature would have enacted, and the second option is 20% likely, the first is more likely to minimize political dissatisfaction, and the relative probabilities (as I am using the term) of enactability among the two options would be 60% and 40%. I defer until Part IV the interesting case where, given three or more interpretive options, no single option has a relative probability of being accurate that is greater than 50%. Sometimes, the odds of deadlock might be so high that there is no relevant enactable preference for a particular government. In that case, a court might shift its focus from enacting governmental preferences to current governmental preferences, or vice versa, or it might look at the most recent indication of enactable preferences. See infra Parts V–VII. An inability to estimate enactable preferences meaningfully might also justify a preference-eliciting or supplemental default rule. See Elhauge, Preference-Eliciting, supra note 7.
enacting legislators, was dictated by some general purpose that was in their minds, or in any other sense reflected a common legislative intent or purpose. The court need merely have estimated that, if the legislature had addressed the issue, the first interpretation is more likely to have been what it would have enacted than the second. Assuming these probabilistic estimates are more accurate than random guesses, choosing the first interpretation would still minimize the dissatisfaction of enactable preferences. Thus the enacting legislature would want courts to choose a default rule that tracked their best estimate of enactable legislative preferences even if it does not reflect their common legislative “intent” in any meaningful way.

But, one might object, the cycling problem means that one may not be able meaningfully to assess (or even order) the odds of various interpretations being enacted because the legislature would cycle among them. This objection overstates the problem. While Kenneth Arrow proved that it was impossible to define a method of aggregating preferences that satisfied certain rationality principles and never cycled, this does not mean that cycling always occurs. In fact, empirical literature has proven that (as common observation indicates) endless legislative cycling is not the norm.85 Indeed, on plausible assumptions, the odds that majority preferences will not cycle on any given policy choice are 94-99%.86 Further, if voting behavior is probabilistic rather than known with certainty, then public choice theory itself shows that majority voting can avoid cycling problems.87 And a great body of theoretical work has shown how, even when majority preferences are cyclical, a political equilibrium is commonly produced by legislative structures, such as the need to get committee approval and consent from multiple legislative houses and either the executive or a legislative supermajority.88

Even when cycling problems mean that legislative results depend on how the agenda is structured, the fact remains that legislative agendas are structured in ways that courts can take into account. In particular, the cycling literature indicates that what the legislature enacts can turn heavily on the political preferences of whichever elected officials have agenda-setting power, like committee chairs, legislative sponsors, and legislative

85. See Elhauge, Interest Group Theory, supra note 21, at 102 (collecting literature).
87. See Dennis Mueller, Public Choice II 196–203 (1989); Elhauge, Interest Group Theory, supra note 21, at 102 n.270.
leaders. The political preferences of these agenda-setters are thus very likely to influence where enactable preferences lie. Consistent with this, interpreting courts treat committee reports and sponsor statements as especially persuasive legislative history. Even without any cycling issues, committee reports offer strong evidence about enactable preferences in any legislative system that effectively requires committee consent to enact legislation within that committee’s jurisdiction. In particular, the fact that a committee report rejects a particular interpretation accurately indicates that such an interpretation does not match enactable legislative preferences, either because the committee does not prefer that interpretation or because the committee has determined that it must signal opposition to that interpretation to procure enactment. As between two interpretive options, the one rejected by a committee with gatekeeping power can thus safely be rejected as having no chance of reflecting enactable preferences.

More generally, influential rational choice modelers like McNollgast have concluded that, when one takes into account the actual existence of agenda and veto powers, one can arrive at determinant conclusions about whose political preferences determined what was enactable. In their model, they assume that legislation requires the consent of multiple actors (committees, house majorities, the President) who have political preferences that lie in a policy spectrum on one side of the status quo. For any legislation that occurs, the preferences of the actor who can last propose a law that the others can only accept or veto will govern if those preferences are closer to the status quo than the veto point of any other actor. Otherwise, the political preferences that govern will be those of the actor with the veto point closest to the status quo. The legislative result thus depends only on where the political preferences lie in relation to the status quo and which actor can make the last offer under legislative procedures.

89. See Elhauge, Interest Group Theory, supra note 21, at 104–05 (collecting sources).
90. See Manning, Textualism as Nondelegation, supra note 76, at 679–80 nn.22 & 27.
92. Id. at 720–27. If the actors’ political preferences lay on both sides of the status quo, then no legislation could be enacted because some actor would veto any shift from the status quo in a direction unfavorable to it.
93. The veto point for each actor is not its ideal point but the point at which the proposal has gotten so far away from its ideal point that it would prefer the status quo and will thus veto the proposal. Id. at 722–24.
94. When one actor requires the concurrence of a second actor to make its veto stick, like a President who needs the political support of one third the legislators to sustain his veto, their collective veto point will be the furthest of their two veto points from the status quo. Id.
95. For example, if the legislative procedure does not allow amendments, then the committee is the last offeror and has more influence. If the legislative procedure does allow amendments, then the house majority (perhaps represented by its majority leader or caucus) is the last offeror. Id. at 722–25.
There are problems with this model. In particular, it effectively assumes that the last offeror can grab all the joint gains from agreement for itself. Thus, in the model, Congress can offer the President a statute only marginally better than one he would regard as worse than the status quo. But in fact, a President is likely to veto such a statute not only in order to get a better deal on that statute, but also to prevent Congress from persisting in such one-sided deals in the future. More generally, given that the legislative participants are repeat players, they are instead likely to veto such one-sided deals in order to induce offers that give them a larger share of the joint gains in the future. Thus, the McNollgast model seems to overstate the certainty with which courts could determine whose political preferences were enactable. But, coupled with some common sense about bargaining dynamics, it does provide helpful guidance for at least making estimates about enactable preferences.

One might still object that this approach allows the result to be distorted by the veto or agenda-setting power of certain legislators who are not representative of the entire legislature. But under a preference-estimating default rule, the court’s role is not to determine what the legislature would have enacted if it had a different legislative process than it actually has. That legislative process, whatever its flaws, is apparently legitimate enough to justify compelled obedience to enactments whose meaning can be divined. The default rule just aims to resolve the ambiguities that the legislature left by minimizing the dissatisfaction of those preferences that are enactable under the regime that actually exists. Further, since the very literature that suggests great agenda-setting power also indicates that some agenda-setting is necessary to avoid cycling, it hardly makes sense to ask what the legislature would have done without anyone setting the agenda. That question has no answer. Nor can one realistically speak of the legislative process being “distorted” by agenda-setting power when it is inevitable that any process would necessarily have to have someone set the agenda.

Other textualist objections to inquiries into legislative purpose are that statutes may reflect a bargain or tradeoff, or may choose a rule over a standard, either of which could be upset by using generalizations about statutory purposes to extend the statute or to convert a statutory rule into a judicial standard. These are valid objections to loose-minded purposivism, but not to looking to legislative history or estimating legislative preferences. To the contrary, examining legislative history (capaciously defined) will often reveal the limits of the bargain or a preference for a rule, both of which are proper inquiries for estimating legislative preferences. But there is no reason to assume that in all cases legislatures

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96. See supra Part II.A.
97. See Manning, Textualism and Equity, supra note 51, at 18, 20–22 (collecting sources).
98. See McNollgast, Positive Canons, supra note 75, at 705–07.
meant to adopt the most narrow bargain or to choose bright line rules over flexible standards.

In short, a preference-estimating default rule calls for estimating the probabilities of enactable preferences, not for claiming a common legislative intent or unrestricted purpose that would have been consented to regardless of the actual legislative procedure used or tradeoffs made. While these estimates may sometimes be uncertain, even then they should improve the satisfaction of enactable preferences as long as the estimates are more accurate than random guesses.

Still, it may often be the case that enactable preferences do not admit of any reliable estimate. Even that does not, however, mean that the default rule approach should be abandoned. To the contrary, the judicial inability to estimate enactable preferences itself justifies either a preference-eliciting default rule to obtain an accurate answer to the question about where enactable preferences lie,99 or a supplemental default rule based on deference to political subunits or judicially developed views.100 The same applies, only more broadly, for those who have a more thoroughgoing skepticism of any judicial ability to estimate legislative preferences. Judge Easterbrook, for example, has written that agenda manipulation and logrolling have such extensive effects on legislative outcomes that "judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses."101 This strikes me as somewhat extreme, in part because the interpreting judge need not guess what precisely the legislature would have done, but which among some limited set of interpretive options the legislature is more likely to have chosen. But even if one shared Easterbrook’s bleak assessment, it would not mean that default rules to maximize political satisfaction have no place. It would merely mean that one should favor more extensive application of preference-eliciting or supplemental default rules.

Objection 2. Legislative History Is Inaccurate. — Another argument against using legislative history is that, even if a coherent legislative intent existed, the legislative history would not accurately reveal it. Commentators from Max Radin to Justice Scalia have argued that statements by legislators or legislative committees offer a very inaccurate picture of legislative intent.102 They stress that legislators or committees may make statements strategically, to lull opponents or mislead interpreters, even if the speakers themselves do not believe them. Further, even if the legislative statements accurately reflect the speakers’ own preferences, we can-

99. See Elhauge, Preference-Eliciting, supra note 7, Part II (specifying conditions under which this will be true).
100. Id. at Part VII.
101. Easterbrook, Statutes’ Domains, supra note 26, at 548.
102. See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 518–28 (1993) (Scalia, J., concurring in the judgment); Dickerson, supra note 70, at 155–58, 174–75; Radin, supra note 70, at 870–71; Vermeule, Legislative History, supra note 70, at 1896.
not assume those preferences were read or shared by other legislators. Although normally couched as arguments regarding legislative intent, these points seem equally valid in analyzing the use of legislative history to estimate enactable political preferences.

Others have disputed this claim of great inaccuracy in legislative statements, or (perhaps more to the point) denied that it is less accurate than the alternative methods of resolving statutory ambiguities. They note, for example, that studies indicate legislators are more likely to read committee reports than statutory text. Moreover, the alternative to relying on legislative history to resolve textual ambiguities is relying on dictionaries, treatises and case law, and legislators are even less likely to have read those. Some public choice scholars also argue that committee chairs and floor managers act as agents for the legislative majority and are subject to removal or reputational sanctions if they are inaccurate.

I do not propose to resolve this longstanding debate here. Rather, I wish to stress how these problems can be minimized if the question is instead whether to use a general default rule of inquiring into all forms of legislative history that bear on enactable preferences. The essential problem with relying on statements by legislators and committees is that they may be insincere or fail to reflect the views of other legislative participants. But a preference-estimating default rule would, as noted above, often focus instead on the inferences that can be drawn from other provisions in the same statute, other actual legislative enactments, or widespread political clout, each of which is objectively verifiable and harder to fake or hide. If legislator and committee statements are unreliable, that would not at all contradict a tailored preference-estimating default rule, but would instead counsel for using one that estimated enactable preferences from these more reliable sources.

As for statements by legislators and committees, a default rule approach could help in two ways. First, courts could adopt default rules about which forms of legislative statements to rely on, and how much reliance to give them, that are more firmly linked to determining which political views are actually enactable. For example, legislative statements provided by those who opposed a bill, and were thus not part of the coalition

103. See Landis, supra note 70, at 888–89; sources cited supra note 70. In one sense, legislative history is likely to be far more accurate than the extrinsic evidence commonly used to interpret ambiguous text or fill gaps in contract cases. Pre-contract statements are often oral or documented in only a fragmentary fashion, raising serious questions about the accuracy of any finding about what statements were made. For legislative history, there is usually little argument that some official documentary source accurately recorded what was stated. See Ross & Tranen, supra note 70, at 224–25. The dispute is just whether what was stated reflects correctly the legislature’s views.

104. See Farber & Frickey, Legislative Intent, supra note 70, at 445.

necessary for enactment, cannot determine which political preferences were actually enactable. Likewise, while sponsor and committee statements are invaluable when accepted by other legislators, they are also likely to be at the extreme end of enthusiasm for the statute and thus should not be regarded as controlling when rejected by the median legislators whose agreement was necessary for enactment.

Second, to deal with the residual uncertainty created by concerns about the possible inaccuracy of any legislative statements that make it through these screening rules, let us divide the issue into two possible cases: (1) the case where the examined legislative statements accurately reflect enactable preferences; and (2) the case where they do not.

If accurate, then there is plainly a strong preference-estimating argument for courts relying on legislative statements; not because they reveal the actual subjective intent of the government, but because they provide the best guess as to the political preferences that would have determined how the government would have resolved the question if it had thought about it. The enacting government would want such legislative statements used because the introduction of reliable evidence of its political preferences can only increase the extent to which those preferences are accurately reflected in statutory results.

If inaccurate, then there is a strong preference-eliciting argument for relying on such legislative statements in statutory interpretation. Such interpretive use discourages legislators from strategically making statements that do not accurately reflect their own political preferences in order to lull opponents. Knowing that their statements will guide interpretation, legislators will be encouraged either to make accurate statements about their own preferences, or (in what amounts to the same thing) to state accurately what they are willing to live with on the particular issue to procure the more general statutory result. Such interpretive use also encourages opponents to contradict a legislator who makes an assertion about the legislature’s political preferences that does not match their own. Those who do not voice such objections will suffer the penalty of having those adverse statements guide interpretation. Thus, a default rule of relying on legislative history will encourage both sides to state their disagreement with whatever their colleagues are saying so that any interpretative problem is out in the open. This will not only make the final set of legislative statements a more accurate reflection of overall governmental preferences, but will also reduce inaccuracy by alerting the legislature about issues that it may want to resolve explicitly. Thus, even if many legislative statements are inaccurate, the government should generally prefer a default rule of relying on them because it will produce an increase in the satisfaction of its political preferences overall.

107. Id. at 711–13, 731.
108. See Elhauge, Preference-Eliciting, supra note 7.
A default rule of examining legislative history also usefully elicits legis-
lative-wide reactions to improve the accuracy of its legislative history. If
the current forms of legislative history the legislature generates are inac-
curate, then this default rule will increase the legislature’s political dissat-
sisfaction with statutory interpretations. This will give a legislature incen-
tives to take steps to improve the accuracy of its legislative history. For
example, it might publish committee mark-ups, identify the bill sponsor
on the record, state whether certain articulated views represent a consen-
sus among the enacting coalition, and require that committee members
sign the committee reports to make sure they reflect the full committee’s
views. Judges could move that process along by, for example, recognizing
that committee reports that are signed only by the chair may not signal
majority support even at the committee level and thus are far less determi-
native of what is enactable.

The above analysis also suggests limits on the reliance on legislative
history. Some legislative statements might not be disseminated widely
enough to alert others to respond or might come too late in the legisla-
tive process to allow time for contradiction. This is generally not a prob-
lem for the sort of committee reports and sponsor statements normally
treated as most authoritative by the court. But it is a serious problem for
statements made in final House-Senate conference reports about statutes
that are then enacted with little or no opportunity for debate. Even
worse problems are presented by House Reports or statements delivered
too late to be considered by the other House, or statements inserted in
the Congressional Record that were never actually stated in Congress or
Presidential Signing Statements that are made after all legislative ac-
 tion has ended.

However, a willingness to refer to legislative history need not dictate
a blind willingness to accept anything that can go under that label. In-
stead, an interpreter should properly be skeptical of any legislative state-
ments that were offered under circumstances that did not permit others
to contradict them. This is clearest if those last minute statements are
likely inaccurate. But even if they are likely to be accurate, courts might
reasonably ignore them, effectively using a form of preference-eliciting
default rule that encourages legislators either to make such statements
earlier in the process (and thus allow more time for contradiction) or to
put the point into explicit legislative language. Such a default rule would
likely produce both more preference satisfaction and better deliberation.
Consistent with this, courts often reject legislative history that is placed on

109. Ross, supra note 9, at 575–76.
110. See Manning, Textualism as Nondelegation, supra note 76, at 686 (collecting
sources on such practices).
111. See McNollgast, Positive Canons, supra note 75, at 726–27; Jonathan R. Siegel,
The Use of Legislative History in a System of Separated Powers, 53 Vand. L. Rev. 1457,
the congressional record but that other legislators did not have an opportunity to correct before enactment.\footnote{112} One might fear presidential statements would always be excluded under such a rule since a bill is only presented to the President after it is passed by Congress. Such exclusion would be distorting since presidential views often strongly influence what is actually enactable. But the President can always have his legislative allies put his views on the Congressional Record.\footnote{113} If the President does not have enough legislative support to do even that, he will not have the one third support he needs to sustain a veto and make his views relevant to determining what preferences are enactable.

Finally, an important implication follows from the premise that the whole preference-estimating approach of examining legislative history is just a default rule. That premise means the legislature can always opt out of this default rule if the legislature determines that legislative history on balance will decrease the accuracy with which its preferences are estimated. In actual practice, as we have seen, those legislatures to consider the question have done precisely the opposite.\footnote{114} This strongly suggests that legislatures themselves do not believe that judicial reliance on legislative history generally reduces the satisfaction of legislative preferences. But even if this is a generally sensible default rule, it might not be advisable for particular forms of legislative history or particular statutes. Thus legislatures can tailor opt-outs for particular statutes or forms of legislative history, and have done so at least once.\footnote{115} The availability of this rarely used failsafe does not undermine, but rather confirms, the wisdom of the general rule, because it means legislatures can deviate from the general rule when merited by particular circumstances.

\textit{Objection 3. Using Legislative History Is Unconstitutional.} — The objection might still remain that, whether or not using legislative history improves the extent to which statutory results accurately reflect legislative preferences, its use is unconstitutional.

The standard textualist argument is that courts should not rely on legislative history because it has not satisfied the constitutional requirements for enacting statutes—in the United States, bicameral adoption by both legislative houses and presentment to the President.\footnote{116} Courts

\begin{itemize}
  \item \footnote{112} E.g., Clarke v. Sec. Indus. Ass’n, 479 U.S. 388, 407 (1987); Bd. of Governors, FRS v. Dimension Fin. Corp., 474 U.S. 361, 372 (1986); Monterey Coal Co. v. Fed. Mine Safety & Health Review Comm’n, 743 F.2d 589 (7th Cir. 1984); Costello, supra note 70, at 43–60 (collecting cases).
  \item \footnote{113} Ross & Tranen, supra note 70, at 235.
  \item \footnote{114} See supra text accompanying notes 72–73.
  \item \footnote{115} See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071 (1991) (‘‘No statements other than the interpretive memorandum . . . shall be considered legislative history.’’).
  \item \footnote{116} See Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., dissenting) (‘‘Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.’’)
should instead rely only on the statutory text that did comply with these constitutional requirements. But because no text can be interpreted without some resort to extrinsic evidence, one cannot really say that interpretive aids are limited to the text.\textsuperscript{117} Further, the Constitution simply leaves statutory interpretation to be resolved by the “judicial power” without specifying how that interpretation should be conducted, and to the extent we have evidence on the original understanding of this phrase, it appears to have conferred broad power on courts to go beyond the text in interpreting statutes when that helps courts advance legislative preferences.

The more serious question with extrinsic evidence is not whether to rely on it, but what types of extrinsic evidence we should use. Thus, a more clever argument against the use of legislative history, offered by Justice Scalia and well developed by Professor Manning, is that the problem is not with all uses of extrinsic evidence, but rather with relying on statements by legislative subgroups.\textsuperscript{118} They point out that legislative committees are agencies controlled by Congress. Thus, they argue, relying on their statements as authoritative interpretations amounts to allowing an improper delegation of administrative powers to an agency controlled by Congress, which violates constitutional separation of powers principles.\textsuperscript{119} This argument should be distinguished from the argument, also made by Scalia and others, that relying on legislative history violates the general nondelegation doctrine that limits the legislature’s ability to delegate its legislative powers to anyone else.\textsuperscript{120} The general nondelegation doctrine has little if any bite,\textsuperscript{121} and in any event would not explain why courts should reject legislative history but rely on dictionary or treatise writers, agencies, or judicial precedent.\textsuperscript{122} Instead, the more telling argument is that relying on legislative history allows legislatures to violate the separation of powers prohibition against legislative self-delegation. This

\textsuperscript{117} The points in this paragraph are discussed in greater detail in Elhauge, Preference-Eliciting, supra note 7, Part VIII.C.6, which addresses the general textualist case for an alternative default rule of narrow construction.


\textsuperscript{119} Manning, Textualism as Nondelegation, supra note 76, at 715–19 (collecting cases barring legislative delegations to one house of the legislature, to a subset of legislators, or to an official under the control or removable by the legislature, and arguing that they require rejecting legislative history).

\textsuperscript{120} Id. at 698 (describing this as one of Scalia’s arguments).

\textsuperscript{121} Id. at 727–28.

\textsuperscript{122} Id. at 699–705.
argument rests on an objection to legislative self-aggrandizement, rather than to legislative self-abnegation.  

There are several responses to this interesting constitutional theory. To begin with, even if valid, this theory is not inconsistent with the default rule approach emphasized here. Professor Manning himself concedes that this anti-self-delegation principle does not bar courts from examining legislative history that takes the form of other actual legislative acts or failures to act—like the adoption or rejection of amendments or the enactment or failure to enact other statutes. And of course it provides no bar to relying on other provisions in the same statute, general political forces, or agency interpretations. All those form major parts of a sensible doctrine of preference-estimating default rules.

Professor Manning’s theory might seem more directly in conflict with respect to his treatment of statements by legislative committees and sponsors. But what proves to be the crucial point in this argument is that some cases are treating the legislative committee and sponsor statements as “authoritative” rather than just as one piece of possibly relevant extrinsic evidence. This is what justifies the claim that relying on such statements allows a self-delegation of actual administrative power. Under a preference-estimating default rule, in contrast, such legislative statements would be only one relevant piece of evidence, albeit an important one, within a larger set of possibly more important evidence for inferring what political preferences were enactable. Indeed, a major advantage committee and sponsor statements have compared to other sources of extrinsic evidence (like dictionaries, treatises, and case law) is that they are more likely to alert other legislators who are necessary for the enactment to object when those statements do not accurately reflect their views, an opportunity for objection that can only be meaningful if the committee or sponsor statements are not treated as irrebuttable. Professor Manning’s argument, if credited, would thus explain why such legislative statements should not be given authoritative weight, but not why they should be ignored altogether.

