POLITICS AND PRICES: JUDICIAL UTILITY MAXIMIZATION AND CONSTITUTIONAL CONSTRUCTION

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1. Introduction

Constitutional interpretation is hard work. Post-modern theorists have correctly (and relentlessly) observed that all language is indeterminate and that texts are innately vulnerable to the unsettling play of deconstructive forces.[1] This raises an obvious question – one that is typically ignored by the lion's share of deconstructive theorists. If language is unstable and indeterminate, why does it work so well?[2] Why is language so effective in conveying information? As Canada's leading constitutional scholar once asked, why is it that, despite the indeterminacy of language, people successfully *"keep dental appointments and stop at stop signs"*?[3] My own view is that the degree of communicative success and interpretive consistency we observe in the real world does not imply that language is more determinate than post-modernists let on. Instead, it suggests that there is something apart from language that constrains the "*free play*" of deconstructive interpretation; something that restrains the post-modern impulse to destabilize the meaning of texts (including constitutional texts) through deconstructive acts. This "something else", in my opinion, is self-interest.[4] At its most basic level, interpretation is a form of decision-making whereby interpreters must choose

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1 A good introduction to Post-Modern theory can be found in Christopher Norris, *Deconstruction: Theory and Practice*, rev. ed. (London: Routledge, 1991). Another is found in James Boyle, *Critical Legal Studies* (New York: New York University Press, 1994). My own take on the inherent indeterminacy of language can be found in chapter 2 of R Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001).

2 While this question has been ignored by a majority of language scholars, there are noteworthy exceptions. Stanley Fish, in particular, has done some excellent work in this area. See, for example, S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980) and S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989).

3 Peter W. Hogg in Foreword to R. Graham, supra n.1 at vii.

4 Throughout this paper the phrase "self-interest" is used in the microeconomic sense of "self-interested utility maximization". In this context, it is important to bear in mind that "self interest" does not imply immoral, amoral, or mercenary behavior: someone whose over-riding personal preference is to do good deeds in the community, for example, can still be regarded as

between competing, alternative meanings. Like all decisions, interpretive choices are constrained by the self-interest of the decision-maker in question. This is equally true of the choices made by judges when they interpret legislation (and Constitutions, in particular). All people, including judges, interpret texts in whatever way they think will benefit them the most.[5] This universal pursuit of self-interest has the effect of constraining the types of interpretive choices that an interpreter will make.

The interpreter's self-interested assessment of the costs associated with specific interpretative outcomes is a powerful determinant of interpretive decisions. This should come as no surprise. Indeed, all choices are guided by the decision-maker's assessment of competing costs and benefits. Ronald Coase explained the impact of costs and benefits upon the decision-making process in these terms:

> *"Whatever makes men choose as they do, we must be content with the knowledge that for groups of human beings, in almost all circumstances, a higher (relative) price for anything will lead to a reduction in the amount demanded. This does not only refer to a money price but to price in its widest sense. Whether men are rational or not in deciding to walk across a dangerous thoroughfare to reach a certain restaurant, we can be sure that fewer will do so the more dangerous it becomes. And we need not doubt that the availability of a less dangerous alternative, say, a pedestrian bridge, will normally reduce the number of those crossing the thoroughfare, nor that, as what is gained by crossing becomes more attractive, the number of people crossing will increase. The generalization of such knowledge constitutes price theory ... Why a man will take a risk of being killed in order to obtain a*

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a "self-interested" actor when carrying out these good works. As a result, a highly "moral" judge, whose preference set includes a number of altruistic goals, can nevertheless be regarded as "self-interested". For a more thorough discussion of the intersection of self-interest and altruistic behavior, see R Graham, *Legal Ethics* (Toronto: Emond Montgomery Publications, 2004), chapter 1.

5 The role of self-interest in constraining interpretive choices can be demonstrated through everyday examples. Recall Hogg's observations concerning dental appointments and stop signs. Even post-modern theorists manage to make it to the dentist despite their ability to deconstruct, destabilize, reinterpret and unravel any text that they encounter (including their own appointment books). They also stop at stop signs. The reason is that post-modern scholars (like the rest of us) have an interest in dental hygiene and in avoiding car crashes. While they could choose to undertake a convincing deconstructive romp through their appointment books, or deploy post-modern tools to reveal the layers of meaning embedded in a stop sign, they typically choose not to do so: their commitment to deconstructing the relevant text is overborne by their desire to achieve a particular outcome (clean teeth or safe driving in these examples). They do their best to interpret appointment books and stop signs in a conventional way because the cost of doing otherwise is too high. The cost associated with counter-intuitive interpretations of appointment books (namely, an increased risk of missed appointments) and the cost associated with unusual interpretations of stop signs (namely, an increased risk of a car accident) are so great that most people avoid deconstructing such texts.

> *sandwich is hidden from us even though we known that, if the risk is increased sufficiently, he will forego seeking that pleasure."*[6]

Of course, the explanatory power of price theory is not limited to the context of humankind's quest for sandwiches. As Coase explains, every decision made by every thinking being (including non-human animals)[7] can be explained by models rooted in price theory. The decisions made by judges are no exception. According to Coase:

> *"If the theories which have been developed in economics (or at any rate in micro-economics) constitute for the most part a way of analysing the determinants of choice (and I think this is true), it is easy to see that they should be applicable to other human choices such as those that are made in law or politics."*[8]

It should therefore come as no surprise that price theory – the basic notion that a higher relative cost for a given choice will reduce the frequency with which that choice is selected – has the capacity to explain the interpretive choices judges make.

