BOOK REVIEW

PREFERENCES, LAWS, AND DEFAULT RULES

STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION. By Einer Elhauge. Cambridge: Harvard Univ. Press. 2008. Pp. 386. $55.00.

Reviewed by Elizabeth Garrett[*]

In his book *Statutory Default Rules*,[1] Einer Elhauge responds to calls to assess statutory interpretation techniques through the lens of contract default rules.[2] The two areas of law invite comparison: both attempt to bring clarity to ambiguous terms in written agreements that are often accompanied by extrinsic clues that may have been strategically developed during negotiations. Just as contract law relies on the default rules of the Uniform Commercial Code and the common law of contract, statutory interpretation incorporates its own set of default rules: the canons of construction. Contract law scholars view default rules as maximizing the preferences of contracting parties through two mechanisms. In many cases, they provide the rule that most parties would have wanted; by reflecting typical preferences, they reduce transaction costs and allow parties to pay greater attention to aspects of the bargain in which they intend to diverge from usual preferences. In other cases, contract default rules elicit preferences and work to force parties to reveal material information by leading to a result that penalizes strategic withholding of such information.[3]

There are significant differences between the two areas of law, however. As Elhauge acknowledges, parties to legislative agreements cannot be presumed to be seeking efficient outcomes, and the parties

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[1] This book is an extension of two earlier articles: Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); and Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

[2] *See, e.g.*, Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 685–88 (1999); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 645–47 (1999). For another theory of canonical construction that makes the connection to contract law, see McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 708–11 (1992).

[3] *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).

bound by such agreements will change over time as the legislative polity changes (pp. 5–6). In addition, the legislative process is complex. It is affected by many actors who are often pursuing different goals; it is governed by detailed rules and institutional structures that affect the outcomes of bargaining; and it produces agreements often penned by several different authors, at different times, under different conditions. Nonetheless, *Statutory Default Rules* demonstrates the powerful insights that a default rules approach can provide for the study of statutory interpretation. Moreover, Elhauge's comprehensive descriptive and normative framework is a major contribution to the field. In the end, however, he fails to present a persuasive case that his descriptive account is accurate, and some key elements of his normative vision, including the concept of a "currently enactable preference" that would supersede the intent of those who enacted the legislation in the past, cannot sustain his framework for interpretation.

Elhauge's book is part of a trend in statutory interpretation scholarship: several scholars who write from a public choice perspective are working to develop theories of interpretation that incorporate some aspect of intentionalism.[4] Initially, scholars influenced by public choice rejected using congressional intent as a guide in interpretation because they argued that the notion of intent in a collective body is incoherent and the main evidence of intent outside the statutory text — legislative history — is unreliable and strategically created. Their work formed the foundation of textualism.[5] A second, more sophisticated wave of public choice–influenced scholarship takes a different stance, working to determine principled methods of ascertaining the purpose that led to statutory enactments and then using that legislative intent to help resolve ambiguities and gaps in the text.[6] *Statutory Default Rules* is part of that project. Elhauge's insistence that clear statutory text must be given primacy in interpretation and cannot be varied by evidence of different legislative intentions demonstrates the influence of the first wave of this scholarship on his analysis (p. 65). But his use of "enactor preferences" and "preferences of the current legislative polity" as

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[4] *See* Elizabeth Garrett, *Legislation and Statutory Interpretation*, *in* THE OXFORD HAND-BOOK OF LAW AND POLITICS 360, 363–65 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008) (discussing scholarship in this area).

[5] *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 535 n.3, 547–48 (1983); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 16–18, 29–37 (Amy Gutmann ed., 1997).

[6] *See, e.g.*, Cheryl Boudreau, Arthur Lupia, Mathew D. McCubbins & Daniel B. Rodriguez, *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957 (2007); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003).

guides to meaning when the text is not clear is just a different way to ascertain legislative intent, either of the enacting legislators or the current members of Congress. He uses the insights of public choice to shape his theory of what legislative and other official materials interpreters should consult, but he does not eschew any effort to construct congressional intent, or "preferences," to use the term he prefers.

This book review begins with a description of Elhauge's system of default rules, with particular emphasis on the rules that relate to "current enactable preferences" (as opposed to the preferences of enactors) and the rules that are designed to elicit a reaction from legislators. Although Part I is largely an overview of Elhauge's interpretive framework, it also critiques his treatment of the argument that the default rules are triggered only when the textual language is unclear.

Elhauge claims that his theory is both descriptively accurate — that is, courts are applying his default rules in interpretation and federal legislators would support this approach — and normatively appealing — that is, his system of default rules is the best interpretive approach, even if it is not what occurs now. Part II takes issue with the descriptive portion of his project. It is unlikely that legislators would support a system that allows "current enactable preferences" to trump the views of the enactors in the case of unclear language. Moreover, courts are not applying the key aspects of Elhauge's default rules, either consciously or unconsciously, to achieve the aims he articulates. It is hard to understand how this framework would have evolved without drafters and interpreters knowing they were pursuing these objectives.

Part III turns to Elhauge's normative project. It first argues that one main building block on which his default rules framework rests — the idea of "current enactable preferences" — is intrinsically indeterminate in the absence of an actual current enactment. Current enactable preferences therefore cannot serve as a meaningful restraint on judicial discretion. Determining what might be enactable with respect to a particular policy requires considering current political preferences, legislative rules and procedures, various legislative vehicles available to enact the policy, party and committee configurations, interbranch relationships, and so on — an enterprise that will either stymie interpreters seeking to apply Elhauge's framework in good faith or allow them to reach a myriad of different conclusions depending on what counterfactual scenario they pursue. Part III also raises concerns about the institutional capability of courts to apply Elhauge's default rules competently. It describes two particular concerns: the likelihood that courts will embark on a far-ranging inquiry into current enactable preferences, at least with regard to statutes that were passed a long time ago; and the complex calculations required of judges trying to ascertain whether preference-eliciting canons are appropriate.

I. A Framework of Default Rules

One of the contributions of Elhauge's theory of interpretation is his sustained and unique defense of judicial updating of statutes through the use of current preferences about policy outcomes to understand language passed by past Congresses. Among intentionalist interpreters, there has long been a tension between those who are purely archeological in their approach, arguing that only the enactors' legislative intent is a legitimate source of meaning, and those who would also consult evidence about what today's polity would intend with regard to the meaning of unclear language.[7] Typically, the former group defends its position using agency theory: interpreters should act as the agents of the members of the legislative branch who drafted and enacted the law. Those willing to update statutes to reflect current conditions, meanwhile, argue that they are performing a task that a busy legislature simply lacks the time to fulfill or that they are improving policy by taking current realities into account. Elhauge's very interesting and original contribution to the literature is his argument that purports to resolve this tension: he claims that the enacting legislators would prefer a rule that relies, when possible, on evidence of current enactable preferences rather than on evidence of their original intent (pp. 41–42). Thus, a court using his method of interpretation would be serving as the enactors' honest agent.

Elhauge's first task is to convince readers that enacting legislators would prefer a system that is designed to maximize current enactable preferences, even after they have left office. He begins by focusing on what interpretive rule legislators would prefer in general — not with respect to a particular statutory provision that they strongly support or oppose. Here, he argues that the rational lawmaker would understand that "[p]resent influence over *all* statutes might well be far more desirable than *future* influence over a *subset* of statutes," namely, those enacted while the lawmaker was serving in office (p. 42). With a backward-looking rule focused on enactor preferences, lawmakers can influence the interpretation of their own enactments far into the future, but with a current enactable preferences rule, they can influence the interpretation of all statutes that are interpreted during their term of office, no matter when they were enacted. A current enactable preferences rule also permits legislators to control interpretation of the statutes they enact for as long as political preferences remain unchanged, or longer if they enact clear, unambiguous text.

Statutory Default Rules sets out a comprehensive framework of the canons of construction to achieve this interpretive objective, dividing

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[7] *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988) (contrasting "archeological" and "nautical" approaches to interpretation).

them into four groups: preference-estimating canons, enactor preferences canons, preference-eliciting canons, and supplemental canons. As a whole, they work as a "system of default rules that maximize political satisfaction" (p. 13).

A. Preference-Estimating Canons

An interpreter's first task when faced with unclear statutory language is to use interpretive methods that will help to discern the current enactable preference on the topic. The first set of canons that Elhauge discusses is therefore aimed at "maximiz[ing] the satisfaction of enactable preferences" (p. 8). Elhauge is well aware that other theorists who have argued for updating statutes through dynamic approaches to interpretation[8] have been criticized for allowing judges too much discretion to adopt their own policy preferences under the guise of the popular will. Indeed, Elhauge sounds some of these criticisms in this book (pp. 62–64). He argues that his approach cabins judicial discretion because courts can consider limited kinds of evidence of current enactable preferences (pp. 64–65).

First, a court should consider certain subsequent legislative actions that provide reliable evidence of current enactable preferences on the interpretive question. Although legislative inaction generally does not accurately reveal current enactable preferences, subsequent legislative action is a "reliable indicator" of those preferences "where the subsequent legislature took the time to amend or reenact a statute, or to enact a statute covering the same area, without disturbing an existing interpretation in that area that had been brought to its attention" (p. 72). The quantum of proof that subsequent official actions must provide about current enactable preferences is lower with respect to older laws, where the enactor preferences are "more ancient" and therefore themselves arguably more uncertain (and presumably more likely to diverge from current preferences) (p. 77).