The truth is that judges do not rely on committee and sponsor statements because they have any inherent authority. Judges rely on them only because (and to the extent that) as a matter of legislative practice other legislators rely on such statements to explain the import of the bills.

123. The argument thus has less weight in systems less concerned about maintaining a balance of powers between legislatures, executives, and courts.

124. See Manning, Textualism as Nondelegation, supra note 76, at 675 n.9.

125. Id. at 725.

126. See supra text accompanying notes 75–80; infra Parts VI–VII.

127. See Manning, Textualism as Nondelegation, supra note 76, at 679–80, 683–84, 721.

128. Further, as noted above, such statements should be treated as much more authoritative when they reject a certain interpretation (assuming the committee has de facto veto power) than when they embrace a certain interpretation. See supra text accompanying note 91.
on which they are voting. And each legislative chamber has direct author-
ity under the Constitution to determine its own rules for considering bills.\textsuperscript{129} To refuse to recognize such actual legislative reliance not be-
cause it is irrelevant but because a court considers the reliance illegiti-
mate might even violate the Constitutional provisions vesting that
rulemaking authority solely in the respective chambers. In any event, igno-
ring such committee and sponsors statements would certainly be un-
fortunate since, especially when other legislators acquiesce in them, they
constitute the best evidence of what political preferences were actually
enactable.

Indeed, Professor Manning himself ultimately argues that judicial in-
terpretations that do not use legislative history are desirable precisely be-
cause they are more likely to deviate from legislative preferences and thus
provide a structural incentive for Congress to clarify more in the statutory
text.\textsuperscript{130} This argument implicitly concedes that legislative history does
help accurately estimate legislative preferences, but invokes a preference-
eliciting argument for thwarting legislative preferences to provoke legisla-
tive clarification. Although a preference-eliciting default rule is some-
times desirable, the conditions when this is true are limited, and when
they do not hold, imposing a preference-eliciting default rule systemati-
cally increases political dissatisfaction.\textsuperscript{131} Moreover, without those limit-
ning conditions, the principle of encouraging clarification through statu-
tory text lacks any logical stopping point, but rather would generally
require the worst interpretation the court can imagine because that is
always more likely to elicit clarifying text than a more desirable
interpretation.\textsuperscript{132}

Even in terms of preventing self-delegation, Manning’s argument has
the internal problem that legislatures usually also delegate the drafting of
statutory text to committees and sponsors, and that other legislators re-
view the text even less closely than they review the committee reports and
sponsor statements.\textsuperscript{133} Further, as others have persuasively argued, dele-
gation is an inherently forward-looking concept, and thus cannot be im-
plicated by reliance on preceding legislative history, which instead in-
volves at most permissible ratification or incorporation by reference of
past statements.\textsuperscript{134}

\textsuperscript{129} See U.S. Const. art. I, § 5, cl. 2.
\textsuperscript{130} Manning, Textualism as Nondelegation, supra note 76, at 706±07.
\textsuperscript{131} See Elhauge, Preference-Eliciting, supra note 7, Parts II, VIII.C. Moreover, even
when the conditions are met, judicial interpretations that ignore legislative history may not
put the burden of eliciting legislative reaction on the right side of the political controversy
and thus fail to elicit a legislative reaction at all.
\textsuperscript{132} See id.
\textsuperscript{133} See supra text accompanying note 104.
\textsuperscript{134} See Rosenkranz, supra note 9, at 2136±37; Siegel, supra note 111, at 1479±80.
C. Updating for Changed Circumstances, Opting Out, and How Hermeneutic Inquiry Differs

Static preferences need not dictate a static default rule. The same preferences may dictate a different result when applied to changed factual circumstances.

Consider the following example from corporate law. Even if one assumes a static preference for the most efficient default rule, it is well accepted that the corporate default rules used for closely held corporations often do and should differ from those used for publicly held corporations. But if this is correct, it follows that the proper corporate default rules will often change as the corporation grows from closely held to publicly held. Thus, if one asked the question which default rule the corporation’s original shareholders would have preferred at the time of incorporation, the answer is not simply the default rule that is best for closely held corporations. For such a static default rule will, when the corporation grows, produce inefficient results, the prospect of which will in turn depress the original share price. Instead, the original shareholders would prefer a dynamic default rule that starts out as the rule best suited to closely held corporations but changes as the corporation grows to the rule best suited to publicly held corporations. That will maximize the original share price, which in part impounds the likely future price if the corporation goes public.

Take the corporate opportunities doctrine. Few corporate charters define which business opportunities are corporate opportunities unavailable to corporate fiduciaries. We thus need some default rule. Suppose the following standard analysis is correct. Because fiduciaries in closely held corporations often have outside business interests in the same line of business as the corporation, every business opportunity that lies within a close corporation’s line of business should not be considered a corporate opportunity, or else the rule would discourage skilled persons from participating in close corporations. But in publicly held corporations, where officers generally work full time for the corporation, it makes more sense to define everything within the corporation’s line of business as a corporate opportunity. If this analysis is true, then the appropriate corporate opportunity default rule changes as the corporation grows from closely held to publicly held. And the original shareholders would prefer a default rule that adjusts over time to reflect this. This appears to be implicitly accepted by corporate law, which does in fact vary the corpo-


136. Sometimes corporations change their corporate identity when they go public. But they do not always, and in any case even when they do, they rarely define matters covered by default rules, like the proper scope of fiduciary duties such as the corporate opportunity doctrine.

137. See Clark, supra note 135, at 234–62 (collecting cases that fit this account).
rate opportunities doctrine for closely held and publicly held corporations.\textsuperscript{138}

This is not to say that the courts would be justified in changing an explicit charter provision on corporate opportunities. If the corporate founders wished to opt out of judicially set default rules entirely by providing an explicit provision, their preference for that explicit term would be thwarted by judicial modification. If the corporate founders prefer dynamic modification, they are free to leave gaps or ambiguities that effectively delegate the matter to ongoing judicial resolution. But where they have enacted an explicit term, it must be given effect until the charter itself is amended. In some applications, giving effect to explicit terms will no doubt turn out to be unwise and undesirable to the corporate founders. But by opting out of judicial default rules, the founders have indicated that they view these costs of having an inflexible explicit term as lower than the costs of judicial error in filling and dynamically altering a default rule. The corporate founders are entitled to trade off the greater flexibility of judicial ex post modification against the greater accuracy from tailoring a fixed rule themselves.

The above sort of rationale for—and limits on—dynamic default rules in corporate law will also often be true for those who enact legislative statutes. Pursuing the enactors’ preferences may well call for a default rule that responds to changes in technology, society, the economy, and surrounding legal framework. Courts are then justified, in cases of statutory ambiguity, in updating the default rule along with those changed circumstances, because it maximizes the political satisfaction of the enacting polity. Enacting governments may always opt out of this dynamic default rule, but unless they opt out, they should be understood to have accepted updating of the default rules used to resolve the ambiguities or gaps they left in statutory meaning.

This provides a more solid (but more limited) ground for the proposal by many notable scholars that courts should update statutory meaning and even overrule “outdated” statutes to adjust for changed circumstances.\textsuperscript{139} Many of these proposals would consider changed political preferences a change in circumstances that justifies a different interpretation.\textsuperscript{140} In contrast, I would sharply distinguish the argument for al-

\textsuperscript{138} Id.


\textsuperscript{140} See infra text accompanying notes 152–166.
allowing updated interpretation when changes in factual circumstances indicate that enacting legislative preferences would favor a new interpretation, which is all this section argues, from the claim courts should update interpretations when new political preferences differ from enacting preferences. The latter claim requires a different and more complicated sort of justification and is valid only in a more narrow set of circumstances where official action provides some reliable indication those new preferences are actually enactable.141 Further, the claim here stands even if this latter claim is rejected.

In addition, these prior proposals would generally allow changed circumstances to authorize judges to update even a statute whose original meaning was unambiguous. In contrast, my claim is only that a dynamic default rule is appropriate when statutory meaning is ambiguous enough to require resort to a default rule. If the statute is taken to have a fixed meaning, then the government that enacted that meaning has effectively opted out of any default rule, including dynamic default rules. The inflexibility costs of adopting such a fixed meaning would surely be significant when factual circumstances change. But it would be entirely rational for an enacting government to conclude that (for some issues or statutes) such inflexibility costs would be outweighed by the judicial errors that would result if courts were freely permitted to update statutory meanings to adjust for changed circumstances. As honest interpretative agents, courts cannot decline to follow such a legislative opt-out, and thus are not free to deviate from any fixed meaning they find in the statute.

But while bound by the meaning of what was actually enacted, courts need not be bound by hermeneutic inquiries into what the enactors most likely thought the statutory language meant. Asking that question (in cases where meaning is ambiguous) is likely to produce a meaning restricted to expectations that were constrained by the factual circumstances that existed at the time of enactment. And a meaning fixed by those circumstances will likely thwart the enactors’ preferences when circumstances change.

Again, corporate law offers a fruitful analogy. If a news reporter asked a founding shareholder in a closely held corporation what specific fiduciary duties he means to imply by the provisions creating the corporate office of treasurer, he is likely to produce a meaning restricted to expectations that were constrained by the factual circumstances that existed at the time of enactment. A meaning fixed by those circumstances will likely thwart the enactors’ preferences when circumstances change.

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

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

IV. WHEN NO ONE INTERPRETIVE OPTION IS MORE THAN LIKELY TO REFLECT ENACTABLE PREFERENCES

Most rational choice models assume that judges pick statutory interpretations from an infinite set of options in a policy space. This is an unrealistic depiction of actual statutory interpretation. Although legal
methods of statutory interpretation often fail to point to one unambiguous interpretation, legal methodology is sufficiently constraining that it normally produces some limited set of legally plausible interpretations, from which the court must choose.

Nonetheless, often there will be more than two legally plausible interpretive options, meaning that none of the options might be the one the legislature “most likely” would have chosen if it had made a choice. What should courts do when there are multiple interpretive options, none of which seems more than 50% likely to be what the enactors would have chosen if it had made a choice? Suppose, for example, there are three plausible interpretive options, and the court’s best estimate of the relative odds of what the government would have enacted had it made a choice is 40% for option 1, 30% for option 2, and 30% for option 3.143 Should the court just go with option 1 because its odds of matching enactable preferences are higher than those of the other options?

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

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

144. See Ian Ayres, Default Rules for Incomplete Contracts, in 1 The New Palgrave Dictionary of Economics and the Law 585, 586 (Peter Newman ed., 1998); Ian Ayres, Making a Difference: The Contractual Contributions of Easterbrook & Fischel, 59 U. Chi. L. Rev. 1391, 1402 (1992); David Charny, Hypothetical Bargains: The Normative Structure of Contract Interpretation, 89 Mich. L. Rev. 1815, 1816–17 (1991). In contracts and corporate charters, the problem arises in a somewhat different guise, because the usual question is what to do when the population entering into contracts or corporate charters differ in what default rule they would prefer, but the court cannot tell them apart and no single default rule seems likely to command a majority. Thus, for contracts and corporate charters this question would normally be framed as which of the “minority” options to choose as a general default rule where tailoring seems impossible. Here, in contrast, I am assuming courts are tailoring and the percentages do not refer to the share of the population that favors a particular statutory interpretation, but rather refer to the estimated odds that the interpretation could have been enacted if the enactors had been required to make a choice. Of course, this question can also arise for tailored contract or corporate default rules where the court is tailoring the default rule and is uncertain what the parties would have wanted.
Perhaps surprisingly, this is not the same as choosing the option that has the highest odds of being right. A diagram might help. Suppose statutory uncertainty leaves us with three possible interpretive options that can be plotted on a line where the distance between options indicates the extent to which the preferences of an enacting government desiring one option would be dissatisfied with the other option. Let us call the options Narrow, Middle, and Broad, with each separated by 10 units of preference dissatisfaction: that is, if the enacting government would have preferred the middle option, it suffers 10 units of dissatisfaction from either the narrow or broad options; if it would have preferred one of the extremes, it suffers 10 units of dissatisfaction from the middle option and 20 units from the opposite extreme.

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

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

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

146. Relatedly, the claim is not that this default rule maximizes utility, a goal that is normatively controversial and may or may not be maximized by the enactment process. The claim is rather that it will maximize the satisfaction of those preferences that are enactable and thus make the political preferences reflected in statutory interpretations parallel those reflected in statutory meaning. See supra Part II.A. If it were viewed
Suppose we have three interpretative options (A, B, and C) that can each be conceptualized as points along a policy continuum so that the further the point is away from the enactors’ ideal point, the more dissatisfied they are, with B signifying some point between A and C.

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

- If choose A: $P_B D_{AB} + P_C D_{AC}$
- If choose B: $P_A D_{AB} + P_C D_{BC}$
- If choose C: $P_A D_{AC} + P_B D_{BC}$

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

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

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

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

which can be rearranged as:

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

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

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147. This follows because if B is some middle point, the distance from A to B, plus the distance from B to C, must add up to the distance between A and C.
Where end point A has the highest odds of matching enactable preferences, middle option B is also always a better option than end point option C. Option B will produce less dissatisfaction than option C if:

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

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

\[ P_A D_{AB} + P_C D_{BC} < P_A D_{AC} + (1 - P_A - P_C) D_{BC}, \]

which can be rearranged as:

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

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

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

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

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

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148. A fortiori, option C cannot be preferable to A because option B dominates C.
preferences are enactable, the court should focus on the marginal legislators whose agreement was necessary to enact the legislation. That point is true, and the views of that marginal legislator should be followed when a court can determine with greater than 50% odds that their preferences would have governed. But suppose that after going through this thought process, one determines that no one interpretive option is more than 50% likely to reflect enactable preferences. Then, even if one predicts the marginal legislator would be more likely to pick an option that, among the available interpretations, is more extreme, the court should nonetheless choose a more moderate option.

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

V. THE THEORY BEHIND A CURRENT PREFERENCES DEFAULT RULE

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

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

149. See supra Part III.B.
150. Justice Powell’s middle ground opinion in Univ. of Cal. Bd. of Regents v. Bakke, 438 U.S. 265, 269–320 (1978), has effectively become the governing law on affirmative action even though the other eight justices disagreed with it.
151. See supra Part III.C.
152. See Calabresi, supra note 139, at 7; Dworkin, supra note 27, at 348–50; Eskridge, Dynamic, supra note 139, at 5–7, 9–11, 69, 107–08, 120–21; Sunstein, Interpreting Statutes, supra note 1, at 412, 433 & n.99, 495.
First, these scholars would have courts look to loose understandings about current public opinion or social norms, whether or not there is any evidence that those reflect the preferences most likely to be enactable in the current legislature.\footnote{See Dworkin, supra note 27, at 349 (looking to whether interpretation is “fair” given current “public opinion”); Eskridge, Dynamic, supra note 139, at 10–11, 156–59 (looking at modern “social developments, and current values and social needs” and looking to “majority preferences” even though they would not actually be enactable because the actual legislative system is responsive to an interest group minority); William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1017–61 (1989); Sunstein, Interpreting Statutes, supra note 1, at 495 (stating that interpretation may change if statutory provision is “no longer consistent with widely held social norms”).} Their approach thus requires the exercise of substantive judicial judgment about which of the unenactable current public opinions or values are meritorious enough to govern statutory interpretation.\footnote{Dworkin argues that the judge should act as the legislature’s “partner” (rather than agent), developing the statutory scheme in “the best way,” which will turn in part on the judge’s “own judgment.” Dworkin, supra note 27, at 315. He rejects the view that “statutes should be read, not according to what judges believe would make them best, but according to what the legislators who actually adopted them intended,” and argues that interpretive questions “must be answered in political theory, by taking up particular views about controversial issues of political morality.” Id. at 313–14, 316; see also id. at 320 (“[A judge’s] judgments will also be sensitive to his convictions about the relative importance of fairness . . . .”); id. at 334 (“A judge must ultimately rely on his own opinions [and] [h]is own political convictions . . . .”); id. at 347 (stating that interpretation should turn in part on the judge’s “substantive opinion” about which statutory reading “would make it better from the point of view of sound policy”); id. at 354 (arguing that which cases are easy or hard turns on the judge’s personal “convictions about justice and fairness”). Eskridge likewise regards it as unavoidable that courts must make “value choices,” and ultimately supports his theory of dynamic interpretation with the argument that it is “normatively desirable” for courts to adopt a stance of critical pragmatism that considers whether an interpretation will “unsettle existing practice,” “reasonably accommodate a diversity of interests,” and be “responsive to social needs and public values.” Eskridge, Dynamic, supra note 139, at 174–76; see also Sunstein, Interpreting Statutes, supra note 1, at 412–13 (rejecting view that “controversial views about public policy . . . should never be part of statutory construction” and setting forth the “substantive norms” courts should follow and those it should reject).} Indeed, these scholars would make statutory interpretation turn on a judicial view about which public opinions or majority preferences \textit{would} be enactable but for certain political realities that these scholars deem normatively undesirable even if they are not unconstitutional.\footnote{Eskridge does argue that courts must make sure not to adopt interpretations that will be legislatively overridden, Eskridge, Dynamic, supra note 139, at 7, 69, but not that they should adopt the interpretation most likely to be enactable. Indeed, he even argues in favor of statutory interpretations that are sometimes “counter- or nonmajoritarian.” Id. at 151. Calabresi argues that courts should overrule old statutory meanings that are no longer enactable by the current legislature, but he would not require any evidence that the new meaning is the one most likely to be enactable. Calabresi, supra note 139, at 2, 7.} Accordingly, even when these scholars would have judges look
to current political preferences, their approach has more in common with theories that advocate the exercise of substantive judicial judgment to resolve statutory ambiguity. They therefore differ sharply from my approach of adopting statutory default rules that maximize the satisfaction of those political preferences that are enactable.

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

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

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

157. Id. at 341.
158. Id. at 340–41.
159. Id. at 342; see also id. at 349.
160. Eskridge, Dynamic, supra note 139, at 151 (emphasis added).
161. Id. at 156–57, 159–61.
tional law, it is unclear what would authorize judges to impose their substantive judgments on a democratic political process. In contrast, I argue that, when interpreting statutes, judges should not exercise substantive judicial judgment but rather should (and do) try to maximize political satisfaction.\footnote{See supra Parts I±II.}

Third, the position of these scholars is not limited to resolving how courts should fill in the default rules that resolve ambiguities in statutory meaning. Rather, these scholars argue that current public opinion or values should prevail over enacting preferences even when this requires a change in statutory meaning.\footnote{See Calabresi, supra note 139, at 2, 6±7; Dworkin, supra note 27, at 347±54; Eskridge, Dynamic, supra note 139, at 5±7, 9±11, 107±08, 120±21; Sunstein, Interpreting Statutes, supra note 1, at 412, 495.} Their form of political updating thus has a much wider zone of application since it is not limited (like mine) to cases of hermeneutic exhaustion but can occur at any time. This not only makes their approach far more fluid but also raises a fundamental problem that I address in more detail below: the current polity, unlike the enacting one, did not actually complete the process for enacting a text with an understood statutory meaning, and thus has less claim to authority and less accurately ascertainable preferences.\footnote{See infra Part V.E.1.}

Fourth, the underlying rationale of these other scholars is significantly different. These scholars essentially argue that current public opinion and values should (at least when judges deem them substantively important) normatively take precedence when they conflict with enacting legislative preferences.\footnote{See infra note 164.} In contrast, my argument will be based on an analysis about what statutory default rule the enacting legislature itself would prefer.

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

This probably seems counterintuitive. One would naturally think that the enacting government’s political preferences would necessarily be best maximized by a default rule that stuck to those preferences. And that would indeed be true if we were asking only which default rule would maximize the enacting government’s preference satisfaction for the statutes it enacted. But here we are asking what general default rule for filling all statutory indeterminancies maximizes the enacting government’s
political satisfaction. In choosing between default rules, the enacting government would realize that a rule that stuck only to enacting preferences would maximize its preference satisfaction in the future over the statutes it enacted. But a rule that tracked current enactable preferences would maximize the enacting government’s preference satisfaction during its time in office over all existing statutes, including those enacted by previous legislatures.

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

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

A. Current Preferences More Reliably Ascertainable

Consider first the situation where an interpreting court cannot come to any reliable estimate of what the enacting government’s enactable preferences would have been for filling in a statutory ambiguity, but can reliably estimate current enactable preferences. This is not a fanciful case, given that current preferences are often better known because contemporaneous, and interpretation often involves issues not thought of in the past, or on which any record of thoughts has been lost. In such situations, even the enacting government’s political preferences would clearly be maximized by a general default rule that tracked current preferences. Such a default rule would not lose the enacting government any real influence over future statutory interpretations since its preferences cannot reliably be estimated in the future anyway. But the default rule would increase the satisfaction of the enacting government’s preferences with statutory interpretations about older statutes made during the enacting government’s time in office. Given this trade-off, the enacting government would plainly prefer to gain influence over present interpretations rather than retain an illusory influence over future interpretations. The answer here depends solely on the relative accuracy of preference estimation, and is thus independent of whether the enacting government has stronger preferences regarding future or present events.
Consider next the more prevalent situation where a court can estimate both the enacting and current preferences, but can estimate current preferences more accurately. Again, this improved accuracy is a powerful reason why even the enacting government would prefer the court to track current governmental preferences. The enacting government gains more satisfaction from having its preferences accurately estimated during its time in office than from the prospect they will be less accurately estimated in the future. This holds unless the enacting government’s preferences about future events are not just stronger than its preferences about the era which it governs, but stronger by a sufficient margin to outweigh the decreased accuracy. But for which era are preferences likely to be stronger? To isolate this issue, let us now consider the case where a court can ascertain either enacting or current preferences with equal accuracy.