The goal of this essay is to apply price theory to statutory construction, with particular emphasis on the interpretation of constitutional texts. To that end, this essay begins with a discussion of "*the Realist Vision*" of statutory construction, a vision which holds that the judicial interpretation of legislation as well as of Constitutions involve the manipulation of text in furtherance of the judicial interpreter's preferences. Accepting the Realist Vision as correct,[9] I move on (in section 3) to examine the forces constraining the judiciary's ideological manipulation of legal language – in other words, the typical "costs" of statutory interpretation. While judicial self-interest might give rise to a judge's impulse to manipulate legal documents in accordance with the judge's policy preferences, the costs identified in section 3 of this essay (namely, reputation and time) can counter-act this impulse, effectively reining in a rational judge's manipulation of statutory language. The identification of these costs paves the way for the development of an economic model of statutory interpretation, one that depicts the interpretive process as an exercise in judicial utility maximization constrained by an array of competing costs.

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6 R. Coase, *The Firm, The Market, and The Law* (Chicago: University of Chicago Press, 1988), at 4–5.

7 "Indeed, since man is not the only animal that chooses, it is to be expected that the same approach can be applied to the rat, cat, and octopus, all of whom are no doubt engaged in maximizing their utilities in much the same way as does man. It is therefore no accident that price theory has been shown to be applicable to animal behavior": Ibid at 3.

8 Ibid.

9 By stating that the Realist Vision is correct, I mean that it is "accurate", not that the Realist Vision represents the way in which judges *ought to* interpret legislation.

Judges doing the job of interpreting legislation or constitutions are engaged in a process of rational, constrained and self-interested maximization: they subconsciously (and sometimes consciously) weigh the costs and benefits (to themselves) associated with specific interpretive outcomes, weighing the benefits derived from the ideological manipulation of legal texts against the costs that judges incur when interpreting statutes. The ways in which these costs and benefits interact, and their implications for a broader theory of statutory interpretation, will be developed throughout the remainder of this essay.

2. The Realist Vision of Statutory Interpretation

The traditional view of statutory construction holds that judges are politically neutral and objective when they interpret legislation. On this conception of the interpretive process, a judge's only goal in the interpretation of statutes is to discover and apply the will of the legislative author. The interpreter's role *"resembles that of an historian, or an archaeologist, in quest of an ancient thought of which the enactment may contain traces"*.[10] This idealized view of the interpretive process – a view Côté refers to as *"The Official Theory"* of statutory construction – posits that the meaning judges discover when interpreting legislation is the meaning that *"was sought by the legislator at the time of [the Act's] adoption"*.[11] This official theory accepts *"the passivity of the interpreter on the political level"*.[12] When carrying out their interpretive task, it is argued, judges set aside their own political preferences, disregard their personal ideologies and ignore the meaning that *they want* the statute to support. Instead of relying on their own political preferences, judicial interpreters are subservient to the author of the legislative text, carrying out will of Parliament without regard for their own ideological goals.

The official theory of statutory construction is attractive. Indeed, this view has been accepted as the accurate model of statutory interpretation by virtually every Western court.[13] Unfortunately, the idealized view is wrong. While it would be nice to live in a world where judges were capable of setting aside their personal policy preferences when interpreting legislation, this is not the world we inhabit. Instead, we live in a world in which all language is indeterminate and interpreters cannot help but confront language through a lens distorted by personal ideology. In the real world, judges (whether consciously or unconsciously) manipulate the text of legislation as

10 P. Côté, *The Interpretation of Legislation in Canada*, 2d ed., (Cowansville, QC: Yvon Blais, 1992), at 7.
11 Ibid at 6.
12 Ibid at 9.
13 Some particularly potent endorsements of this view of interpretation can be seen in *R. v. Judge of the City of London Court* [1892] 1 QB 273, at 290; *Sussex Peerage Case* (1844) 11 C&F 85, 8 E.R. 1034 (H.L.), *R. v. McIntosh* [1995] 1 SCR 686; *R. v. Multiform Manufacturing Co.* [1990] 2 SCR 624, at 630; and *US v. Alpers* (1950) 338 US 680 (USSC).

well as Constitutions in ways that give effect to judges' ideological preferences.

The depiction of statutory interpretation as an exercise in ideological manipulation has been put forward in a variety of contexts, most frequently by scholars affiliated with the school of Legal Realism and, perhaps most famously, by adherents of the Critical Legal Studies movement (affectionately called "Crits").[14] This view of interpretation – which I shall call *"The Realist Vision"* – is far more accurate than the idealized model of statutory construction described above. Schauer summarizes the Realist Vision as follows:

> *"Realism ... maintained that judges were never, rarely, or at least less often than advertised controlled in their decisions by constitutional provisions, statutes, rules, regulations, reported cases, maxims, canons, and all of the other traditional items of formal law. Instead, these Realists argued, the primary causal influences on judicial decision-making consisted of the judge's views about the immediate equities of the case at hand, the judge's less particularistic views about public policy, or the judge's array of philosophical, political, and policy views, an array that is nowadays called 'ideology'."*[15]

These ideas are echoed by a diverse group of legal academics,[16] who note that judicial decision-making is *"obviously open to sub rosa ideological influence"*,[17] and that judges inevitably reshape legal language *"according to the political philosophies of the judge"*.[18] According to Manfredi:

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14 The nomenclature applied to scholars interested in the "value-laden" nature of interpretive activity is, somewhat ironically, shifting and indeterminate. Names applied to such groups include "attitudinalists", "positive scholars", "anti-foundationalists", "non-foundationalists", etc.