Second, Elhauge provides an extended examination of the *Chevron*[9] doctrine as a default rule designed to maximize current political satisfaction (pp. 79–111). Agencies are in a good position to discern current enactable preferences, he argues; therefore, deference to certain agency interpretations of unclear statutory language is likely to allow appropriate updating of statutory meaning (p. 110). Indeed, one has the impression from his articles and book that working to understand *Chevron* better may have been the genesis of this more comprehensive framework. His extended treatment in Chapter 5 concludes that the

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    [8] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

    [9] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

jurisprudence of the *Chevron* doctrine, developed through *United States v. Mead Corp.*[10] and other cases, focuses courts on the kinds of agency actions that are likely to reliably indicate current enactable preferences (pp. 90–99). The doctrine has been (somewhat) clarified by these cases so that courts rely mainly on agency statements that involve participation by interested parties, which in turn is an indicator of "more serious legislative oversight and executive involvement" (p. 91). Interestingly, Elhauge's approach suggests that agencies should approach the interpretive task differently than courts. When faced with unclear text, agencies should seek to track current enactable preferences to the greatest extent possible, by relying on evidence of current views that courts do not use, including informal sources of meaning (p. 111). The notion that agencies and courts should use different methods of interpretation, based in part on the differences between the two institutions, is increasingly a focus of legal scholars,[11] and Elhauge makes a contribution to this emerging literature.

B. *Enactor Preferences Canons*

If the text is unclear and courts do not have reliable evidence of current enactable preferences, a second set of default rules works to allow judges to estimate enactor preferences. This discussion forms Part II of *Statutory Default Rules*, and it is primarily a description of when and how courts should use legislative history if statutory text is unclear. Elhauge's treatment of legislative history avoids one of the most contested questions of statutory interpretation, namely, whether interpreters can consult legislative materials beyond the statute itself to determine at the outset whether legislative meaning is clear.[12] Most who believe that legislative intent is relevant to interpretation would consult some legislative history in the threshold determination of clarity before any default rules would be triggered. Elhauge acknowledges the "voluminous debate" on this subject but then brackets it, arguing that he is concerned only with the strategies used once a court has decided the statute is unclear (p. 115). Of course, this threshold inquiry will determine the scope and influence of any default rules regime; if interpreters determine that statutory meaning is clear in most cases, then the default rules will rarely be needed. By seeking to avoid this

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[10] 533 U.S. 218 (2001).

[11] *See, e.g.*, Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).

[12] *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 189–97 (2006). *See generally* Stephen Breyer, Lecture, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Peter L. Strauss, *The Courts and Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998).

contentious question at the heart of interpretation, Elhauge runs the risk that either his framework will be marginalized if clarity is found frequently, or it will operate too robustly if courts are denied important tools to ascertain a clear statutory meaning. At the least, Elhauge's decision to steer clear of this debate begs a difficult question facing courts seeking to interpret statutes.

The limited guidance that *Statutory Default Rules* does provide with respect to a theory of statutory meaning focuses on the reason Elhauge believes that legislators use clear language: to avoid triggering default rules (pp. 146–47). It is not surprising that a theory of default rules based on contract law includes the principle that legislators can consciously choose not to rely on such rules, and in Elhauge's framework, lawmakers opt out by enacting statutes with clear meanings. An opt-out is more likely, he asserts, when the legislature uses precise words, rather than broader terms like "reasonable," and when the language is applied to a contingency that was actually contemplated by the legislature or within the range of contemplation (p. 147).[13] This does not provide much practical assistance to judges. "Precise" is not synonymous with "clear," and general statutory language may have been drafted to provide clear guidance to the entities applying the law, thereby avoiding the prospect of a judge using different guidelines in interpreting the statute.

General language can be entirely appropriate in legislative drafting when the scope of the legislation is broad or when lawmakers intend that the law take account of developments in knowledge or understanding. For example, lawmakers may have a firm sense of how an environmental statute should be applied, and attempt to draft clear but general language, precisely because they anticipate that scientific advances will change what is regulated in the future. They contemplate specific actions or subjects that will be regulated because they share certain characteristics, but they also know that over time other actions or subjects will be suitable for regulation because we will have more information about them. Under these circumstances, general language may well lead to the conclusion that the enacting legislators have purposefully opted out of any interpretive regime that would change the characteristics leading to regulation to reflect different legislative preferences, even though the universe of what is regulated might well expand (or contract). In the end, the notion that clarity can be meaningfully elucidated by the desire to opt out of the default rules provides only partial guidance to interpreters trying to determine

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[13] Elhauge spends some time discussing the absurdity rule (pp. 143–46), which is an issue that generally plagues textualists. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419–31 (2003). However, his discussion of clarity as an opt-out from the default rules regime is not limited to a consideration of absurdity (pp. 146–47).

whether the default rules have been triggered or the text is sufficiently clear without resort to the canons.

Because he largely avoids the question of textual clarity and entirely ignores the debate about what tools are available to determine whether there is ambiguity or vagueness,[14] Elhauge focuses instead on the use of legislative history only after a court has found unclarity. Here his analysis adds little to contemporary scholarship, particularly that informed by political science, which often takes the same careful approach that Elhauge describes in seeking to discriminate between reliable history and legislative materials strategically developed to manipulate subsequent interpretation.[15] Elhauge also argues that when a court is faced with several plausible interpretations, none of which is more than fifty percent likely to match enactor preferences, it should choose the most moderate option, even if a more extreme option is more likely to match the preferences. He offers proof to demonstrate that selecting the moderate position will maximize political satisfaction under many conditions (pp. 135–38). While this is persuasive, it carries an air of unreality because it portrays courts as able to evaluate with some precision the likelihood that any particular interpretation will mirror enactable preferences; moreover, it is not entirely clear how Elhauge is defining "moderate," a contested concept. Elhauge does acknowledge that courts will seldom have precise percentages in mind,[16] but he claims they nevertheless can successfully apply the general rule that moderate interpretations should be favored over other more extreme plausible interpretations (pp. 137–38).

C. Preference-Eliciting Canons

A third set of canons provides a more significant contribution to the literature. Preference-eliciting canons are "designed to choose the interpretations that are most likely to elicit legislative reactions, which will produce a statutory result that embodies enactable preferences more accurately than any judicial estimate could" (p. 152). In other words, these canons also maximize current political satisfaction, but in a different way from the first set: they are used to prod the legislature into action, thus producing a reaction that necessarily embodies current enactable preferences. Elhauge is inspired here by the theory of information-forcing defaults in contract law; the use of these canons is intended to elicit more information from the entity with the best data about current enactable preferences, the sitting legislature.

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[14] It seems fair to conclude from Elhauge's discussion of legislative history that these materials could not be used to determine textual clarity; however, he is silent about whether courts could use dictionaries or any other extrinsic tools at the threshold inquiry.

[15] *See* Garrett, *supra* note 4, at 363–65.

[16] Section III.B returns to this issue of institutional capacity.

Preference-eliciting canons can work to clarify which among several plausible meanings reflects current preferences, or they can increase the chance that the legislature will craft a more nuanced approach to the problem. Elhauge argues that three conditions are necessary before a court should apply a preference-eliciting canon: "(1) estimated enactable preferences are unclear, (2) significant differential odds of legislative correction exist, and (3) any interim costs from lowering immediate expected political satisfaction are acceptable" (p. 155). Elhauge mounts a mathematical defense of the second condition, explaining that it hinges primarily on the likelihood that the chosen interpretation will provoke a legislative response and the degree of certainty that another interpretation actually matches current preferences (p. 161).[17]

It is difficult to know in practice how often courts appropriately use preference-eliciting canons because in some cases the interpretation chosen will actually capture enactable preferences and therefore not produce a response. Moreover, according to Elhauge, courts usually do not apply preference-eliciting canons, and thus the fact that most interpretations are met with legislative silence simply means that they have successfully mirrored enactable preferences (p. 158) (or perhaps that the legislature does not disagree strongly enough to overcome the substantial hurdles to overriding the judicial decision). As Elhauge notes, the relevant statistic is how many legislative overrides occur when a court adopts an interpretation designed to conflict with enactable preferences; although his example posits that the override rate in those cases could be sixty to ninety percent (pp. 158–59), there is no empirical support for this figure (nor does Elhauge claim any).

The examples he provides of preference-eliciting canons are those that favor the politically powerless — the rule of lenity, in particular — over an opposing group that is organized, powerful, and therefore disproportionately able to influence legislative outcomes (pp. 176–78). In those circumstances, if the court's decision conflicts with current enactable preferences, the losers can often successfully appeal to the legislature for an override, and legislative action may occur relatively quickly, minimizing the time during which the interpretation that does not maximize political satisfaction governs.

