EINER ELHAUGE

Statutory Default Rules

How to Interpret Unclear Legislation

HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts, and London, England 2008

CHAPTER 1

Introduction and Overview

The Legal Dilemma

You are a conscientious judge, and you have a problem. The case before you presents an important question of statutory interpretation. Having listened dutifully in law school, you understand that the primary issue before you is to determine the meaning of the statute. Unfortunately, you also know that there is no consensus about how to do that. You try formalism on for size, and thus at first focus only on the statutory text and a dictionary that was published as close in time to the statutory enactment as you can find. But you are well aware of the extensive critique that says that formalistic approaches exclude much of the evidence that is relevant to determining what the legislature meant. Formalism also sometimes leads to results that seem absurd or contrary to what the legislature could have possibly desired. Moreover, even after applying the full panoply of approved formalistic techniques, you are forced to admit that the statutory meaning remains unclear in your case. You have narrowed the range of possible interpretations to a few options, but cannot really say with any confidence that one of them is *the* meaning of the statute.

So you consider turning to legislative history, as most judges do, to try to figure out the legislative intent or purpose that should help resolve the ambiguity in meaning. But you are also aware of the equally extensive critique that has been leveled against this practice. You know there is really no such thing as a shared intent or purpose in a multimember legislature. Each legislator has his own complex mix of reasons for voting for the legislation, and some of them may have less to do with legislative substance than with the fear of losing campaign donations, or with the legislator's loyalty or opposition to party

leadership. You also know that legislative history has the considerable problem that the legislature never voted on it, and that it may thus reflect the views of those legislators who authored the relevant statements or committee reports, rather than the views of the legislature as a whole. In any event, after looking at all the legislative history in your case, you find that it points in somewhat conflicting directions, and does not really provide a clear answer to how the statute should be interpreted. Instead, you again have a range of possible answers, and no clear grounds for choosing one over the others.

You do not give up in despair yet. For we have canons of statutory construction to deal with such cases of ambiguity. But then you remember what the literature on them says: for every canon, there is a counter-canon that leads to the opposite interpretation. For example, one canon says a statute that lists specific applications excludes unlisted applications. But it seems in direct conflict with a counter-canon, which advises that a statute should be interpreted to extend to unlisted applications when doing so furthers the general statutory purpose indicated by the listed applications. And there appear to be no consistently followed rules about which canons to invoke in particular cases. Perhaps you even recall your law professors telling you with a resigned shrug, or a nihilistic smirk, that judges seem to invoke whichever one leads them to the result they favor in the particular case.

Even if you could figure out which canon to choose among any opposing pair of canons, there is a bewildering range of nonopposing canons one could possibly invoke, and the priority among them is unclear. For example, should one invoke the canon against interpreting statutes to create constitutional doubts before, or after, one invokes the canon that a statute that lists applications means to exclude unlisted ones? Not only do the legal materials fail to specify the order in which to apply most canons, they don't even provide generally accepted criteria for making case-by-case judgments about how best to prioritize the canons.

Many of the traditional canons are also normatively controversial, and you are not quite sure what justifies invoking a canon that embodies a general substantive slant you doubt the legislature shares. And you also can't help but notice that many of the relevant canons are themselves linguistically ambiguous, at least in their application to your particular case. Absent some larger theory about when and why to apply canons, they don't seem to resolve the case.

What is an honest, well-intentioned judge to do when traditional legal methods of interpretation give out in this way?

Filling the Legal Gap with Judicial Judgment

The dominant answer given in modern American law schools is that when the legal materials fail to specify the statutory meaning, you as judge have no choice but to exercise your own normative judgment about which statutory interpretations would be best, so you might as well be up front about it. Most substantive courses leap rather reflexively to this approach, treating the necessary judicial judgment as an interstitial lawmaking power akin to making common law. Other courses and scholars, especially those focusing on issues of statutory interpretation, may instead stress that the judicial judgment could or should be made at a more systematic level: judges can choose (or develop) general canons of statutory construction that further worthy public values. Such systemic judicial judgments could be made either at the level of substance—choosing canons that generally embody normatively attractive results—or process—choosing canons that lean against groups that are deemed to have excessive political influence. Some such canons operate at a high level of generality about what results are normatively attractive. Proposals that favor interpretations that promote statutory coherence rest on the premise that furthering this goal is generally normatively desirable. Proposals that favor interpreting ambiguities to minimize legislative change or the scope of statutes rest on the different proposition that change or regulation is generally undesirable. Given the diversity of positions and proposals about which substantive results or process claims are normatively desirable, analysis under this modern approach turns on which of them are deemed most normatively attractive by judges.

The resulting approach requires judges to adopt sharply bifurcated roles. Under it, judges are to act as honest agents for the legislature to the extent they can divine its meaning using traditional methods of legal interpretation. But once those methods give out, judges must instead shift to becoming independent lawmakers, furthering the normative views or canons they themselves find most attractive.