B. Current and Enacting Preferences Equally Ascertainable

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

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

The enacting polity’s political preferences for a given statutory result are thus likely to be stronger at the time the enacting government sits because those who hold those preferences are those who experience that result. Accordingly, the enacting polity would generally be willing to trade off having less influence over future interpretation of its statutes for having more influence over current interpretation of past statutes. For example, enactable political preferences that hold sway in 2000 are more
likely to be maximized by statutory results that correspond to those preferences in 2000 than by statutory results that correspond to them in 2100.

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

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

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

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

168. Political preferences that a polity holds but fails to reflect in its choice of legislators would not be enactable preferences.
that run contrary to their current political preferences because that gives them something to run against in the next election. This is an intriguing possibility, but the hypothesis is probably untrue, and even if true would not justify a different default rule.

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

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

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

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

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

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


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

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

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

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

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

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

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

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

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

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

Consider, for example, the civil rights and voting acts of the 1960s. If ever there were a set of statutes where the enacting legislators and polity might be thought to have a special interest, these would appear to be them. But while the 1960s did finally signal the creation of a political coalition strongly interested in changing civil rights law and this was a topic of intense interest, the truth is that the topic of race relations has been, and will continue to be, of intense interest to every polity. And one must distinguish interest in the topic of civil rights from interest in the issues raised by statutory ambiguities left in the 1960s civil rights statutes. The latter do not necessarily signal an issue in which the 1960s Congress had a particularly strong enactable interest. More likely, the issues that were left ambiguous in its enactments signaled either that its views were not that strong on that issue, that it had not foreseen the issue at all, or that its views were sufficiently divergent that they had no enactable preference on the issue. If there were some issue on which the 1960s Congress had an intense enactable interest that it somehow failed to express, that is likely to be of intense interest to the future polity as well, and a statutory interpretation that deviated from those future enactable preferences would not stick anyway. A preference-estimating default rule is thus likely to matter mainly for issues minor enough not to excite much legislative interest. Would the 1960s Congress really willingly trade future
influence over those minor issues for influence during the 1960s on statutory interpretation concerning all topics? Even if the 1960s Congress were solely interested in race relations that seems dubious, for interpretation of a host of statutes besides the 1960s civil rights acts affected race relations during this era, including statutes on taxation, education, health care, benefits programs, government contracting, criminal law, past statutes on voting and employment, and the Civil War era statutes whose updated interpretation proved crucial. And the 1960s Congress did have many interests other than race relations, including all the nonracial issues in the above list, as well as issues in administrative law, antitrust, banking, securities, intellectual property, and all the other statutory topics that affected its constituency.

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

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

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

175. See infra Part VI.
176. See supra text accompanying notes 25–26. Consistent with this, one study has shown that Supreme Court decisions interpreting civil rights statutes track the ideological preferences of the Justices and are not affected by the changing preferences of Congress or the President. See Jeffrey A. Segal, Separation-of-Powers Games in the Positive Theory of Congress and Courts, 91 Am. Pol. Sci. Rev. 28, 39-42 (1997).
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... wanes the further away in time, as less and less of the polity is around to experience the statutory results. At some future point, then, even such extraordinary legislatures and polities would prefer a current preferences default rule. Moreover, I doubt there are administrable criteria for distinguishing such extraordinary cases. The lack of any such criteria will make it hard for courts to resist deciding based on whether they approve of the preferences that existed at the time of enactment, because preferences that one shares are naturally going to seem more “extraordinary” than others. Indeed, once one took this tack, there would be no sharp distinction between ordinary and extraordinary, but rather a continuum in the degree of extraordinariness that, at a different point for each degree, would yield if the statutory interpretation were so far in the future that the discount for the lack of effect on the polity would outweigh the degree of extraordinariness in its interest. Thus, even if such extraordinary cases existed, tailoring the default rule for the degree of extraordinariness seems far less preferable than choosing a general default rule to govern all such cases.

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

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

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

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

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

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

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

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

180. Id. at 880–85.
182. See Elhauge, Interest Group Theory, supra note 21, at 48–66.
maximized by a general default rule that tracks current enactable preferences when enacting and current preferences can be estimated with equal accuracy.

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

C. Enacting Preferences More Reliably Ascertainable

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

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

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

183. See infra Parts V.E, VI.C, VII; Elhauge, Preference-Eliciting, supra note 7, Part VIII.B.
184. See Elhauge, Preference-Eliciting, supra note 7, Part VIII.B.
185. See infra Parts V.E, VI.C., VII; Elhauge, Preference-Eliciting, supra note 7, Part VIII.B.
enacting polity likely has little preference at all about the future event.\textsuperscript{186} If enacting preferences are highly unclear, even an uncertain estimate of current preferences is more likely to increase political satisfaction.\textsuperscript{187} Likewise, even such an uncertain estimate of current preferences regarding present events the polity experiences and cares about is more likely to maximize political satisfaction than a more accurate estimate of enacting preferences concerning events a century in the future they do not care about at all. This is not because, as some have suggested, an old statute with a defined meaning can be condemned and overruled as obsolete by a court.\textsuperscript{188} It is rather based on the more limited ground that, when no defined statutory meaning exists, the enacting polity itself would prefer that enacting preferences, even when more ascertainable, should be discounted in the far distant future in favor of a default rule that tracks the preferences of the current polity, including the enacting polity’s own views about more ancient statutes being interpreted during its own era.

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

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

\textsuperscript{186} See infra Part VI (discussing cases where enacting legislative preferences are obscure or old).
\textsuperscript{187} This is essentially the first case considered supra Part V.A.
\textsuperscript{188} See Calabresi, supra note 139, at 2, 6–7, 100–04.
The conclusions here diverge sharply from those in prior rational choice scholarship. This might seem troubling to those (like me) who have been impressed by the rigor and ingenuity of these models, which have made such great contributions to how we think about statutory interpretation. It thus may help to explain the source of the divergence. As is often the case, differences in conclusion are traceable to differences in assumptions, often assumptions that were asserted with little justification in the prior models.

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

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

A few rational choice models entertain the alternative assumption that judges try to act as honest agents for the enacting legislature. Normally they leap to the conclusion that this assumption would mean judges should interpret the statute to match enacting legislative preferences when they conflict with current preferences. In an ingenious twist,
Ferejohn and Weingast argue that, while this is what a naive textualist would do, a more politically sophisticated honest agent for the enacting legislature would realize that an interpretation that matches enacting preferences might provoke a statutory override by the current legislature. They then conclude that an honest interpretive agent that seeks to maximize the satisfaction of enacting legislative preferences should first ascertain the range of interpretations that would not get overridden by the current legislature, and then choose the option within that range that comes closest to enacting legislative preferences.

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

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

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

194. Id. at 269.
195. Id. at 266–67 (collecting sources); Eskridge & Ferejohn, Game, supra note 118, at 548–51. Because Ferejohn and Weingast focus only on future applications of the enacted statutes, and ignore present applications of all statutes, they conclude that durability is what would matter most to the enacting legislature. Ferejohn & Weingast, supra note 142, at 271.
196. Ferejohn and Weingast also never explain why any society would prefer to avoid legislative reconsideration that made clear where current enactable preferences lay. Rather than trying to avoid legislative reconsideration, in my analysis courts can and should sometimes try to provoke such reconsideration when legislative preferences are unclear. See Elhauge, Preference-Eliciting, supra note 7, Parts I–II.
197. See Eskridge, Dynamic, supra note 139, at 167–70; Cohen & Spitzer, Puzzle, supra note 142, at 69–70, 75–76; Eskridge, Overriding, supra note 139, at 378–85; Eskridge & Ferejohn, Deal, supra note 142, at 167–71; Eskridge & Ferejohn, Game, supra note 118, at 528–51; Ferejohn & Weingast, supra note 142, at 267–76; Gely & Spiller, supra note 142, at 267–83.
stead to develop an interpretive theory for general application across different legislative structures, including parliamentary ones that do not involve a similar separation of legislative powers.

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

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

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

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

199. See infra Part VII.


from having their favored result hold in the interim before any statutory override occurs. It ignores the fact that personal preference-maximizing judges could just respond to any statutory override by interpreting the override to fit judicial preferences too.\footnote{See Frank B. Cross & Blake J. Nelson, Strategic Institutional Effects on Supreme Court Decisionmaking, 95 Nw. U. L. Rev. 1437, 1455–57 (2001). In contrast, if courts follow statutory meaning and legislative preferences when they can and provoke statutory overrides only to elicit legislative preferences, see Elhauge, Preference-Eliciting, supra note 7, Part II, that explains why courts do not simply evade statutory overrides with fresh misinterpretations.} It ignores the fact that, if the Supreme Court just wanted to further its own preferences without being overridden, the easiest way to accomplish that goal would be not to take cases where its preferences conflicted with legislative preferences.\footnote{See id. at 1452–55; Elhauge, Preference-Eliciting, supra note 7, at Part II.A.4 (noting that while odds of override are higher in particular areas, the overall odds of statutory override are 6–8%).} Finally, it ignores the fact that, in most areas, legislative override is far less likely than legislative nonresponse,\footnote{In some statutory areas a differential likelihood of legislative correction is sufficiently high that judges who are trying to maximize political satisfaction should employ a preference-eliciting default rule where legislative preferences are obscure. See Elhauge, Preference-Eliciting, supra note 7, Part II. But preference-maximizing judges would know their own preferences and have nothing to elicit.} meaning that in most cases judges would best satisfy their preferences by directly interpreting statutes to match those preferences.\footnote{See supra Parts I, II.A.} Nor would pursuing that direct approach harm a personal preference-maximizing judge by much in the minority of cases where override did occur because the alternative would be an interpretation that (to avoid override) also deviated from judicial preferences. The only gain (in this minority of cases) would be that this deviation from judicial preferences might be somewhat smaller than the deviation that would be created by the predicted override, which is unlikely to offset the loss from issuing interpretations that deviate from judicial preferences in most cases, especially given the difficulty of predicting just what an override would produce. A personal preference-maximizing judge would thus have little strategic reason not to simply interpret statutes in ways that furthered judicial preferences rather than following current legislative preferences.

The rational choice assumption that self-interested judges would just push their own preferences unless they would trigger statutory override also mistakenly fails to consider all the other means a legislature has to influence a judiciary that tried to maximize its own preferences rather than the legislature’s. Legislatures can enact codes of statutory construction and take into account during confirmation hearings judges’ tendency to privilege their own political preferences over legislative preferences.\footnote{See supra Parts I, II.A.} Further, the political branches can and do influence the judiciary by holding hearings, making public statements, threatening im-
peachment, limiting jurisdiction, cutting budgets, withholding pay raises, denying promotions, expanding courts, and resisting implementation of judicial orders. Thus, even if judges were purely self-interested, it is unlikely they would deviate from current political preferences whenever the risk of statutory override was low.

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

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


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

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

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

211. See Elhauge, Preference-Eliciting, supra note 7, Parts II.B.3, IV.C.
None of this evidence is consistent with the notion that judges just try to further their own preferences while avoiding override and thus provoke overrides only by mistake.\textsuperscript{212} This statistical information is often misinterpreted because the literature presumes that the only alternative to assuming judges directly or strategically further their own (or enacting legislative) preferences is that judges follow mechanistic legal rules that bear no relation to current political preferences.\textsuperscript{213} The empirical data look quite different if one considers the hypothesis that those legal rules might themselves call on judges to estimate or elicit current political preferences when that would maximize political satisfaction.

E. \textit{Limits on a Current Preferences Default Rule}

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

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

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

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

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

\textsuperscript{214} See sources cited supra note 152.
To begin with, my rebuttals to objections to a current preferences default rule depended in part on the existence of a statutory ambiguity to explain why the enacting polity did not have a special interest, or would not prefer greater durability, in the statutes it enacted.\(^{215}\) Likewise, my response to the argument that reliance interests should bar a current preferences default rule turns critically on the premise that there was no clear statutory meaning on which reasonable reliance could be made.\(^{216}\)

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

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

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

\(^{215}\) See supra Part V.B (discussing objections 2 and 3).
\(^{216}\) See Elhauge, Preference-Eliciting, supra note 7, Part VIII.B.
\(^{217}\) See supra Parts II–III; Elhauge, Preference-Eliciting, supra note 7, Part VIII.C.
tary, as we shall see, courts tend to be more exacting about the reliability of evidence of current preferences they require compared to the evidence typically used to estimate enacting preferences.\(^{218}\)

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

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

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

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

\(^{218}\) See infra Parts VI–VII.

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

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

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

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

220. Special issues might be raised when a prior judicial interpretation exists, and are discussed infra Part VI.C, and in Elhauge, Preference-Eliciting, supra note 7, Parts V, VIII.B.
during its time and its preferences govern a subset of statutes in the future. In any event, the analysis so far puts aside the possibility of legislative override, which I consider at length in a companion piece.221

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

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

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

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

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221. See Elhauge, Preference-Eliciting, supra note 7.
222. See supra text accompanying notes 152–166.
realm of statutory interpretation, where some judicial judgment about the proper default rules is required, for judges to exercise that judgment to further political preferences that could not be enacted would undermine this constitutional structure. It would also create a divergence between the results when statutes have clear meaning, which do track enactable preferences, and the results when statutes are ambiguous, which would instead track some set of unenactable preferences that appeal to judges. There is no warrant for such a divergence.223

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

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

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

223. See supra Part II.A.
224. Elhauge, Preference-Eliciting, supra note 7, Part VIII.B (rejecting claims that reliance interests should trump political preference satisfaction but explaining the extent to which political satisfaction would be advanced by interpretations that are sufficiently stable to induce some reliance).
225. Supra Part V.E.1.
226. Supra Part V.C.
5. Legislature Can Opt Out, Within Limits. — As with all default rules, a current preferences default rule is subject to opt-out. That is what makes it a default rule rather than a mandatory rule. This provides another reason why courts should not modify explicit statutory meanings to conform to changes in legislative preferences, for adopting a defined statutory meaning is how governments opt out of statutory default rules. Modifying explicit statutory terms would take away the governmental power to opt out of a current preferences default rule.

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

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


228. See infra text accompanying notes 341–343 (discussing McNollgast theory that the New Deal Congress wanted judges to defer to agencies as long as its political forces controlled the agencies, but when at the end of the New Deal era it became clear that new
A more problematic case is where a government enacts a general interpretive statute providing that—from now on—all statutory ambiguities should be interpreted to further the preferences of the enacting government. If applied both to older statutes interpreted during its time in office and to the statutes it enacted that are interpreted during the future, such a tradeoff might seem unproblematic. But if such a change in interpretive rules were enacted toward the end of the government’s reign, that government would in effect have had the benefit of a current preferences default rule during its time in office, and then be imposing an enacting preferences default rule for the interpretation of its statutes in the future. Moreover, such a statute would also apply to future governments that might have different views about the best default rule for statutes interpreted or enacted during its reign. Courts would then have to decide between applying the current preferences default rule that seems likely to maximize that future government’s political preferences, or using the enacting preferences default rule preferred by a past government that did not enact the future (or older) statutes being interpreted and does not represent current legislative preferences during the time of interpretation.

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

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

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

232. See Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932) (finding that a statute “expressed no more than the will of a particular Congress which does not impose itself upon those to follow in succeeding years”); Newton v. Comm’rs, 100 U.S. 548, 559 (1879) (“Every succeeding legislature possesses the same jurisdiction and power with respect to [legislative acts] as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality.”); 1 Blackstone, supra note 56, at 990 (“Acts of parliament derogatory from the power of subsequent parliaments bind not.”); Thomas M. Cooley, Constitutional Limitations 125–26 (Boston, Little, Brown, and Co. 1868) (stating that one legislature cannot constitutionally bind a subsequent one by its enactments); Earl T. Crawford, The Construction of Statutes 171, 193 (1940) (collecting state court cases holding the same).

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

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

235. See id. at 2116–18 (arguing that it is).
tion is unlikely.236 Or the future legislature may not be able to form sufficient agreement on an alternative rule or overcome procedural obstacles or effective supermajority requirements. One thus cannot deduce that the failure of the future legislature to override the prior interpretive statute itself indicates correspondence with its enactable preferences. Second, enactments take time, and in the meantime future legislatures will have suffered a diminished influence that was effectively stolen by the legislature that enacted the interpretive rule. Such delays seem particularly likely if, as noted above, a temporal legislature is better understood as a legislature with a distinctive political coalition, for it will not always be clear when the political coalition has shifted. And during the transition to the new governing coalition, the old coalition favored by the interpretive rule may have enough political influence to block or delay change.

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

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

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

236. See supra Part V.E.2.
237. For the seminal work on collective action problems, see Mancur Olson, The Logic of Collective Action 2, 11–16, 21 (2d ed. 1971).
238. See supra Part V.B (explaining why each legislature would be better off by trading future influence over its enactments for present influence over all enactments).
of a current preferences default rule at all. Rather, it simply means it cannot be effectuated by one legislature in a way biased toward itself, and should instead be done through a constitutional amendment that can bind future legislatures and polities and modify the constitutional interpretive power of judges, a power that, without amendment, judges should wield on behalf of the enactable political interests of the polity. In any event, even if such a self-aggrandizing legislative opt-out were constitutionally permissible, it would remain inadvisable and thus outside the limits of this Article’s recommendations.

VI. TRACKING CURRENT LEGISLATIVE PREFERENCES IN PRACTICE

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

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

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

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

239. See infra Part VI.C; Elhauge, Preference-Eliciting, supra note 7, Part V.
240. This would also apply to legislative decisions to let stand agency interpretations that either were decided before Chevron or fall outside its scope. See infra Part VII (discussing Chevron deference).
242. Rutherford, 442 U.S. at 554 n.10; North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 (1982); see also Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 846 (1986) (“It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional
follows if the legislature allows an interpretation to stand when it reenacts a statute or enacts other statutes on the same subject. Legislative action that consciously lets an interpretation stand suffices, whereas mere legislative inaction would not.

This reliance on subsequent legislative action is hard to square with a hermeneutic interpretation of the original statute. The actions of a subsequent legislature are irrelevant to the meaning or intent of the enacting legislature. Similarly, subsequent legislative action (at least when it comes significantly later in time) is irrelevant to estimating the political preferences of the enacting legislature, and thus cannot be explained as an enacting preferences default rule. Nor has the subsequent legislation enacted any amendment regarding the issue at hand that would itself have the force of law or create a new statutory meaning.

But this case law does make sense as a current preferences default rule, for the subsequent legislative action provides a good indication of more current enactable preferences. Consistent with this approach, courts are not willing to rely on the sort of subsequent legislative events that fail to provide any reliable means of ascertaining enactable preferences. Mere legislative inaction cannot offer such a reliable means, for inaction can result from lack of time or attention to the issue, or from an inability to gain the concurrence of some key committee, the other legisl...
ative house, or the executive branch. Neither inattention nor deadlock can indicate current enactable preferences with sufficient reliability to justify deviating from the likely preferences of the enacting legislature.\textsuperscript{248}

But where the subsequent legislature took the time to amend, enact, or reenact a statutory provision, without disturbing an outstanding interpretation that had been brought to its attention, then that outstanding interpretation does become a fairly reliable indicator of the balance of political forces affecting how the more current legislature would want the default rule filled. And the fact that the more current legislature took affirmative legislative action means that the other house and the executive concurred in the decision to let the interpretation stand, so that the preferences implied by that action are enactable.

The persuasive objection to relying on subsequent legislative action— that it might reflect a lack of time, attention, or agreement rather than current political preferences—also applies to affirmative legislative action if the acting legislature was unaware of any prevailing interpretation, or believed (accurately or inaccurately) that no single interpretation prevailed. The objection would also still apply if the subsequent legislature was aware of a prevailing interpretation, but its legislative action focused on unrelated provisions of the statute. Consistent with this, courts in fact do not rely on subsequent legislative action to justify deviating from enacting legislative preferences in cases meeting these descriptions.\textsuperscript{249}

Sometimes subsequent legislatures affirmatively rely on a particular statutory interpretation in enacting another statute. In such cases, even justices otherwise loathe to draw inferences from subsequent legislative action agree the relied-upon assumption should be adopted.\textsuperscript{250} The reason is not, I will argue, because mistaken reliance is generally a sensible ground for a default rule.\textsuperscript{251} It is, rather, because the reliance by the subsequent Congress provides a fairly reliable indication that more current political preferences favor the interpretation in question.

\textsuperscript{248} In contrast, proof of such legislative inaction can rebut a claim that current enactable preferences have changed in a way that justifies deviating from a prevailing interpretation that \textit{does} conform to enacting legislative preferences. See infra Part VI.C.


\textsuperscript{251} See Elhauge, Preference-Eliciting, supra note 7, Part VIII.B.
B. Other Evidence of Changed Legislative Preferences

What should a court do when subsequent legislative history or statutes do not retain or rely on a prevailing interpretation, but more generally indicate that the current government would resolve a matter differently from the enacting government? The U.S. Supreme Court has sometimes seemed inconsistent in its treatment of such subsequent legislative history or statutes. On the one hand, the Court has stressed that: “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”252 On the other hand, the Supreme Court has held that “while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight and particularly so when the precise intent of the enacting Congress is obscure.”253 In some cases, the Court has recited—as a “cardinal rule” no less—that “repeals by implication are not favored,” thus indicating that Congress must be explicit when it repeals prior legislation.254 In other cases, the Court states that: “a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.”255

In short, the Court has sometimes been willing to be guided by subsequent legislative history, especially when it takes the form of statutes that (even though not repeaters) indicate current enactable preferences


253. Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (citations omitted); see also Finkelstein, 496 U.S. at 628 n.8 (relying on subsequent legislative history); Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) (“[W]hile arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent.”).


that bear on that topic. This would be puzzling as a matter of hermeneutics. If the meaning of the enacting legislature were the touchstone, the views of subsequent legislators expressed even in official legislative history should be irrelevant.\textsuperscript{256} Nor would the subsequent enactment of (nonrepealing) statutes bear on the original legislature’s meaning.