Elhauge also includes some linguistic canons in his list of preference-eliciting canons (pp. 188–203); this is a departure from other scholarship that typically understands these rules as aimed at deter-

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[17] The second condition is the especially tricky one, and section III.B's discussion of whether courts are institutionally capable of applying Elhauge's framework returns to this issue.

mining the meaning intended by enactors.[18] Elhauge uses *Tennessee Valley Authority (TVA) v. Hill*[19] to illustrate his argument with respect to linguistic canons (pp. 198–99). The main challenge of the case was that Congress had enacted seemingly conflicting policies. The Endangered Species Act[20] contained sweeping language protecting endangered species absolutely, no matter the economic cost.[21] However, appropriations acts contained congressional directives specifically aimed at the continued construction of the Tellico Dam, which imperiled the habitat of the endangered snail darter.[22] The Court's decision to halt the Tellico Dam, justified in part by its understanding of the "plain language" of the Endangered Species Act,[23] did prompt a legislative reaction of the kind Elhauge favors — a more nuanced and particularized process to allow certain projects to go forward even if they would negatively affect some endangered species.[24] It is not clear how instrumental the use of preference-eliciting canons was in provoking a congressional response in *TVA v. Hill*, however, because both the majority and dissenting opinions explicitly called for further congressional action to ameliorate the result the majority felt compelled to reach.[25]

D. Supplemental Canons

Finally, *Statutory Default Rules* describes a fourth category of canons, a sort of catchall of those canons that Elhauge cannot fit in any of the other three. Supplemental default rules are those that courts resort to when meaning is not clear, when the court can determine neither current preferences nor enactor preferences, and when the conditions for preference-eliciting canons are not present. These rules seem to embody a particular normative view of government that is likely to be contested by those who do not share Elhauge's vision. For example, he argues that the preferences of state polities should be given priority because "[g]iven a lack of reliable information about the enacting or current Congress's preferences, the default rule best calculated to minimize political dissatisfaction is to track local democratic choice"

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[18] *See* Elizabeth Garrett, *Step One of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 55, 70 (John F. Duffy & Michael Herz eds., 2005).

[19] 437 U.S. 153 (1978).

[20] Endangered Species Act of 1973, 16 U.S.C. § 1536 (2006).

[21] *See* TVA v. Hill, 437 U.S. at 173.

[22] *See id.* at 167.

[23] *Id.* at 187.

[24] *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 763 (4th ed. 2007).

[25] *See* TVA v. Hill, 437 U.S. at 194–95 (noting that it was not passing on the wisdom of the congressional enactment and that "[w]e do not sit as a committee of review, nor are we vested with the power of veto"); *id.* at 210 (Powell, J., dissenting) (stating his conviction that Congress would react to the opinion by amending the Endangered Species Act).

(p. 228). Or in very limited circumstances, it is best for the court to interpret ambiguous language to be consistent with common law. In the end, these supplemental rules are not major components of Elhauge's framework, and given the inconsistency of their application and their close connection to particular views of the appropriate structure of democratic institutions, the discussion is the least compelling of the four categories.

II. ELHAUGE'S DESCRIPTIVE PROJECT: ARE LAWMAKERS AND JUDGES ACTUALLY APPLYING THE DEFAULT RULES FRAMEWORK?

Elhauge characterizes his framework as both descriptively and normatively appealing. Descriptively, he claims that legislators would favor his approach that emphasizes current enactable preferences; courts applying it are therefore the "honest agent[s]" of the legislative branch (p. 8). However, I am not aware of any lawmaker who has explicitly urged courts to adopt this perspective. He also argues that his view of the canons "largely fit[s] U.S. legal doctrine," although he accepts that it does not necessarily "match[] . . . what judges say they are doing in their opinions nor what judges subjectively think they are doing" (p. 14).

A. What Rule Do Legislators Prefer?

Elhauge's unique and thought-provoking claim with respect to legislators' views of the best interpretive default rules is that lawmakers would choose a regime that would give them greater influence not only over the statutes they enact but also over all statutes being interpreted during their term of office. In fairness, Elhauge does not precisely give the views of current legislators primacy in the interpretive process; rather, he states at various points in the book that interpreters are to "maximize the enactable preferences of the legislative polity" rather than "strategic preferences of legislators" (p. 54). Section III.A discusses the difficulty of determining a definitive "enactable preference" in the absence of an actual enactment, but it is important to note here that it is the legislature that enacts laws, not the polity. Thus, enactable preferences are necessarily tied to the views of the lawmakers, as informed by their need to be accountable to the electorate and, in most cases, to obtain the signature of the President on the bill. Moreover, to the extent that legislators are likely to support Elhauge's methodology as consistent with an "honest agent" model of governance, they are likely to view the judiciary as their agent, not as the agent of "the polity" vaguely defined. Thus, one can fairly conclude that the current preferences canons are designed to allow the preferences of today's members of Congress to influence the meaning of statutes enacted in the past, with the understanding that future Con-

gresses may influence the meaning of the statutes that the current members pass in ways they might not support.

Whether current lawmakers would favor Elhauge's approach, rather than the traditional archeological approach that seeks to discern enactors' intent in all cases, turns on at least two considerations: how many statutes a legislature is likely to pass during the relevant period versus how many are likely to be interpreted, and how intense the preferences of current legislators are with respect to both sets of laws. The answer to the first seems to favor Elhauge's approach — certainly, many more laws are interpreted by federal and state courts throughout any two-year period than Congress actually enacts (at least, if one does not include the dozens of inconsequential laws passed to commemorate groups or causes, to name federal buildings, and the like). In fact, Elhauge supports his claim that legislators would prefer courts to pay attention to current preferences by noting that this approach allows Congress to avoid spending its limited time and resources updating laws in circumstances where courts have enough credible evidence to perform that task. "Having to expend such legislative effort would crowd out other legislative activities, such as updating clear statutes that have become undesirable in ways that courts and agencies cannot correct [because they cannot countermand clear language], or enacting new statutes to address new problems" (p. 45). However, it is worth noting that current legislators will influence the interpretation of past statutes only when there is certain evidence about current preferences: agency decisions adopted through certain procedures and certain subsequent legislative actions short of a new enactment. Although there are often agency pronouncements on a topic (which may not actually reflect legislative preferences[26]), there is infrequently the kind of legislative action that Elhauge would require to signal current preferences.

Elhauge's claim that legislators will not necessarily care more about the way courts interpret the statutes they enact than they care about influencing the interpretation of statutes enacted by past Congresses (pp. 48–52) is more problematic. Elhauge acknowledges that legislators may have intense preferences about legislation they choose to spend their time on, but he argues that they will express those preferences in clear statutory language that allows them to opt out of current preferences canons. Default rules only come into play when lawmakers have used ambiguous or vague language,[27] and Elhauge argues that ambiguity signals that the issue was marginal, that there was no enactable preference on the matter, or that unforeseen events have undermined the clarity of the language. "In short, legislators may have a

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[26] *See infra* pp. 2122–24.

[27] *See supra* section I.B, pp. 2109–11.

personal stake in the statutes they enacted, but probably not in the statutory ambiguities they enacted" (p. 48). This argument is unpersuasive for several reasons.

First, Elhauge falls into the trap that captures many textualists: they overstate the ease with which lawmakers can enact clear, definitive legislation that leaves no room for ambiguity. Legislative time is limited; text can be written in haste on the floor to reflect bargains reached at crucial times; lawmakers may believe language to be clear because they understand the context of the enactment but an agency or court will view the same language as ambiguous; or legislators may fail to foresee circumstances in which the statute will arguably apply. In some cases, statutory language is purposefully left ambiguous precisely because lawmakers have a substantial stake in the meaning and cannot achieve consensus on more precise terminology.[28] Instead, they adopt language that is susceptible to several meanings, intending to continue to fight in the agency and in the courts — but probably not with the intent that succeeding Congresses will influence the interpretation absent an actual legislative enactment amending the challenged language. Elhauge's notion that ambiguous language in a statute primarily occurs when the issue is marginal has no empirical support, and it seems contrary to what we often observe with respect to major legislation and its most controversial provisions.

It is also unpersuasive to characterize lawmakers' "personal stake" in legislation they enact as, to a substantial degree, mere "credit-claiming or pride of authorship" (p. 48), objectives Elhauge assumes are best met with clear textual language. Legislators invest time in particular issues because their constituents care a great deal about the matter, because they have strong views about the policy, or both. Claiming credit may be important to their reelection, and they may well be proud of their accomplishments, but they also care about the policy enacted.[29] In some cases, that policy can be enacted only with purposeful ambiguity in the statute; in other cases, inadvertent ambiguity results with respect to an important issue as a function of the realities of the legislative process. Such unclarity, however, cannot be equated with an intentional desire to allow future interpreters to determine statutory meaning through subsequent legislators' preferences.

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[28] For an example of a court finding evidence of such a purposeful ambiguity, see *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994), which interpreted the effective-date provision of the Civil Rights Act of 1991, *id.* at 261–63.

[29] *See, e.g.*, RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1 (1973) (mentioning concern over public policy as one of three main goals of legislators in selecting committees); JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 246–49 (3d ed. 1989); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 32 (1991) ("[T]he main reward of being a legislator lies in shaping public policy.").

Other aspects of his analysis reveal that Elhauge shares the view that legislators are more concerned about policy outcomes than credit-claiming; for example, his argument that lawmakers favor a current preferences default rule hinges on their concerns about policy outcomes because they will not be able to effectively claim credit for policy change adopted through judicial decision.

Elhauge also argues that there is no reason to believe that members of Congress feel more strongly about the laws they enact than about many other important topics on which there are already statutes (pp. 48–49). Legislative action signals merely an interest in "*changing* the preexisting law on that topic" (p. 49):

> Whether a polity wants to *change* the law turns not on its absolute level of interest in the topic, but on the extent to which it is dissatisfied with prior enactments. Indeed, the more important the issue, the more likely some satisfactory enactment already exists to deal with it. (p. 49)

My intuition here does not parallel Elhauge's. He may be right in some circumstances, particularly when the majority in Congress has been stable for some time and there has not been a change of party in the presidency. But when a new majority takes control of Congress, or a new President ushers in a partisan shift, it is hard to believe that policymakers would agree that satisfactory enactments with respect to many important issues are already on the books. Certainly, Elhauge is right that a legislative enactment is primarily a signal of the majority's view about the desirability of change from the status quo, and he accurately observes that outside forces often drive the legislative agenda (p. 49). The current focus, for example, on overhauling the financial services industry and stimulating the economy arises from the global economic crisis. In other cases, an issue rises to the top of the agenda because legislation is set to expire, as with the need to reauthorize certain environmental laws, education laws, or the Voting Rights Act. All this suggests that the development of a legislative agenda is complex and subject to many forces, and it is difficult to assert confidently, as Elhauge does, that lawmakers would prefer ex ante an interpretive framework that emphasized current preferences over enactor preferences. Indeed, lawmakers do not necessarily have particularly informed views about laws they have not enacted or considered amending.