Not everyone seems disturbed by this result. Some seem to fairly celebrate it, trumpeting the virtues of judicial judgment. They argue that the judicial process is more nimble than the legislative process, more aware of changed circumstances and able to update statutes, and more focused on fact-specific applications and thus able to tailor statutes to them. They may also argue that the judicial process better protects certain fundamental values or traditions, in part because of its system of precedent and common law develop-

ment. To them, judges are more likely to reach desirable results if they act as partners of the legislature rather than as its agents. Such scholars are thus not disturbed that the legal materials give out, and may in fact stress the indeterminacy of traditional legal methods in order to expand the scope for such desirable exercises of judicial judgment.

Others do find this result disturbing. In particular, many formalist scholars stress the perils of allowing judges to make judgments that deviate from prevailing political views. They seek to avoid what they consider more open-ended methods of interpretation precisely to constrain the exercise of such judicial judgment. But even this position shares the same premise that once the traditional legal methods have given out, such exercises of judicial judgment are unavoidable. Other scholars may find the situation lamentable but have no faith that formalistic methods can do anything to lessen the problem. To them, this is simply an imperfection we must resign ourselves to accept, given the inevitable imprecision of legislative language, and the necessity of having judges resolve the legal disputes that such imprecision creates.

In short, whether or not judicial judgment is desirable, it is widely viewed to be a proposition of logic that unclear legislative instructions require shifting from an honest agent model to exercises of judicial judgment. Cass Sunstein states the prevailing view well when he says: "[T]raditional sources offer incomplete guidance and . . . their incompleteness reveals the inevitable failure of the agency conception of the judicial role." Thus, he concludes, the argument that the failure of the agency model requires judges to exercise substantive judgment about which interpretive principles or gap-filling devices to employ "is a conceptual or logical claim, not a proposition about the appropriate distribution of powers among administrative agencies, courts, and legislatures. It depends not at all on a belief in the wisdom and decency of the judges."[1]

Must the honest agent model be put aside once legislative instructions are unclear? My first task in this book will be to convince you that the answer is no. One can instead extend the honest agent model to cases of statutory uncertainty by adopting a set of statutory default rules that maximizes political satisfaction. My honest agent approach does not regard judges as robots that mechanically execute clear legislative instructions, nor as psychics who can always divine legislative intent. But it also rejects the view that judges are partners in lawmaking, or free to maximize their own ideological preferences where statutes are unclear. Instead, an honest interpretive agent should, when statutory meaning is unclear, adopt statutory default

rules that probabilistically tend to maximize political satisfaction. Given the uncertainty left by unclear statutory language, no system of interpretation can ever hope to always correctly ascertain political preferences, but the right set of default rules can minimize the expected political dissatisfaction.

My second task will be to show which set of statutory default rules would fulfill this goal. If I can accomplish those two tasks, I would be more than happy. But I am going to get a bit greedy and also try to demonstrate two more things: that current interpretive practices actually embody those default rules, and that this approach to statutory interpretation is better than relying on judicial judgment.

Interpreting Statutes to Maximize Political Satisfaction

Statutes are hardly the only kind of legal text that courts must interpret. Contracts and corporate charters are also often unclear in ways that both cases and scholarship acknowledge cannot be resolved by traditional legal interpretation. Yet in the areas of contracts and corporate law, cases and scholars do not assume that, when the meaning of the legal text is unclear, the only way to resolve the matter is by having judges exercise their own substantive judgment. Rather, the modern view is that, when contracts and corporate charters are unclear, courts should apply whichever default rules are most likely to accurately reflect or elicit the preferences of the parties who agreed to such contracts or charters. If, for example, a contract has not specified when payment for a product will be made, the default rule is that payment is due when the product is delivered. This is not because the courts think the parties "meant" or "intended" this default rule. It is because courts believe that most contracting parties would want that rule. Accordingly, the preferences of contracting parties will generally be maximized if this default rule is used when contractual meaning is unclear.

This does not mean that we can simply apply the default rule approach that is used in contract and corporate law in some wholesale way to statutes. For business contracts and corporations, the normal premise is that the participants would prefer the default rule that maximizes the economic pie, on the assumption that any distributional effects would be reflected in (and thus offset by) the price of the contract or corporate securities. This permits the general assumption that all parties share a preference for the most efficient default rules—though, to be sure, which default rules are efficient may turn on personal characteristics of the parties, such as their aversion to risk.

With statutes, we have no warrant for assuming that the legislative participants share the same set of preferences, and certainly no general grounds for assuming they prefer the most efficient default rules. One point of the political process is precisely to decide how much to pursue efficiency versus other social goals. Thus, if the issue is what the statutory outcome should be, we need to inquire into the set of political preferences possessed by a particular legislative polity to devise the appropriate default rules. In short, compared to corporate and contract law default rules, statutory default rules about outcomes are more likely to be tailored to the preferences of the particular participants in question. The key question will thus be how to go about doing such tailoring, and how to deal with the inevitable uncertainty about which preferences are enactable.

