EINER ELHAUGE

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How to Interpret Unclear Legislation

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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 a different name, or without any name but implicitly through a pattern of practice.

1. Current Preferences Default Rules

My first major point will be 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