Elhauge responds to these arguments with the claim that even when a Congress has intense preferences about a particular topic — for example, civil rights laws in the 1960s — lawmakers will still prefer to influence all statutes being interpreted during their time in power as well as to shape civil rights laws by enacting specific statutes on the topic and exerting influence over interpretations of those statutes in the near term (pp. 50–51). Or, to use the example above of a new Congress and President entering office with a sweeping agenda for change, Elhauge's default rules allow them not only to enact laws that

change the status quo, but also to have wider influence by taking certain actions, short of a new enactment, that will determine judicial interpretation of ambiguities in past laws currently being challenged. Although Elhauge's claim is plausible, it is not fully convincing, in part because his framework requires certain kinds of evidence to trigger a current preferences default rule — certain legislative actions or agency interpretations (pp. 64–65) — so the breadth of the influence over laws being interpreted during a certain period of time is actually much less sweeping than his analysis suggests.

Elhauge acknowledges that his formulation of the current preferences canons is actually not likely the rule that lawmakers would prefer; rather, rational legislators would prefer a current preferences rule while they are in office and an enactor preferences rule, at least with respect to the statutes they passed, after they leave office (p. 68). He decries this as "self-aggrandiz[ement]" and argues that a current preferences rule is constitutionally protected from general repeal (p. 67) (although an opt-out with respect to particular statutes is possible through clear textual language). Such protection is necessary so as not to permit "a single legislature to adopt [a] general interpretive rule [that] will enhance its political power at the expense of the political satisfaction of future legislatures" (p. 66). Placing the interpretive rule off-limits so that one legislature cannot alter it and bind future legislatures may be the right way to solve the "trans-temporal collective action problem" he identifies (p. 68), but the solution moves his analysis from the descriptive to the normative. His approach, he argues, maximizes political satisfaction over time and is thus normatively warranted, but it is not the approach that a particular legislature would support because its members would favor maximizing their own satisfaction. A constitutional solution to this collective action problem is required or else each successive legislature would try to adopt the interpretive regime Elhauge believes legislators really prefer: current preferences for their time in office and enactor preferences thereafter.

In short, lawmakers care strongly about the legislation they have drafted and debated, and it seems unlikely they would be willing to trade continuing influence over the interpretation of these laws for limited influence over all statutes being interpreted. Legislators typically spend significantly more time drafting legislation and producing legislative history on bills they hope to enact than overseeing previously passed laws. Members of Congress vie for assignments to committees with jurisdiction over policy in which they take a strong interest, either because of personal preferences, constituent interests, the potential

for influence within the legislature, or some combination,[30] and ardent supporters of policy outcomes invest their time and other resources in developing expertise in a particular subject matter.[31] Notably, no legislature has codified the current preferences default regime in the statutory rules of construction, nor does Elhauge point to any explicit indication by a lawmaker or from Congress that legislators would favor this sort of default regime.[32] The failure of the dog to bark here[33] is telling because Elhauge points to other codified rules of construction as evidence of legislator support in other parts of his book (p. 320).[34] Most significantly, he notes that eighty percent of state legislatures have explicitly or implicitly directed courts to consider the intent of enactors and legislative history (p. 116). Why is it not equally significant for Elhauge's descriptive project that no legislative body has directed courts to adopt rules that maximize current lawmakers' influence over statutes being interpreted while they are in office?

B. What Default Rules Are Courts Using?

The second part of Elhauge's descriptive analysis focuses on judicial interpretation. He claims that even if judges do not say they are privileging current legislative preferences through the use of certain canons, this perspective nonetheless accurately describes judicial outcomes (p. 14). It is not clear what mechanism has achieved such consistency in the application of a framework that has never been articulated before Elhauge's work, particularly given the diversity of approaches to statutory interpretation within the American judiciary.[35]

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[30] *See* CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 63–77 (3d ed. 1997).

[31] *Cf.* James J. Brudney, *Intentionalism's Revival*, 44 SAN DIEGO L. REV. 1001, 1024 (2007) (discussing the deep investment and long-term interest of "ardent supporters" of a certain piece of legislation in their particular policy area).

[32] It may be that legislators would understand and appreciate the arguments made in Part III that the current preferences default is indeterminate and would not meaningfully constrain judges, and that applying the framework would challenge the capacity of the courts.

[33] This reference to a Sherlock Holmes mystery, ARTHUR CONAN DOYLE, *The Adventure of Silver Blaze*, *in* THE COMPLETE ADVENTURES AND MEMOIRS OF SHERLOCK HOLMES 172, 184 (1st ed. 1975), is one that is also found in some Supreme Court opinions employing a canon of construction under which Congress's failure to discuss an issue in the legislative history of a statute over which it otherwise deliberated thoroughly is thought to indicate that it did not intend a dramatic change in that area. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 589 (1982) (Stevens, J., dissenting). *But see* Harrison v. PPG Indus., 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

[34] Elhauge argues that "[t]o confirm that an anti-change or no-effect default rule would not maximize political satisfaction, we might look to the interpretive codes that legislatures promulgate" (p. 320).

[35] *See generally* Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005) (discussing consequences for

Elhauge presents only one piece of evidence to support the suggestion that judges know they have created, case by case and in a decentralized way, an interpretive regime that favors current preferences. He points to a finding by Lee Epstein and Jack Knight that "70% of conference discussions in nonconstitutional cases refer to the preferences or likely reactions of current legislatures or other governmental actors" (p. 252).[36] Although Elhauge acknowledges that Epstein and Knight use the statistic to support a different theory of judicial behavior, he correctly notes that it "is at least equally consistent with this book's theory that judges employ a current preferences default rule" (p. 252).

The seventy percent figure is based on an examination of Justice Brennan's conference memoranda and his and Justice Powell's notes from conversations between Justices regarding cases for which they heard oral argument in the 1983 Term.[37] Certainly, the results in this small sample are interesting, not just because of the number of cases in which one or more Justices referred to current legislative or political actions but also because of the substance of some of those remarks. For example, Epstein and Knight quote from one memorandum in which Justice Brennan noted a specific bill pending in Congress related to the case before the Court.[38] But it is a substantial leap from evidence about one term of the Supreme Court more than a quarter of a century ago to generalizations about the entire federal bench over decades. Thus, while the finding seems consistent with Elhauge's theory, this very limited empirical finding cannot alone be extrapolated to the generalization that all judges seek to maximize current enactable preferences through a framework of default rules.

The lack of evidence is all the more surprising given that it would be in judges' interest to reveal when they are employing the default rules framework Elhauge describes. Explicitly acknowledging their use of this interpretive approach would be an effective response to the charge that willful judges are merely "legislating" their own preferences and undermining the will of the elected representatives of the people. Elhauge recommends in his conclusion that judges be more transparent in their use of current preferences default rules and other aspects of his framework (p. 325), but he never provides a satisfactory reason to explain why no judge has yet provided that transparency.

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interpretive theory of the fact that the judiciary is made up of many judges using different interpretive methods).

[36] Elhauge cites LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 150 (1998).

[37] *Id.* at 148–50.

[38] *Id.* at 149–50 (concerning *Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co.*, 464 U.S. 30 (1983)).

Nor does Elhauge identify any mechanism that would result in the selection of judges who would render opinions consistent with his framework. For example, there is no reason to think that the nomination and confirmation process would produce judges who would converge on a framework primarily designed to maximize current enactable preferences, particularly when, as far as I am aware, that objective has never been discussed in a modern confirmation hearing.[39] To the extent there is any congressional indication of what method lawmakers prefer, all signs point toward using enactor preferences as revealed in text and legislative history.[40]

But is Elhauge correct that, even if judges are not consciously applying his framework and we cannot identify any mechanism that would lead to judicial results consistent with his interpretive theory, it nevertheless best describes the jurisprudential landscape of statutory interpretation cases? Again, his argument is not convincing. Two aspects of his descriptive project raise particular doubts: his analysis of the *Chevron* line of cases and his description of the cases he classifies as using preference-eliciting canons.

First, he emphasizes the *Chevron* doctrine as an example of a current preferences default rule (pp. 79–111). Although Elhauge works to explain how all the nuances of the *Chevron* doctrine are consistent with his view of what kinds of agency action accurately reflect current enactable preferences, he does not address a preliminary issue that has been raised in recent scholarship: namely, just how influential is the *Chevron* doctrine with respect to judicial outcomes? William Eskridge and Lauren Baer provide an exhaustive analysis of more than 1000 cases between 1984 and 2006 in which the Supreme Court could have used the *Chevron* doctrine, and they demonstrate that the Justices of-

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[39] The discussions of statutory interpretation in most modern confirmation hearings focus on the appropriate use of legislative history by courts, *see* James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. (forthcoming Apr. 2009) (manuscript at 63 & n.241, on file with author) (citing hearings on the nominations of Justices Breyer and Ginsburg), and it appears that nominees claim to share with lawmakers the objective of discerning the intent of the enacting Congress. *See* Jason J. Czarnezki, William K. Ford & Lori A. Ringhand, *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 151–58 (2007) (providing information on Chief Justice Rehnquist and Justices O'Connor, Souter, Thomas, Breyer, and Ginsburg).