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

Finally, consider the possibility that the choice of default rule might itself provoke the parties who created the relevant text to clarify it. For contracts and corporate charters, any clarification made in response to a default rule of interpretation must come ex ante, in the initial contract or charter, before persons develop vested rights. But for statutes, the correction can come either ex ante, in the initial statutory drafting, or ex post, through subsequent statutory amendments or overrides that can overturn the vested rights created by statutory interpretations. This will prove to be another important way by which statutory default rules differ from contractual default rules.

In short, many of the most interesting points about statutory default rules arise from their differences from contractual and corporate default rules. Nonetheless, the practice of using default rules in contracts and corporate law does show that unclarity about the meaning of legal texts, or about the intent or purpose of those who agreed to them, does not logically compel a

reliance on judicial judgment. Moreover, it illustrates that an honest agent model need not rely on claims that courts have correctly ascertained textual meaning or purpose. Instead, it can take the form of default rules that reflect probabilistic judgments about which interpretations are most likely to maximize the satisfaction of the preferences of those who agreed to the relevant legal text.

This book takes a similar approach to statutory interpretation. It rejects the common assumption that the honest agent model must give out once the legislative instructions are unclear. Instead, it argues that judges can still act as honest agents when resolving indeterminate statutory meaning. Courts need simply, as they do in contracts and corporate law cases, adopt default rules that are designed to maximize the preference satisfaction of the parties who agreed to the text being interpreted.

But who are the parties who agree to statutes? It is tempting to say the electorate, or at least a majority of voters, but that would be untrue. The electorate generally does not vote on statutes. Rather, some of the electorate vote for legislators and executives, who in turn vote on legislation. What matters is thus how their elective choices are mediated by the particular political system used to translate those choices into statutes. The particular system may well alter the distribution of influence; for example, the U.S. Senate gives disproportionate influence to citizens from states with below-average populations.

Nor, however, would it be accurate to say that the relevant preferences are those of the legislators and executives themselves. They cannot enact whatever maximizes their personal utilities or even their sincere ideological views, for they are constrained by the need to get reelected, and thus cannot deviate too much from the preferences of the electorate. A majority of legislators may also be unable to take action if members of the key legislative committee are opposed, or if the executive is willing to veto and a supermajority to override does not exist.

For statutes, then, we cannot aim to maximize the preferences of particular individuals or majorities in the electorate or government. Instead, the relevant preferences must reflect the complex ways by which actual legislative procedure weighs and aggregates preferences to determine which statutes to enact. To refer to these preferences, I will use the term "enactable preferences," by which I mean the set of political preferences that would be enacted into law if the issue were considered and resolved by the legislative process. As I hope this makes clear, the term "enactable preferences" does

not refer to polling data, nor to any other indications of the electorate's general political preferences that were not manifested in their choice of elected officials. It also does not refer to legislator utility, nor to strategic private aims that legislators may harbor but could not actually enact into law.

This book argues that, when statutory meaning is unclear, judges can still act as honest agents by using statutory default rules that are designed to maximize the satisfaction of enactable preferences. I will sometimes refer to this as maximizing the preferences of the "legislative polity" because clear sentence structure often requires a subject. However, this term should be understood as an abstraction that reflects the particular political organization by which the relevant society weighs and aggregates choices into the power to make statutory enactments. Because both terms are a mouthful, I will also sometimes refer to the relevant concept as "maximizing political satisfaction," but by now you know that what I mean by this is the satisfaction of enactable political preferences. Maximizing political satisfaction means the same thing as minimizing political dissatisfaction; which is an alternative way of framing the goal that I shall use when it is clarifying.

Of course, one way to assure that political preferences are enactable is to force them to be enacted into clear statutory meaning before acting on them. And, as I will show, there are certain circumstances where that is precisely the default rule that maximizes political satisfaction. But this is not generally true because, unless and until the legislature acts, the interpretation that governs is whatever the courts say the statute means. Interpretations that deviate from the best estimate of enactable preferences thus would generally increase political dissatisfaction.

I will not, however, stop with the argument that it is logically possible to implement an honest agent model, even in cases of statutory uncertainty, by adopting statutory default rules that maximize political satisfaction. I will further argue that judges *should* adopt such statutory default rules because it is the political process for enacting statutes—not judicial judgment—that is supposed to determine what is normatively desirable within constitutional boundaries. Thus, the political preferences reflected in the portions of statutes whose meaning is understood should be equally reflected in the statutory interpretations that govern when that meaning is unclear.

This is not to deny that courts should consider other possible traditional judicial goals like advancing statutory coherence, stability, or certainty. But the proper basis for such consideration is not that these goals are ends in themselves, but rather that advancing them generally increases political satisfac-

tion. Interpretations thus should not further those goals when other evidence indicates that doing so would deviate from enactable preferences. This goes more generally for the diverse array of public values that various proponents have argued should govern statutory interpretation. As worthy as the proposed public values generally are, they deserve consideration only to the extent that they help maximize the satisfaction of enactable preferences.

