

CONGRESSIONAL POLARIZATION DUE TO MAXIMIZING POLITICAL SATISFACTION: WHY ELHAUGE'S CURRENT ENACTABLE PREFERENCES DEFAULT RULE FAILS TO AVOID THE CONGRESSIONAL DEADLOCK AND POLARIZATION THAT STEMS FROM EXPANSIONIST STATUTORY INTERPRETATION

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I. INTRODUCTION

In their recent article in the *Northwestern University Law Review*,¹ Daniel B. Rodriguez and Barry R. Weingast show that expansionist statutory interpretations, like those promoted by dynamic theorists such as Cass Sunstein, William Eskridge, and Jonathan Macey, have resulted in congressional polarization and an inability for Congress to pass landmark, progressive legislation.² This essay explores whether Rodriguez and Weingast's warning to dynamic theorists as to the unforeseen consequences of judicial expansionist statutory interpretation also applies to Professor Einer Elhauge's theory of statutory interpretation, which is not directly addressed in Rodriguez and Weingast's article.³ While dynamic theories generally urge courts to interpret statutes "in light of their present societal, political, and legal context,"⁴ Elhauge's theory is unique in that its focus is

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¹ Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207 (2007) (link).

² *Id.* at 1211, 1253–54.

³ In 2006 Elhauge participated in Northwestern University School of Law's Constitutional Law Colloquium, in which he presented a chapter of his forthcoming book, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (forthcoming 2008). This essay is an outgrowth of Elhauge's talk. The ideas presented at that discussion are largely mirrored in an earlier article by Elhauge. See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

⁴ William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1997).

on the political maximization of the enacting governmental polity.⁵ Counterintuitively, Elhauge argues that judges can maximize the political preferences of the enacting governmental polity by interpreting statutory ambiguity in accord with the “enactable preferences” of the current government.⁶ Elhauge also maintains that his theory is much more limited in scope than other dynamic theories and cabins undesirable judicial discretion, since the theory only applies in cases of statutory ambiguity and only where current enactable preferences are revealed through official action.⁷

This Essay analyzes the distinctions that Elhauge draws between his theory and those of other dynamic theorists, as well as the limitations he places on his “current enactable preferences” default rules, to show that Elhauge’s theory fails to maximize the political satisfaction of moderate legislators. Given that failure, this Essay argues that the congressional deadlock and polarization described by Rodriguez and Weingast will persist under Elhauge’s default rules.

II. BACKGROUND

A. “*The Paradox of Expansionist Statutory Interpretations*”: *How Expansionist Statutory Interpretation Deadlocks and Polarizes Congress*

In their article, Rodriguez and Weingast observe that significant watershed legislation is the product of bargaining and compromise, where moderates play a critical role, because neither ardent supporters nor opponents usually have the necessary majorities to pass or defeat a bill.⁸ The authors then use positive political theory⁹ to show that many of the delicate legisla-

⁵ Elhauge, *supra* note 3, at 2040–48.

⁶ *Id.* at 2084. Elhauge’s theory tracks “enactable political preferences,” which he defines as “the political preferences of the polity that are shared among sufficient elected officials (taking into account any requirements for the concurrence of different political bodies like a House and Senate or President) that they could and would be enacted into law if the issue were on the legislative agenda.” *Id.* at 2034.

⁷ *Id.* at 2102–08.

⁸ Rodriguez & Weingast, *supra* note 1, at 1215–19. According to Rodriguez and Weingast, examples of “watershed” statutes include the Civil Rights Act, the Voting Rights Act, and the Clean Air Act. *Id.* at 1207.