15 F. Schauer, "Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior" (2000) 68 U. Cin. L. Rev. 615, at 619.

16 In another context, I summarized The Realist Vision of statutory interpretation as follows: "...some element of "ideological appropriation" can be found in every act of interpretation. The views of the interpreter are necessarily relevant to the interpretation of every legal text. By emphasizing the elements of the text that support the judge's opinions, the judge inevitably – and often unconsciously – gives official approval to his or her own privately held beliefs, effectively grafting those beliefs onto the otherwise indeterminate legal text. The values of "the law" are inescapably shaped by the values of those who are charged with the task of interpreting legal rules. The "meaning" of a legal rule is not discovered by a neutral arbitrator, but selected from a wide array of interpretive possibilities "by the people who had the power to make the choices in accord with their views on morality and justice and their own self-interest". Interpretation is not constrained by any discoverable, original intention, but is left to the discretion of those who are given the freedom to impose their own beliefs on legal texts." See R. Graham, supra n. 1 at 70 – 71. The quoted language within this passage is taken from Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986), 36 *Journal of Legal Education*, 521.

17 D. Kennedy, "Law and Economics from the Perspective of Critical Legal Studies", The New Palgrave Dictionary of Economics and the Law, Edited by Peter Newman (1998), 465, at 468.

18 J. Goldsworthy, "Interpreting the Constitution In Its Second Century" (2000) 24 Melbourne U. L. Rev. 678, at 687. Note that Professor Goldsworthy is opposed to this form of judicial power, and points to it as a reason for embracing originalism as the appropriate theory of statutory construction.

> *"Individual justices are goal-oriented actors whose personal attitudes and beliefs shape their interpretation of the law. They behave strategically to maximize the probability that their preferences will become binding rules. In the end, the Supreme Court makes policy not as an accidental by-product of performing its legal function, but because a majority of justices believes that certain legal rules will be socially beneficial."*[19]

Other scholars note that:

> *"... Justices are not constrained by judicial precedent but rather manipulate it (and, for that matter, all other legal materials) to maximize their personal, policy, and institutional preferences."*[20]

Those who endorse this claim believe that when judges interpret constitutions, read statutes, apply precedent or otherwise engage with legal materials, they inevitably manipulate those materials (whether consciously or unconsciously) in a manner that accords with the judge's personal policy goals.

While the Realist Vision has *influenced* the writing of numerous scholars, relatively few legal academics – and virtually no judges – explicitly adopt the Realist Vision as an accurate model of statutory construction. Indeed, much of the social science evidence supporting the Realist Vision has been *"ignored by legal scholars".*[21] There are exceptions. Endorsements of (or at least tacit reliance on) the Realist Vision can be seen in the works of such notable scholars as Jeremy Waldron,[22] Peter Hogg,[23] Richard Posner,[24]

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19 C. Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998 – 2003", in G. Huscroft and I. Brodie (eds.), *Constitutionalism in the Charter Era* (Toronto: LexisNexis, 2004), 105,at 131. See also B. Friedman, "The Politics of Judicial review" (2005) 84 Tex. L. Rev. 257, where Friedman notes (at 258) that "Many positive theorists suggest that judicial ideology plays a significant role in how judges decide cases and that judges respond to pressures from other political actors. Positive scholars believe these forces play a large hand in shaping the content of the law, especially constitutional law". At 272, Friedman goes on to note that "attitudinal" scholars believe that "...the primary determinant of much judicial decisionmaking is the judge's own values. Judges come onto the bench with a set of ideological dispositions and apply them in resolving cases. As the most notable proponents of the attudinal model, Jeffrey Segal and Harold Spaeth, explain: "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal".

20 M. Gerhardt, "The Limited Path Dependency of Precedent", 7 U. Pa. J. Const. L. 903, at 911.

21 Ibid at 905.

22 See J. Waldron, "The Core of the Case Against Judicial Review", 115 Yale LJ 1346 at 1401, where Waldron writes that judges engaged in strong judicial review "are ipso facto ruling on the acceptability of their own view". Also see J. Waldron, "Do Judges Reason Morally?" (Draft prepared for conference on constitutional interpretation, University of Western Ontario, October, 2006).

23 See P. Hogg and A. Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)", (1997) 35 Osgoode Hall LJ, 75, at 77.

24 See R. Posner, "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)", Supreme Court Economic Review, Vol 3. (1993) 1.

Michael Gerhardt,[25] Larry Alexander,[26] Duncan Kennedy,[27] Frederick Shauer,[28] Jeffrey Goldsworthy,[29] William Leuchtenburg,[30] William Eskridge,[31] and Barry Friedman[32] (to name a few). Indeed, I would argue that all mainstream legal theorists rely (unconsciously in some cases) on the Realist Vision of statutory construction – even those theorists who suggest that it provides an inaccurate model of statutory interpretation.