But which statutory default rules are best designed to maximize political satisfaction? And does using such statutory default rules really add anything to simply choosing the most likely meaning of the statute?

Identifying the Statutory Default Rules That Maximize Political Satisfaction

What I am about to say is quite counterintuitive, so I don't expect you to believe me yet. It turns out that an approach of maximizing political satisfaction often dictates adopting statutory default rules that do *not* reflect the enactors' most likely meaning or preferences. It is the major burden of this book to show why this is so, and the argument is sufficiently complex that it requires me to develop this point in four separate stages, each of which occupies several chapters. At each stage, I aim to do more than just make the normative case that the relevant default rule maximizes political satisfaction. I also aim to establish my descriptive thesis that these default rules better explain actual interpretive doctrine. That is, I aim to not only identify which statutory default rules courts should use, but to show they are actually using them already, though often either under different name, or without any name but implicitly through a pattern of practice.

1. Current Preferences Default Rules

My first major point will be that the default rules that overall best maximize the political preferences of the *enacting* legislative polity turn out to track the preferences of the *current* legislative polity when the latter can be reliably ascertained from official action. By "official action," I mean either agency decisions interpreting the statute or subsequent legislative statutes that help reveal current enactable preferences even though they do not amend the relevant provision.

This argument for current preferences default rules may be the most counterintuitive of my claims. Why wouldn't the enacting legislative polity want

its *own* political preferences followed? The key to the answer is that the question here is not what result the enacting legislative polity would most likely want for the *particular* statute; if that were the question then it would be true that the legislature would want its own preferences followed. However, the question here is instead what *general* rules for resolving uncertainties about statutory meaning—including uncertainties in older statutes that are being interpreted and applied during the time that the enacting legislative polity holds office—would most maximize the political satisfaction of the enacting legislative polity? In choosing such general statutory default rules, I will show, the enacting legislative polity would prefer *present* influence (while it exists) over *all* the statutes being interpreted, rather than *future* influence (when it no longer exists) over the *subset* of statutes it enacted.

The current preferences default rule approach explains many actual cases that rely on subsequent legislative action. More important, we shall see that it explains the *Chevron* doctrine that judges should defer to agency interpretations of unclear statutes, because agency action is generally a fairly good indicator of where current enactable preferences lie. Further, this approach explains the otherwise confusing pattern of exceptions to that deference that exist under *Mead* and other doctrines. These exceptions turn out to track cases where agency decisions are less exposed to the sort of political influence that makes them likely to reflect current enactable preferences. The current preferences approach can also explain why deference is denied to those agency interpretations that plainly conflict with prevailing legislative preferences, and thus could not be enactable. This approach explains, among other things, why the Court denied deference to a Clinton agency decision that cigarettes could be regulated as a drug, and to a Bush agency decision that drugs used in physician-assisted suicide could be criminalized as a controlled substance.

Explaining *Chevron* and its numerous exceptions is no minor matter, because this is the single canon of statutory interpretation that is most frequently applied in the modern administrative state. Thus, the current preferences default rule approach not only merits theoretical priority, but is the most important practically because it explains the biggest set of statutory interpretations.

2. Enactor Preferences Default Rules

What, however, should courts do when current preferences cannot be reliably ascertained from recent official action, perhaps because there is no rel-

evant agency decision or legislation on the topic? In those cases, courts should use enactor preferences default rules that maximize the preference satisfaction of the enacting legislative polity.

Enactor preferences default rules come closest to paralleling the meaning that the enacting legislative polity would most likely have attached to the unclear text. But we shall see that even here the inquiries differ, mainly because the sources of information for making probabilistic estimates of political *preferences* are broader than those for ascertaining the *meaning* the enactors likely attached to a particular text. The probabilistic goal of maximizing political satisfaction thus provides an alternative way to justify and understand many common interpretive practices, which have been heavily critiqued as means of ascertaining statutory meaning. For example, this approach can explain the judicial practice of making broad-ranging inquiries into legislative history when the statute is unclear, even if one agrees with the critique that such inquiries cannot accurately reveal any shared legislative intent. It also provides a stronger justification for the practice of allowing statutory interpretations to vary over time with changes in factual circumstances. Even when those changes cannot really alter any fixed statutory meaning, they do often alter which statutory results we think would maximize the satisfaction of a fixed set of enactor preferences.

Perhaps more surprisingly, I will show that, given sufficient uncertainty about which preferences are enactable, minimizing the dissatisfaction of those preferences often dictates adopting *moderate* interpretations, even when more extreme interpretations are more likely to reflect enactable preferences. For example, suppose a statute has three plausible interpretations, and the likelihood that each will reflect enactable preferences is 40% for the right-wing option, 35% for the left-wing option, and only 25% for the moderate option. It turns out a default rule favoring the moderate interpretation will minimize expected political dissatisfaction, even though it is the least likely to reflect enactable preferences. Thus, even enactor preferences default rules often deviate from just choosing whichever interpretive option is most likely to reflect the preferences of the enacting polity.