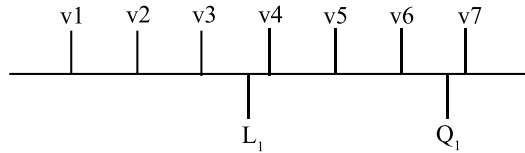
⁹ In an earlier article, Rodriguez and Weingast provided the following definitional overview of positive political theory:

The positive political theory of legislative decision making describes the statute-making process as a collection of purposive, strategic decisions made by rational decision makers within the structure of legislative institutions. These legislative institutions are themselves the creation of legislators acting to maximize their own varied interests through collective choice mechanisms. The “industrial organization of Congress” represents the constructed environment within which legislators bargain with one another in order to facilitate their individual and collective goals. Statute—including both the text of the enacted law and the legislative “history” encoded into the public record of the statute—reflect not only legislative specialization and expertise, but the vitally important object of trade and negotiation. The legislators’ statements that make up the legislative history that attaches to the statute also reflect these important objects. Critically, the statute’s implementation will be influenced by the meaning given to it by interpretations.

tive compromises needed to pass the landmark progressive legislation of the 1960s and 1970s were undone in that era by courts using expansionist statutory interpretations.¹⁰ Rodriguez and Weingast surmise that following these court decisions, moderate legislators, now aware of the likelihood that an expansionist court will undermine any legislative compromise, vote instead to maintain the status quo.¹¹ This explains the increased polarization in Congress and its failure to pass significant progressive legislation since the 1970s.¹² It also leads to the paradox that lobbying courts for progressive statutory interpretations undermines similar lobbying efforts for progressive legislation.¹³

Rodriguez and Weingast illustrate their theory—that expansionist judicial interpretations result in the passage of less legislation and greater polarization—by using a simple legislative model.¹⁴ Rodriguez and Weingast posit a basic, seven-person legislature (v1–v7) spread over a left-right political continuum, with v1–v4 in the majority party and v5–v7 in the minority party.¹⁵ Each legislator then votes according to whether the proposed law (L) or the status quo (Q) is closer to her individual policy preferences.¹⁶

Figure 1¹⁷



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, 1431–32 (2003) (internal citations omitted). According to Rodriguez and Weingast, positive political theory provides “three key insights about legislative behavior”: (1) the theory recognizes the presence of “pivotal, moderate legislators” in Congress; (2) the passage of legislation typically involves bargaining between “ardent supporters” and moderates; and (3) legislators intentionally create legislative history so as to support their view of the statute. Rodriguez & Weingast, *supra* note 1, at 1222.

¹⁰ *Id.* at 1241–50 (pointing to the D.C. Circuit’s interpretation of the National Environment Policy Act in *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971) and to interpretations of civil rights legislation, such as in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)).

¹¹ *Id.* at 1211.

¹² *Id.* at 1255.

¹³ *Id.* at 1211.

¹⁴ *Id.* at 1235–41.

¹⁵ *Id.* at 1236.

¹⁶ *Id.*

¹⁷ *Id.* at 1237 (“First Legislative Proposal”).

In this scenario, legislators v1–v5 favor the legislation, while v6–v7 prefer the status quo, resulting in the legislation achieving cloture and passing.¹⁸

The key insight of Rodriguez and Weingast’s article analyzes what would occur if expansionist judicial interpretations of these laws moved the legislation a little to the left, to v3’s voting position on the continuum.¹⁹ In this scenario, the legislation would still command a majority (v1–v4), but v5 would now vote to maintain the status quo, therefore rendering the Senate unable to overcome a filibuster. Rodriguez and Weingast argue that, since legislators are aware that judges will later expand the scope of statutes, legislators will vote according to where they expect the legislation to lie on the continuum following judicial expansion, rather than according to where the legislation lies when presented to Congress.²⁰ This poses difficulties, not just in forming majorities, but also in obtaining the supermajority necessary to achieve cloture.²¹

Rodriguez and Weingast also observe that Congress becomes more polarized when the judiciary expands legislation to more extreme positions on the left/right political continuum.²² In the original scenario, v5, a member of the minority party, voted moderately with the majority party. However, when legislators modify their votes in anticipation of expansionist statutory interpretation, v5 votes with the minority party instead.²³ Therefore, expansionist statutory interpretations not only lead moderate legislators to vote with greater frequency to maintain the status quo, but also limits the degree to which legislators are willing to cross party lines on a given piece of legislation.²⁴

B. Elhauge’s Statutory Default Rules

Elhauge claims that judges should employ statutory default rules that ensure that statutes are interpreted so as to “accurately reflect enactable political preferences.”²⁵ In cases where the political preferences of the enacting and current legislative polities differ, Elhauge maintains that the

¹⁸ *Id.* at 1236–37.