But none of this is puzzling if the interpreter is actually just applying a current preferences default rule in a case where the enacting government’s meaning is unclear. The views of the subsequent legislature may indeed be a “hazardous basis” for inferring the meaning or intent of an earlier legislature, but they are not being used for that purpose. They are, rather, being used to fill the default when the enacting government’s meaning and even preferences are “obscure.”

Likewise, implied repeals are suspect when there is an enacted statutory meaning that has gone through the political process, but not when the prevailing interpretation is just a default rule that estimated enactable preferences to plug a gap in statutory meaning. The courts accordingly hold that the doctrine allowing statutory interpretation to be altered by subsequent legislation applies only when, at the time of enactment, the statute has “a range of plausible meanings.”\textsuperscript{257} If that is the case, “subsequent acts can shape or focus those meanings,” that is, they can provide a basis for selecting an interpretive option among the range of plausible statutory meanings.\textsuperscript{258} In short, we have a doctrine against implied repeals of actual statutory meaning but not against implied repeals of default rule interpretations that fill gaps in meaning.

The remaining complication is that subsequent legislative history is often a hazardous basis for inferring current enactable preferences as well. It is particularly difficult to ascertain how much weight to give to legislative statements that were not memorialized in, or did not lead to, the enactment of actual legislation. Through enactments a legislature speaks in one voice, and manifests the political preferences that sufficed to secure the actual enactment of something. In other statements, legislatures speak through multiple voices, none of which may reliably indicate enactable preferences. Some skepticism is warranted. Which is why the Court quite properly restricts the use of subsequent legislative history to cases where either enacting preferences are particularly obscure or current enactable preferences are especially clear. The paradigm case is the enactment of a subsequent (nonrepealing) statute that nonetheless reliably indicates the prevailing political preferences most likely to be able to secure enactment in the current legislature. A new statute is no more reliable an indicator of the earlier government’s meaning, intent, or preferences than mere statements by current legislators would be. But a new statute is a

\textsuperscript{256} See Hart & Sacks, supra note 23, at 1284–86 (treating legislative history as irrelevant unless “officially before the legislature at the time of [the statute’s] enactment”).

\textsuperscript{257} Brown & Williamson Tobacco Corp., 529 U.S. at 143.

\textsuperscript{258} Id. (emphasis added).
more reliable indicator of current enactable preferences and thus has greater influence on judicial interpretation of earlier statutes.

This analysis means that courts cannot be deemed internally inconsistent merely because they sometimes rely on subsequent legislative history and statutes and sometimes do not. Subsequent legislative history and statutes should indeed be rejected when the enacting legislative intent or meaning is clear. Moreover, even when the original meaning is unclear, subsequent legislative history should be rejected when it provides an unreliable indicator of current enactable legislative preferences. But when it does provide a reliable indicator of current preferences, particularly as reflected in subsequently enacted statutes, then that subsequent legislative history offers sufficient grounds for filling the default.

Nicholas Rosenkranz argues that because a congressional statute that required courts to interpret statutes according to the future views of some subset of Congress like a legislative committee would be unconstitutional under INS v. Chadha, it must also be unconstitutional for a court to use such subsequent legislative history in its own interpretations. But in addition to being contrary to actual precedent, this claim does not logically follow. If Congress requires always deferring to some legislative subset, that would impermissibly require courts to deviate from a current preferences default rule when the views of that subset are not enactable. If a court examines subsequent legislative history only when it offers a reliable indication of current enactable preferences, that examination requires no such deviation. Chadha is thus not at all inconsistent with a current preferences default rule, but to the contrary flows naturally from its logic.

Moreover, even if one thought that courts could not constitutionally rely on statements by future legislators or committees that did not produce legislation, that does not mean, as Rosenkranz assumes, that it would be unconstitutional to have an interpretive statute that required courts to track current legislative intent. Instead, that would mean that courts should only rely on future enactments (normally on related topics) in order to estimate current enactable preferences, which in fact is the sort of subsequent legislative history on which courts most rely. And once reliance on those future enactments is permissible, then reliance on the statements by future legislators and committees that led to those enactments would also be permissible under Rosenkranz’s own view that reliance on past legislative history involves no impermissible delegation.

260. See Rosenkranz, supra note 9, at 2134–35.
261. See id. at 2135.
262. See id. at 2136–37; see also supra Part III.B (explaining why and how reliance on such legislative statements can properly help estimate the preferences of the enacting legislature).
One would finally predict that the more obscure or ancient the enacting preferences, the less demanding the courts will be about how reliable the indication of current preferences must be. For example, the Supreme Court in Bob Jones concluded that religious nonprofit universities with racially discriminatory admissions standards were not "charitable" organizations entitled to tax exemption under federal statute. The Court conceded that the 1894 legislature that enacted the statute probably would have regarded such racist admissions standards as unproblematic given the prevalence of racial segregation at the time. If one asks the question what the enacting legislature would have wanted, or what its political preferences were, the most likely answer would be to grant the exemption.

But by 1983, it was clear that, while the current Congress had not decided the precise question, granting such a charitable exemption fundamentally contradicted modern congressional race relations policy. The Court could have reached this conclusion by relying simply on congressional acquiescence in an IRS interpretation that Congress had repeatedly refused to alter even though it otherwise amended the statute. But the Court first made clear that the same conclusion would follow (even without any legislative acquiescence in a prevailing interpretation) because "over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education." Further, when the Court later approved the IRS interpretation, the Court did so not because the IRS correctly divined what the 1894 Congress would have wanted, but because the IRS correctly estimated current legislative preferences.

In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear. . . . Indeed, it would be anomalous for the Executive, Legislative, and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared.

263. See supra Part V.C (explaining why both relative clarity and age of enacting preferences would matter under a current preferences default rule).
265. Id. at 593 n.20.
266. Id. at 599–602 (noting that Congress had rejected thirteen bills to overturn the IRS interpretation despite making other enactments, including one that denied any tax exemption to racially discriminatory social clubs); see supra Part VLA. This IRS interpretation might also seem to merit deference under tax case law that preceded the Chevron case. See Bob Jones, 461 U.S. at 596–97. But this theory faced the considerable difficulty that the then-current Treasury Department had announced its intent to revoke this interpretation. Id. at 585 n.9. See generally infra text accompanying notes 416–420 (discussing how Bob Jones fits Chevron deference).
268. Id. at 598.
The clear import was that both the courts and agencies should, in case of ambiguity, follow the clearly indicated preferences of the current legislature, here reflected in the repeated enactment of actual laws.

A skeptic might wonder whether these enactments really reflected current enactable preferences in 1983 given that the then-current Reagan administration had, through its Treasury Department, announced its intent to revoke the prevailing IRS interpretation against granting tax exemptions to racially discriminatory schools.269 However, the Reagan Treasury Department made plain that this recission reflected its legal interpretation, not its political views.270 Indeed, the Reagan administration simultaneously introduced a bill before Congress to deny statutorily any tax exemption to racially discriminatory schools.271 Democrats alleged that this bill was just a response to the political outcry that attended the administration’s decision to rescind the IRS interpretation,272 but that is besides the point. What matters are not the private political preferences of political actors, but what their actions show about the state of current enactable preferences. If political actors who suffice to enact legislation would be unable to resist political pressure for a certain result, then that suffices to show that this result reflects an enactable political preference, regardless of the private preferences those political actors might have.

A skeptic might further worry: if current enactable preferences really supported a denial of tax exemption, then why didn’t Congress enact this proposed bill? The answer seems plain: since the issue was already before the U.S. Supreme Court, Congress figured it might as well wait to see whether the Court resolved the problem for it. Bob Dole, the Chairman of the relevant Senate committee, was quite explicit about this, adding that: “I know we can’t suggest that the Court go ahead and make that decision, but hopefully they read the papers.”273

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269. Id. at 585 n.9.
270. See Legislation to Deny Tax Exemption to Racially Discriminatory Private Schools: Hearing Before the Senate Comm. on Fin., 97th Cong. 225±26, 229 (1982) [hereinafter Tax Exemption Hearing] (statement of Hon. R.T. McNamar, Deputy Sec’y of the Treasury). For an explanation of why the court should not defer to such an agency interpretation under Chevron, see infra text accompanying notes 416±420.
272. See id. at 244, 247 (statement of Sen. Boren).
273. Id. at 244–35, 253. Chairman Dole stated that, while “legislation is going to be very difficult until there is a full understanding” of where the Supreme Court would leave the state of the law, if action were necessary his assessment was: “there has been such an avalanche of feeling about racial discrimination. You are not going to get any votes in this committee for racial discrimination.” Id. at 254. Some statements also suggested that Senate Democrats were not eager to enact a bill that would get the Reagan administration off the political hook, id. at 244, 247, and that might imply that the prior IRS interpretation had not been legally proper, id. at 241, 244. But notwithstanding this strategic political interest there was no doubt that their enactable preference would, if necessary, have been for a statute that denied a tax exemption to racially discriminatory schools.
tive inertia is hardly unusual, and also explains why Congress had not bothered to enact any legislation codifying the IRS interpretation in the preceding twelve years, even though it did enact legislation denying a tax exemption to racially discriminatory social clubs.\textsuperscript{274} Enacting anything requires the expenditure of time and political effort that will often not seem worthwhile (compared to other pursuits), especially when the enactment will not change the status quo. The fact that Congress has failed to enact something does not mean it would not be supported by enactable preferences if necessary. Thus, the Court correctly inferred that the enactment denying a tax exemption to racially discriminatory social clubs did not mean Congress wanted a different rule for racially discriminatory schools, but most likely meant that, if enactment were necessary, then enactable political preferences favored denying tax exemptions to racially discriminatory entities.\textsuperscript{275}

Naturally, any estimate of enactable political preferences is necessarily less accurate than actually waiting to see what gets enacted. But the whole point of using preference-estimating default rules is to minimize political dissatisfaction for issues too minor to provoke legislative action, or in the interim before the legislature acts, and to free the political process from the needless burden of making enactments it would probably make if time and political energy were not scarce. When what the government would enact is sufficiently uncertain, a preference-eliciting default rule may well be called for to provoke legislative responses\textsuperscript{276} but when official actions provide a sufficiently reliable estimate of current enactable preferences, then those should be followed. And the necessary threshold of reliability declines the more ancient any enacting legislative preferences, as with the 1894 statute in \textit{Bob Jones}.

Still, sometimes the current or subsequent preferences are quite general, whereas the enacting preferences were quite specific. In such cases, canons of construction provide that “[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”\textsuperscript{277} Under this canon, a old statute can trump a later one if the former is more specific. Thus, the Court ruled that a general statute against employment discrimination should yield to an earlier specific statute allowing preferences for Native Americans.\textsuperscript{278} This might seem inconsistent with a policy of satisfying current preferences, but is not. What the Court recognizes is that often enactors adopt general principles without foreseeing certain specific implications, and that the government’s views on those specific implications

\textsuperscript{274.} \textit{Bob Jones}, 461 U.S. at 601.
\textsuperscript{275.} See id. at 601–02. For social clubs, enactment was necessary to express this political preference because they were not governed by the IRS interpretation that produced this result for schools.
\textsuperscript{276.} See Elhauge, Preference-Eliciting, supra note 7.
\textsuperscript{278.} Id.
C. When to Overrule Statutory Precedent

When a court has itself interpreted a provision in a prior opinion, that creates statutory precedent that might be considered binding under stare decisis. Indeed, such statutory precedent is often said to enjoy a doctrine of “super-strong” stare decisis.280 If a current preferences default rule governed, one would expect this nominally super-strong rule to be far weaker when it conflicted with reliable evidence of current enactable preferences—which is in fact what we see.

As Professor Eskridge has persuasively shown, statutory stare decisis tends to be followed when the statutory precedent conforms with current legislative preferences but not when it conflicts.281 Court decisions sticking to statutory precedent often rely expressly on indications that the current legislature favors the precedent, whereas court decisions overruling statutory precedent frequently rely expressly on indications that the current legislature disfavors that interpretation.282

To be sure, often court decisions about whether to overrule statutory precedent make no express statement about current enactable preferences. Even then, an implicit effort to conform to current enactable preferences can be inferred from the fact that decisions overruling statutory precedent are the least likely to be legislatively overridden. Indeed, an astonishingly low 0% of Supreme Court cases overruling statutory precedent were overridden by Congress from 1967–1990.283 This is far below the 6–8% rate at which Congress generally overrides statutory interpretations by the Supreme Court.284

None of this is to say one can establish a simple one-to-one correspondence between decisions overruling statutory precedents and a cur-

279. Id. at 548–49.
281. Eskridge, Overriding, supra note 139, at 397–100.
282. Id. at 399–400 & n.218 (noting that 38% of cases overruling federal statutory precedent relied on indications of current congressional preferences).
283. Id. at 399.
284. Congress overrode 121 Supreme Court statutory interpretations from 1967–1990, and 98 from 1975–1990. Id. at 338 & tbl.1. This amounts to 5–6 decisions a year, which is 6–8% of the 80 statutory interpretations the Court on average issued a year. Id. at 339 n.15.
rent preferences default rule. The connection is far more complicated because many cases overrule statutory precedent that also failed to comport with the preferences of the enacting legislature. Sometimes, the Court recognizes that it incorrectly identified enacting legislative preferences in the statutory precedent.285 In other cases, changed circumstances may mean that the precedent no longer conforms to initial legislative preferences.286 Or perhaps the initial legislative preference was to delegate the matter to ongoing judicial resolution, and thus supports no special preference for the first precedent decided as part of that common law. The classic example is judicial development of what “restraint of trade” or “monopolization” means under antitrust law.287 Such a delegation to a common law process implies that the legislative preference is to have judges correct decisions that proved mistaken, not stick with them. Finally, on some occasions, the statutory precedent reflects a preference-eliciting default rule that should be abandoned because new information has arisen about the likelihood it will elicit any legislative reconsideration.288 In all these cases, overruling the statutory precedent does not conflict with enacting legislative preferences.

When overruling statutory precedent does not conflict with enacting legislative preferences, it is not surprising to see courts use subsequent

286. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279–88 (1988) (overruling earlier construction predicated on division between law and equity in federal courts because it no longer furthered statutory purpose once that division had been eliminated); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 244–53 (1970) (overruling earlier construction of a federal labor statute and allowing federal courts to enjoin strikes because an intervening decision had allowed unions to remove to federal court, thereby thwarting the enacting Congress’s aim of supplementing rather than supplanting state remedies); Eskridge, Overruling, supra note 280, at 1390–91 (pointing out that continued adherence to old statutory interpretations would have frustrated national policy goals given changed circumstances); supra Part III.C.
287. See Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”); Easterbrook, Statutes’ Domains, supra note 26, at 544 (“The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.”). See generally Eskridge, Overruling, supra note 280, at 1376–78 (arguing that when Congress implicitly has left discretion to courts, those courts should be more willing than usual to overrule old and inappropriate constructions of the statutory language). Sometimes this is mistakenly taken to mean that any statutory language in the antitrust statutes confers the same common lawmaking authority on courts, id. at 1378–81, but it is only general language like “restraint of trade” or “monopolization” that conveys that meaning. Thus, it is not anomalous that the Court has simultaneously been careful about statutory stare decisis when invoking more technical antitrust decisions about the jurisdictional reach of the statute, even though some notable scholars have thought so. Id. at 1378–81, 1414–21 (collecting such cases and asserting they are anomalous).
288. See Elhauge, Preference-Eliciting, supra note 7, Part V. The lack of a legislative override does not alone suffice to provide that information; to the contrary, standing alone it strongly supports retention. See id.
legislative history far more liberally in estimating and following current legislative preferences. Since the precedent fails to provide any reliable indication of enacting preferences, the interpretive strategy that maximizes political preference satisfaction includes somewhat less reliable evidence of current legislative preferences. Indeed, when precedent conflicts with enacting legislative preferences, legislative preferences cannot counsel against overruling that precedent unless there is affirmative evidence that current enactable preferences favor that precedent.

But when there is affirmative evidence that current enactable preferences favor a precedent, it should not be overruled even though the court has come to the conclusion that the precedent likely conflicts with enacting preferences. A prominent example was Patterson v. McLean Credit Union. There the Supreme Court admitted to some uncertainty about whether a precedent interpreting § 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter. Without resolving whether the precedent matched enacting preferences, the Court held it should not overturn the precedent because recent enactments indicated that current congressional preferences embodied a “deep commitment to the eradication of discrimination” consistent with that precedent.

Where current enactable preferences either affirmatively agree or disagree with statutory precedent, applying a current preferences default rule is relatively clear. But what about when the current legislature is split or has simply failed to act? Above I noted that mere legislative inaction is generally an insufficient basis for concluding that legislative preferences have changed, and thus such inaction does not justify following an otherwise nonbinding interpretation that seems to conflict with enacting preferences. But where there is statutory precedent by the same court that otherwise would be binding as a matter of stare decisis, the matter is different. Then legislative inaction can be relevant because it indicates the absence of any change in enactable legislative preferences that might justify overruling the initial statutory precedent. In short, while legislative inaction cannot affirmatively establish current enactable preferences, it can sometimes rebut a claim that current enactable preferences have changed in ways that require overruling statutory precedent.

This seems the best explanation for the Supreme Court’s much-maligned 1972 decision in Flood v. Kuhn, which declined to overrule stat-

289. See, e.g., Monell, 436 U.S. at 696–99 (relying on very general inferences drawn from current legislative action).
290. See supra Part II.A (considering case where there are no reliable indicators of enacting governmental preferences and some indication of current governmental preferences).
292. Id. at 174 (emphasis added).
293. Id.
294. See supra Part VI.A.
utory precedent that for five decades had held the business of baseball
was not “commerce” subject to antitrust scrutiny. \(^{295}\) “Commerce” is not a self-defining term, but the first case announcing this interpretation probably reflected accurately enacting (1890) and then-current (1922) legislative preferences about whether the antitrust laws should apply to baseball. \(^{296}\) The main argument for overruling this interpretation in 1972 was that, because baseball had developed into a big business and other sports had been judicially denied any antitrust exemption, the current legislature would prefer to abandon the baseball antitrust exemption. \(^{297}\) But the Court observed that Congress had repeatedly rejected bills that would eliminate the baseball antitrust exemption. The only statute it enacted expanded this exemption to allow other sports to collectively bargain about television rates, and expressly stated that it did not intend to otherwise change any existing antitrust exemption or nonexemption for any sport. \(^{298}\)

Likewise, the only other bills to get out of committee (one passed by each legislative chamber at different times) would have expanded the baseball exemption by extending it to other sports. \(^{299}\) The standard critique is that such failures to act need not indicate congressional approval of the baseball exemption—it may merely mean Congress was too busy or divided to take any action. \(^{300}\) But the Court was not relying on legislative inaction to support an interpretation that was initially flawed. The Court was invoking this legislative inaction to rebut the argument that changed political preferences meant it should now abandon otherwise binding precedent that did seem to accurately reflect enacting legislative preferences. For such a rebuttal, it sufficed that there were no indications that enactable preferences had changed, and that to the extent current political preferences could be ascertained, they cut against changing the inter-

\(^{295}\) 407 U.S. 258, 282 (1972). For an example of the criticism, see Eskridge, Overruling, supra note 280, at 1381, 1385 (calling the decision “almost comical” and “silly”).


\(^{297}\) See, e.g., Eskridge, Overruling, supra note 280, at 1380–81 (collecting authorities).


\(^{299}\) Flood, 407 U.S. at 281–82; Eskridge, Overruling, supra note 280, at 1404. The Court acknowledged this baseball exemption was inconsistent and illogical because other sports had subsequently been held to be subject to antitrust scrutiny. 407 U.S. at 282–84. But there is no requirement that political preferences conform to judicial notions of consistency. See supra Part II.B. Moreover, where neither the baseball exemption, nor the other sports’ nonexemption, conflicted with any affirmative indication of current enactable preferences, it was not in fact illogical to differentiate the sports based on their reliance on different precedent, which is what the court did. See Flood, 407 U.S. at 283–84. While such reliance interests should not trump the goal of political satisfaction when political preferences fail to cut reliably in either direction, it does advance that goal to generally keep interpretations stable because that induces more behavioral reliance. See Elhauge, Preference-Eliciting, supra note 7, Part VIII.B.

\(^{300}\) See Eskridge, Overruling, supra note 280, at 1404–06.
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pretation. Thus, this was an appropriate case in which to insist, as the court did, that any override be provided by affirmative legislative action.301

Apparent inconsistencies in judicial willingness to follow statutory stare decisis or pay attention to subsequent legislative inaction have been a favorite target of academic critique. But default rule analysis indicates that this critique cannot justifiably be founded (as it generally is) merely on the facts that the statutory stare decisis is sometimes applied and sometimes is not, and that subsequent legislative inaction is sometimes deemed relevant and sometimes is not. Whether to apply statutory stare decisis often should (and does) turn on whether the statutory precedent conflicts with reliable indicators of current enactable preferences. Likewise, subsequent legislative inaction generally should not (and is not) used to justify deviating from statutory precedent that conforms to enacting preferences, but should (and is) used to rebut an argument that enactable preferences have changed in ways that justify such a deviation.

D. Evidence That Legislatures Prefer a Current Preferences Default Rule

The analysis so far is that it makes sense for legislatures to prefer a current preferences default rule, and that the actual judicial practice has been to use one when there is reliable official evidence of current enactable preferences. But is there any direct evidence that legislatures actually prefer a current preferences default rule? Not much, but what there is of it is confirmatory. Since this is the actual default rule, one would think legislatures would opt out of it if it did not maximize political satisfaction. In fact, no legislature in the United States has done so even though each has enacted a code of statutory construction.