The influence of the Realist Vision is most evident in scholarship concerning the interpretation of constitutional text. Gerhardt, for example, baldly states that *"personal ideologies and strategic maneuvering do play a significant role in constitutional adjudication."*[33] According to Gerhardt:

> *"Most social scientists reject altogether the possibility of the path dependency of precedent in constitutional law. They produce extensive empirical studies, largely ignored by legal scholars, which purportedly show that Supreme Court Justices base their constitutional decisions not on precedent (or the law in any form, for that matter), but rather on exogenous factors, such as their personal policy preferences or strategic objectives."*[34]

This vision of constitutional interpretation is endorsed not only by social scientists, but also by influential legal scholars.[35] According to Peter Hogg, for example:

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25 See M. Gerhardt, supra n. 20 at 909, where Gerhardt describes the attitudinal model (what I call the Realist Vision) as asserting that "Justices primarily base their decisions on their personal preferences about social policy".

26 See L. Alexander, "Constitutions, Judicial Review, Moral Rights, and Democracy: Disentangling the Issues" (Draft paper prepared for conference on Constitutional Interpretation, Oct. 13 – 14, University of Western Ontario), at pages 12 – 13, where Alexander writes "it is ...the... decisionmaker's view of real moral rights that is constitutionally controlling".

27 See D. Kennedy, "Strategizing Strategic Behavior in Legal Interpretation" (1996) Utah Law Review No. 3, 785. At page 788 of that article Kennedy claims that "It is a common belief, supported by a not inconsiderable social science literature, that judges ... often can and do work to make the law correspond to "justice", or to some other "legislative" ideal, and that they direct this work under the influence of their ideological preferences."

28 See F. Schauer, supra n. 15.

29 See J. Goldsworthy, "Interpreting the Constitution In Its Second Century" (2000) 24 Melbourne U. L. Rev. 678.

30 See W. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York, Oxford University Press, 1995).

31 See W. Eskridge, *Dynamic Statutory Interpretation* (Cambridge, Mass: Harvard University Press, 1994).

32 See B. Friedman, supra n. 19, 276, where Friedman writes that "At best, law is having an influence, but any judge's view of the law necessarily is influenced by ideology. (At worst, it is ideology and preference all the way down)".

33 M. Gerhardt, supra n. 20 at 906.

34 Ibid at 905.

35 See, for example, J. Goldsworthy, supra n. 29, and D. Dyzenhaus, "The Unwritten Constitution and the Rule of Law", in Huscroft and Brodie (eds.), supra n. 19.

> *"Judges have a great deal of discretion in "interpreting" the law of the constitution, and the process of interpretation inevitably remakes the constitution in the likeness favoured by the judges."*[36]

As a result, leading constitutional scholars accept that the interpretation of constitutional text involves the judiciary's ideological manipulation of text with a view to entrenching individual judges' personal preferences.[37]

The Realist Vision of statutory construction is unpalatable. It paints a picture of a world in which the law is indeterminate and its meaning is controlled by the political views of judges. Under this view of statutory interpretation, the meaning of legislative text – and therefore the content of the law – is not established by politically accountable institutions comprising elected officials. Instead, it is continually transformed by reference to the shifting political preferences of an elite cadre of relatively unaccountable judges. This bleak portrayal of the interpretive process is the principal reason for the Realist Vision's failure to achieve widespread acknowledgment. Its apparently nihilistic depiction of the interpretive process is unseemly and unsettling, and unlikely to gain support from those who cherish democratic institutions. I also suspect that many commentators confuse *"normative unpalatability"* with *"descriptive inaccuracy":* because they believe the Realist Vision is not how statutory construction *ought* to proceed, they suggest that it fails to describe how interpretation *does* proceed. Moreover, the Realist Vision is unlikely to be acknowledged by the courts: courts have an obvious interest in depicting adjudication as a value-neutral process governed by the will of legislative actors. As a result, judges frequently go to great lengths to deny the role of judges' personal policy preferences in the interpretation of legislative text. Indeed, as we shall see in Section 3, below, denial of the Realist Vision is one of the core judicial strategies for encouraging respect for the judiciary.

Despite its lack of popularity, the Realist Vision is an accurate portrayal of the process of statutory and constitutional interpretation. The Realist Vision may be normatively unpalatable, but (subject to refinements introduced in section 3 of this essay) it represents the way that statutory interpretation really works. I believe this for a number of reasons, only two of which bear mentioning in this context. First, the Realist Vision accords with logical and widely accepted views regarding the self-interested nature of decision-making in general (a subject to which we will return in section 3).

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36 P. Hogg and A. Bushell, supra n. 23 at 77.

37 See also M.P. Singh, "Securing the Independence of the Judiciary – The Indian Experience", 10 Ind. Int'l & Comp. L. Rev. 245, at 281, where professor Singh notes that "Studies on judicial behavior have long established that a judge's background plays an important role in that judge's decision making".

As a form of decision-making, statutory interpretation is subject to the same forces and constraints as other decisions, including the constraints imposed by the decision-maker's interests. More importantly, the Realist Vision offers the most coherent and sensible explanation for the large number of cases in which we observe the judicial propensity to render decisions coinciding with the relevant judges' personal policy preferences. Obvious examples drawn from the constitutional context include the nakedly partisan opinions in *Bush v. Gore*,[38] the United States Supreme Court's infamous "*reinterpretation*" of the Commerce Clause on the heels of FDR's threat to pack the Court,[39] the Supreme Court of Canada's constitutional entrenchment of judicial salaries and perquisites in the widely reviled *Remuneration Reference*,[40] and