¹⁹ *Id.* at 1238–39.

²⁰ *Id.* at 1240–41.

²¹ *Id.*

²² *Id.* at 1240.

²³ *Id.*

²⁴ *Id.* at 1239–40.

²⁵ Elhauge, *supra* note 3, at 2036, 1240–48. This Essay focuses on Elhauge’s “preference-estimating” statutory default rules. In a companion article, Elhauge discusses how, “when enactable preferences are unclear, often the best choice is instead a preference-eliciting default rule that is more likely to provoke a legislative reaction that resolves the statutory indeterminacy and thus creates an ultimate statutory result that reflects enactable political preferences more accurately than any judicial estimate possibly could.” Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002).

political satisfaction of the enacting legislative polity can be maximized by interpreting statutory ambiguity in line with the enactable preferences of the current polity.²⁶ Elhauge concedes that it seems counterintuitive that judges can best maximize the political satisfaction of the enacting legislative polity by interpreting all statutes in accord with the enactable preferences of the current legislative polity,²⁷ but he defends this assertion by arguing that every enacting legislative polity would prefer to have all new and existing statutes interpreted in accord with its enactable preferences during its tenure, rather than have its preferences followed indefinitely into the future for only those statutes that it enacted.²⁸ The remainder of this Essay will explore whether Elhauge's default rule, which utilizes current enactable preferences, maximizes the political satisfaction of congressional moderates—the group which is the critical focus of Rodriguez and Weingast's piece.

III. WHETHER CONGRESSIONAL DEADLOCK AND POLARIZATION PERSIST WHEN JUDGES EMPLOY A CURRENT ENACTABLE PREFERENCES DEFAULT RULE?

The remainder of this Essay addresses whether the congressional deadlock and polarization described by Rodriguez and Weingast would persist under Elhauge's current enactable preferences default rule.²⁹ In his article, Elhauge draws a number of distinctions between his theory and those of other dynamic scholars, which he claims provide his theory with a "more solid basis, more constraining methodology, and more limited scope" than those of other dynamic scholars,³⁰ and also articulates a number of self-imposed limitations on his current preferences default rule.³¹ This Section

²⁶ See *id.* at 2037, 2084. Elhauge does not provide an exhaustive list of what he considers to be "official action," but does provide that it includes actions by administrative agencies, *id.* at 2131, and subsequent legislative action and legislative history on the same, or similar legislation to that before the court. *Id.* at 2112.

²⁷ *Id.* at 2037.

²⁸ *Id.* at 2084–85.

²⁹ To the extent that Elhauge's default rule is, as he claims, already embodied in existing modes of statutory interpretation, *id.* at 2034–35, this analysis could be quite succinct, since Rodriguez and Weingast's historical analysis would then reflect that Elhauge's theory leads to the same congressional polarization and deadlock caused by other dynamic theories of statutory interpretation. However, Elhauge is careful to note that his descriptive claim is only that his theory "fits and predicts the doctrine," not that judges say or subjectively think they are applying Elhauge's default rules. *Id.* at 2034–35. Therefore, because Rodriguez and Weingast's theory of congressional behavior posits that legislators place their votes based upon how they expect courts to interpret the statute in the future, it would be unfair to dismiss Elhauge's theory based solely on Rodriguez and Weingast's historical evidence. As a result, this section will instead focus upon how moderate legislators would respond if they were aware that courts would uniformly interpret statutory ambiguity in accord with Elhauge's default rule.

³⁰ *Id.* at 2084.