This evidence standing alone is weak because many of these codes cover only relatively unimportant matters and even the legislatures that enacted more substantive construction codes may have never considered this issue. But the only state legislatures that have adverted to the issue have adopted elements of a current preferences default rule. Two state legislatures have directed that: “When the words of a law are not explicit, the intention of the legislature may be ascertained by considering . . . legislative . . . interpretations of the statute.”302 Similarly, another state legislature has provided that: “The construction of a statute by the Legislature, as indicated by the language of later enactments, is entitled to consideration as an aid in the construction of the statute, but is not generally regarded as controlling.”303 The fact that it is not controlling em-

301. Flood, 407 U.S. at 276, 283. Further, it can be shown that, even if the initial adoption of the baseball exemption reflected a preference-eliciting default rule, the lack of a legislative override justifies retaining that precedent absent any other demonstrable change in legislative conditions. See Elhauge, Preference-Eliciting, supra note 7, Part V.
phasizes that this is only a default rule, not a ground for changing the actual meaning of the statutory language. Two state legislatures have also adopted the default rule in favor of prevailing interpretations that the legislature elected not to alter when it enacted "subsequent laws on the same subject matter."304

Finally, many state legislatures have also adopted the interpretive rule that, when a statute is ambiguous, a court may consider the administrative construction of the statute.305 I could find no state legislature that rejected this default rule. One state legislature even adds that the court can consider an agency’s interpretation of a “similar statute.”306 As we will see next, this rule of deferring to agency interpretations can also be explained as a current preferences default rule.

VII. DEERENCE TO INTERPRETATIONS BY POLITICALLY ACCOUNTABLE AGENCIES

In all the above cases, courts are tracking political preferences directly evidenced by the most recent legislative and executive action. But sometimes, especially when there is no indication from the legislature or executive themselves, the next best indicators of current enactable preferences are the acts of a politically accountable agency. The Chevron doctrine can thus be understood as a current preferences default rule. Indeed, it turns out that this theory better explains Chevron’s justification and limited scope than prevailing theories.

A. Chevron as a Current Preferences Default Rule

Under Chevron, U.S. courts defer to agency interpretations of ambiguous statutes.307 Deference to agencies was not new, but prior to Chevron, courts sometimes said they deferred to agencies on interpretative matters only when Congress had expressly delegated interpretive authority to the agency.308 Chevron made clear that courts were bound by a default rule that, unless Congress indicates otherwise, courts must defer to interpretations by the agency charged with administering the statute.309

308. Thomas W. Merrill & Kristin E. Hickman, Chevron’s Domain, 89 Geo. L.J. 833, 833 (2001). Some areas, like labor and tax law, had longstanding deference doctrines similar to Chevron. Id. at 838-39. And in practice, deference was extensive even before Chevron. See infra note 469.
309. Id. at 833.
As a hermeneutic matter, this choice of a general default rule would be odd. Agencies may be very familiar with the statute in question, but they are not particularly skilled in legal interpretation, at least no more skilled than courts. Further, agencies have certain biases (such as a bias in favor of expanding their power) that might distort their interpretation. Courts thus seem better hermeneutic interpreters of statutory meaning.

But *Chevron* does make sense as a current preferences default rule, to cope with cases left unresolved by hermeneutic theory. In the United States, agency heads have been nominated by the President and confirmed by the Senate based largely on the acceptability of their policy views in a specific policy area. Executive interviews and Senate confirmation hearings pin down nominees on the issues likely to arise during what will be a relatively brief tenure. Consider the close questioning of John Ashcroft during his confirmation hearings, which produced commitments that help explain his later decision as Attorney General to defend the constitutionality of an affirmative action plan he had opposed as a Senator.

Agency heads are also supervised by the executive, and subject to extensive committee oversight and budgetary review in the legislature. They are normally removable by the executive, and even in independent agencies, they serve limited terms and thus depend on the executive and legislature for their reappointment. Agency heads also depend on the executive and legislature for cooperation on future initiatives, including any new legislation, executive action, or appointment of subordinates. The policy views that govern the actions of agency heads thus generally come about as close to an accurate barometer of current political preferences as courts can get. This is particularly true for agency action

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310. Although many Senate confirmation votes are unanimous, this most likely reflects the fact that the President takes Senate preferences into account before nominating. Models indicate that where the status quo lies between the preferences of the President and Senate, appointee policy views will reflect a compromise between their ideal points, and otherwise will be closer to whichever actor (President or Senate) has preferences closest to the status quo. See Kelly H. Chang, The President Versus the Senate: Appointments in the American System of Separated Powers and the Federal Reserve, 17 J. L. Econ. & Org. 319, 332–34 (2001).


313. The personal political views of agency heads may be a different matter, but what matters here are the revealed political preferences implied by what they actually do.
taken after current political forces have had an opportunity to participate. Such participation not only helps those actors directly inform agencies about prevailing political preferences, but also enables them to alert Congress when a problematic issue has arisen.\textsuperscript{314} Indeed, as we will see, an agency that acts without such an opportunity for political participation does not get \textit{Chevron} deference.\textsuperscript{315} Agencies that get \textit{Chevron} deference are thus subject to a combination of political influences by the executive, legislature, and outside political groups.\textsuperscript{316} Such agency action generally provides the best available estimate of where current enactable preferences lie.

True, agency accountability to political oversight is not perfect, in part because such oversight probably gives the President and oversight committees somewhat greater power vis-à-vis other legislative participants than they normally possess in securing enactments.\textsuperscript{317} Thus some deviation between agency action and current enactable preferences must be expected. But the deviation is not that great. After all, Presidents and oversight committees also have disproportionate influence over what is enactable because of their veto and gatekeeping powers.\textsuperscript{318} Further, studies show that few oversight committees are in fact statistical outliers from median congressional preferences, and those who more accurately reflect congressional preferences are more likely to hold oversight hear-

\textsuperscript{314} See Kagan, supra note 312, at 2258 (noting that procedures force agencies to respond to policy preferences of groups other than those favored by the President, and summarizing “fire alarm” theory of congressional oversight); McNollgast, The Political Origins of the Administrative Procedure Act, 15 J.L. Econ. & Org. 180, 181, 185–86, 198–99 (1999) [hereinafter McNollgast, APA] (same). The authors collectively dubbed McNollgast theorize that the purpose of imposing administrative procedures that give interested groups the ability to raise a “fire alarm” to Congress is to make sure the agency does not deviate from the preferences of the enacting coalition. McNollgast, Structure and Process, supra note 88, at 432–34, 441–42. But this theory fits poorly with the actual Administrative Procedure Act, which “gives exactly the same participation opportunity to groups that opposed the original legislation as to those who supported it . . . . And when groups that oppose agency action trip legislative fire alarms, the fire will be doused (or fed or ignored) by the existing power balance in the legislature rather than by the coalition that existed at the time the legislation was enacted.” Michael Asimov, On Pressing McNollgast to the Limits, Law & Contemp. Probs., Winter 1994, at 127, 131.

\textsuperscript{315} See infra Part VII.C.

\textsuperscript{316} See Kagan, supra note 312, at 2254–60, 2264–69, 2274–2319 (observing that while different theories emphasize presidential, congressional, and interest group influence respectively, the combined literature indicates that all of them have real influence on agency action).


\textsuperscript{318} See supra Part III.B.
The evidence also shows that, to the extent committees are outliers, it is in the opposite direction as the President, a dialectic that models prove actually results in the optimal representation of median legislative preferences—better than if committees mirrored median legislative preferences. In any event, the question is not whether agencies perfectly reflect current political preferences. The question is whether agencies generally reflect current enactable preferences better than judicial estimates about where those preferences lie. If they do, then political satisfaction can be maximized by a general default rule of deferring to agency interpretations.

Compared to agency heads, judges were appointed a long time ago, with far less inquiry into their policy views, whose relevance is limited neither to a specific policy area nor to a short period of time that makes most relevant issues foreseeable. Judges are also politically insulated. They serve life terms, are not removable, and have salaries that cannot be lowered. They depend little on budgetary support, which anyway as a matter of practice is unaffected by their individual decisions. Perhaps more important, they are insulated by judicial norms and ethical canons from general contact with, and information flow from, political officials and groups. Judges can thus generally ascertain current political preferences only from a cold record of legislative action. Absent the sort of recent legislative action described in Part VI, such a record can be quite unrevealing about where current enactable preferences lie.

The details may differ in other nations, but the general point likely remains valid. Being more accountable and informed by current political preferences than the judiciary, agency action is more likely to accurately reflect current enactable preferences than judicial estimates about what current political forces would enact. Indeed, agency responsiveness to

320. Id. at 375–79, 381–85.
322. Even if Congress wanted to lower judicial budgets in response to adverse judicial decisions, this would be a poor tool because there are so many judges. Congress would thus have to punish all judges to punish one, and no single judge would have much incentive to render cooperative decisions to help judges collectively protect their budgets. See Elhauge, Interest Group Theory, supra note 21, at 85–86.
323. In contrast, the Administrative Procedure Act does not bar “ex parte contacts between agency personnel and outside persons in notice-and-comment rulemaking.” See Kagan, supra note 312, at 2280–81 n.142.
324. It is most revealing when it consists of actual legislative action, but least revealing when it consists of statements by some of many legislators. See supra Part VI. A related advantage of agency deference is that it provides a single source for the best estimate of current preferences, rather than a multiplicity of possible conflicting sources.
325. One might wonder why, if agencies are generally better at estimating current preferences than judges, legislatures do not simply create an Agency of Statutory Interpretation, to decide all interpretive issues. The answer is likely that, as detailed below, an important part of the judicial role is to deny deference when the agency does not seem likely to be reflecting current preferences, such as when: (1) it makes its claim in a way
enactable preferences should even be stronger in parliamentary systems where the agency does not enjoy the protection from legislative overrides sometimes provided by deadlock between the President and Congress.\footnote{326}{Cf. Kagan, supra note 312, at 2347–48 (noting evidence that independent agencies, which are less likely to be protected from overriding legislation by Presidential veto, are more responsive to Congress).} By following agency interpretations to resolve statutory indeterminacies when the record leaves statutory meaning unknown, courts thus follow a default rule that is best calculated to minimize current political dissatisfaction.

The language of \textit{Chevron} tracks this Article’s distinction between hermeneutic matters (on which there is no deference) and the policy choice of how to resolve the indeterminacy (on which there is deference). When courts can divine the meaning of a statute, \textit{Chevron} provides that this meaning must be followed notwithstanding contrary agency interpretations.\footnote{327}{Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).} On the other hand:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.\footnote{328}{Id. at 865–66. For better flow, I have changed the order of these quotes.}

This language justifies the \textit{Chevron} default rule because of the rule’s ability to track current political preferences by following the interpretations of agencies that were best positioned to ascertain where the current balance of political interests lay. The \textit{Chevron} Court squarely considered the alternative default rule—that such matters should be left to judicial judgment—and rejected that rule as insufficiently responsive to current political preferences:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the ba-
sis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”329

The Chevron Court also made clear that the proper default rule was dynamic. The Court chastised the appellate court for adopting “a static judicial definition” of the statutory term “when it had decided that Congress itself had not commanded that definition,” and rejected the argument that deference to agency interpretations should not apply where, as here, the agency had changed its interpretation over time.330 Again, the distinction between hermeneutic and default rule analysis helps in understanding the point. Changing an interpretation over time does undermine the credibility of a hermeneutic judgment regarding statutory meaning, for it suggests the agency itself is inconsistent or uncertain about what that meaning is. But changing an interpretation does not undermine a default rule judgment about where current political preferences lie, for an accurate reading of those would change over time.

Also consistent with this Article’s analysis, the Court rejected dynamic statutory interpretation (by agencies or courts) in cases where the enacting legislature’s meaning was clear.331 It thus rejected the proposition, advanced by some scholars,332 that changing political preferences should change statutory meaning itself. Instead, this current preference default rule is limited, as is default rule analysis generally, to cases where statutory meaning is unclear.

B. Prior Theories of Chevron

Since most statutory interpretations today are administrative ones, understanding the proper justification for, and limits on, the Chevron doctrine is vital to understanding modern interpretive practice. And a rich literature today provides theories of Chevron. Each existing theory, however, in the end proves unsatisfactory and fails to explain the full pattern of which agency interpretations do and do not get judicial deference. Current preferences default rule analysis provides an improved way of justifying and explaining the scope of the Chevron doctrine.

1. Theories About the Source of Law. — One topic is what source of law underpins the Chevron doctrine. As Thomas Merrill and Kristin Hickman summarize in their recent tour-de-force on Chevron’s domain, the current

329. Id. at 865–66.
330. Id. at 842, 863–64.
331. Id. at 842–43.
332. See supra text accompanying notes 164–165, 216–220.
literature identifies three possible sources. One possible source is constitutional separation of powers and anti-delegation norms. But Chevron does not cite any constitutional provision or rest on any constitutional argument, and (if anything) seems to enhance rather than deter delegation of legislative responsibilities to agencies. Thus, few scholars are convinced that the source of law for Chevron is constitutional.

A second theory, to which most subscribe, is that when Congress enacts an ambiguous statute and is silent about whom it wants to resolve that ambiguity, it implicitly intends to delegate interpretive authority to the administering agency. The problem is that even adherents to this theory—like Merrill and Hickman, and Chevron’s leading judicial champion, Justice Scalia—acknowledge that the evidence of such enacting congressional intent is “weak” and even “fictional.” At the time Chevron was decided, Congress had no reason to think that enacting a vague statute delegated interpretation to agencies rather than courts, and had never indicated any disapproval of the less deferential judicial interpretation that then prevailed. Moreover, Chevron itself acknowledged that statutory ambiguity might be created “inadvertently” because Congress “simply did not consider the question.” Nor had Congress given any other affirmative indication of an intent to delegate interpretive decisions to agencies.

To the contrary, the most relevant statute Congress enacted, the Administrative Procedure Act, provides an opposite indication by stating that courts “shall decide all relevant questions of law [and] interpret constitutional and statutory provisions” when they review agency action. Further, McNollgast’s political analysis shows the enactment of the Administrative Procedure Act was motivated by a congressional desire to constrain agency discretion. Thus, it seems dubious to conclude that the enactment of a vague statute itself indicates a congressional intent to give agencies discretion over its interpretation.

But seeing the issue as a current preferences default rule makes more sense of Chevron’s implicit interpretation of the Administrative Procedure Act. For on McNollgast’s analysis, what the New Deal Congress did was enjoy the benefits of agency discretion when it was in power (thus

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333. Merrill & Hickman, supra note 308, at 863.
334. Id. at 864–65 (summarizing the literature); see also Manning, Textualism as Nondelegation, supra note 76, at 706–14 (offering such an argument).
336. Id. at 870–71.
337. Id. at 871; Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517; see also Farina, supra note 317, at 468–76 (detailing the weaknesses of basing Chevron on legislative intent).
338. Merrill & Hickman, supra note 308, at 871.
influencing the agencies) and then, when it saw its dominance ending, try to lock in its political gains by constraining that discretion in the future.\textsuperscript{342} This is a special case of the general situation (described above) when a legislature enjoys the benefits of a current preferences default rule, then at the end of its reign tries to enact an interpretive rule adopting an enacting preferences default rule for future cases.\textsuperscript{343} My prediction that courts would treat such an opt-out with hostility is consistent with the narrow reading given the Administrative Procedure Act by the \textit{Chevron} doctrine, and provides a normative justification for that otherwise anomalous reading.

A third theory is that \textit{Chevron} is a species of federal common law, a judicially devised canon of interpretation.\textsuperscript{344} Merrill and Hickman argue against this theory on the grounds that it: (1) cannot explain why \textit{Chevron} is mandatory, (2) does not explain how to prioritize the \textit{Chevron} canon against other canons, (3) fits poorly with the normal understanding that canons are used to divine statutory meaning, (4) does not match the language in court opinions that refers to implicit congressional desires, and (5) robs \textit{Chevron} of its normative force.\textsuperscript{345}

Understanding \textit{Chevron} as default rule, however, provides a fourth source of law that avoids the weaknesses of the second and third approaches. Like the second theory, a default rule approach rests on a view about what Congress wants. But it does not rely on any strained conclusion that the enacting Congress “intended” any delegation to agencies by failing to cure all ambiguities in its statute. Rather, its justification is that, where the enacting government has left no clear intent, it would want courts to choose the default rules that minimize political dissatisfaction, and that \textit{Chevron} is such a rule. Nor is the Administrative Procedure Act a problem because the “relevant questions of law” that courts must resolve to “interpret . . . statutory provisions” include deciding which default rule to choose when statutes are ambiguous, so that when courts choose \textit{Chevron} they are deciding the relevant legal question of statutory interpretation.

Like the third theory, the default rule approach is judicially created. But because it is created based on a theory of what Congress would want if it thought about the general default rule issue, it is broadly consistent with the language in court opinions that refers to implicit congressional desires. This also explains why \textit{Chevron} is mandatory and has such normative force: it conforms to the ultimate aim in statutory interpretation of

\textsuperscript{342} Id. Further supporting this theory is an APA provision establishing the code of construction that future statutes should not be interpreted to modify the APA unless they did so expressly. 5 U.S.C. § 559.

\textsuperscript{343} See supra Part V.E.5.

\textsuperscript{344} Merrill & Hickman, supra note 308, at 867–68 & n.191 (collecting sources).

\textsuperscript{345} Id. at 868–70 & n.197. Merrill and Hickman also worry that this theory is hard to square with the APA, but they ultimately concede that understanding \textit{Chevron} as a canon of construction avoids this problem. Id. at 868.
maximizing the satisfaction of enactable political preferences. It does fit poorly with the notion that statutory canons are exclusively about divining statutory meaning, but fits well with this Article’s thesis that these canons can generally be better understood as default rules calculated to maximize political satisfaction when statutory meaning is ambiguous.\footnote{346. See also Elhauge, Preference-Eliciting, supra note 7 (describing how many canons are instead designed to elicit more precise indications of political preferences).}

This theory also provides an overarching structure and objective to prioritize what otherwise seems like a mélange of conflicting canons.

2. \textit{Normative Theories}. — Other theories focus less on explaining the source of law for \textit{Chevron} than on establishing a good policy justification for it. One theory, well developed by Peter Strauss, is that \textit{Chevron} deference furthers important interests of uniformity in an administrative system where diverging lower court interpretations would otherwise be the norm because the U.S. Supreme Court decides relatively few cases each year.\footnote{347. Peter L. Strauss, One-Hundred-Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1118–29 (1987). At the time it was 150 cases a year. Now it is about seventy-five, and most of these do not involve reviews of agency interpretations.} This is certainly an important virtue of agency deference, and does ameliorate the problems resulting from the agency practice of sometimes declining to follow circuit interpretations in other cases until the agency has secured review in the Supreme Court.\footnote{348. Under this practice of nonacquiescence, the agency declines to follow an appellate interpretation in other circuits or even in the same circuit unless the relevant persons were parties to the adjudicated appeal. Id. at 1110–13.}

But the fit between uniformity and \textit{Chevron} is not great. Uniformity does not explain why, as discussed in Section C below, the Supreme Court denies \textit{Chevron} deference to many sorts of agency interpretations that would confer the necessary uniformity, but lack sufficiently reliable opportunities for political participation. Nor does uniformity explain why the U.S. Supreme Court itself defers to agency interpretations, or why there should be agency deference in less fractured state or foreign appellate systems. Uniformity also does not justify deference to agency decisions that are either formally or de facto appealable only to one intermediate appellate court (like the Federal Circuit or the D.C. Circuit), which can thus create national uniformity in the appellate system.\footnote{349. See Richard L Revesz, Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit, 76 N.Y.U. L. Rev. 1100, 1103 (2001) (noting that the D.C. Circuit has exclusive venue to review many agency decisions and hears one third of appeals from federal agencies).} Further, uniformity cannot explain why the appellate courts do not also defer on whether a statute has an unambiguous meaning and what that meaning is, issues on which an agency decision can also cure the disuniformity that might otherwise result from conflicting circuit decisions. Finally, if uniformity were the goal, then it could equally be advanced by the alternative default rule of interpreting all statutory ambiguities to...
mean that the statute has the most narrow regulatory effect possible.\textsuperscript{350} We need some theory to explain why the uniformity-promoting default rule chosen was instead to defer to agencies. The structure of the doctrine thus leaves the definite sense that while greater national uniformity in the U.S. appellate system is an important benefit of \textit{Chevron}, it is a subsidiary benefit rather than the driving force behind the doctrine.

This points to another advantage to a current preferences default rule approach. It frees \textit{Chevron} from just being a parochial theory limited to the particular case of the United States. The theories above depend to varying degrees on peculiarities of the U.S.’s history, constitutional or statutory provisions, agency structure, appellate system, or practice of judicial common law. They thus render \textit{Chevron} a doctrine to some degree limited to a particular nation under particular legal circumstances. The analysis here, in contrast, provides a more general justification for judicial deference to statutory interpretations by politically accountable agencies, a justification that would extend to legislation enacted elsewhere in the world or by political subunits of the United States. For example, given the fact that many state legislatures have adopted (and to my knowledge none has rejected) the \textit{Chevron} rule,\textsuperscript{351} a satisfying theory for \textit{Chevron} should not rest on peculiarities of the limited docket of the U.S. Supreme Court and its inability to police circuit conflicts in statutory interpretation.