38 531 U.S. 98. In this case, the US Supreme Court effectively had the power (through the interpretation of the 14th Amendment of the US Constitution) to decide whether the next US President would be a Democrat (Al Gore) or a Republican (George Bush, Jr.). All five members of the majority (who decided in favour of the Republicans) were appointed by a Republican President: Chief Justice Rehnquist, along with Justices Scalia, O'Connor and Kennedy were appointed by President Reagan, and Justice Thomas was appointed by the first President Bush. The four judge minority was comprised of two Justices appointed by the Clinton-Gore administration (Justices Ginsburg and Breyer) as well as two Justices appointed by Republicans who have nonetheless come to be regarded as political liberals (namely, Justice Stevens who was appointed by President Ford, and Justice Souter who was appointed by the first President Bush). For an excellent review of academic literature concerning the partisan nature of the *Bush v. Gore* opinions, see P. Berkowitz and B. Wittes, "The professors and Bush v Gore", The Wilson Quarterly, Autumn 2001, 76. In that article, Berkowitz and Wittes conclude that the lion's share of American Constitutional Experts (including such luminaries as Cass Sunstein, Ronald Dworkin and Bruce Ackerman) regard the opinions in *Bush v. Gore* as manifestations of the relevant Justice's partisan political preferences. See also Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 1 Ind. J. Const. L. (2007).

39 In these cases, at least one Justice of the United States Supreme Court (namely, Justice Roberts) appears to have selected whatever interpretation of the Commerce Clause maximized his personal preferences. Prior to FDR's threats, Justice Roberts had consistently held that the President's New Deal laws violated the Commerce Clause. Immediately following FDR's court packing threats (which, if carried out, would have undermined Roberts' influence on the Court), Justice Roberts "switched sides", now consistently voting that New Deal laws (even those that were startlingly similar to laws that Roberts had previously held unconstitutional) were constitutionally permissible. For a thoroughgoing review of the behavior of the Court in response to FDR's threat, see W. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

40 *Re Remuneration of Judges* [1997] 3 SCR 3. In this case, the Supreme Court of Canada was asked to determine whether or not the constitution protected judicial salaries from reduction by the government. The Court held that "unwritten principles" within the constitution did, in fact, protect the Justices' salaries. Canada's leading constitutional scholar, Peter Hogg, condemned this decision as unprincipled and nakedly self-interested. See P. Hogg, "Canada: Privy Council to Supreme Court", appearing as chapter 2 in J. Goldsworthy, ed., *Interpreting Constitutions: A Comparative Study* (New York: Oxford University Press, 2006) 55, at 73 – 74, where Hogg writes that "The Supreme Court of Canada has held that any reduction in judicial salaries, whether for superior or inferior judges, is a breach of judicial independence. The Court has struck down statutes reducing judicial salaries in Prince Edward Island, Alberta, and Manitoba, although in each case the judges' salaries had been reduced by a statute that applied across-the-board to all public sector salaries. How such a measure could be a threat to judicial independence was never explained. The Court invoked, not simply the guarantees of judicial independence that are explicit in the Constitution of Canada ... but an 'unwritten constitutional principle' of judicial independence, which was broader than the carefully drafted language of the constitutional text".

the same Court's decision to override the will of the constitution's framers in the *Motor Vehicle Reference*[41] : a decision by which the Canadian court radically expanded its own power to invalidate legislation. The Supreme Court of India has gone so far (under the auspices of constitutional interpretation) as to grant itself the powers to veto formal constitutional amendments[42] and to nominate, approve and appoint its own members[43] notwithstanding constitutional text vesting the power of appointment in the executive.[44] These examples seem outrageous when listed together, but they are not atypical. Indeed, recently released correspondence between Justices of the US Supreme Court suggests that ideological (or self-interested) interpretation of constitutional text is the norm, and that some Supreme Court Justices have admittedly interpreted constitutional text disingenuously – that is, giving effect to interpretations which they did not sincerely believe the text could bear – where doing so could entrench the relevant Justice's personal preferences.[45]

Hogg concluded (at 74) that "The jurisprudence interpreting judicial independence is not based on any ambiguity or uncertainty in the text of the Constitution of Canada. Rather, the judges have constructed an elaborate edifice of doctrine with little or no basis in the text *in order to protect the power, influence, salaries and perquisites of themselves and their colleagues*" (emphasis added).

41 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

42 *Kesavandanda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

43 *Supreme Court Advocates on Record Ass'n v. Union of India*, A.I.R. 1994 S.C. 268 (also known as "The Second Judges Case"). For an illuminating discussion of this case, see M.P. Singh, supra n. 37. Singh notes (at p. 270) that, despite s. 124(2) of the Constitution, the Court in The Second Judges Case held that "the proposal for the appointment of judges to the Supreme Court and the High Courts must be initiated by the Chief Justices of the respective courts. These proposals have to be submitted by the Chief Justice of India to the President. The President must consider these proposals within a set time frame. In case of a difference of opinion between different constitutional functionaries, the opinion of the Chief Justice of India has primacy." Singh goes on to note (at page 271) that, as a result of this decision, "No appointment to the Supreme Court or a High Court shall be made except in conformity with the final opinion of the Chief Justice of India". It should be noted that "the Chief Justice of India" is required, as a result of the Court's decision, to act in consultation with his fellow judges in making appointment decisions.

44 Section 124(2) of India's Constitution provides that "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States *as the President may deem necessary*" (emphasis added). As a result of the Supreme Court's "interpretation" of this clause, the President is now required to await the Court's own list of nominees, and to accept whatever nominee for appointment is preferred by the Chief Justice (acting on behalf of the members of the Court).