³¹ *Id.* at 2102–12. Elhauge discusses five limitations on his theory: (1) current enactable preferences should only be applied to resolve statutory ambiguity, not to alter unambiguous statutory meaning; (2) the current preferences default rule only applies when action by the current government is unlikely, due to "legislative inertia and the costs of enacting legislation," or delayed; (3) "current preferences

will begin by addressing those distinctions and limits that do in fact have the potential to avoid the congressional polarization and deadlock that result from courts' application of other dynamic theories. This Essay will then proceed to discuss three reasons why, despite these distinctions, the congressional behavior described by Rodriguez and Weingast will persist. First, this Essay will draw attention to the fact that judicial discretion persists under Elhauge's theory, since Elhauge leaves it to judges to determine when a statute is ambiguous. Next, this Essay will show why the views of congressional moderates are marginalized when courts strive to ascertain current enactable preferences through "official action" such as a congressional response on similar legislation or administrative agency decisions. Finally, this Essay will point out as a more general matter that Elhauge, by limiting his default rule's applicability to the "marginal area where explicit legislative action [is] unlikely,"³² undermines the underlying justification for his current enactable preferences default rule.

A. Characteristics of Elhauge's Default Rule that Serve to Avoid Congressional Polarization and Deadlock

Elhauge strives to distinguish his theory by setting forth important limitations on his default rule and by drawing distinctions between his default rule and other dynamic scholars' theories. A number of these limitations and distinctions reflect that Elhauge's theory has the potential to avoid the congressional deadlock and polarization described by Rodriguez and Weingast.

Elhauge criticizes other dynamic theories for the amount of substantive judicial judgment they give to the courts. These dynamic theories instruct judges to assess current societal preferences on an issue, and then permit judges to further exercise their discretion in determining whether the statute should be interpreted in accord with their assessment of general public opinion.³³ Elhauge points out that his theory does much more to limit judicial discretion, since statutes are only to be interpreted according to the enactable preferences of the current legislative polity, binding judges to interpret statutory ambiguity to maximize political satisfaction.³⁴

Elhauge's default rule is more restrained than those rules proposed by other dynamic scholars. This is illustrated by Rodriguez and Weingast's legislative model's described earlier in this Essay:

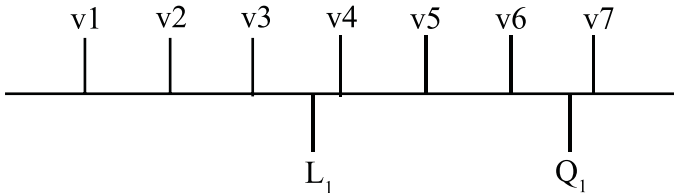
must be truly enactable," reflecting the requirements of bicameralism and presentment; (4) "current preferences must be memorialized in official action," rather than merely reflected by changes in polls; and (5) a legislature could opt-out of Elhauge's default rule, subject to limitations if the opt-out was too self-aggrandizing.

³² *Id.* at 2105.

³³ *Id.* at 2082–83.

³⁴ *Id.* at 2082–84.

Figure 2



The sentiments in Congress on a particular issue can conceivably change over time just as radically as those in society as a whole. Therefore, tracking the legislative polity's current enactable preferences, rather than general societal preferences, does not in and of itself limit how far to the left or right on the political continuum a piece of legislation (L_1) will shift based on a court interpretation. Elhauge's theory, however, focuses upon maximizing political satisfaction and thereby ensures that an interpretation shifting a statute's (L_1 's) position on the political continuum only occurs so as to mirror a similar shift in legislators' (v_1 – v_7) positions along this same continuum. Therefore, Elhauge's default rule serves to assure legislators that the statute will always be reflective of Congress's view on a particular issue.³⁵ Elhauge reiterates this point by emphasizing that under his theory, "current preferences must be truly enactable."³⁶ This limitation prevents judges from favoring a particular political party in cases of congressional deadlock.³⁷