[40] *See, e.g.*, *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 1–3 (1990) (containing statements by committee members indicating that Congress expects courts to use legislative history in determining legislative intent, presumably that of the enacting Congress); *see also* Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43, 45–48 (1988) (assuming that courts use legislative history for the purpose of determining congressional intent); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 385–86 (discussing judicial uses of legislative history).

ten fail to apply *Chevron* in cases where it would be appropriate.[41] Moreover, in cases where *Chevron* is invoked, its application is inconsistent,[42] and the Court considers legislative history (enactor preferences, in Elhauge's framework) as well as agency views (which Elhauge equates to current enactable preferences) to determine statutory meaning.[43] Other empirical work suggests that *Chevron* has been somewhat more robust in certain lower courts, at least in the period immediately after the opinion was published.[44] So the picture is no doubt complicated. More empirical analysis is required to determine the validity of Elhauge's descriptive claim, but the initial work suggests that the *Chevron* default rule is not as vigorous as Elhauge's statutory framework would demand. This scholarship does not undermine Elhauge's normative points — it may still be the case that courts *should* emphasize current enactable preferences in the face of ambiguous statutory language, and it may be that consistent application of the modern *Chevron* doctrine would achieve that — but it does raise serious questions about the accuracy of the descriptive claim.

A second objection to Elhauge's view of *Chevron* as implementing interpretations that track current enactable preferences does not depend on empirical analysis of the jurisprudence. Enactable preferences are presumably the policies that the legislative branch would pass and that would be accepted by the President or enacted over his veto. Even if that notion of current enactable preferences is determinate and knowable (and section III.A suggests it is not), it is emphatically not equivalent to the policies that the President would favor, or even necessarily what an executive branch agency would adopt. Yet those are the policies that the *Chevron* doctrine directs courts to con-

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[41] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1117–20 (2008).

[42] *Id.* at 1120–23.

[43] *Id.* at 1135–36; *see also* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 359–61 (1994) (noting findings similar to Eskridge & Baer's in a much smaller sample); *cf.* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) (analyzing the threshold decision of when *Chevron* applies, an issue of growing jurisprudential importance that limits the effect of the *Chevron* default rule).

[44] *See, e.g.*, Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1057–59 (finding in a study of cases through 1988 that *Chevron* had an effect on outcomes but the effect weakened over time); Aaron P. Avila, Student Article, *Application of the* Chevron *Doctrine in the D.C. Circuit*, 8 N.Y.U. ENVTL. L.J. 398 (2000) (finding that *Chevron* had some effect on outcomes); *see also* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006) (analyzing all Supreme Court decisions reviewing agency interpretations of law between 1989 and 2005 and 253 lower court opinions reviewing interpretations by the EPA and NLRB, and concluding that the application of *Chevron* is significantly affected by the judges' own convictions). Elhauge's work relies only on Supreme Court cases, so it is not clear how relevant the experiences of lower courts, even lower federal appellate courts, are to his framework.

PREFERENCES, LAWS, AND DEFAULT RULES

sider deferentially. Although Elhauge restricts judicial deference to policies that have been adopted after public participation in the rule-making, thereby allowing a possibility for legislative oversight (pp. 90–91),[45] occasional oversight by one or a few congressional committees does not necessarily result in policies that would be enacted by both houses and signed by the President. Elhauge admits the divergence but then minimizes it (p. 81). Positive political theory has persuasively demonstrated, however, that a policy adopted through formal constitutional lawmaking procedures is often very different from the policy that would be implemented by one of the political players, acting alone, when legislation would be required to overturn its decision.[46] In other words, an administrative agency, with leaders appointed by the President who are likely to share his policy agenda, will seek to implement policy as close to the President's preference as possible without prompting intrusive oversight or legislative override. This equilibrium will be different from the policy that could be enacted by the legislature at the same period of time. Thus, an interpretive regime that defers to agency interpretations will not capture current enactable preferences, although it will locate policy close to the preferences of some political actors, particularly those in the executive branch.[47]

There may well be good reasons to prefer decisions reached by agencies to those reached by courts on matters of statutory interpretation when statutory text is vague and ambiguous. Persuasive arguments can be mounted to defend allowing the political branches greater influence over the meaning of statutes even if the result is not the same as the policy that would be adopted by formal legislation; not only do agencies have policy expertise, but they are accountable to the executive and legislative branches.[48] But it seems unlikely that if leg-

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[45] Elhauge's rationale for restricting application of his default rule to agency pronouncements made through a decisionmaking process that allows public input is not entirely persuasive. He argues that such rulemaking makes it more likely that there will be legislative awareness of the rule and thus that the outcome may better reflect current enactable preferences (p. 91). That is true only for a handful of rulemakings and adjudications that are salient and come to the attention of a busy Congress, not for all such decisions. In addition, the opportunity for public participation does not necessarily mean that the views presented are broadly representative of the public's views or are the same views that would be expressed during a legislative process that results in the enactment of a new law on the topic.

[46] *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); *see also* Daniel B. Rodriguez, *Administrative Law*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 4, at 340, 352–54 (describing the influence of the legislative branch and President on agencies from the perspective of positive political theory).

[47] *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 111–12 (2009).

[48] *See, e.g.*, VERMEULE, *supra* note 12, at 208–11, 225–26 (noting that agencies may be more competent to ascertain enactor preferences than courts and defending the notion that agencies are

islators actually favored Elhauge's current preferences default rule, they would believe that administrative agencies necessarily seek to reach outcomes that are consistent with that approach. Instead, agencies are likely to adopt interpretations that can be characterized accurately, if somewhat inelegantly, as current non-overrideable executive branch preferences. Deferring to these interpretations cannot be justified with Elhauge's "honest agent" approach and should not be cloaked in language that suggests *Chevron* protects the prerogatives of the legislature. *Chevron* deference should instead be understood as a mechanism that shifts power to make policy from the legislative branch to the executive branch, a shift that may make sense, all things considered. But that justification looks very different from the one mounted in *Statutory Default Rules*.

The second aspect of Elhauge's descriptive project as it relates to judicial practice that fails to persuade is his argument that courts use a collection of canons to elicit current enactable preferences. The notion of preference-eliciting canons, which is inspired by information-forcing default rules in contract law, is an intriguing one. Section III.B questions whether courts can actually apply this set of default rules as Elhauge counsels, and suggests that the framework demands more of the judiciary than it can reasonably be expected to deliver. The question now is whether this aspect of his framework accurately describes current judicial practice, and on this score, Elhauge's argument is not compelling.

One challenge to this aspect of his descriptive claim is that so few judicial interpretations are actually overridden by Congress. Elhauge directly addresses this question, first by noting that consistent use of the canons will spark ex ante clarification by legislators seeking to evade application of the canons (pp. 157–58). Assuming they are successful in incentivizing Congress to draft text with specificity, Elhauge reasons, there will be little need to deploy preference-eliciting rules. As I have noted, there are limits to the ability of lawmakers to legislate clearly and specifically, however, so there should still be some significant number of cases that demand interpretation even with the consistent judicial use of the default rules framework. Indeed, many of the canons that courts frequently use to interpret statutes are classified by Elhauge as preference-eliciting — from the rule of lenity in criminal cases to other canons protecting the politically powerless to many of the linguistic canons (pp. 168–87, 188–203). The statistic that only six to eight percent of all Supreme Court statutory interpretations are

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more institutionally capable of updating statutes); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517–18.

overridden by subsequent legislative action (p. 158)[49] is surprising given the frequency with which the Court uses canons that Elhauge describes as preference-eliciting.

Elhauge responds to the reality of a low number of overrides by arguing that the Court tends to estimate current preferences accurately, so the number of cases where it seeks to elicit a legislative response is probably very low, in the range perhaps of ten percent (p. 158). Indeed, through a series of unsupported assumptions, he uses the six to eight percent figure to conclude that perhaps eighty to ninety percent of the cases in which the Court uses a preference-eliciting approach actually prompt an override. These assumptions are subject to question, however, because I suspect that the default rules designed to estimate current preferences — *Chevron* and specific subsequent legislative action short of a new enactment — are used by courts much less frequently than the canons he classifies as preference-eliciting. I would have been interested, for example, in an empirical analysis of how often the Supreme Court uses the current preferences default canons versus the preference-eliciting canons. It is also not clear how Elhauge classifies a case where a court uses mixed strategies, spending time on strategies designed to approximate enactor preferences as well as the canons he classifies as preference-eliciting (but which are often described by judges as tools to understand enactor preferences).