The discussion will also shed light on the current controversy about how to treat presidential signing statements. Given the power of the presidential veto, such statements can indicate what was actually enactable. They thus should influence interpretation when they have been signaled early enough to be reflected in the legislative drafting. But they should not be given weight when they came too late for the legislature to take them into account in deciding what to enact, because then they may not accurately reflect a

constraint on what was actually enactable. In short, the problem with most presidential signing statements is not with their presidential nature, but with their late timing.

3. Preference-Eliciting Default Rules

Suppose that both current and enactor preferences are unclear, making it highly uncertain which interpretive option either would prefer. Then, I will show that, under certain conditions, political satisfaction can be maximized by choosing preference-eliciting default rules. Such rules intentionally *differ* from the most likely political preferences, in order to elicit a legislative response that makes it clearer precisely where enactable preferences lie. The elicited legislative response may either come in more explicit statutory drafting by the enactors (anticipating the future application of an eliciting rule) or in post-interpretation statutory overrides by the current legislature.

Preference-eliciting default rules will, however, enhance political satisfaction only when the chosen interpretation is more likely to elicit a legislative response, by a margin sufficient to outweigh a weak estimate that another interpretation is more likely to match enactable preferences. In other words, a necessary condition for applying a preference-eliciting default rule is the existence of a significant differential likelihood of legislative correction. Where that and other conditions are met, a preference-eliciting default rule can create statutory results that reflect enactable preferences more accurately than any judicial estimate of current or enactor preferences possibly could.

Like current and enactor preferences default rules, preference-eliciting default rules are not merely a matter of theory. To the contrary, they explain many apparent anomalies and inconsistencies we see in the actual application of legislative canons. The above-described conflict between various canons and counter-canons, for example, can be resolved by understanding the necessary conditions for applying preference-eliciting default rules, rather than current or enactor preferences default rules.

Preference-eliciting analysis also explains various canons that favor politically powerless groups. This includes the recent Supreme Court decision in *Hamdan,* which interpreted statutes to favor the adjudication rights of Guantanamo detainees. Given the lack of political clout these detainees had, it was entirely predictable that this decision would, as it did, elicit a statutory override, which made clear precisely where enactable preferences lay on the trial rights of detainees in the war on terror.

4. Supplemental Default Rules

Finally, what should a court do when it can neither meaningfully estimate nor elicit the preferences of the relevant legislative polity? I will show that, in such cases, a set of supplemental statutory default rules exists that is and should be applied. In some of these cases, the political preferences of a *subordinate* legislative polity will be clear, and political satisfaction can thus be maximized by having the supplemental default rule track them. This explains many canons that interpret ambiguous federal statutes to incorporate state law or protect state autonomy. In the remaining cases, the judiciary must resolve the statutory ambiguity with the default rule that (within the politically plausible range) the judiciary deems best. But this does not mean every judge is left to her own devices. Instead, canons of construction in such cases serve mainly to limit judicial variance by requiring judges to follow common law or constitutional principles. Limiting such variance is desirable because it minimizes uncertainty even if it does not reduce the magnitude of likely judicial error in estimating enactable preferences.

5. The Resulting Order of Application

I will show that our existing set of statutory canons can all be explained as different parts of this system of default rules that maximize political satisfaction. Further, understanding the underlying theory allows one to better prioritize the canons and understand their pattern of application. For example, the priority outlined above explains why *Chevron* deference (a current preferences default rule) should be employed before looking at legislative history (an enactor preferences default rule). It also explains why both should be employed before using the canons that serve a preference-eliciting function, such as the rule lenity, and why all three should be applied before using supplemental default rules, such as the canon against preempting state law.

Let me summarize. When statutory meaning is ambiguous, courts should first determine whether current enactable preferences can reliably be inferred from official action. If so, courts should apply a current preferences default rule. If not, then courts should apply an enactor preferences default rule, whose content may vary over time with changing factual circumstances. If neither enactor nor current preferences seem very certain, a preference-eliciting default rule should be used in those categories of cases that meet the necessary conditions, including—most important—a significant differential likelihood of

legislative correction. Where neither estimating nor eliciting preferences is feasible, then supplemental default rules should be used that track the preferences of political subunits or (where those are unavailable) that reduce judicial variance by reducing constitutional difficulties or deviations from common law principles. As we shall see, understanding this prioritization of default rules, and the conditions for applying them, explains many otherwise puzzling anomalies in the doctrine of statutory *stare decisis*.

The Nature and Scope of My Descriptive and Normative Claims

Throughout this book, I will be making both the normative claim that the statutory default rules I just described are desirable, and the descriptive claim that they largely fit U.S. legal doctrine. Even if I convince you of my normative claim, you might balk at my descriptive claim on the ground that what I describe matches neither what judges say they are doing in their opinions nor what judges subjectively think they are doing. But this is not what I mean by my descriptive claim. Rather, I mean that my theory fits and predicts the legal doctrine.