Based on these distinctions and limitations, Elhauge's theory has the potential to avoid the congressional deadlock and polarization described by Rodriguez and Weingast. In order for this to truly occur, however, Elhauge's theory must ensure that enactable preferences reflect the views of congressional moderates often critical to legislation's passage. If current enactable preferences are gauged by the "cheap talk" of ardent supporters, rather than reflecting the compromises these ardent supporters often must make with moderates in order to form a viable consensus, then moderate legislators will not have confidence in Elhauge's default rule and congres-

³⁵ This assurance reinforces Elhauge's premise that his theory actually serves to maximize the political satisfaction of the enacting legislative polity. *See id.* at 2040. This is another distinction between Elhauge's theory and those of other dynamic scholars, which maintain that current public opinion and social values should trump enacting legislative preferences. *Id.* at 2084.

³⁶ *Id.* at 2106 (emphasizing that current preferences, in order to be "truly enactable," must be able to measure up to the requirements of bicameralism and presentment).

³⁷ *Id.*

sional deadlock and polarization will persist. Unfortunately, as the rest of this Essay reflects, Elhauge's default rule does not sufficiently account for moderate legislators' perspectives.

B. Fostering Judicial Discretion in Determining when a Statute is Ambiguous

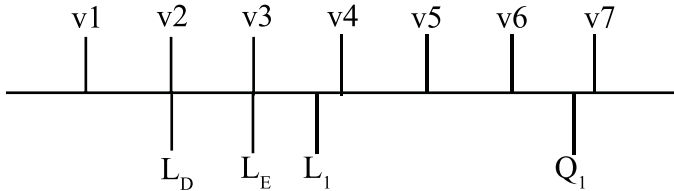
A key feature that distinguishes Elhauge's theory from the work of other dynamic theorists is that Elhauge's theory is limited to cases of statutory ambiguity, while other scholars argue that courts should track current public opinion, even when this changes a statute's clear meaning.³⁸ Elhauge limits his theory to cases of statutory ambiguity because the enacting legislature does not have a strong interest in issues of statutory ambiguity.³⁹ At first blush, it appears that limiting the applicability of the current enactable preferences default rule to matters of statutory ambiguity would correspondingly limit the degree to which moderates shift to more polarized voting behavior. Because the rule lessens the degree to which judges can change the statute from its original form, this restriction to cases of ambiguity reduces the number of moderates who will change their vote. This is borne out in Figure 3, below, where L1 represents the legislation as passed by Congress, LD represents the maximum a statute can be expanded under dynamic theories that are not limited to areas of statutory ambiguity, and

³⁸ *Id.* at 2084, 2102–03.

³⁹ *Id.* at 2103. Elhauge uses this same argument to show why his default rule should apply to watershed, landmark legislation. Elhauge argues that even the enacting legislative politics of landmark civil rights and voting rights acts of the 1960s would prefer his current enactable preferences default rule. *Id.* at 2091–92. Elhauge supports this argument by contending that even if the enacting polity had a heightened interest in the legislation it passed, this would not similarly extend to ambiguities in the statute, since such ambiguities are largely the product of either “an unforeseen issue, an intentional failure to decide, or so little interest in the issue that the legislature was unwilling to incur the decisionmaking costs of resolving it.” *Id.* at 2091. Rodriguez and Weingast's theory, however, calls into question Elhauge's claim that legislators do not have a strong interest in statutory ambiguity. Rodriguez and Weingast discuss, for example, how courts have undone many of the critical compromises struck between ardent supporters and moderates with respect to civil rights legislation. Rodriguez & Weingast, *supra* note 1, at 1248–49. The importance of these bargains in securing civil rights laws' passage undermines Elhauge's treatment of statutory ambiguity as consisting of unforeseen issues and those of little interest to legislators. The one area where Elhauge's theory may hold true is with respect to intentionally included ambiguity, so long as both the ardent supporters and moderates on a piece of legislation purposely included such ambiguity. This again reflects the importance of considering moderates' views, since, as Rodriguez and Weingast point out, congressional polarization and deadlock persists, even in circumstances where a law's ardent supporters preferred that the statute be interpreted to track current legislative preferences. *Id.* at 1252. Moreover, the main thesis of Rodriguez and Weingast's article—that in highly politically charged areas such as civil rights, voting rights, and the environment, Congress is unable to pass any significant legislation because expansionist court decisions polarize Congress beyond the point of compromise, *see* discussion *supra* Part II(A), also undermines Elhauge's assertion that in areas as politically charged as civil rights, the current legislature will likely overturn any statutory interpretation that deviates from current enactable preferences. Elhauge, *supra* note 3, at 2091.