The leading alternative theory for \textit{Chevron} is that agencies have greater policy expertise than courts. But the legal realists’ hope that legal ambiguities could be resolved by objective policy expertise has long ago grown quaint. Although expertise can theoretically inform decisionmakers about the likely consequences of a given interpretation, even in theory it cannot resolve which statutory interpretation has the “best” policy implications. Such ultimate resolution depends on political preferences about how to weigh those consequences. Both theory and experience have “sapped faith in the existence of an objective basis for social choice.”\textsuperscript{352} In practice, it is rare to find a field of social policy where there are not experts on opposing sides of an issue, each retained by a rival camp, undermining any claim to an objective expert resolution. This is true even for many scientific or empirical questions.\textsuperscript{353} Indeed, on probably most issues the two U.S. political parties are divided less by differing normative assessments than by contrary views (informed by rival expert academics and think tanks) about what empirical consequences

\textsuperscript{350} See Elhauge, Preference-Eliciting, supra note 7, Part VIII.C (considering this alternative default rule).
\textsuperscript{351} See supra Part VI.D.
\textsuperscript{352} Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1683 (1975); see also Farina, supra note 317, at 524 (collecting sources).
will flow from certain policy choices. For example, rival empirical views seem to largely dominate policy debate on such contemporary issues as rent control, free trade agreements, global warming treaties, ballistic missile defense, the patients’ bill of rights, Medicare reform, tax cuts, and the creation of individual Social Security accounts. Further, many actual agency resolutions of ambiguities depend less on policy than on linguistic or hermeneutic claims on which they are probably less expert than courts. Finally, even if objective policy expertise could resolve the relevant issue, agencies may not use it. For agencies are in fact subject to external political influences, or internal desires to expand their power or express their own ideological preferences, any of which might distort expert judgment.354

In short, rather than reflecting objective expertise, “the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy.”355 This is troubling under an expertise model. But under a current preferences default rule, the fact that the “required balancing of policies is an inherently discretionary, ultimately political procedure,”356 does not undermine Chevron deference; it justifies it.

None of this is to say that agency expertise and uniformity is irrelevant. Agencies have substantive expertise that helps them resolve how any given political preferences should apply to particular facts, and are also better placed to coordinate, prioritize, or trade off conflicting regulatory preferences compared to courts, which see only one statutory provision or fail to see how regulating one problem can worsen others.357 But such factors are properly taken into account under the weaker deference doctrine of Skidmore, which explicitly depends on the degree of agency expertise, care, persuasiveness, consistency over time, and uniformity across the agency.358 All these are logical features of a doctrine based on

354. See William A. Niskanen, Jr., Bureaucracy and Representative Government 36–42 (1971) (arguing that bureaucrats try to maximize their budget and power); Elhauge, Interest Group Theory, supra note 21, at 42 (collecting literature on agency capture); Kagan, supra note 312, at 2354 (noting that instead of applying expertise, agencies might respond to “interest group lobbying, bureaucratic (but nonexpertise-based) policy views, or bureaucratic protection of turf or other self-interest”); Stewart, supra note 352, at 1682–83 (“To the extent that belief in an objective ‘public interest’ remains, the agencies are accused of subverting it in favor of the private interests of regulated and client firms.”); John Shepard Wiley, Jr., A Capture Theory of Antitrust Federalism, 99 Harv. L. Rev. 713, 723–28 (1986) (collecting literature on agency capture).

355. Stewart, supra note 352, at 1683.

356. Id. at 1684.


policy expertise, for one would expect judgments based on objective expertise to be made carefully and persuasively, and to be consistent over time and uniform across the agency (absent changed circumstances that should be evident from the record).

But these features have little to do with the actual *Chevron* doctrine. While *Chevron* does refer to the fact that “[j]udges are not experts in the field,” its analysis ultimately rests on the notion that agencies will rely on political determinations of wise policy and how best to trade off conflicting interests. Unlike *Skidmore*, *Chevron* was untroubled by (indeed almost celebrated) the fact that the agency position changed over time with changing political preferences rather than sticking to an objectively expert opinion. Unlike *Skidmore* deference, *Chevron* deference does not depend on any showing of agency expertise, or the care or persuasiveness of agency decisions. Instead, as shown in the next section, *Chevron* deference depends mainly on the opportunities for political participation in the relevant agency decision. Without such an opportunity, *Chevron* deference is denied even though the agency decision is just as expert and uniform as decisions that get *Chevron* deference. These characteristics would poorly fit a doctrine that tracks agency expertise or uniformity, but make sense if the doctrine instead tracks current political preferences.

C. Explaining *Chevron*’s Limits

The logic of current preferences default rules also suggests limits on deference to agency interpretations. These limits help explain why the Court defers to some agency interpretations and not others—an inconsistency that has often baffled commentators under prevailing theories. Understanding *Chevron* as a current preferences default rule explains these limits better than prior theories can.

One limit is that courts do not defer to agency interpretations that just reflect positions taken in litigation briefs, on the ground that they were not arrived at in the normal course of its administration or exercise of rulemaking powers. This case law would not make much sense if

359. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); see also id. (noting that the particular regulatory scheme was “technical and complex”).

360. Id. at 865–66, quoted supra text accompanying note 50; Merrill & Hickman, supra note 308, at 855 (agreeing that while *Skidmore* is based on agency expertise, that plays little if any role under *Chevron*).

361. See supra Part VII.A. Agency uniformity is somewhat different in that, while it is not a sufficient condition for *Chevron* deference, it may be a necessary condition. See infra Part VII.C.

362. A different issue is raised when Congress expressly delegates agency authority to interpret a statute without any political input. Such agency action does not fit within the default rule provided by *Chevron*, but Congress has in these circumstances opted out of that default rule, perhaps because it finds the expertise model particularly attractive for that agency.

agency expertise were the basis for deference, for an agency can provide just as much expertise and reasoned decisionmaking during litigation as outside of it. Nor does it fit well with a concern about uniformity, since top-level agency decisions to take a position in litigation could confer just as much uniformity as any other top-level agency decision. But this distinction does make sense if the real ground is deference to current political preferences. Unlike positions taken in litigation briefs, agency proceedings that allow regular opportunities for legislative oversight and political participation provide grounds for some reasonable confidence that the agency position reflects current political preferences. This is why the Supreme Court does defer when, in response to litigation, the agency promulgates a rule through notice-and-comment rulemaking. Although this too reflects a litigation position, such a rulemaking process affords an opportunity for political input that makes it a more reliable indicator of current preferences.

Similarly, the courts have never adopted the position, cleverly argued by Dan Kahan, that courts should give Chevron deference to Department of Justice interpretations of criminal law. The Department of Justice is undoubtedly expert, and can render nationally uniform interpretations through enforcement manuals or other means in advance of undertaking any litigation. Such decisions thus need not fall within the rule against deferring to agency interpretations taken during litigation, and deference would seem warranted if uniformity or expertise were the true basis of Chevron. However, far from rendering itself accountable to prevailing political preferences, the Department of Justice proudly takes great pains to insulate itself from political interference, especially with respect to criminal prosecutions. There is accordingly no reason to think that Department of Justice interpretations bear any relation to current political preferences. Thus, they do not fall within a current preferences default rule, which explains why they do not in fact get Chevron deference even

Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (“We have never applied [Chevron deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”); Gregory v. Ashcroft, 501 U.S. 452, 485 n.3 (1991) (White, J., concurring) (denying deference to EEOC’s litigation position). In contrast, the courts do give Seminole Rock deference to agency interpretations of their own regulations even though those interpretations are only advanced in litigation briefing. See Auer v. Robbins, 519 U.S. 452, 461–63 (1997). Although, for Justice Scalia, Auer indicated a change in the law on Chevron deference, the Supreme Court rejected that view in Mead, 533 U.S. at 238 (denying Chevron deference to agency statutory interpretation that was reflected in litigation briefs).

365. See infra notes 378–391 and accompanying text (discussing this more fully).
367. Id. at 495–96, 518–20.
though the uniformity and expertise rationales would suggest otherwise.\footnote{Id. at 490; Merrill & Hickman, supra note 308, at 879. Outside of criminal law, Department of Justice expertise and uniformity instead justify weaker Skidmore deference. Kahan, supra note 366, at 509. Inside criminal law, however, there are grounds for a preference-eliciting default rule that explains why, rather than deferring to the Department of Justice, the courts instead apply a rule of lenity that leans against it. See Elhauge, Preference-Eliciting, supra note 7, Part III.A.}

More generally, the U.S. Supreme Court has recently made clear that it will not grant \textit{Chevron} deference to agency interpretations contained in agency letter rulings, opinion letters, policy statements, agency manuals, and enforcement guidelines.\footnote{United States v. Mead Corp., 533 U.S. 218, 237 n.17 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000). Nor would \textit{Chevron} deference be triggered by more informal statements by agency officials in speeches, press releases, or press conferences. See Merrill & Hickman, supra note 308, at 866.} Again, from an expertise or uniformity perspective, this is puzzling, since such agency statements might well reflect an expert judgment applied uniformly throughout the agency. However, these sorts of agency statements can be made without allowing for notice to, and participation by, interested parties, which in turn would likely trigger more serious legislative oversight and executive involvement.\footnote{Merrill & Hickman, supra note 308, at 886 & n.262 (collecting cases showing that such statements, manuals, and guidelines do not require notice and comment).} They thus do not ordinarily provide a sufficiently reliable assurance that the agency decision reflects prevailing political preferences.

The Supreme Court has arrived at a different formulation to reconcile its case law: to get \textit{Chevron} deference, agency action must have the “force of law.”\footnote{Mead, 533 U.S. at 227±31; Christensen, 529 U.S. at 587.} This label is hardly self-defining. \textit{Mead} held that agency action qualifies if it involves notice-and-comment rulemaking, formal adjudication, or “other” cases where agencies speak with the force of law, and cites only one example (discussed below) for this residual “other” category.\footnote{Mead, 533 U.S. at 229±31; Christensen, 529 U.S. at 587.} This seems hard to square with the ordinary formalistic understanding, ably championed by Merrill and Hickman, that actions have the “force of law” if, of their own force, they can command behavior or impose penalties.\footnote{See Merrill & Hickman, supra note 308, at 881.} True, this formalistic understanding is consistent with the lack of deference given to agency positions taken during litigation, in Department of Justice manuals, or in opinion letters and the like, each of which normally requires the agency to go to court in order to have any coercive effect on private parties.\footnote{Id. It also generally explains \textit{Chevron}’s inapplicability to agencies which perform only funding, investigation, or prosecution. Id. at 837.} But, as Merrill and Hickman themselves argue, their formalistic force of law notion would also extend deference to many forms of rulemaking undertaken without notice and comment, and deny deference to formal agency adjudications.
that are not self-executing.\textsuperscript{375} Yet the Court shows no sign of doing so. It continues to define the rulemaking that has force of law as “notice-and-comment rulemaking” and the adjudication that has the force of law as “formal” adjudication.\textsuperscript{376} True, \textit{Mead} left open a small residual category illustrated by one case that involved informal rulemaking,\textsuperscript{377} but it made clear that the most significant factor was the existence of a “notice-and-comment” procedure.\textsuperscript{378} In justifying its actual holding denying deference, \textit{Mead} repeatedly stressed the lack of any broad-based notice-and-comment opportunity.\textsuperscript{379} Likewise, \textit{Christensen} denied deference based in part on the proposition that an agency guideline that is not subject to “public notice and comment” is entitled only to “some deference.”\textsuperscript{380} And the Court has repeatedly deferred to interpretations rendered through formal agency adjudications that were not self-executing.\textsuperscript{381}

Understanding \textit{Chevron} as a current preferences default rule can make sense of these apparent anomalies. While different forms of rulemaking have equally coercive effects on third parties, it is only rulemaking that is conducted after notice and comment that gives some reasonable assurance that the agency surveyed the current political preferences before acting. The notice-and-comment process also alerts congressional members and the President’s political advisors that an issue is coming up that they may be interested in influencing, or at least alerts private parties who then alert these political officials. Likewise, formal adjudications require hearings that give the immediately affected parties an opportunity to be heard, and generally permit third parties to participate as well.\textsuperscript{382} A recent case apparently endeavors to cut back on the prior doctrine requiring agencies to allow intervention by third parties.\textsuperscript{383} But in practice, formal adjudications provide affected parties with opportunities to make their political views known either directly or by alerting supportive members of the political branches. Thus, although some formal adjudications do not have the force of law in the formalistic sense, they do satisfy the conditions for a current preferences default rule, and thus merit \textit{Chevron} deference.\textsuperscript{384}

\begin{itemize}
\item \textsuperscript{375} Id. at 846–47, 890–92.
\item \textsuperscript{376} \textit{Mead}, 533 U.S. at 229–31; \textit{Christensen}, 529 U.S. at 587.
\item \textsuperscript{377} See infra notes 398–401 and accompanying text (discussing other indicia that this example fits a current preferences default rule).
\item \textsuperscript{378} \textit{Mead}, 533 U.S. at 231.
\item \textsuperscript{379} \textit{Mead}, 533 U.S. at 223–24, 233.
\item \textsuperscript{380} \textit{Christensen}, 529 U.S. at 587 (quoting \textit{Reno v. Koray}, 515 U.S. 50, 61 (1995)).
\item \textsuperscript{381} Merrill & Hickman, supra note 308, at 838 n.23, 890–92 (collecting cases contrary to their position).
\item \textsuperscript{382} See 5 U.S.C. §§ 556–557 (2000) (providing requirements for formal adjudication); Merrill & Hickman, supra note 308, at 884–86.
\item \textsuperscript{383} See Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n, 194 F.3d 72, 79 (D.C. Cir. 1999) (suggesting that the cases collected in Kagan, supra note 312, at 2271 n.92, are no longer good law).
\item \textsuperscript{384} An alternative explanation is that when Congress authorizes agencies formally to adjudicate cases, it is expressly delegating to the agency the authority to make those
\end{itemize}
Ordinary formalistic notions of when agency action has the force of law are also hard to square with Mead’s result, which denied deference to a Customs ruling letter that imposed a duty before certain goods could be imported, even though by statute and regulation that ruling was “binding” on all Customs Service personnel. The letter ruling thus had the concrete coercive effect of restricting importers’ freedom to import the goods without paying a duty. Indeed, the effect was equivalent to a court injunction, which no one would deny has the force of law under ordinary understandings. The fact that the agency reserved the right to change its rulings in the future, although noted by the Mead Court, does not reduce their formalistic force of law until changed, any more than a trial court injunction could be said to lack the force of law just because it might be modified in the future by appellate courts or the trial court itself. Moreover, Chevron itself stressed the importance of allowing agencies the flexibility to change their interpretations over time, and thus mandated deference even though the agency had changed its interpretation in the past and might do so again in the future. “[C]hange is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” An agency interpretation thus clearly need not be regarded as binding on the agency in the future to merit Chevron deference.

The denial of deference in Mead instead rested on an entirely different notion of what the “force of law” meant. That notion requires an agency position articulated as a general rule uniformly applied by the agency to a defined class of persons, as well as the serious solicitation of input, as through notice-and-comment rulemaking, by the members of the affected class. In addition to the lack of any notice-and-comment period, the Mead Court stressed that the agency rendered 10–15,000 letter

statutory interpretations that are incident to that adjudication. Under this explanation, even if such agency adjudications would not by themselves fit within a current preferences default, Congress has opted out of that default rule by enacting the statutory provisions expressly providing for such adjudication. The Court cases finding Chevron applicable to agency adjudications have in fact involved strong evidence that Congress was delegating interpretative authority to the agency adjudications. See, e.g., INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999).

386. Id.
387. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984); Mead, 533 U.S. at 247 (Scalia, J., dissenting) (As Chevron itself held, the Environmental Protection Agency can interpret ‘stationary source’ to mean a single smokestack, can later replace that interpretation with the ‘bubble concept’ embracing an entire plant, and if that proves undesirable can return again to the original interpretation.”).
ruleds a year through forty-six separate branch offices. Further, agency regulations provided that third parties would not receive notice of any change in letter rulings and should not rely on them or “assume that the principles of that ruling will be applied in connection with any [other] transaction.” Such agency decisions, although having an individualized coercive effect on the recipients of the letter rulings, could not be said to have the force of a generally applicable rule of law for a class of parties. Instead, *Mead* indicated that to get *Chevron* deference the agency must have and be exercising the authority “to make rules carrying the force of law,” which the Court concluded must “bespeak the legislative type of activity that would naturally bind more than the parties to the ruling.” The Court did not mean to require formal rulemaking, since it recognized that principles articulated in agency adjudication could suffice. But the Court did mean to exclude individualized arbitrations that bound only the parties to them and failed to create any general rule applicable in other cases.

This distinction between individualized determinations and rulemaking for a general class of persons is entirely understandable from a current preferences perspective. Individualized determinations cannot be said to reflect the current political preferences of any general set of interested parties. One-shot individualized interpretations are also unlikely to provoke any legislative oversight. They thus do not suffice to justify judicial application of a current preferences default rule, which once adopted would create an interpretation that would be binding on the general class of affected persons.

*Mead* thus offers an interesting lesson about uniformity. The fact that an agency position creates national uniformity is not, as noted above, a sufficient condition for *Chevron* deference. *Mead* itself noted as much when it said that even when an agency ruling was precedent for other agency decisions, as with interpretive rules, that did not suffice to confer *Chevron* deference. But *Mead* indicates that agency uniformity is probably a necessary condition. This makes sense if the *Chevron-Mead* doctrine reflects a current preferences default rule. Agency uniformity may not reflect prevailing political preferences, and thus should not suffice for deference. But uniformity is a necessary condition for *Chevron* deference because, if the agency position is not uniform across the nation, it cannot be considered an accurate manifestation of national political preferences.

*Chevron* deference in this sense is an expression of *Mead* deference.

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390. Id. at 225 (quoting 19 C.F.R. § 177.9(c)); see also id. at 233 (“[A] letter’s binding character as a ruling stops short of third parties; Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued . . . .”).
391. Id. at 226–27, 232 (emphasis added).
392. Id. at 232–33.
393. This also explains something else difficult to explain under formalistic force of law notions: why decisions by administrative law judges that are appealable to higher levels in the agency should not get *Chevron* deference even though they can, unless appealed,
not binding in other cases has serious uniformity disadvantages compared to interpretations by an appellate system, especially one that directed appeals through a nationwide Court of International Trade to a single Federal Circuit.\footnote{394}{See Mead, 533 U.S. at 224–25.}

Justice Scalia disagreed in a vehement dissent, taking the position that an authoritative (and thus uniform) agency position had been taken because the agency head signed the brief defending the interpretation in court.\footnote{395}{Id. at 256–57, 258 & n.6, 259–60 (Scalia, J., dissenting).} But the Court has never accepted that position,\footnote{396}{See id. at 238 & n.19; see also supra note 363 and accompanying text.} and seeing Chevron as a current preferences default rule helps us understand why. Part of the explanation, as noted above, is that positions taken in litigation briefs are less likely to reflect a solicitation of political views. But Mead illustrates a further point. If the Court had deferred to the interpretation, then in the future any one of the forty-six branch office interpretations would have to be considered binding in court if the agency head later proved willing to defend it. Under this alternative rule, an agency head that generally committed herself to a strategy of defending interpretations by her forty-six branch offices would create a system of agency interpretations that were binding even though there was no reasonable assurance they reflected current political preferences. The Chevron-Mead doctrine instead seems to require that the agency provide the assurance that its interpretations reflect prevailing national preferences before it imposes those interpretations on others.\footnote{397}{See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (stating that courts cannot accept “post hoc rationalizations” for agency action).}

Understanding Chevron as a current preferences default rule also helps provide some content to its residual “other” category of decisions deemed by Mead to have the “force of law.” The only example the Court cited was a “deliberative conclusion” by the Comptroller of the Currency.\footnote{398}{Mead, 533 U.S. at 228–31 & n.13 (citing NationsBank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57 (1995)).} This decision had two noteworthy differences from Mead. First, it was a top level decision by the head of the agency, under a system whereby the Office of the Comptroller of the Currency itself decided whether bank applications to expand their activities were legally “permissible.”\footnote{399}{NationsBank, 513 U.S. at 254–55.} Second, the agency head’s decision reflected his “deliberative conclusions” about what banks could legally do, was formally manifested in his decision to grant the bank application, and was not taken during independently command behavior and impose penalties. Merrill and Hickman gamely argue that such decisions do not have the force of law because they do not bind the agency in the future. See Merrill & Hickman, supra note 308, at 908. But this seems inconsistent with their earlier definition of when actions have the force of law, id. at 881, as well as with ordinary notions of when judicial decisions have the force of law, not to mention with Chevron’s general willingness to mandate deference for interpretations the agency does not consider binding on itself in the future. See supra notes 330, 361 and accompanying text.
litigation. This case thus did not raise the same concerns as in Mead about disuniform agency interpretations that were not based on any reflection of national political preferences. Similarly, two other cases that Justice Scalia in dissent bemoaned were inconsistent with Mead did involve opinion letters or guidelines. But they were not one-shot opinion letters that might reflect agency disuniformity or a failure to test the interpretation against prevailing political preferences. Instead, they were cases involving multiple opinion letters and guidelines that clearly reflected a uniform national position by politically accountable agencies, and were thus amenable to legislative oversight.

One could try to rationalize all these distinctions by referring to an implicit congressional intent. The Mead Court itself referred to claims about what Congress “would expect” or “meant” when it created agency power that did not satisfy the Court’s “force of law” test. But efforts to explain Chevron by reference to enacting legislative intent are generally strained, and nowhere more so than in Mead itself where the most direct indicator of legislative intent was a statutory provision that cut the other way by providing that the agency decisions must be “presumed to be correct” on judicial review. Moreover, as Justice Scalia pointed out,

400. Id. at 256–57.
401. Mead, 533 U.S. at 253–54 (Scalia, J., dissenting) (citing Mead Corp. v. Tilley, 490 U.S. 714, 722 (1989) and Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 642–43, 647–48 (1990)). Justice Scalia mistakenly stated that the latter case involved only a notice of restoration, but in fact the Court pointed to three separate opinion letters that preceded the notice. Id. at 253. Moreover, the notice of restoration itself might be regarded as an agency adjudication within Mead.