Indeed, by the end of this book, I hope to have persuaded you that designing default rules to minimize political dissatisfaction explains and justifies many judicial practices, doctrinal distinctions, and canons of construction far better than do existing interpretive or substantive theories. This book's approach also helps resolve what might otherwise appear to be little more than open-ended conflicts among statutory canons and cases. But rather than fitting the self-description of these practices by judges, many of the insights will come from using default rule theory as a way of redescribing existing phenomena in statutory interpretation, which under current descriptions have been entirely mired in intractable debates about how best to ascertain statutory meaning. These redescriptions can better justify, cabin, and make sense of these judicial practices. This improved understanding of the reasons underlying statutory constructions, and the justifiable grounds for their seemingly inconsistent application, also renders them more determinate, and thus more constraining on judges.

I mean my normative and descriptive claims to stand separately. If you disagree with my normative thesis, my descriptive claim would remain that my theory best explains the actual contours of current statutory interpretation by U.S. judges. Likewise, if you disagree with my descriptive thesis, my normative claim would remain that statutory interpretation should be governed by the above set of statutory default rules.

While my descriptive claim is limited to U.S. judges because those are the cases I have here studied, there is no reason to be so Americentric or juricentric about the normative claim. The same statutory default rules that are normatively attractive in the United States should be just as attractive in other nations. Nor are judges the only ones who issue binding statutory interpretations. In the modern administrative state, it may well be that most interpretations are rendered by agency officials. One virtue of this book's approach is precisely that it offers needed guidance on the largely unexplored issue of how agencies should interpret statutes. Such guidance is particularly necessary under formalist theories that avoid the problem of what judges should do with uncertain statutes mainly by invoking the rule that they should defer to agencies, a tactic that provides little assistance with the begged question of just how agencies should interpret the same statutes.

With one vital exception, my analysis indicates that agency officials should use the same set of default rules as judges when they interpret statutes. The vital exception arises from the fact that, if the agency itself is making the decision, then deferring to agencies can hardly provide the basis for a current preferences default rule. Rather, agencies are the interpreters who can and should consider more general evidence of current enactable preferences, without limiting their inquiry to the inferences ascertainable from official action. Agencies generally do this naturally because of their responsiveness to political forces. However, agencies are often too formalistic and intent-focused, probably because they are trying to mimic the courts or the judicial doctrines that are the focus of the literature. What is appropriate for courts is not appropriate for agencies if a different statutory default rule would better maximize political preference satisfaction. And that is the case here because agencies are more likely than courts to be knowledgeable about and responsive to general evidence of current enactable preferences. Thus, where statutory meaning is unclear, the current preferences default rule applied by agencies should involve their own open-ended inquiry into current enactable preferences, before they inquire into matters like enactor preferences.

For that matter, the independent nature of my normative claim extends to legislatures themselves. That is, my normative claim indicates not only that adjudicators should adopt statutory default rules that maximize political satisfaction, but that, if adjudicators fail to do so, legislatures should enact codes of statutory construction that specify those statutory default rules. My analysis thus provides a recommended content for any codes of statutory construction that legislatures decide to adopt. Generally one would

expect that self-interest would naturally drive legislatures to adopt codes of statutory construction that maximize the satisfaction of enactable political preferences. Congress has generally not bothered to adopt codes of construction that are very substantive, which itself is an indication that they are fairly happy about the extent to which current judicial interpretive practices already maximize their enactable preferences. But state legislatures have adopted more substantive codes of construction on many issues, which will provide valuable evidence on which statutory default rules are most likely to maximize political satisfaction.

In some cases, however, legislators might try to enact codes of construction that maximize careerist self-interest over the satisfaction of enactable preferences, or that favor their own interests or views over those of future legislatures. In such cases, the theory of this book provides a ground for limiting codes of construction that endeavor to opt out of the statutory default rules that maximize political satisfaction. We shall see that those limits might even be deemed constitutionally mandatory, depending on how one interprets the legislative and judicial powers under the relevant constitution. In any event, these limits affect my own recommendations about the best content for such codes of construction. Further, any code of statutory construction is itself a statute that must be interpreted, and courts will need default rules to do that, which should and have been fashioned to further the same goal of maximizing political satisfaction.

While my normative and descriptive claims stand separately, my claim about U.S. judicial doctrine also draws strength from the combination of descriptive and normative claims that is the peculiar province of law professors. One of the tasks of legal scholarship is to explain legal doctrine in a way that can provide guidance to future courts. It has thus always been important to establish that any proffered theory has not only normative attraction but also a sufficient fit with extant doctrine. For example, suppose one concluded that my descriptive claim was not as accurate as the alternative claim that judges simply interpret statutes in whatever way furthers their personal ideological preferences. Even if this alternative offered a viable positive account of the sort that would be acceptable in political science and rational choice theory, such a normatively corrosive position cannot offer an attractive legal theory for guiding future courts. A valid legal theory must instead have some normative justification to merit adoption.