LE represents the maximum a statute can change when courts are limited to interpreting only areas of statutory ambiguity under Elhauge's theory.

Figure 3



Unfortunately, however, Elhauge has failed to clearly define when a statute is ambiguous.⁴⁰ As a result, the description above is far too clean-cut. In actuality, the distinction between statutory ambiguity and clear meaning is much cloudier than is reflected in the model above. The lack of clarity with respect to whether statutory language is ambiguous provides judges an opportunity to exercise discretion so as to maximize their own personal political preferences. Professors Frank B. Cross and Emerson H. Tiller documented this phenomenon in an essay that empirically showed that judges selectively employed the *Chevron* doctrine—only triggered in cases of statutory ambiguity—so that cases would come out in accord with their political preferences.⁴¹ Therefore, although Elhauge's statutory default rules cabin judicial discretion to when judges are interpreting statutory ambiguity, they do nothing to check the judicial discretion in determining whether a statute is ambiguous in the first place.

The fine line between what is and what is not ambiguous statutory language calls into question the validity of Elhauge's claim that enacting legislatures do not have a strong interest in areas of statutory ambiguity.⁴² In fact, the inclusion of "ambiguous" statutory language is often the critical element for securing a law's passage, because this language is the result of a compromise between the law's ardent supporters and political moderates.⁴³ For example, in *Calvert Cliffs*, the court interpreted the ambiguous word

⁴⁰ Elhauge stated that he has not offered a definite definition of statutory ambiguity. Presentation by Elhauge to the Northwestern University School of Law's Constitutional Law Colloquium, in Chicago, Ill. (Apr. 4, 2006). Similarly, he failed to include such a definition in his earlier Columbia Law Review article. See Elhauge, *supra* note 3.

⁴¹ Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2169 (1998).

⁴² Elhauge, *supra* note 3, at 2103.

⁴³ Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 628 (2002).

“appropriate” in the statute’s language to determine whether environmental agencies were required to abandon their existing regulations and adopt new regulations in accord with the National Environmental Policy Act’s (“NEPA”) mandate.⁴⁴ However, the D.C. Circuit interpreted the statute expansively, and required that new procedures must be implemented. This interpretation undermined the fact that, in order to pass NEPA, the law’s ardent supporters had to compromise with moderates by insisting that agencies would not be required to abandon existing procedures that served other environmental legislation’s purposes.⁴⁵ Thus, as this example illustrates, Elhauge’s claim that the enacting legislature has little interest in areas of statutory ambiguity is not a foregone conclusion, particularly with respect to landmark, watershed legislation.

Furthermore, by failing to address when a statute is ambiguous, the door remains open for judges to exercise judicial discretion in determining whether a term in the statute is clear or ambiguous in the first place. Judges under Elhauge’s theory are able to engage in the same game-playing documented by Cross and Tiller, so the positioning of LD and LE on the model above would be virtually identical. Elhauge, however, could remedy this problem by providing some limits as to when a judge could deem a statute ambiguous. For example, it is questionable how ambiguous a statute is if the preferences of the *enacting* legislative polity are readily ascertainable. Therefore, if Elhauge were to limit his current enactable preferences default rule to situations where the enacting legislative polity’s preferences are not readily ascertainable, this distinction between Elhauge’s and other dynamic theories as to when statutes may be interpreted would be much more pronounced and would limit the degree of congressional deadlock and polarization.