45 See, for example, B. Friedman, supra n. 19. In that article, Friedman discusses the United States Supreme Court's decision in *Penssylvania v. Muniz* (1990), 496 US 582, in which Justice Brennan (for the majority) narrowed the application of the "Miranda" rule, notwithstanding Justice Brennan's longstanding view that no such narrowing was constitutionally permissible. Private correspondence between Justices Brennan and Marshall reveals that Justice Brennan's reason for joining in (and authoring) the majority opinion was to prevent Sandra Day O'Connor from authoring the majority judgment and defining the extent of any exception to Miranda. Friedman summarizes that correspondence as follows (at 283): "Private correspondence between Justice Brennan and Justice Marshall indicates that Brennan's vote and opinion in Muniz likely were not an expression of his sincere [views regarding the meaning of the constitution's text]. Brennan wrote Marshall explaining

While the cases noted above may seem exceptional in that they demonstrate *brazenly* self-interested and partisan behavior, they are nonetheless typical in the sense that all of the relevant judges, under the auspices of constitutional interpretation, manipulated constitutional text with a view to entrenching their own preferences. With so many powerful examples of nakedly self-interested construction, it should be easy to accept the subtler textual manipulations predicted by the Realist Vision of statutory interpretation. As a result, it is somewhat surprising (to me, at least) that there are any mainstream scholars who suggest that the Realist Vision is inaccurate.

We should pause now to note that, while several of the scholars referred to in this essay believe that judges *intentionally* manipulate legal texts in order to give effect to the judge's policy preferences, we needn't accept this notion in order to acknowledge the role of ideological manipulation in the interpretation of constitutions and other legislative texts. Many scholars posit that, even where judges do not intentionally manipulate legal text with a view to entrenching the judge's personal preferences, the ideological manipulation of text is inevitable: readers of any text (including judges reading legislative language) cannot help but view that text through the lens of their own biases. As Searle notes: *"... we have no access to, we have no way of representing, and no means of coping with the real world except from a certain point of view, from a certain set of presuppositions, under a certain aspect, from a certain stance."*[46]

In the context of statutory construction, this implies that we confront the text in a context of our own beliefs and biases. Our own presuppositions, political allegiances, personal experience and values (broadly referred to as "ideology") help infuse the text with meaning, leading us (through our unconscious) to prefer interpretations that support our own ideology. While we manipulate the text in the direction of these biases, this manipulation may nonetheless represent our good-faith effort to discern the meaning of the relevant text. Even if we try our level-best to interpret a constitution from an originalist perspective (for example), we may subconsciously attribute

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that because "everyone except you and me would recognize the existence of an exception to Miranda for "routine booking questions" ... I made the strategic judgment to concede the existence of an exception but to use my control over the opinion to define the exception as narrowly as possible". In response to Marshall's circulated dissent in the case, Brennan wrote Marshall again: "I think it is quite fine, and I fully understand your wanting to take me to task for recognizing an exception for Miranda, though I still firmly believe that this was the strategically proper move here. If Sandra [O'Connor] had gotten her hands on this issue, who knows what would have been left of Miranda". Simply put, Justice Brennan gave the constitution a meaning that he did not think it supported, specifically for the purpose of maximizing the impact of his own policy preferences and minimizing the impact of Justice O'Connor's.

46 J. Searle, *Mind, Language and Society*, (London: Weidenfeld & Nicolson, 1999) at 20.

our own views to the text's authors: we assume that our own views are eminently reasonable, and then imagine that constitutional framers (who we envision as reasonable people) held those views as well. If we attempt to interpret constitutional text from a progressive or "dynamic" interpretive standpoint (and therefore interpret it by reference to the current needs of the public), our assessment of the public's "*current needs*" is bound to be shaped by our own ideological bent. Even where judges do not *intentionally* entrench their policy preferences – even where judges do their best to interpret legislation objectively – the indeterminate nature of all language, coupled with the "*ideological lenses*" through which we perceive indeterminate texts, ensure that all readers of legislation will tend to interpret the text in ways that align with their own ideologies. The Realist Vision of statutory interpretation is not an indictment of the judiciary's intentions: it is simply a description of how interpretation works.[47]

Whether one accepts the "*subconscious*" model of the judiciary's manipulation of legal texts or the "*fully conscious*" model of value-laden interpretation, it is important to note that neither model necessitates the attribution of sinister motives to the judiciary. While both models posit that judges manipulate legislative text in furtherance of the judges' preferences, neither model makes a claim about the *content* of a particular judge's preference-set. A judge's personal preference-set might include a deep desire to help the poor, an urge to ease the plight of the suffering, or a preference for the promotion of world peace. A judge might favour broad interpretations of human rights enactments, expansive powers of judicial review and narrow incursions into personal freedoms because the judge believes that a truly "*just*" world (a world the judge prefers to inhabit) will have these features. Another judge might hold the opposite views, believing that a just society calls for the restrictive interpretation of Bills of Rights and narrow powers of judicial review. All that the Realist Vision of statutory interpretation posits is that, whatever the judge's preferences are (and whatever their original source might be), the judge will give effect to these preferences, either consciously or unconsciously, by manipulating statutory language in a manner that accords with the relevant preference. This does not preclude the existence of an altruistic judge,[48] or suggest that any judge has sinister motives.[49]

47 Interestingly, this coincides with price theory's account of human behavior: humans may not (in many cases) consciously weigh the personal costs and benefits of their actions, but nevertheless behave as though they do.