402. Tilley, 490 U.S. at 722 (detailing how three agencies—the Pension Benefit Guaranty Corporation, the IRS, and the Department of Labor—all agreed on the relevant statutory interpretation in various opinion letters and guidelines written in advance of litigation); LTV, 496 U.S. at 642–43, 647–48 (invoking a consistent uniform agency interpretation evidenced by three separate opinion letters before the notice of restoration challenged in the case). The only two other cases Justice Scalia cited as inconsistent with Mead also involved longstanding uniform agency positions. Mead, 533 U.S. at 252–53 (Scalia, J., dissenting) (citing FDIC v. Phila. Gear Corp., 476 U.S. 426 (1986), and Young v. Cnty. Nutrition Inst., 476 U.S. 974 (1986)). Moreover, they fell within the doctrine that courts should follow prevailing interpretations that Congress was aware of and yet chose not to alter even though it reenacted or amended the statute. See Philadelphia Gear, 476 U.S. at 436–39 (deferring to FDIC interpretation of a statutory “deposit” that had been uniformly applied for over sixty years by the agency in interpreting its own regulations and noting that Congress (knowing this was the prevailing interpretation) had reenacted and otherwise amended the statutory definition of a deposit and even incorporated FDIC regulatory definitions); Young, 476 U.S. at 983 (identifying a longstanding uniformly applied agency interpretation that Congress had not overturned even though it otherwise amended the relevant provision). As explained above, even if such an interpretation is not otherwise binding (here under Chevron), courts are still justified in adopting such an interpretation as the current preferences default rule. See supra Part VI.A.

403. Mead, 533 U.S. at 229–32.
404. See supra text accompanying notes 336–341.
405. Mead, 533 U.S. at 233 & n.16. The court tried to get around this provision by noting that other statutory provisions provided that the reviewing court could consider
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if *Chevron* were truly based on an implicit congressional intent to delegate authority to the agency by enacting the relevant statute, then it would seem that the mere conferral of rulemaking authority to resolve statutory ambiguities should suffice, and deference should be granted even if the agency chose to resolve statutory ambiguities through some other method. 406

Understanding *Chevron* as a current preferences default rule provides a better explanation. By what Congress meant or expected, the Court instead means what general default rule Congress would want, not what the enacting Congress intended for this statute in particular. And the reason the doctrine depends not just on how much power the agency was granted, but on how the agency exercises its power, is that only certain methods of exercise provide the reasonable assurance that the agency action reflects current governmental preferences.

Also consistent with current preferences default rule theory is the Court’s otherwise puzzling distinction between interpretive and legislative rules. An interpretive rule binds agency personnel but not the regulated community. 407 Unlike legislative rules, “interpretive rules . . . enjoy no *Chevron* status as a class.” 408 As a matter of legislative intent, this distinction makes little sense. If the enacting Congress intended to delegate any authority to agencies, it would be authority over the agencies’ own personnel. Less deference, if any, seems merited when the agency tries to exert authority over third parties. To the extent one can read any intent from Congressional statutes, they also seem to cut against the prevailing distinction. The “housekeeping statute” of 1789 provides: “[t]he head of an Executive department or military department may prescribe regulations for the government of his department, [and] the conduct of its employees . . . .” 409 This is an express and very general authority for agencies to adopt interpretive rules binding agency personnel. In contrast, both the Administrative Procedure Act and relevant case law deny agencies any general authority to issue legislative rules that bind third parties unless such authority has been expressly provided in other specific stat-

new grounds and facts, id., but this did not offer any response to Justice Scalia’s cogent critique that this statute provided no reason to deny deference on legal issues that had been considered by the agency. Id. at 257–58 (Scalia, J., dissenting).

406. Id. at 246 (Scalia, J., dissenting).

407. See Merrill & Hickman, supra note 308, at 903 (collecting cases); Peter L. Strauss, The Rulemaking Continuum, 41 Duke L.J. 1463, 1475–87 (1992). Another possible definition is that interpretive rules interpret existing norms whereas legislative rules create new norms, see id., but that definition can hardly help distinguish cases meriting *Chevron* deference since all such cases involve rules that interpret existing statutory norms.

408. *Mead*, 533 U.S. at 232 (internal citation omitted); see also Christensen v. Harris County, 529 U.S. 576, 587 (2000) (holding interpretive rules not entitled to *Chevron* deference).

utes.\textsuperscript{410} Thus, any implied legislative intent would support a doctrine of super-	extit{Chevron} deference for interpretive rules rather than the actual doctrine of lesser deference.

Under a current preferences default rule, in contrast, the distinction does make sense because interpretive rules do not require any notice and comment whereas legislative rules do.\textsuperscript{411} Thus while legislative rules are promulgated after the sort of political participation that provides some assurance that they track current political preferences, interpretive rules need not be. On the other hand, some agencies (like the Treasury Department) make it a practice to use notice-and-comment procedures when adopting interpretive regulations.\textsuperscript{412} If notice and comment is provided, such interpretive regulations do fit within a current preferences default rule and merit \textit{Chevron} deference, which probably explains the tradition of great deference to IRS interpretations and why the \textit{Mead} Court did not say interpretive rules never get \textit{Chevron} deference but only that they do not automatically get it "as a class."\textsuperscript{413}

A current preferences default rule also better explains why \textit{Chevron} deference is granted even when a statute makes agency decisions subject to a de novo trial in court.\textsuperscript{414} Under the legislative intent model, this result has seemed odd because the enacting Congress signaled, if anything, a desire for non-deferential judicial review. The only explanation within this model has been that the presumption that the legislature intends courts to defer to agencies is extremely difficult to rebut, which is hard to justify since the basis for that presumption is acknowledged to be weak and even fictional.\textsuperscript{415} But as a current preferences default rule, the result follows naturally. De novo review of the facts involves the exercise of a traditional adjudicative function that does not require accurately ascertaining prevailing political preferences. It is thus not at all in tension with the court deferring on how the agency fills statutory gaps, a result


\textsuperscript{411} See 5 U.S.C. § 553; Merrill & Hickman, supra note 308, at 905. Interestingly, there appears to be a chicken-and-egg phenomenon at work. The reason the 1946 Administrative Procedure Act exempted interpretative rules from notice-and-comment requirements was that courts at the time did not defer to them. Id. at 887 n.264. The important point is that the two go together: some opportunity for political participation (like notice-and-comment procedures) and deference to the result as likely tracking current political preferences.


\textsuperscript{413} \textit{Mead}, 533 U.S. at 232. Procedural rules are also exempt from notice and comment, see 5 U.S.C. § 553(b)(A), and thus should also not receive \textit{Chevron} deference as a class.


\textsuperscript{415} See Merrill & Hickman, supra note 308, at 840–41, 871–72, 909. Merrill and Hickman also argue that any presumption based on presumed congressional intent should be weak to avoid distorting legislative intent, id. at 888, which is also inconsistent with the doctrine since, in their view, \textit{Haggar} reflects a strong presumption. Id. at 840–41.
justified under a current preferences default rule by the agency’s advantage in ascertaining current enactable preferences.

Finally, a sometimes underappreciated limit is that *Chevron* deference only applies to agency interpretations that reflect a “reasonable policy choice.”416 This, the Court took pains to point out, does not mean a choice reasonable according to a judge’s personal policy preferences, but rather a reasonable accommodation of competing political interests.417 This does mean, however, that to merit *Chevron* deference the agency decision must be based on its policy or political judgment, not the agency’s disagreement with the courts about hermeneutics or the proper default rule. The courts defer to agencies because their policy views are more in tune with prevailing political preferences, not because agencies are better at legal interpretation. If the agency by its own account is not reflecting current political preferences, then its decisions do not merit deference under a current preferences default rule.

*Bob Jones* is illustrative.418 Although the then-current Treasury Department interpreted the statute to allow tax exemptions for racially discriminatory schools, it made no claim its interpretation reflected sound policy or current political preferences on whether racially discriminatory schools should get tax exemptions. To the contrary, the agency supported a new statute to expressly deny such tax exemptions.419 Instead, the Treasury interpretation was based on its view about statutory meaning, and its premise that enacting rather than current political preferences should resolve any ambiguity. The Court gave no indication it even considered deferring to this interpretation.420 If *Chevron* were based on an implicit enacting legislative intent to delegate to the agency the authority to resolve ambiguities, this is hard to understand since, if such a delegated power existed, the Treasury Department was exercising it. Understanding *Chevron* instead as a current preferences default rule, in contrast, readily explains why the Supreme Court would ignore a Treasury position that made no pretense of reflecting current political preferences. The courts are not looking to agencies for expertise in how best to conduct legal interpretation of administrative statutes, but rather for


417. Id. at 864–66.

418. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); see supra text accompanying notes 264–276. Although *Bob Jones* was decided a year before *Chevron*, there were already tax cases providing for a similar rule of deference, and in any event the case illustrates the point.

419. See supra text accompanying notes 270–272.

420. The Treasury interpretation was a change from an IRS interpretation that had prevailed since 1970, but such changes in interpretation are perfectly proper under *Chevron*. See supra Parts VII.A–B. Interestingly, the Court did suggest some willingness to defer to the IRS interpretation, which it stressed was consistent with current political views, see supra Part VI.B, even though it seemed blind to the contrary interpretation by the IRS’s superiors in Treasury. Under the theory urged here, this is explainable because the latter’s admitted lack of conformity to current political views gave them no resonance.
their expertise in determining where current political preferences lie, to resolve ambiguities left by legal interpretation.

Thus, courts should not, and do not, give Chevron deference to agency interpretations that admittedly do not match current enactable policy preferences. This requirement that the agency make a “reasonable policy choice” given competing political interests also suggests courts should deny deference if, even though not openly admitted by the agency, its interpretations plainly conflict with current enactable policy preferences. This is obviously an exception that must be construed narrowly lest it swallow the rule. If courts in every case make their own assessment of where current enactable preferences lie, and reject every agency interpretation that conflicts with that assessment, there would be no effective deference. Nor would that advance political satisfaction because the entire premise of Chevron is that agencies generally know better than courts where current enactable preferences lie. However, there is a definable set of extraordinary cases where a court can determine with confidence that the agency interpretation conflicts with current enactable preferences. But before reaching those cases, we need to confront an issue that has so far been deferred: what should courts do when the political views of the executive and legislature conflict?

D. Conflicts Between the Executive and Legislature

The affirmative argument above for Chevron deference depends on agencies being fairly accurate barometers of current enactable preferences, or at least more accurate than judicial estimates would be. Although the phrase “legislative preferences” is often used as a shorthand, in systems like the United States, the set of preferences that are actually enactable is strongly influenced not just by legislators but also by the executive who has the powers to veto legislation and put issues on the public agenda. Each is in turn influenced by outside political forces who lobby, organize, contribute and otherwise constrain the actions of both legislators and executives. In such a system, agencies must be responsive to executive, legislative, and general political influences for their actions to be likely to minimize the dissatisfaction of enactable political preferences in a way that merits Chevron deference.

Academic critique of Chevron has tended to presume that agencies respond to presidential preferences but not congressional preferences, and that Chevron thus alters the constitutional balance of power by shifting power from Congress to the President where their preferences conflict.421 Where the premises of this argument hold, this is a powerful critique. But the premises are not generally applicable for two reasons.

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First, most agency decisions that get *Chevron* deference do not involve dramatic conflicts between the executive and legislative branches. The real world is notably less exciting. Most agency decisions involve issues too minor to interest the legislature or for which there is no clear indication where legislative preferences lie. This does not mean such cases are unimportant. The entire point of preference-estimating statutory default rules is to resolve the interstitial gaps or ambiguities where legislative action is unlikely. Indeed, it is precisely in such cases that the default rule matters most because that is when the default sticks and becomes enduring law. In this typical set of cases where there is no other clear indicator of legislative preferences, an agency decision responsive to presidential preferences may be the best available indicator of where enactable preferences would lie if the issue ever came to a vote. The President is, after all, responsive to the same electorate as Congress as a whole, and while the different electoral rules for registering that electorate’s preferences in presidential and congressional elections will lead to many differences, it should also lead to broad areas of likely agreement. Absent any other indicator of legislative preferences, then, tracking presidential preferences seems likely to minimize political dissatisfaction.422

Second, and more important, the premise of agency-executive equivalence that underlies this critique is contradicted by an extensive literature showing that agencies in fact are subject not only to presidential influence but to various forms of influence by Congress and outside political groups.423 To be sure, the academic critique finds support in the language of *Chevron* itself, which seemed to base the deference rule on agencies’ accountability to the current President rather than to the political branches as a whole.424 But if so understood, these statements

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422. Cf. Elhauge, Preference-Eliciting, supra note 7, Part VII.A (noting that various pro-federalism canons can also be justified on the related theory that, when enactable national preferences are unclear, the rule of thumb most likely to minimize political dissatisfaction is to track the preferences of political subunits like states).

423. See supra Part VII.A. Because Eskridge and Ferejohn assume that agencies track presidential preferences, they are also led to the conclusion that the legislative veto and delegation of administrative powers to legislative agencies were both proper responses to the administrative state that merely restored the original political balance of power between the President and Congress, and that thus both INS v. Chadha, 462 U.S. 919 (1983), and Bowsher v. Synar, 478 U.S. 714 (1986), were wrongly decided. Eskridge & Ferejohn, Deal, supra note 142, at 540–47. If, as argued here, agencies in fact are responsive to both the executive and legislative branches, then legislative veto statutes and the delegation of power to legislative agencies both try to alter the balance by making agencies responsive only to the legislative branch, thus effectively circumventing the President’s constitutional veto power. The analysis here can thus explain *Chadha* and *Bowsher* as well as *Chevron*. Other rational choice literature also generally incorporates an assumption of agency-presidency correspondence, and thus not surprisingly produces different conclusions than my analysis here. See infra Part VII.E.

424. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (“[A]n agency . . . may . . . properly rely upon the incumbent administration’s views . . . . While agencies are not directly accountable to the people, the Chief Executive is . . . .”); supra Part VII.A.
reflected a very superficial understanding about the relationship between agencies and the President. Not only did the above forms of de facto influence from Congress and outside political interests clearly exist, but at the time the President was understood to lack legal authority to direct how agencies should exercise discretionary authority delegated to those agencies by legislation.\footnote{See Kagan, supra note 312, at 2250, 2290–94, 2323 & n.308 (2001); Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1242–46 (1994); Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1, 25 (1995); Thomas O. Sargentich, The Administrative Process in Crisis—The Example of Presidential Oversight of Agency Rulemaking, 6 Admin. L.J. 710, 716 (1993); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 649–50 (1984).} Any implication to the contrary in \textit{Chevron} was just dicta about a topic that the Court did not directly consider since the case did not involve any clear clash between the President and Congress. Although the new agency interpretation considered in \textit{Chevron} did come in response to a change of administration, the Court stressed that the interpretation that the agency was abandoning had not reflected any prior understanding about current enactable policy preferences, but was rather a mechanical response to a lower court decision.\footnote{See \textit{Chevron}, 467 U.S. at 853–59, 864. The Court also stressed that enacting legislative preferences were unclear. See id. at 845 (“Congress did not actually have an intent [on the relevant question]”). The less clear enacting preferences are, the less reliable the evidence of correspondence with current preferences has to be to merit deference. See supra Part V.A–C.} Indeed, if \textit{Chevron} were based on accountability to presidential views, then independent agencies should get less deference than executive agencies that are subject to agency removal power.\footnote{See Kagan, supra note 312, at 2347 (noting empirical evidence that independent agencies are more responsive to Congress than executive agencies are). Although more responsive to congressional preferences, independent agencies are also responsive to presidential political preferences. See Terry Moe, Regulatory Performance and Presidential Administration, 26 Am. J. Pol. Sci. 197, 220–21 (1982).} In fact, \textit{Chevron} draws no such distinction.\footnote{Kagan, supra note 312, at 2376–77 (proposing such a distinction but acknowledging it does not reflect current law).}

Moreover, the various doctrinal limits detailed above mean that \textit{Chevron} deference cannot in fact be triggered by mere agency responsiveness to executive preferences. If such responsiveness sufficed, then none of the \textit{Chevron} limits should apply because all agency decisions potentially have the requisite accountability to the executive.\footnote{Cf. id. at 2373–75 (acknowledging that various limits on \textit{Chevron} would not make much sense if the doctrine were based on accountability to the President).} Instead, the doctrines that limit \textit{Chevron} require broader indicia that the agency was accurately informed about current political preferences outside the executive branch before it took action.\footnote{See supra Part VII.C.} The analysis here suggests a further limit on \textit{Chevron} deference: the agency action cannot just reflect executive
views that plainly conflict with the legislature’s. With these limits in place, *Chevron* makes sense as a general current preferences default rule.

Different administrations might press against those limits in different ways. Former Clinton policy advisor Elena Kagan has shown in a masterful study of presidential administration that the Clinton administration aggressively expanded presidential authority over agencies, including appropriating agency action and assuming the power to direct it.\footnote{See Kagan, supra note 312, at 2281–2319.} Further, “Clinton’s use of directive authority over the executive branch agencies accelerated dramatically when the Democrats lost control of Congress.”\footnote{Id. at 2312.} Such a shift would, if my current preferences default rule theory is right, naturally provoke a corresponding shift in the application of *Chevron* deference.\footnote{I take no position here on whether such presidential authority over agencies is constitutionally protected or prohibited, or normatively desirable or not. See id. at 2251, 2319–63 (discussing these issues). My only point here is that if such presidential authority is exercised in ways that mean agency action does not reflect current enactable preferences, then judicial deference based on likely agency correspondence to those preferences should be denied. Professor Kagan takes the contrary view that presidential involvement should actually heighten, rather than weaken, *Chevron* deference. Id. at 2372–80. But this is based on her adopting the premise I rejected in Part II: the premise that where congressional intent is unclear, the default rule should reflect what she (or judicial judgment) regards as the wisest policy, id. at 2330–63, even though that conflicts with enactable preferences. Id. at 2345 (acknowledging that “both Presidents [pursuing her approach] self-consciously put in place a set of policies that could not have succeeded in getting through Congress.”). Professor Kagan also acknowledges that her position does not fit the actual contours of the *Chevron* doctrine. Id. at 2373–76.} If agency action can largely be directed by the President, then its actions are more likely to reflect only presidential preferences. Such agency action is more likely to take positions that create sharp conflicts with Congress. More importantly, such agency action is less likely to reflect current enactable preferences since the President’s views reflect only one piece of the political puzzle necessary to create enactments.

Agency action that just takes one side in a heated political disagreement between the executive and legislative branch should, under my theory, thus be denied *Chevron* deference—which is precisely what we have seen. Two recent cases dramatize the shift in the application of *Chevron* that has taken place in reaction to the Clinton expansion of presidential authority over agencies. One case involved the most prominent example of presidentially-led agency action given by Professor Kagan: President Clinton’s announcement that, as executive, he would restrict the marketing of cigarettes through FDA regulations.\footnote{See id. at 2283.} This announcement came before any FDA rule had actually been adopted and indeed before any notice-and-comment period had begun, but nonetheless stated the regulatory principles that the President said “will” be adopted “by executive
authority,” and the FDA later adopted precisely those principles.435 Further, the President announced that he was “authorizing” the FDA regulations,436 thus presupposing an answer to the contested question of statutory interpretation over whether the FDA’s statutory authority to regulate drugs extended to cigarettes.

This statutory issue ultimately was resolved in FDA v. Brown & Williamson Tobacco Corp., where the Supreme Court rejected the FDA’s interpretation that cigarettes were a “drug” or “device” within the meaning of the Food, Drug, and Cosmetic Act.437 The Court did not claim that this agency interpretation conflicted with the plain meaning of the statute. Instead, the Court relied mainly on a series of subsequent statutes that retained or relied on the FDA’s lack of authority to regulate tobacco, opting instead for a more limited regulatory strategy of requiring warnings, limiting advertising, and banning sales to minors.438 The Court also noted that the agency itself had just recently altered its longstanding interpretation that the Act did not give it authority to regulate cigarettes.439 But the Court took pains to stress that its “conclusion does not rely on the fact that the FDA’s assertion of jurisdiction represents a sharp break with its prior interpretation,” recognizing that this would conflict with Chevron.440 Rather, the important point to the Court was that several inter-

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435. Id.
436. Id.
438. Id. at 137–38, 145–59.
439. Id. at 145–47, 151–53.
440. Id. at 156; see also id. at 186–89 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) (collecting cases and quoting Chief Justice Rehnquist for the proposition that: “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”). The Court’s ambivalent reliance on the change in agency interpretation may also have reflected a failure to distinguish between Chevron and Skidmore deference, see supra Part VII.B.2, or perhaps even between hermeneutic inquiry and default rule analysis. Where meaning is unclear and must be filled with a default rule, agency change is fine and indeed encouraged. But this is not inconsistent with the hermeneutic point that the agency’s contemporaneous or past interpretation might be deemed relevant to establishing a statutory meaning from which the current agency was not free to deviate. On this point, the Court could have cited Bankamerica Corp. v. United States, 462 U.S. 122, 131 (1983):

[T]he mere failure of administrative agencies to act is in no sense “a binding administrative interpretation” that the Government lacks the authority to act. However, “just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”

See also Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140–45 (1976) (declining to follow an agency guideline on statutory meaning when it was not contemporaneous with enactment, and it changed many years later) (collecting other cases with similar rulings). Whether Chevron overrules this line of cases as a hermeneutic matter as well as a default rule matter is an interesting question. My answer would be no because, if the statute has a fixed meaning, then varying agency interpretations indicate the agency has sometimes wrongly
vening Congresses had effectively incorporated the agency’s prior interpretation into a broad political compromise leading to several subsequent statutes.441

The Court’s objection, then, was not so much that the FDA was changing its interpretation, but that in doing so it was deviating from the most recent official indications of enactable political preferences. The Court was well aware that the FDA’s changed interpretation was vigorously championed by President Clinton and vociferously opposed by the current Republican majority in Congress. It was also aware that, given this deadlock, “Congress could not muster the votes necessary either to grant or deny the FDA the relevant authority.”442 Sustaining the FDA interpretation would thus amount to allowing the agency (and presidency) to dictate the resolution of a political fight between two factions, neither of which was sufficiently powerful to procure legislation on its own. The Court rejected Justice Breyer’s dissenting position that political accountability to the President should suffice when such a political deadlock exists.443 Instead, the Court in effect relied on the most recent indications it had about what could sufficiently satisfy political preferences to procure legislation: the preferences of intervening Congresses reflected in subsequent legislation. Had the current Congress instead supported the FDA’s changed interpretation, the case would likely have come out the other way.