C. “*Current Preferences Must Be Memorialized in Official Action*”⁴⁶

Another important limit Elhauge places on his current enactable preferences default rule is requiring that current preferences be memorialized in “official action.” Elhauge does this to avoid reliance concerns and to lesson error and agency costs.⁴⁷ Elhauge deems “official action” to include agency interpretation of a statute or subsequent, relative legislative action,⁴⁸ but unfortunately, both of these categories of official action alienate congressional moderates.

⁴⁴ Rodriguez & Weingast, *supra* note 1, at 1245 (citing Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109, 1113 n.8 (D.C. Cir. 1971)).

⁴⁵ *Id.* at 1247.

⁴⁶ Elhauge, *supra* note 3, at 2107.

⁴⁷ *Id.*

⁴⁸ *Id.* at 2112–56.

1. *Agency Action*—Elhauge views agency interpretation of statutory ambiguity as one example of official action for purposes of ascertaining current enactable preferences.⁴⁹ In fact, Elhauge views the *Chevron* doctrine as an example of a current preferences default rule, lending support to Elhauge's descriptive claim that judges already use his statutory default rules.⁵⁰ However, by relying on agency interpretation as a measure of current enactable preferences, Elhauge's theory fails to consider the preferences of congressional moderates, thereby doing nothing to temper the congressional behavior described by Rodriguez and Weingast. The agencies interpreting statutory ambiguity, although ultimately accountable to Congress, are not part of the legislative polity whose political satisfaction Elhauge's theory maximizes. Further marginalizing moderates is the fact that agencies are primarily accountable to the President and oversight committees rather than to the legislative polity, meaning that the legislature's preferences will not be of primary concern to the agencies.⁵¹ In addition, there is no guarantee that agencies, if they in fact consider the enactable preferences of the legislative polity, consider the supermajority necessary to achieve cloture—the part of the legislative process in which moderates wield the most power. As a result, there is no reason that the voting behavior of congressional moderates described by Rodriguez and Weingast would be different when courts look to agency action to ascertain current enactable preferences.

2. *Subsequent Legislative Action*—Under Elhauge's theory, current preferences can also be memorialized in subsequent legislative action.⁵² Thus courts can look to subsequent legislative history, embodied in other recent statutes, that reflect current enactable preferences on a particular issue.⁵³ To some degree, this official action more reliably reflects the enactable preferences of the current legislative polity than looking to agency action, since actual action by the legislature is being measured. However, looking at relative legislation still marginalizes the preferences of moderate legislators. Although both the original and recent pieces of legislation may speak to the same specific topic, because they are two separate statutes, the surrounding context and broader purpose of the laws may very well be different. Thus, there will invariably be fine distinctions between the statute that the court is interpreting and the relative legislative act on a different piece of legislation that the court is using to ascertain current enactable preferences. While these nuanced differences will generally not have an impact on the voting behavior of those legislators who toe their respective

⁴⁹ *Id.* at 2126.

⁵⁰ *Id.* at 2126–31.

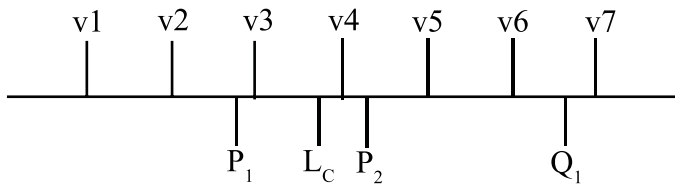
⁵¹ *See id.* at 2127–28.

⁵² *Id.* at 2115–21.

⁵³ *Id.* at 2115–16 (arguing that courts looking to subsequent legislative history is largely descriptive, but noting that it is something that courts already do).

party lines, for moderates the slightest shift in a law to the political right or left could change their vote.⁵⁴ Under Elhauge’s default rule, courts could look to a newly enacted piece of legislation (LC) to determine the current enactable preferences regarding a particular provision in an older statute currently before the court for interpretation. However, the individual provisions in the current legislation will not all lie at the same place on the political spectrum as the statute as a whole, and instead the statute will reflect a combination of both slightly leftward (P1) and slightly rightward (P2) leaning provisions when compared with the statute in its entirety.