Conversely, a perfectly valid normative argument that has no connection to existing doctrine may offer a useful blueprint for legislative reform, but has no

claim to being a theory of legal doctrine. Without any grounding in the authority of existing doctrine, such a normative theory cannot offer guidance to an agency, trial court, or intermediate appellate court. Its utility would even be limited before a jurisdiction's high court, partly because of the presumption in favor of *stare decisis,* but even more so because that court must rule case by case in reviewing lower courts that will generally be following existing doctrine. This structure tends to limit high court decisions to altering the margins of existing doctrine, and makes it difficult for even a high court to accomplish a wholesale shift to an entirely different normative foundation.

Thus, while legal theory often includes pure positive or normative theory, what distinguishes it from those endeavors is that it also focuses on determining which of the possible normative justifications is most consistent with the descriptive landscape of current doctrine. The best legal theory might thus be neither the most descriptively accurate nor the most normatively attractive, but rather the theory that provides the best combined fit of descriptive explanation and normative justification. Accordingly, even if I do not convince you that my theory of statutory default rules offers the best descriptive and normative theory when such matters are considered separately, I still hope to convince you that it offers the best legal theory of current doctrine on statutory interpretation when one considers the combination of descriptive fit and normative attraction.

Objections and Implementation Issues

Perhaps by now you are brimming over with objections or with questions about how precisely one would implement such default rules. I cannot hope to satisfy such concerns at this introductory stage before I have explained my theory in greater detail, but I can at least assure you that I am going to get to them in the last part of this book.

One objection might be that the theories here diverge from some excellent political science literature that models statutory interpretation and provides empirical data designed to validate those models. A modest response is that such theories, even if more accurately reflecting what courts do, depend on corrosive premises that could not, for reasons noted above, offer a sound basis for a legal theory. But there is actually a far more direct response. As I will show in Chapter 15, these models turn on various assumptions. If one alters those assumptions to conform to the default rule theory offered in this book, we shall see that my default rule theories actually pro-

vide a *better* explanation for the results of various empirical studies about statutory interpretation. In short, properly understood, those empirical studies provide strong confirmation of the descriptive accuracy of the default rule theories in this book.

The final part continues by considering the fundamental objection that my theory seems quaint, if not naive, because it assumes enactable political preferences are worthy of respect. This premise might seem contrary to an extensive body of scholarship showing that the political process frequently deviates from the views of the electorate. Given this deviation, what is wrong with judges trying to improve the political process by, say, interpreting statutes against the special interest groups that enjoy disproportionate political influence? Under such an approach, one might argue, judges do not impose their substantive views on statutory interpretations, but simply help the electorate express its true views.

This is a powerful objection and will require an extended response. One modest response is that this line of argument does not really provide any grounds for lessening deference to enactable preferences in those cases where statutory meaning happens to be unclear. If enactable preferences do not merit respect, then why obey them when statutory meaning is clear? Thus, if persuasive, this line of argument may justify reforming the political process or adopting constitutional change, but does not really justify a theory of statutory interpretation.

The more fundamental response will be that this line of argument is wrong to think that one can separate process from substance. The claim that interest group theory shows that some groups have disproportionate influence turns out to inescapably depend on controversial normative baselines about what degree of influence each group should have. Allowing interest group theory to guide interpretation thus does not truly differ from having judges apply those normative judgments directly. Nor, if one believes that interest group theory does show that some groups have disproportionate influences, does that theory demonstrate that the judicial process is less subject to those influences. Similar problems beset claims that collective choice theory shows that legislative preferences are too prone to cycling and path dependence to merit judicial deference. Both theories thus fail to demonstrate that defects in the political process make judicial judgment—about substance or process—preferable to maximizing the satisfaction of enactable political preferences.

The final part next considers the objection that a better alternative would

be default rules that interpret all statutory uncertainty to protect reliance interests or to reduce the effect or change caused by the statute. None of these alternative default rules would be preferable to those that maximize political satisfaction. A pro-reliance default rule would not only reduce political satisfaction, but encourage excessive reliance. The anti-effect and anti-change default rules would systematically sacrifice political satisfaction to further a dubious norm in favor of the status quo. They amount to efforts to elicit legislative preferences, but are not limited to the conditions where such an effort is likely to enhance the satisfaction of enactable political preferences. Nor are they constitutionally mandated, contrary to what some other scholars have argued.

The final part ends by considering operational and jurisprudential objections. I conclude that the jurisprudential objections parallel those historically raised against the legal realist analysis that judges were implicitly using policy in resolving legal uncertainties, and should be rejected for much the same sorts of reasons. A more serious concern might be that judges lack the competence to employ open-ended case-by-case standards that assess testimony by political scientists on how best to estimate or elicit political preferences. The answer to this concern is that my approach requires no such thing. Rather my approach simply offers a better way of explaining the set of existing doctrinal rules that judges have been applying to accomplish those ends.