48 For a more thorough discussion of the intersection of altruism and self-interest, see R. Graham, supra n. 4, 18–20.

49 At first blush, it seems that Justice Posner would like to exclude the possibility of altruism. A closer reading makes it clear that Justice Posner would accept an altruistic motive provided only that the so-called "altruist" felt that acting in the public interest enhanced the judge's utility. For example, in R. Posner, supra n. 24, at 14, Posner writes that "I exclude from the judicial utility

Now that we have reviewed the Realist Vision of statutory interpretation, one point should be obvious to any reader familiar with economic theory. The Realist Vision of statutory construction is perfectly consistent with the economic notion of self-interested utility maximization. According to the Realist Vision, judges interpret texts in ways that give effect to their own preferences. According to microeconomics, *"people choose to perform those actions which they think will promote their own interests"*.[50] When they manipulate the law in the direction of their own policy preferences, judges fulfill the basic predictions of economics, acting as self-interested utility maximizers. All things being equal, an interpretation which favours the judge's personal policy preferences will generate (for the judge) more utility than a contrary interpretation. As a utility maximizer, the judge is very likely to select the interpretation that coincides with his or her preferences. Because the Realist Vision of statutory interpretation coincides with basic economic theory, it seems sensible to apply basic microeconomics to the decisions judges make when they interpret legislation.

Despite the Realist and economic prediction that, all things being equal, judges will interpret statutes in a manner that gives effect to their own preferences, we often observe (or think we observe) judges who make decisions that go *against* the judge's apparent policy preferences.[51] Why is that? Why would judges, who are expected (like the rest of us) to be self-interested utility maximizers, sometimes act in ways that seem to undermine their personal preferences? Why don't judges *always* interpret legislation in a way that gives effect to their own ideological goals? As I noted in the introductory portion of this essay, this can also be explained as a manifestation of self-interest. In many cases, the costs associated with the ideological manipulation of text are so great that the judge will be unwilling to incur those costs in pursuit of specific policy objectives. The nature of those costs, and their impact upon the interpretive practices of judges, are described in the following sections of this essay.

3. The Costs of Statutory Interpretation

(a) Introduction

While Realists and Crits have done a successful job of unveiling the

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function the desire to promote or maximize the public interest ... Although views concerning the public interest undoubtedly affect judicial preferences, just as they affect voter preferences ... they do so, I assume, only insofar as decisions expressing those views enhance the judge's utility".

50 R. Coase, supra n. 6, at 27–28.

51 The most obvious examples include cases in which judges, as a result of constitutional issues, acquit guilty criminal defendants. Such judges are not "pro-criminal", yet render decisions with the effect of immunizing criminals from prosecution. In this sense, such judgments appear to undermine the judge's probable preference of having criminals off the streets.

ideologically-driven nature of statutory interpretation, they have largely ignored the costs associated with the interpretive process. By failing to acknowledge the costs of statutory construction, Crits and Realists have ignored a vital element of the interpretive equation: if language is indeterminate and subject to value-based manipulation by interpreters, the costs interpreters incur in the manipulation of texts serve as a fundamental source of stability in language. The "*free play*" of deconstruction – or the interpreter's willingness to engage in the manipulation of text – is constrained by the costs interpreters incur in the act of interpretation. In the context of legislative interpretation, these costs constrain the judiciary's interpretation of statutory text. As the costs associated with a particular interpretive outcome rise, the judge (regardless of his or her own ideological bent) becomes less likely to endorse that interpretation. This is simply the application of price theory to the practice of statutory interpretation.

What does it mean to apply price theory to statutory interpretation? In simple terms, it means accepting the notion that judges weigh the relative costs and benefits associated with competing interpretations of any legislative text that they confront. To be precise, it means that judges weigh the costs and benefits *to themselves* of those competing interpretations. The higher the cost (to the judge) associated with a given interpretive choice, the less likely the judge is to choose that outcome; the greater the benefit (to the judge) flowing from the relevant choice, the more likely the judge is to choose that outcome. This does not imply that judges typically calculate the financial costs and benefits that result from different outcomes: it is uncommon for a judge's financial interests to be at stake in a case on which the judge is sitting. Judges rarely make decisions concerning judicial compensation (although Canada's *Remuneration Reference*, noted above, shows that this can sometimes happen). Moreover, judges are paid the same amount regardless of the interpretive outcomes that they generate.[52] If price theory applies to the interpretive choices judges make, the costs and benefits associated with interpretive choices must involve something more than judicial income. Happily, price theory can accommodate non-pecuniary determinants of behavior. As Coase observed, the application of price theory is not limited to "*money price*", but refers "to price in its widest sense".[53] This raises a good

52 This is not entirely accurate. If we assume that certain interpretive outcomes enhance the judge's likelihood of promotion to a higher court, it is possible that specific interpretive outcomes over a certain number of cases may ultimately increase the judge's pay. Similarly, if some interpretive outcomes can elevate the judge's popularity in a relevant group, that group might grant the judge access to future income (through lucrative speaking engagements after retirement from the bench, for example).

53 R. Coase, supra n. 6, at 4. Also see R. Posner, supra n. 24, at 9, where Posner notes that the judicial utility function "may be dominated by non pecuniary sources of utility". At page 13 of that article,

question: if price theory applies to the choices involved in statutory interpretation, what are the costs and benefits that influence those choices?