The Court explained its non-application of *Chevron* under what has become known as the “extraordinary case” exception.

Deference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.444

Some have viewed this as a possible adoption of the much-debated claim that courts should not defer to agencies’ interpretations about the scope of their own jurisdiction.445 But the problem with that claim is that every statutory interpretation implicates the scope of agency jurisdiction by defining what comes within the statutes over which the agency has divined it, and that the interpretation closest to the creation of meaning is most likely to be valid. The author of *Chevron* himself seems to agree. See Fed. Election Comm’n v. NRA Political Victory Fund, 513 U.S. 88, 103 (1994) (Stevens, J., dissenting).

442. Id. at 183 (Breyer, J., dissenting) (“Congress both failed to grant express authority to the FDA when the FDA denied it had jurisdiction over tobacco and failed to take that authority expressly away when the agency later asserted jurisdiction.”).
443. Id. at 188–92 (Breyer, J., dissenting).
444. Id. at 159 (citation omitted).
uncontested jurisdiction.\footnote{Miss. Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment); see Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd., 29 F.3d 655, 676–77 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting); Quincy M. Crawford, Comment, Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency’s Jurisdiction, 61 U. Chi. L. Rev. 957, 957 (1994).} A “scope of jurisdiction” exception thus does not helpfully distinguish a set of cases that differ from others where deference is warranted.\footnote{The concern motivating a scope of jurisdiction exception, although really applicable to all agency interpretations, is a real one: that agencies are biased in favor of expanding their own power. See supra Part VII.B. But the mechanisms for keeping this bias in check are the various forms of political accountability that make agencies relatively reliable determinants of current political preferences.} But what the Court mainly pointed to as showing that agency interpretation was “extraordinary” was that: (1) it was an issue important enough for Congress to have preferences and (2) the agency action conflicted with the political views reflected in a series of congressional actions subsequent to the initial enactment.\footnote{Brown & Williamson Tobacco Corp., 529 U.S. at 159–61.} That is, the case manifested precisely the two factors that the analysis above suggested would undermine \textit{Chevron} deference. Thus, one way to provide more concrete content to the vague “extraordinary case” exception would be to conclude that cases are “extraordinary” if they involve a split on a politically salient issue between the President and Congress that makes it clear that the agency position does not reflect any enactable political preference.

The second recent case that raised the question whether \textit{Chevron} deference applies to agencies that take sides in an executive-legislative dispute was \textit{Department of Commerce v. United States House of Representatives}.\footnote{525 U.S. 316 (1999).} There the question was whether the census statute could be interpreted to allow statistical sampling in apportioning congressional seats. The statute, in various amended versions, had been interpreted to prohibit statistical sampling from 1790 until 1994, when the Census Bureau changed its interpretation.\footnote{Id. at 334–41.} The majority agreed the matter was not settled by the plain language of the statute.\footnote{Id. at 339–40 (admitting linguistic ambiguity but finding it resolved by historical context); id. at 346 (Scalia, J., joined by Thomas, J., concurring) (concluding that statutory intent “is at least not clear”).} Nonetheless, the agency waived any claim to \textit{Chevron} deference in light of its changed position.\footnote{Id. at 340–41.} This might seem odd since \textit{Chevron} expressly sanctions changes in agency interpretation. But the agency no doubt recognized its tenuous political position given that the change reflected its decision to side with President Clinton on an issue that was strongly opposed by the then-current Republican majority in Congress.\footnote{Id. at 360–61 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting) (acknowledging that the use of sample had become a “partisan issue”).} Thus, any choice of default rule could not be
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overturned by the political process: the Republican Congress would block any statute that authorized statistical sampling, and the Democratic President, coupled with a veto-sustaining congressional minority, would block any statute that took such authority away. Deferring to the agency on the default rule would thus give it the power to take sides in this political stalemate. The agency did not claim such power, perhaps understanding the implicit limits on *Chevron*, and the Court instead resolved the matter with its assessment of the legislative preferences that actually sufficed to enact prior versions of the statute.454

This is consistent with the point established above that, when there is no reliable basis for determining current or recent enactable preferences, the proper tack is to rely on the best estimate of enacting legislative preferences.455 That will generally be the case when the current political branches are at loggerheads on some issue. Tracking current enactable preferences is not the same as deferring to presidential administrations; nor is it an invitation to pretend a sufficient political consensus exists when it plainly does not.456 A court can often do no better than make an educated estimate about what is currently enactable, or adopt a general rule of deferring to agencies who can make those estimates better than courts. But when a court knows that a particular interpretation could not get enacted in the current legislature, then that interpretation should not be adopted as the best estimate of current enactable preferences. This was true in the above cases. It would also be true if Congress enacted a bill to override an agency interpretation but was vetoed by the President. An agency interpretation protected from legislative override only by executive veto should not get *Chevron* deference.457

Thus, under *Chevron* the courts adopt a general rule of deferring to an agency that has been duly influenced by presidential, legislative, and outside political input. The courts do not defer to the President himself, who reflects only one piece of the political puzzle necessary to create an enactable political preference. This limit on *Chevron* is (like the others) hard to explain if *Chevron* were really based on the conclusion that the enacting Congress intended to delegate interpretive authority, since the

454. Id. at 334–42. Three Justices also relied on a general assessment that legislators would not prefer to change the method by which they are elected without some discussion. Id. at 342–43 (O’Connor, J., plurality opinion as to Part III.B, joined by Rehnquist, C.J., & Kennedy, J.).

455. See supra Part III.

456. As always, one should distinguish the default rule case (where the statute is ambiguous) from the case where there is a clear statutory meaning to delegate authority to the President or agency. In the latter case, one does not reach the default rule issue, and (absent some constitutional obstacle) courts are bound by the President or agency’s exercise of statutory authority even if it conflicts with current congressional preferences.

457. Of course, the unenacted congressional bill would not be entitled to deference either. Instead, since no current preference could be said to be enactable regarding the interpretive choice, the court must turn to the most recent indication of enactable preferences, or perhaps to a preference-eliciting default rule.
agency would be exercising delegated authority either way. But it does make sense if *Chevron* is a current preferences default rule.

E. Conclusion on Agency Deference

In short, *Chevron* does not require deference to all agency action, but limits that deference in many ways. The courts defer on agency gap-filling, not on hermeneutic interpretation of whether statutory meaning leaves a gap and whether the default rule for filling that gap should look to enacting or current preferences. The courts defer on agency gap-filling arrived at after general political input, not on agency positions insulated from such outside input. And the courts refuse to follow agency interpretations that either contravene prevailing political preferences or fashion a false political consensus out of what is in fact open political gridlock. This pattern of exceptions does not fit prevailing theories of *Chevron* but does fit if *Chevron* is instead a current preferences default rule.

None of this means that the deference provided within the limits of *Chevron* rests on any unrealistic view that agencies perfectly reflect enactable preferences. Enactable preferences may be highly uncertain and agencies may often fail to reflect them. To justify *Chevron* as a current preferences default rule, it need only be the case that, within *Chevron*’s limits, agencies are more likely to reflect enactable preferences than judicial judgment would. If judicial judgment is 40% likely to reflect an enactable preference, and agency decisions are 60% likely to reflect an enactable preference, then a general policy of following agency decisions will still maximize the satisfaction of enactable preferences. But where judges have special reason to know the agency action has 0% odds of reflecting an enactable preference, the court should not defer. More generally, the nuanced doctrines that set the limits on *Chevron* can properly be understood as excluding those cases where there is little reason to

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458. See Kagan, supra note 312, at 2378 (stating that if *Chevron* is based on Congress’s intent to delegate, then presidential involvement should make no difference).

459. Since the *Chevron* doctrine merely states a default rule, these same limits would not apply if Congress expressly delegated interpretive authority to the agency.

460. In addition to being inconsistent with prevailing normative theories, this pattern of exceptions to *Chevron* deference is hard to square with the more cynical theory that judges defer to agencies in order to save themselves the time and effort of analyzing tedious regulatory issues. See Stephen M. Bainbridge & G. Mitu Gulati, How do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions, 51 Emory L.J. 83, 150–51 (2002) (arguing that self-interested judges will avoid issues or delegate them to law clerks to avoid the costs of analyzing the issues themselves); Cross & Nelson, supra note 202, at 1481–82 (discussing this theory for deference). If courts wished to minimize their decisionmaking costs, they would be better off deferring to all agency decisions rather than frequently making exceptions.

461. If legislative reaction seems likely, then highly uncertain enactable preferences may be grounds for instead using a preference-eliciting default rule to better ascertain enactable preferences. That topic is discussed in Elhauge, Preference-Eliciting, supra note 7, Parts I–II.
think the agency action has any comparative advantage in reflecting enactable preferences.

These conclusions about *Chevron* differ greatly from those offered in some terrific prior work by Professors Eskridge, Ferejohn, Cohen, and Spitzer. As foreshadowed above, this difference results from a difference in assumptions. Unlike my analysis, these models assume that judges just try to maximize their own preferences. But the difference in assumptions more specific to the *Chevron* issue is that these models assume that executive and legislative preferences are perfectly known. This assumption is plainly incorrect, and ignores the possibility that agencies can help courts ascertain current enactable preferences, which I show above is actually the central purpose of *Chevron*. These models also wrongly assume that agencies only reflect executive preferences when in fact agencies are also strongly influenced by legislative preferences. Finally, these models wrongly assume, contrary to the cases noted above, that *Chevron* deference applies when the agency position sides with the executive in a conflict with plain legislative preferences. Indeed, because they ignore the informational feature of agency action, these models assume that agency action only matters when it poses such a conflict. In contrast, under my analysis—as under current law—agency action only matters when it does not pose that conflict and to the contrary helps the court ascertain current enactable preferences.

The conclusions here might seem inconsistent with various empirical studies finding that D.C. Circuit judges are less likely to affirm agency decisions that conflict with the judge’s ideology, especially when all the panel shares that ideology. But default rules can meaningfully constrain judicial decisions without eliminating all ideological influence.

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462. Eskridge, Dynamic, supra note 139, at 167–70; Cohen & Spitzer, Puzzle, supra note 142, at 73–76; Eskridge & Ferejohn, Deal, supra note 142, at 177–88; Eskridge & Ferejohn, Game, supra note 118, at 528–40, 547–51.

463. See supra Part II.D (collecting sources).

464. Id.

465. Eskridge, Dynamic, supra note 139, at 164–70; Cohen & Spitzer, Puzzle, supra note 142, at 69; Eskridge & Ferejohn, Deal, supra note 142, at 176; Eskridge & Ferejohn, Game, supra note 118, at 533, 535–40. The text in these articles sometimes acknowledges that the legislature also exerts some influence on agencies but argues it is small, see, e.g., id. at 540, and then in the actual models, the articles assume agency action reflects only presidential preferences.

466. See supra Parts VII.A, D.

467. Eskridge, Dynamic, supra note 139, at 165–70; Cohen & Spitzer, Puzzle, supra note 142, at 69–70, 72–74; Eskridge & Ferejohn, Deal, supra note 142, at 182; Eskridge & Ferejohn, Game, supra note 118, at 536–40.


469. Much empirical rational choice work on *Chevron* has tried to determine whether it is meaningful by assessing whether affirmation rates increased after *Chevron*. See Cross & Tiller, supra note 468, at 2165–68 (reviewing literature). Unfortunately, affirmation rates provide a poor measure both because many *Chevron* cases are decided on unambiguous
Indeed, it is remarkable how constraining the statutory default rule here is because the studies show that the ideological effect in the D.C. Circuit actually comes entirely from votes on procedural issues and that “following the Supreme Court’s Chevron decision, there were no statistically significant differences in the way in which Democratic and Republican judges voted on statutory issues.”

Professor Revesz hypothesizes this is true because the Supreme Court is more likely to reverse statutory interpretations, but given the actual low odds of Supreme Court review the more plausible explanation is that judges are following the default rule in the interpretive cases. In any event, the fact that appellate review is what enforces a legal rule hardly makes it meaningless. Further, the statistical evidence shows that the U.S. Supreme Court’s own review of agency actions not only cannot be explained by judicial ideology but conflicts with it. This is even more remarkable given that issues generally do not

statutory meaning and because one would expect parties to adjust to a more pro-agency rule by bringing more appeals in cases where the agency was less deserving of deference, which is consistent with the evidence that the affirmation rates initially increased and then steadily went down. Id. This is particularly likely since many parties misinterpreted Chevron to offer broader deference than it actually does, given the various exceptions, probably because they did not appreciate the current preferences limits on the doctrine. Further, Chevron did not so much state a new legal rule as codify an existing practice: the empirical evidence was that the Supreme Court already strongly deferred to agency decisions. See Cross & Nelson, supra note 202, at 1489. So even if the sort of agency deference we now call Chevron deference matters, one would not expect outcomes to change greatly after the date of the Chevron decision.

470. Revesz, supra note 349, at 1106, 1113–15. See also Jerome Nelson, The Chevron Deference Rule and Judicial Review of FERC Orders, 9 Energy L.J. 59, 82 (1988) (finding that judicial ideology does not affect whether courts give Chevron deference to orders of the Federal Energy Regulatory Commission). Another study of all circuit courts from 1995–1996 finds that whether judicial ideology matches or differs from agency ideology does not affect the likelihood that judges will invoke Chevron or use it to sustain an agency interpretation. Orin S. Kerr, Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals, 15 Yale J. on Reg. 1, 35–37 (1998). The study did find that judges who author Chevron opinions are somewhat (20%) more likely to reach outcomes that match their ideology, but found this was overstated by self-selection bias because it also found that judges are more likely to be willing to author an opinion if they find the outcome congenial. Id. at 37–40, 49–50. This study thus did not find that judicial ideology affected actual judicial votes as opposed to willingness to author opinions. The study also concluded that Chevron did not increase any tendency to further judicial ideology. Id. at 50–52.

471. Revesz, supra note 349, at 1113.

472. The leading proponents of the view that ideology determines judicial voting found that outcomes of Supreme Court decisions reviewing agency action were not determined by ideology; indeed 68% of decisions were the opposite of what the ideological model predicted. Cross, supra note 210, at 294 n.259, 303–04 (citing Jeffrey Segal & Harold Spaeth, The Supreme Court and the Attitudinal Model 259 (1993)). Interestingly, those proponents also found that most of the individual justices’ votes on whether to defer to agencies were influenced by ideology. Segal & Spaeth, supra, at 305–08. This apparent inconsistency can be reconciled. In a court that spans ideologies, the median votes that affect outcomes are likely to be those of the justices who do not vote ideologically either generally or in the particular case. It thus makes sense that the higher the court the more judges it has, because higher courts deal with more ambiguous legal
reach the Supreme Court unless they involve legal uncertainties severe enough to have split the lower courts, which would leave more room for ideological influences. Statistical studies also indicate that Supreme Court decisions over whether to grant certiorari are mainly influenced by legal factors like circuit splits rather than ideology. Professor Revesz’s study also shows that the D.C. Circuit’s willingness to affirm agencies is not affected either by whether the political branches are politically divided or by whether the President or Congress shares the judge’s ideology. This is inconsistent with the rational choice view that judges just further their own ideological views unless statutory override is likely. It is, however, consistent with the view advanced here that judges defer to agency interpretations presumptively because agency interpretations are normally influenced by whatever combination of parties govern Congress and the Presidency.

VIII. Conclusion

Where a statute is ambiguous, and current enactable preferences cannot reliably be ascertained or elicited, an honest interpretive agent issues and thus leave greater room for ideological decisionmaking that can be constrained by increasing the number of judges.

473. Cross, supra note 210, at 308–09 (summarizing literature). Professors Cohen and Spitzer instead conclude Supreme Court deference is ideological because from 1981–1984 the Supreme Court increasingly reversed lower court decisions that denied agency deference and then did so less frequently in the late 1980s. Cohen & Spitzer, Puzzle, supra note 142, at 68, 98–106; Linda R. Cohen & Matthew L. Spitzer, Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test, 69 S. Cal. L. Rev. 431, 460, 464–65, 469, 472 (1996). Their explanation is that in 1981 the Reagan victory resulted in agencies whose conservative views were closer to that of the Supreme Court than to the relatively liberal appellate courts, but that by the late 1980s the appellate courts had become more conservative and the agencies more liberal. But this evidence is equally consistent with the explanation that in the early 1980s some wayward appellate courts were deviating from the legally required deference to the change in enactable political preferences reflected by new agency action, and that the Supreme Court had to send increasingly strong signals that this was inappropriate, culminating in the strong statement in *Chevron*. Once that signal was absorbed, case outcomes predictably equilibrated, especially since parties overread the extent of *Chevron* deference. See supra note 469.

474. Revesz, supra note 349, at 1104, 1116, 1124–29.

475. See supra Part V.D. Revesz interprets his data as more consistent with the attitudinal hypothesis that judges just vote their ideological preferences. See Revesz, supra note 349, at 1129–30. But the fact that there is some ideological influence on decisions hardly proves the attitudinal hypothesis that this influence is exclusive. Moreover, ideological influence can be expected to be greater on procedural issues that lack meaningful default rules and thus leave judges with nothing else than their policy views to fall back on in cases of ambiguity about procedural rules. Revesz’s own work disproves any ideological influence on statutory interpretation and concludes that the pattern of ideological voting is consistent with a legal formalist model of adjudication given the vagueness of procedural law. Id. at 1106, 1113–14. See also Elhauge, Preference-Eliciting, supra note 7, Part II.B.3 (collecting other data inconsistent with the attitudinal hypothesis on statutory interpretation); supra note 14 (same).
should endeavor to reconstruct the enacting government’s political preferences to estimate what it would have wanted to do. Sometimes this is relatively easy because any government should share the preference to avoid absurd results or invalidating the statute, or because the statute itself evidences the relevant preferences. But other times the preference estimate will be quite uncertain. Nonetheless, the enacting government itself would want the court to proceed based on a probabilistic estimate of its preferences. That estimate should be based not only on the fragments the enacting government left in the legislative history of the particular statute, but on all sources of information about its preference structure at the time. Relying on enacting preferences does not mandate static interpretation, for those initial preferences may well call for changing interpretations as circumstances change. Further, where no one option seems more likely than not to reflect governmental preferences, the courts should adopt the most moderate interpretive option. This helps explain many practices and seeming inconsistencies in statutory interpretation.

But an honest interpretive agent for the enacting government will also want to adopt a statutory default rule that tracks reliable official indications of the political preferences of the current government because the enacting government itself would want that general default rule applied to all statutes—past and future. This does not condemn judges to some crude model of political polling. A current preferences default rule will only track reliable official indicia of enactable preferences, not transient political views that are never shared by all the political actors necessary to enact statutes. Further, relatively categorical rules, like deferring to certain classes of agency interpretations, can be used to further this goal. Where great uncertainty remains about enactable preferences, that itself will often call for using a preference-eliciting rule instead.476

To many, one major thesis of this Article will seem highly counterintuitive: why wouldn’t the enacting government want its own political preferences satisfied? The key is that the enacting government does, but cares not only about the interpretation of the statutes it enacts but also about the interpretation of older statutes being applied during its time of governance. To others, the analysis may seem sufficiently compelling to suggest extending the proposition to updating defined statutory meanings. But allowing enacted statutory meanings to be updated by even relatively accurate estimates of current enactable preferences circumvents a demanding, constitutionally required process with a less demanding one and reduces the accuracy with which any estimate of enactable preferences can be made.

The analysis here differs sharply from typical rational choice models, which assume that judges interpret statutes to maximize the satisfaction of either (in most models) judicial preferences or (in some models) the preferences of the enacting legislature regarding the particular statute

476. See Elhauge, Preference-Eliciting, supra note 7, Part II.
being interpreted. These models ignore the possibility that judges might, acting as honest agents for the enacting legislature, realize that the enacting legislature cares about the general default rule applied to all statutes, not just those it enacts. Also contrary to these models, I do not assume judges have anything resembling perfect knowledge of legislative preferences, but rather assume they use certain methods of statutory construction precisely because they help estimate those uncertain preferences.

My analysis also has the advantage of providing an explanation for many troubling twists and turns in statutory interpretation, especially within the *Chevron* doctrine. It also explains why there might be limits on the ability of legislatures to opt out of a current preferences default rule.

I began with the observation that our methods for resolving statutory meaning affect how often default rule issues arise. But a feedback effect runs in the reverse direction too. The better our default rules, the less courts may feel impelled to insist on strained claims that hermeneutic methods establish a particular meaning or intent in unanticipated cases. The judges most likely to feel the need to strain to find unambiguous meaning are those who—quite properly—believe that statutory interpretation should constrain judges to effectuate legislature preferences. A theory of default rules designed to do precisely that should increase their willingness to rely on default rules and thus reduce the number of cases resolved on implausible claims that the statute has a determinate meaning.

In short, judges can be honest interpretive agents for the political process without always claiming that the process has generated a clear statutory meaning they can decode. To the contrary, the political process should prefer to appoint interpretive agents who, rather than insisting on resolutions of ambiguous statutory meaning that are arbitrary or heavily tinged by (perhaps unspoken) judicial preferences, resolve those statutory ambiguities with default rules that are designed to maximize the satisfaction of political preferences.

By the same token, the more constraining our default rules, the less those who celebrate judicial judgment over political judgment may feel an impetus to strain to find ambiguities in statutory meaning. For instead of authorizing the exercise of judicial judgment, the proposed default rules would constrain judicial judgment to further the satisfaction of political preferences. A well-developed theory of default rules can thus help avoid strained hermeneutic efforts in both directions.