This leads to the final criticism of the descriptive project with respect to preference-eliciting canons. Elhauge simply includes too many canons in this set of default rules. One group of such canons are those he describes as favoring the politically powerless, because in these cases, the politically powerful group that loses can more successfully appeal to the legislature for an override (pp. 168–87). The rule of lenity, which favors a particularly powerless group — those accused of a crime — seems generally well suited to Elhauge's explanation. Not only does the rule of lenity protect a particularly powerless group (except perhaps with respect to certain "white-collar" criminals), but it systematically disadvantages the government, which is the most successful entity in securing congressional overrides of judicial decisions.[50] It is not clear, however, that all the canons he considers under this rubric accurately reflect modern political dynamics. For example, he includes the canon to adopt interpretations that favor Indian tribes (pp. 186–87); yet, in the current political landscape some tribes have access to wealth, sophisticated lobbyists, and political influence. Members of Indian tribes may still be relatively powerless, especially if there is

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[49] Elhauge calculates this statistic from data in William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

[50] *See* JEB BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 163–64 (2004).

substantial principal-agent slack between the members and their leaders, but it is not clear that the canon operates to protect the interests of the average tribal member as opposed to those of the relatively powerful leadership.[51]

Elhauge also classifies many linguistic canons as preference-eliciting rules (pp. 188–203). His decision to consider these canons as aimed at an objective other than mirroring enactor preferences is understandable because many of them do not capture the everyday use of language. For example, Elhauge convincingly argues that the frequently invoked maxim of *expressio unius est exclusio alterius* is based on dubious assumptions about the meaning of omissions in a list contained in a statute (p. 189). Certainly, understanding many of the linguistic canons as aimed at something other than capturing everyday use of language is necessary,[52] but whether they operate as preference-eliciting canons is less clear. For one thing, they are used quite often by courts in statutory interpretation,[53] a reality that is inconsistent with Elhauge's assertion that recourse to preference-eliciting canons occurs less frequently than use of current preference or enactor preference defaults (p. 158). It seems extraordinarily unlikely that courts are using these linguistic canons to prompt a legislative override; it is much more likely that they are attempting, as they often expressly explain,[54] to capture the meaning that the enacting legislators were likely to have understood when they wrote and enacted the text.

In short, the descriptive element of Elhauge's formulation of the preference-eliciting default rules suffers from an ailment commonly seen in law professors' attempts to bring clarity to a group of judicial opinions through a unifying and comprehensive theory, even though no institutional actors have articulated that theory to explain their behavior. He focuses on some Supreme Court cases that, if characterized in a particular way, seem to support his theory; he does not discuss the dozens, and likely hundreds, of cases at all levels of the judiciary that

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[51] This complex reality suggests that these canons may be subject to revision over time as interest group influence waxes and wanes, but Elhauge does not undertake an evolutionary analysis of the canons.

[52] *See* Garrett, *supra* note 18, at 70 (describing these canons as "aimed more at describing the linguistic conventions of legislative drafters rather than those of ordinary people"); *cf.* Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806–07 (1983) (criticizing many linguistic canons).

[53] *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 30 tbl.I, 34 tbl.II (2005).

[54] *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (using a variety of linguistic canons to determine congressional intent); United States v. Smith, 499 U.S. 160, 173 (1991) (using a textual canon to determine congressional intent with respect to a list of exceptions); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 836–37 (1988) (refusing to imply an additional exemption in the attempt to discern enactor intent).

do not necessarily fit the theory;[55] and he tells a story that fits the cases he has emphasized. Here, as elsewhere, he uses only Supreme Court cases as evidence of what the judiciary is doing when judges interpret statutes, and so he selects among an already skewed sample of all statutory interpretation cases.[56] The theory might be normatively appealing, but it is not descriptively accurate — it is rather an exercise in connecting the dots (or at least some of them) post hoc.

Two problems with such an approach are that it often leaves out cases that do not support the picture the author draws, and it may not grapple with alternative understandings of the cases selected because the author is more concerned with making the outcomes fit his theory. For example, Elhauge discusses *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*,[57] a case that would have been a good candidate for a preference-eliciting default rule, but in which the Court did not follow such an approach. However, Elhauge does not criticize the Court for failing to issue a judgment that would have been likely to trigger an override and therefore to maximize political satisfaction. *Brown & Williamson* was a challenge to the FDA's determination that it had the authority to regulate cigarettes under the broad language of the Food, Drug, and Cosmetic Act (FDCA). Application of Elhauge's current preferences default rules would usually result in a judicial decision deferring to the agency interpretation. Though the FDA's pronouncement contradicted the agency's longstanding position that it lacked the authority to regulate cigarettes, a reversal of agency position is not prohibited under *Chevron* or the default rules framework (p. 83). The case was complicated, however, by subsequent congressional enactments that could be understood as demonstrating the current Congress's view that the agency could not validly regulate cigarettes under the FDCA. Elhauge argues that, when faced with this conflicting evidence of current preferences, the Court appropriately turned to the second set of canons in order to "rely on the best estimate of the preferences of the enacting legislative polity" (p. 105). The Court followed that course by using various linguistic canons, such as the whole act rule, to reject the agency's interpretation of what many

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[55] *See, e.g.*, Brudney & Ditslear, *supra* note 53 (studying every Supreme Court case from 1969 to 2003 that dealt with workplace safety and finding inconsistent use of canons).

[56] Elhauge notes that the Supreme Court would use preference-eliciting canons more frequently than lower courts because it is more likely to prompt a legislative override (p. 202). That is certainly accurate, but then the question remains why the lower courts so frequently use the canons he describes as preference-eliciting, in particular the rule of lenity and the linguistic canons. Do they serve some different function when used by lower courts? Or are lower court judges unaware of the real reason for the canons, perhaps because no Supreme Court Justice has made explicit the preference-eliciting rationale?

[57] 529 U.S. 120 (2000).

would consider to be clear text broad enough to encompass cigarettes as a "device" subject to regulation by the FDA.[58]

Why was *Brown & Williamson* not a candidate for preference-eliciting interpretation, perhaps through the use of plain meaning rules like those the Court deployed in *TVA v. Hill*, that would have forced the powerful tobacco lobby to go to Congress to overturn the agency's interpretation? Elhauge does not consider this possibility, even though the FDCA was more than sixty years old and had been adopted at a time when the scientific evidence about the danger of cigarettes was much less clear than it is today. It seems quite likely that the polity would be supportive of greater regulation of cigarettes — certainly, the President and his appointee to head the FDA believed such regulation to be consistent with their electoral mandate. However, the tobacco lobby has long been able to use vetogates in the Congress to derail any legislative attempt to increase regulation. By deploying Elhauge's default rules framework creatively, the Court could have used *Brown & Williamson* to change the legislative dynamics and force the organized group to seek some override of an unfavorable court decision. This might also have prompted Congress, working with the President and the FDA, to craft a more nuanced approach to the regulation of cigarettes.

Furthermore, it could be argued that all three of the conditions Elhauge sets out for the use of the preference-eliciting canons (p. 155) were present in this case. First, it is not clear whether the enacting Congress intended the agency to regulate products thought safe at the time of enactment that were later proved to be unsafe. The general language used in the FDCA, which arguably could be understood in ordinary usage to cover cigarettes, could have been intended to allow flexibility and change over time. Second, as discussed above, the power of the tobacco lobby meant that it could block legislation, even if a majority favored it, and that it would be in a relatively strong position to bargain for a legislative override of an unfavorable court decision. Finally, the interim costs of a decision affirming the FDA seem acceptable. The FDA had not banned cigarettes, but had only promulgated regulations concerning advertising, labeling, and accessibility to children. The economic future of the tobacco industry would not have been imperiled by allowing the regulations to go into effect during any legislative consideration of a reaction to the new regulatory policy.

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[58] Indeed, the clarity of the text when read without any recourse to legislative context raises the question of why the default rules were triggered at all. But as has been previously observed, *see supra* section I.B, pp. 2109–11, the question of when statutes are clear and what sorts of extrinsic evidence can be used in that determination is not part of Elhauge's project.

III. ASSESSING THE NORMATIVE CLAIMS
OF *STATUTORY DEFAULT RULES*

The innovative aspects of Elhauge's project — the current preferences default rules and the preference-eliciting canons — are unpersuasive as a descriptive matter, but the failure of his theory to capture the current state of the law does not necessarily undermine its normative appeal. The notion that a framework of default rules could be consistently applied by courts and thereby encourage Congress to take account of those rules when it legislates has long been an attractive one to scholars of statutory interpretation.[59] The final section of this book review turns to issues that undermine the normative force of Elhauge's argument: first, the absence of a determinate notion of "enactable preferences" that default rules could maximize, and, second, the institutional challenges that would face judges seeking to apply his framework.

A. *Enactable Preferences: Can They Be Determined*
in the Absence of an Enactment?

One of Elhauge's most significant contributions to the literature on statutory interpretation is the notion that courts should often strive to maximize "the satisfaction of enactable political preferences" (p. 8) and not the intentions of the enacting coalition. He emphasizes that the current preferences maximized by use of the default rules "must be truly enactable" (p. 61). In some cases, the use of a preference-eliciting technique is designed to cause Congress to respond by enacting new legislation; in that case, no one can disagree that the statutory framework has operated to align policy with current political preferences. Yet, much of his work depends on the argument that there are "current enactable preferences" that are determinate and knowable apart from an actual current enactment. He typically considers issues as stand-alone policies when he discusses whether there is some current political preference that could be enacted by Congress. This formulation of current preferences, while intriguing, ignores the reality of the political process in all its complexity.