Figure 4



In this example, the legislation as a whole (LC) will achieve cloture and be enacted by Congress, but a particular provision in the statute, P1, would not successfully obtain cloture or be enacted if voted upon on its own, because v5’s vote would be different. As a result, reliance on relative legislative action as an indication of current enactable preferences maximizes the political satisfaction of the majority of legislators who lean strongly towards the political left or right, but fails to account for moderates who would have changed their vote based on the overall context of the law. Under Rodriguez and Weingast’s model, these moderates, realizing that their preferences are marginalized under the current enactable preferences rule, will be less inclined to compromise in the future, leading to congressional deadlock and polarization.

D. “Relevance Normally Limited to Marginal Area Where Explicit Legislative Action Unlikely”⁵⁵

Finally, Elhauge emphasizes that his current enactable preferences default rule only applies in the limited situation where the preferences of the current legislative polity are enactable, but have not been passed into law due to the force of legislative inertia, the cost in enacting legislation, or the

⁵⁴ This is reflected in Rodriguez and Weingast’s legislative models. *Supra* Part II(A).

⁵⁵ *Id.* at 2105.

delay before legislation actually takes effect.⁵⁶ Although this limitation counters the argument that the enacting legislative polity would not prefer this default rule because the current legislative polity could always override interpretations of past legislation with which it disagreed,⁵⁷ it also undermines the basic rationale for implementing a current enactable preferences default rule in the first place.

Elhauge contends that the enacting legislative polity would prefer that its enactable preferences be tracked for all cases of statutory uncertainty arising during its tenure rather than preserving its preferences only for statutory ambiguity in the legislation it enacted.⁵⁸ However, by limiting the default rule's reach to the "marginal area where explicit action by the current government is unlikely or delayed,"⁵⁹ Elhauge limits the number of cases of statutory interpretation in which this default rule is applicable. Therefore, Elhauge's focus on the current legislative polity's ability to influence the interpretation of all statutes is misleading to the extent that the current legislative polity is only able to affect the statutory interpretation of statutes where explicit legislative action is unlikely. By limiting his default rule's applicability to this "marginal area," Elhauge undermines the very justification for his default rule in the first place, that the enacting legislative polity would prefer to have its preferences tracked for all statutes during its tenure rather than only for those statutes which it enacted. It is uncertain whether congressional moderates, and indeed the legislature as a whole, would prefer Elhauge's default rule given this limitation on its applicability.

IV. CONCLUSION

Although Elhauge's current enactable preferences default rule is based on maximizing the political satisfaction of the enacting legislative polity, the rule fails to achieve this goal with respect to the preferences of moderate legislators. As a result, despite Elhauge's efforts to distinguish his theory from those of other dynamic theorists, the application of Elhauge's current enactable preferences default rule by the courts would lead to congressional deadlock and polarization with respect to landmark, progressive legislation, as described by Rodriguez and Weingast.

Elhauge fails to sufficiently limit his current enactable preferences default rule or distinguish his theory from those of other dynamic scholars for purposes of avoiding Rodriguez and Weingast's conclusion, but Elhauge could modify his theory to minimize congressional deadlock and polarization. One critical way in which Elhauge could do this is by defining when a statutory term is ambiguous. Elhauge could also modify his current en-

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 2084–85.

⁵⁹ *Id.* at 2105.

actable preferences default rule to further limit what qualifies as “official action” for purposes of memorializing current enactable preferences.

Elhauge’s default rule utilizing current enactable preferences does a great deal to limit judicial discretion and is commendable for its effort to maximize political satisfaction. Unless Elhauge makes such modifications to his current enactable preferences default rule, however, his theory fails to respect the delicate compromises fashioned by legislative moderates that are often critical to a law’s passage. As a result, Elhauge’s default rule fails to limit the congressional deadlock and polarization with respect to landmark, progressive legislation described by Rodriguez and Weingast.