Nor, I hope to show you, is it a persuasive objection that judicial decisions about which rules best advance those ends may be uncertain and often inaccurate. That problem exists for any sort of judicial decision, and here judges can take uncertainty about political preferences into account by using eliciting or supplemental default rules. Moreover, judges cannot avoid making decisions one way or the other about how to resolve uncertainties in statutory interpretations. If, for example, courts ignored the consequences of their decisions for the likelihood of legislative override and ultimate satisfaction of political preferences, that does not mean those consequences would not follow. It would merely mean courts would be making decisions that have those consequences without thinking about them. There is no reason to think that judicial incompetence is so great that judges make worse decisions when they estimate the consequences of their decisions than when they ignore them. That would be true only if judicial estimations were actually worse than random, which hardly seems plausible.

In any event, claims of judicial incompetence can be persuasive only if it

is possible for courts to shift the relevant decision to a more competent branch. But that is not a claim that can be made against statutory default rules that maximize political satisfaction, for their aim is precisely to either estimate political preferences where enacted clarification has not yet occurred, or (with preference-eliciting canons) to shift the decision to the legislative branch, which can best maximize the satisfaction of enactable political preferences by identifying what they are.

The Scope of Statutory Default Rules and Their Feedback Effect on Inquiries into Meaning

I began this chapter by assuming a case where statutory meaning was unclear under existing methods of interpreting that meaning. After all, it is only when statutory meaning is unclear that the need for statutory default rules arises. But, as I shall argue in one chapter, we might instead reason in reverse: using the theory of statutory default rules to found a theory of meaning. That is, I shall argue that the best grounds for concluding that a meaning is "clear" is by asking whether the legislature signaled a desire to opt out of the default rule process. Opting out by adopting a fixed meaning will make sense, even though it results in some deviations from political satisfaction, where the legislature fears that judicial inaccuracies in applying the default rule methodology would on balance produce greater deviations from political satisfaction. I shall further suggest that a legislature should be understood to have desired such an opt out whenever (1) it uses precise statutory language, rather than words (like "reasonable") that delegate the development of standards to courts or agencies, and (2) the statutory language is being applied to a contingency that the legislature actually considered, or that was common enough to be within the normal range of contemplation when it enacted the statute.

But my theory of default rules stands entirely independent of this theory of meaning, and throughout the rest of the book I shall remain relentlessly agnostic about what the proper theory of meaning might be. For those who hold other theories of meaning, this means the importance of statutory default rules clearly varies with how determinate those methods for divining statutory meaning are. Suppose you find the various arguments in the debate about how to interpret statutory meaning sufficiently persuasive to believe that judges and scholars could reasonably subscribe to different theories. Then statutory default rules should be especially important, for in many

cases those theories point in opposite directions. But suppose you are a partisan for a particular theory of meaning—say, a dedicated formalist or a thoroughgoing purposivist. Even then, I would hope you would confess that reasonable persons applying that same theory would often reach different conclusions in the same case. That is, each theory for finding statutory meaning has many unclear applications that cannot be resolved by the theory itself.

To those who find our legal methods for ascertaining statutory meaning wholly indeterminate, the choice of default rules actually resolves more cases than the choice of interpretive method—at the extreme, all cases. But even if one has a high degree of faith in such methods, choices about which statutory default rules to use will resolve many interesting cases in whatever residual remains unresolved by such methods. The proportion of such residual cases will be particularly large in the U.S. Supreme Court, which only takes cases that have split the lower courts, because cases that do not involve statutory uncertainty are less likely to create such splits. So even if statutory default rules do not dominate interpretation in the lower courts, we can expect them to dominate interpretation at the Supreme Court.

We might also expect to see a feedback effect running in the reverse direction. The better our statutory default rules, the less courts may feel impelled to insist on strained claims that current legal methods establish a particular statutory meaning or legislative intent, even in cases that were probably unanticipated by the enactors. The judges most likely to feel the need to strain to find unambiguous meaning are those who—quite properly—believe that statutory interpretation doctrine should constrain judges to effectuate legislative preferences. A theory of statutory default rules that is designed to provide such a constraint should increase their willingness to rely on those default rules. This should, in turn, reduce the number of cases that are resolved with rather implausible claims that the statute has a determinate meaning.

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

new way of understanding many judicial doctrines that are currently cast as strained claims about what the legislature "intended."

By the same token, the more constraining our statutory default rules, the less those who celebrate judicial judgment over political judgment may feel an impetus to strain to find uncertainties in statutory meaning. For instead of authorizing the exercise of judicial judgment, the proposed default rules would constrain judicial judgment to further the satisfaction of political preferences. In short, a well-developed theory of statutory default rules can help avoid strained efforts in both directions on the issue of when statutory meaning or intent can be ascertained. So let's see whether we can develop such a theory in the following chapters.