As Elhauge explains in detail, legislative procedures and structures play a significant role in determining which policies are enacted and how those enactments are framed (pp. 120–23). The structure of the legislative process allows Congress to avoid some collective action problems, such as cycling, and to produce policies that are relatively

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[59] *See, e.g.*, McNollgast, *supra* note 2 (arguing for a set of canons to serve as a stable interpretive regime against which Congress can act).

stable.[60] That reality means that the substance of enacted policies are heavily dependent on the procedures through which they are considered — the committees that consider the proposal; the role of party leadership; the procedures on the floor like special rules in the House, the germaneness requirements for amendments, the amendment procedures, and the possibility of a Senate filibuster; and many other rules. Furthermore, Jeremy Waldron has argued that in the "circumstances of politics" — that is, in the context of decisionmaking by an assembly of lawmakers representing diverse perspectives and in the face of inevitable disagreement about the best course of action — the procedures through which statutory text is developed and voted on are crucial to more than just the policy equilibrium enacted by Congress.[61] They are intertwined with the legitimacy and authority of the laws. Indeed, to the extent that the current preferences default regime is seen as allowing courts to amend statutes to update them to maximize current political satisfaction, these new directives have not complied with the constitutional requirements of Article I, Section 7 for the exercise of legislative power.[62]

Few policies are considered in isolation; instead, they are part of larger legislative packages that are constructed by congressional committees, party leaders, ardent supporters, and pivotal voters as the policies proceed through the legislative process. Leaders often create omnibus bills combining policies in various ways that allow them to be enacted as part of a larger bill even if they could not be enacted as stand-alone laws.[63] If a budget reconciliation act is used as the legislative vehicle, proponents will be able to avoid a Senate filibuster and take advantage of other rules that shape the provisions of the vehicle.[64] Party leaders may be involved differently in shepherding omnibus legislation through the congressional process, and the enacting coalitions for various vehicles are assembled using different strategies. Budget reconciliation acts are often supported mainly by the majority party, whereas appropriations bills may contain enough projects

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[60] *See generally* GERRY MACKIE, DEMOCRACY DEFENDED (2003); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503 (1981).

[61] JEREMY WALDRON, LAW AND DISAGREEMENT 101 (1999); *see also id.* at 69–118.

[62] The line between lawmaking and legal interpretation is difficult to draw. Presumably Elhauge would characterize the judicial role as interpretive, particularly because he justifies the current preferences default as consistent with the judiciary's acting as the faithful agent of the legislature.

[63] *See* Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, art. 1, *available at* http://www.bepress.com/ils/iss3/art1. *See generally* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 64, 69 (2d ed. 2000).

[64] *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 24, at 461.

spread throughout the country to command broad approval from both parties. In some cases, majority party leaders work actively to ensure bipartisan support because the subject matter is controversial and they want the cover of their colleagues across the aisle.[65] In other cases, the majority party wants the credit for a popular policy and spends little time convincing opponents to change their votes. Sometimes, notwithstanding the work of ardent supporters of a policy, certain proposals that could command majority votes and presidential approval may be successfully blocked by opponents who control a key committee or other vetogate, especially if party leadership is not willing to protect the proposal or move it forward. Given the importance of procedure and legislative packages to which policies are actually enacted, it is difficult, if not impossible, to identify a likely current enactable preference on a single policy — and it may be the case that there are multiple conflicting preferences that could be enacted by the same Congress, depending on how they are packaged with other policies and the context of their consideration.

Virtually no one — and certainly not Elhauge — denies that legislative procedures, including who sets the agenda, which committees consider the proposal, how the final package is structured, and how floor deliberation is shaped, are critical to determining what is enacted.[66] Many scholars argue that interpreting the meaning of ambiguous or vague statutory language requires close attention to those procedures and structures so that the interpreter accurately reads the signals sent by the enacting legislators and disregards cues left strategically by actors who could not garner majority support for their views.[67] Others have attempted to devise canons based on legislative structures and rules that can help interpreters reconstruct the actual legislative bargain.[68] These efforts to accurately reconstruct the legislative bargain and extract the understanding that the median or pivotal lawmaker would have reached about unclear statutory texts at the time of enactment demand that interpreters understand the complex legislative environment in which laws are made.[69] This endeavor is

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[65] *See* Brudney, *supra* note 31, at 1016 (describing reasons bipartisan support may be seen as desirable).

[66] The literature on this proposition is vast. For a recent discussion, see GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES (2005).

[67] *See, e.g.*, Boudreau et al., *supra* note 6, at 979–80; Rodriguez & Weingast, *supra* note 6, at 1420–23.

[68] *See, e.g.*, McNollgast, *supra* note 2.

[69] For example, the two houses of Congress have different rules and procedures, which will affect interpretation. *See* Brudney, *supra* note 31, at 1013–14. Modern omnibus legislation often follows a different legislative path than the traditional process, particularly if the legislation is considered under some of the special congressional budget rules. *See* Garrett, *supra* note 63.

difficult, but it is less tricky than Elhauge's project of determining a current enactable preference without an actual enactment. At least in the ordinary method of statutory interpretation that takes account of rules and procedures, interpreters are working to make sense of a particular process in the past through which an actual piece of legislation was enacted. Although there might have been many paths through which the policy at issue could have been enacted, when a court or agency is seeking to understand a law that has been passed by the legislature, only one path of enactment was actually followed. This process of decoding the signals sent by lawmakers as that process unfolded may be challenging — perhaps too challenging for a court[70] — but there is something out there that is, in principle, knowable with the right tools and training.

In contrast, Elhauge's notion of "current enactable preferences" is a complex counterfactual and therefore inherently indeterminate.[71] Most crucially, what can be enacted depends on how party leaders craft the package in which the policy appears. Seldom in the federal legislature does a law include only one policy; instead, it is part of a larger package. In some cases, the larger package may include only related policies — for example, a policy on air pollution may be part of a larger Clean Air Act or an even broader antipollution proposal; but in other cases, the policy may be combined with relatively unrelated provisions, perhaps in a wide-ranging omnibus appropriations bill. Thus, whether a particular policy is "enactable" is a question that cannot be answered without a clear understanding of the vehicle through which it would have been enacted. The legislative process is relatively malleable and fluid; most policies could be added to several, perhaps many, different legislative vehicles, particularly in the Senate, which lacks germaneness rules for amendments to most bills.

Given the right legislative compromise, many policies are enactable — indeed, it may be that conflicting policies are enactable simultaneously, or nearly so, depending on the coalition the majority leadership

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[70] *See* VERMEULE, *supra* note 12, at 107–15; Garrett, *supra* note 63, at 12–14.

[71] Presumably Elhauge would counsel courts to determine what is currently enactable using the legislative rules and procedures that are currently effective. Legislative rules change in significant ways over time — for example, the filibuster rule has changed in the Senate; rules concerning committee referrals have changed significantly; the structure of committees themselves change over time; the strength of the party leaders versus committee chairs waxes and wanes; and so on. So the rules that shaped the original enactment are apt to be different from the current rules; in the case of older statutes, the divergence may be substantial. It would be important to clarify which rules courts should use in attempting to construct what is currently enactable, and to ensure that they cannot pick and choose rules, which would add additional indeterminacy into the process.

in both houses is able to assemble.[72] And, given certain circumstances, it may be that no policy on a topic is "truly" enactable, even if a majority of legislators would favor the policy, because a well-organized opposition group controls a key vetogate and proponents cannot develop a package of proposals that allow them to pass through that vetogate successfully or bypass it entirely. In other cases, a popular proposal may not be enactable because of the other policies that leaders would insist be added to any package. Remember the questions in the 2008 presidential election of whether the candidates supported more funding for U.S. troops in Iraq. Both men had voted against proposals providing that funding because of the other provisions included in the package presented — in this case, provisions concerning a timetable for withdrawal of troops. Clearly, providing financial support for our troops would have maximized political satisfaction on that issue alone, but, in the real world, that decision came packaged with other related decisions, and whether it was enactable depended on the overall package and the way the question was presented to lawmakers (that is, whether the package was amendable or submitted for one up-or-down vote).

    The sensitivity of policy to the packages in which it is enacted and the procedures that are used to shape its journey from proposal to enactment is demonstrated by some of the cases that Elhauge uses. Consider the facts of *Chevron* itself. In *Chevron*, the Court upheld the EPA's interpretation of "stationary source" in the Clean Air Act Amendments as referring to an entire plant, not to each smokestack (as the EPA had previously defined the term).[73] Elhauge clearly believes that this interpretation maximized current enactable preferences. But could this interpretation actually have been enacted? The Reagan administration would have supported codifying its bubble concept (encompassing the entire plant), but would the Democratic House of the 98th Congress have agreed to enact the amendment? Could the Republican leadership, with fifty-four Republicans in the Senate at that time, have overcome a filibuster? Or would the past understanding of "stationary source" supported by the Carter Administration have been the more likely candidate to emerge from Congress? If so, would President Reagan have vetoed it, and could Congress have overridden a veto? Or, given divided government, was neither interpretation currently enactable in 1984, a reality that the EPA understood when it adopted the bubble concept by regulation? All the answers to these questions depended, among other things, on the package in which the

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[72] *See* Andrei Marmor, *Should We Value Legislative Integrity?*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 125, 136–37 (Richard W. Bauman & Tsvi Kahana eds., 2006).

[73] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840, 866 (1984).

provision appeared and the rules governing its consideration. Congressional support for either formulation would have turned in part on the other provisions enacted simultaneously; the President's decision to veto would have been influenced by what other provisions he would have to reject at the same time; the ability of Congress to muster supermajority support to override a veto would have been determined by the entirety of the package, not just one provision.

Perhaps because of the difficulty in constructing a current enactable preference without an actual enactment, Elhauge limits courts to only a few indications of current preferences — notably, subsequent legislative action, short of enactment, and certain agency pronouncements. The problem is that neither of these may accurately reflect what Congress could enact on the topic if leaders decided to allocate space on its agenda to consider the issue. Section II.B already discussed how an agency decision is more accurately considered as a current non-overrideable executive branch preference.[74] With regard to subsequent legislative enactments, Elhauge rules out reliance on legislative inaction unless there is evidence that Congress was aware of the matter and that it consciously determined not to change the policy through a new enactment (p. 71).[75] Very few cases will present the kind of evidence of legislative action short of an enactment or of conscious inaction that Elhauge demands, so this is unlikely to be a robust default rule. But in any of these cases, the question is always raised whether it is significant that the subsequent legislative action has fallen short of a definitive enactment in the area. It may be the case that Congress just did not have the time to draft a full proposal on the topic, or thought it unnecessary, as Elhauge argues was the case in *Bob Jones University v. United States*[76] (p. 76). But it also may be the case that there was no current enactable preference for the reasons I have discussed above.

The problem with guessing what the legislature might do in the absence of an actual enactment is that any number of stories can fit the facts. It might be that those who supported denying tax-exempt status to Bob Jones University and other similar educational institutions were worried that a proposal to do so would be stopped somewhere along the legislative path. Certainly, the fact that thirteen bills to overturn the IRS ruling denying tax-exempt status to racially discriminatory private schools had been introduced in the twelve years before

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[74] *See supra* 2122–24.

[75] Elhauge applies the rule to the case of *Flood v. Kuhn*, 407 U.S. 258 (1972), (pp. 218–19).

[76] 461 U.S. 574 (1983). Elhauge argues that Congress chose not to enact a bill clearly denying tax-exempt status to racially discriminatory schools because lawmakers knew it was before the Court and they expected the matter to be settled there without the need for congressional action (p. 76).

the *Bob Jones University* case[77] suggests that some members of Congress and their constituents opposed the IRS interpretation, perhaps passionately enough to derail proposals to codify the interpretation. Indeed, Congressmen Ashbrook and Dornan were able to limit the IRS's enforcement actions against racially discriminatory schools through amendments to appropriations bills,[78] suggesting that in the context of some packages, opponents of the IRS's position were able to prevail. In short, even with the relatively substantial evidence of legislative action and conscious inaction, it is hard to be confident that the Court's result in *Bob Jones University* represents a preference that was "truly enactable."

Asking courts to determine coherent enactable preferences on the strength of evidence short of a current enactment, no matter how limited the evidence allowed to them in their search, is an impossible request. Too much depends on how consideration of the legislative proposal would be structured, and multiple policy equilibria are possible. An important, related question, then, is whether Elhauge's proposal for preference-eliciting defaults is a workable way for courts to force the legislature to provide a current enacted preference on an important policy. Although his theory of preference-eliciting defaults is thought-provoking and clever, it too falls short because courts lack the institutional capacity to apply these defaults appropriately.

B. *Judicial Capabilities and the Challenge of Elhauge's Default Rules Framework*

Comprehensive theories of statutory interpretation are generally susceptible to the attack that they would overwhelm the capacity of courts to apply them consistently and accurately. Elhauge's default rules framework falls prey to such critiques. Adrian Vermeule's criticism of "democracy-forcing statutory interpretation,"[79] for example, which includes the argument that such a method ignores the collective nature of the judiciary and the strong likelihood that only some judges would apply the canons and other interpretive methods designed to force the legislature to enact clearer laws,[80] can be leveled effectively at Elhauge's framework. Elhauge responds to this criticism, denying the need for coordination in order for his approach to affect legislative behavior and emphasizing the primary role of the Supreme Court in implementing the preference-eliciting canons (pp. 332–34). Readers can determine for themselves whether Elhauge has persuasively an-

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[77] *Bob Jones Univ.*, 461 U.S. at 600.

[78] *See id.* at 621–22 (Rehnquist, J., dissenting). The majority understood these amendments differently. *See id.* at 602 n.27 (majority opinion).

[79] VERMEULE, *supra* note 12, at 132.

[80] *Id.* at 129–37.

swered this institutional claim. Instead, this section identifies two particularly challenging aspects of Elhauge's framework that would severely strain the judiciary's institutional capabilities, even if the problems of coordination could either be overcome or would result in little threat to the effectiveness of the approach.[81]

First, although Elhauge's preference-estimating default canons are framed in terms of clear-cut rules (p. 327)[82] — that is, courts should consider only certain subsequent legislative action and only particular agency interpretations as valid evidence of current enactable preferences — there are indications that this set of default rules may nevertheless provide challenges to the capacity of courts. At times, Elhauge signals a willingness to depart from the two bright-line categories. For example, he writes:

> If evidence about enactor preferences is obscure or ancient, courts might well not demand as high a standard of reliability for proof of current preferences before they apply a current preferences default rule. If enactor preferences are totally uncertain, even a somewhat loose estimate of current preferences is likely to increase political satisfaction. If the enactment occurred so long ago that the enacting polity likely has little preference at all about the future event, then once again relatively loose estimates about current preferences may suffice. (p. 55)

Note again that the triggers for more wide-ranging examination of current preferences are relatively flexible; it is up to the interpreter, apparently, to determine when an enactment is sufficiently "obscure" or "ancient" that additional evidence of current enactable preferences can be considered. Certainly, this passage suggests that a court will not be constrained by the two types of evidence that Elhauge describes, as long as it justifies a wider-ranging analysis by finding enactor preferences murky or obsolete.

It seems likely that courts will depart from Elhauge's limitations on the acceptable evidence of current default rules relatively frequently. As judges begin to explicitly identify their interpretive objective to be implementation of current enactable preferences because it is the best way for them to be the faithful agents of the enacting legislature, they may feel justified in considering more than just particular agency pronouncements and a narrow category of subsequent legislative enactments. After all, if judges become convinced that they can ascertain current enactable preferences, interpreting statutes consistently with such preferences allows them not only to follow the wishes of the enacting legislators, but also to update the law, thereby freeing current lawmakers to focus on new and pressing problems that need their at-

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[81] Another challenge to the judiciary's capacity was suggested in the discussion of Elhauge's formulation of the enactor preferences canon. *See supra* p. 2111.

[82] Elhauge provides this response as an answer to questions of administrability.

tention. Here, the objection raised in section III.A becomes particularly acute: if the idea of a current enactable preference in the absence of an actual current enactment is indeterminate, then the specter of courts pursuing that objective vigorously should be unsettling to those who seek to restrain judges and empower the political branches to set policy. In many — perhaps most — cases, there will be multiple current enactable preferences that can be constructed and defended plausibly. Judges, presumably aided by political scientists retained as experts to demonstrate what policies could be enacted, will be able to choose among several possible outcomes. Thus, the criticisms that Elhauge levels against other interpretive methodologies — namely, that they do not restrain judges from implementing their own views of good policy — can be used just as persuasively against a world in which courts strive to determine and institutionalize their view of current enactable preferences on a particular topic.[83]

Finally, the institutional capacity of judges to apply the preference-eliciting canons seems particularly questionable. Elhauge argues that preference-eliciting default rules should be used only when three conditions are met: "(1) estimated enactable preferences are unclear; (2) significant differential odds of legislative correction exist; and (3) any interim costs from lowering immediate expected political satisfaction are acceptable" (p. 155). Condition one is susceptible to all the arguments about the challenges of distinguishing clear signals from unclear signals in the legislative process, although presumably the search for clarity here is not limited to text but can include consideration of other legislative materials.

Perhaps the most problematic condition is the second, which requires courts to estimate the odds that the legislature will correct an interpretation that inaccurately identifies current enactable preferences. Merely reading through Elhauge's discussion, including mathematical formulas, of how courts are to gauge these odds (pp. 157–65) should raise serious questions about the ability of judges to make this determination. Even if preference-eliciting strategies are left primarily to Supreme Court Justices, as Elhauge suggests later in the book (p. 333), they will be hard pressed to make the appropriate calculations and reach majority consensus on the right answer. One aspect of the calculation requires, for example, that judges analyze the relative power of interest groups concerned about the issue to determine whether there is "persistent one-sided political demand for legislation" (p. 164). Judges must also consider whether one side is favored

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[83] *Cf.* Boudreau et al., *supra* note 6, at 991 (describing methods that allow judges to disregard enacting legislators' signals to update legislative meaning as "an abandonment of interpretation, in favor of other forms of judicial decisionmaking").

by a politically powerless group, although judges are not to base this determination on the "political vagaries of the moment" (p. 165). None of this sort of analysis lies within a particular institutional strength of the judiciary.[84] Again, some canons of construction are rules of thumb to aid in this determination, but they are not likely to be accurate in all cases, and judges are likely to seek to tailor the analysis to the particular facts of the case. One can only imagine the expert witness industry that this condition will stimulate; political scientists will be in great demand to analyze the "differential odds of legislative correction" (p. 165).[85]

The third condition is somewhat more manageable, although it requires courts to estimate how long it will take for the legislature to override an interpretation that has been purposely decided in a way not to mirror enactor preferences or current enactable preferences. Moreover, it may be difficult in the context of a judicial case — rather than, say, an administrative proceeding — to accurately determine whether the interim costs of a preference-eliciting outcome are sufficiently large or irreversible to lead a court to eschew the approach. The evidence developed in the trial court will be focused on the case at hand, but the inquiry demanded by condition three involves a more holistic view of the field and of future developments.

CONCLUSION

In the end, *Statutory Default Rules* is interesting and stimulating scholarship, but, because of these practical objections, it has little real-world promise. Moreover, to the extent that courts are unlikely to faithfully apply the concept of "current enactable preferences" or cannot accurately gauge the conditions under which preference-eliciting defaults are likely to cause the legislature to enact new policy, it is hard to imagine that lawmakers would really favor Elhauge's approach. Thus, the problems of institutional capacity that bedevil the default rules framework undermine both its descriptive and normative justifications.

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[84] *See, e.g.*, Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 112 (2000); *see also id.* at 119 (noting that judges are also not particularly good at using expert studies to overcome this institutional incapacity).

[85] Emphasis has been omitted.