Legal scholars have posited a wide array of costs and incentives to which judges may respond. Justice Posner, for example, suggests that a judge's decisions may be influenced by:

> *"... dislike of a lawyer or litigant, gratitude to the appointing authorities, desire for advancement, irritation with or even a desire to undermine a judicial colleague or subordinate, willingness to trade votes, desire to be on good terms with colleagues, not wanting to disagree with people one likes or respects, fear for personal safety, fear of ridicule, reluctance to offend one's spouse or close friends, and racial or class solidarity.*[54]

Professor Schauer proposes an equally broad array of costs and benefits that may influence the course of a judge's holdings. According to Schauer, judges might render decisions that maximize their chances of "*influencing the direction of policy ... being the object of deference by lawyers and litigants ... being adored by legal academics ... gaining higher judicial office, and ... seeing the morally worthier party prevail in a particular case*".[55] Gerhardt agrees, noting that judges may "*try to maximize other interests, including preserving leisure time, desire for prestige, promoting the public interest, avoiding reversal, and enhancing reputation*".[56] According to Friedman: "*... judges also might care about things as varied (and human) as reaching the outcome they prefer, increasing their leisure, anticipating what other people or groups think of them based on their decisions, seeing that their will is obeyed, and – particularly for lower court judges – being promoted.*"[57]

Friedman goes on to note that judges have historically shown a tendency to change their interpretation of the legal texts where the personal costs (to the relevant judges) associated with prior interpretations grow too high. According to Friedman:

> *"... judicial change in constitutional doctrine is correlated with utilization of ... court-disciplining measures, or the threat to do so. Under threat of judicial impeachments, John Marshall offered to give up the judiciary's last word on constitutional questions. Jurisdiction was stripped in a manner that prevented the Supreme Court from ruling on the constitutionality of Reconstruction at a critical moment,*

Posner also states that the judicial "utility function must in short contain something besides money income (from their judicial salary)".

54 R. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995), 130.

55 F. Schauer, supra n. 15, at 635-636.

56 M. Gerhardt, supra n. 20, at 916.

57 B. Friedman, supra n. 19, 270–271.

> *and the Court acquiesced. The Court's size was changed at several points during the Civil war and Reconstruction and, in at least one famous instance; this had an immediate and substantial impact. Roosevelt's Court-packing plan did not succeed in changing the size of the Court, but the doctrine itself changed quickly enough thereafter. Congress threatened to strip jurisdiction after Red Monday and the Court moderated its views. To this day, Justices demonstrate an awareness of these historical events as a nod toward the Court's relatively fragile position."*[58]

While the authors quoted above propose a diverse set of determinants of a judge's interpretive choices, they seem unified in their assumption that price theory applies to judicial decision-making. As the cost associated with a particular outcome rises, a judge becomes less likely to select the relevant outcome. Whether the cost in question relates to financial incentives, political preference, likelihood of promotion, or reputation within a relevant group, a judge will (either consciously or unconsciously) balance that cost against the benefits of the outcome in question. In effect, judges are engaged in self-interested utility maximization when they interpret law: they weigh the costs and benefits (to themselves) of competing interpretations, and choose whichever interpretive outcome maximizes their utility. On this conception of the interpretive process, judges are the consumers of specific interpretive outcomes, and they engage in a process of rational price comparison when deciding between competing interpretations of legal texts.

The application of price theory to judicial behavior should be uncontroversial. Indeed, well-accepted legal doctrines are formulated on the premise that judges are likely to respond to personal costs when making decisions. Consider, for example, the rule (common to most legal systems) that no person may act as judge in his or her own cause (encapsulated by the maxim *nemo judex in causa propria sua debet esse*).[59] The reason for this rule is obvious: We assume that where a judge's personal interests are directly implicated in a dispute, the judge will find it difficult to be objective.[60] The judge's interest in applying the law objectively is likely to be outweighed by the judge's interest in reaching whatever decision the judge prefers.[61] Similarly,

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58 Ibid at 314–315.

59 For a thorough discussion of this maxim, see chapter 2 of D. Mullen, *Administrative Law: Cases, Text and Materials*, 5th ed., (Toronto: Emond Montgomery, 2003).

60 This includes both the possibility of a decision directly in the judge's favour (regardless of the merits of the dispute), as well as the possibility of a decision *against* the judge's apparent interest driven by the desire to appear objective (again, regardless of the merits of the dispute).

61 Do not be fooled by the suggestion that it is not "actual bias" that we fear in such cases, but the "reasonable apprehension of bias". Bias is "reasonably apprehended" in such cases because reasonable people are likely to believe that a judge will be biased where his or her own interests are

judges are precluded from hearing cases in which their family members are parties. In such cases, we assume that the costs (to the judge) associated with a decision against the judge's family are so great that the judge is likely to be unable to apply the law objectively. In these contexts, we accept that the costs associated with particular adjudicative outcomes are so great that they are likely to control the judge's decision: in short, we acknowledge that self-interest (in the economic sense) plays a role in the decisions judges make.

A detailed study of every cost or benefit to which a judge is likely to respond when making interpretive choices is beyond the scope of this essay. Such a detailed account would require extensive empirical study. In many instances, the relevant costs and benefits are likely to vary from judge to judge. There are two costs, however, that are relevant to all judges' interpretive choices. Those costs – namely, reputation and time – work together to generate a useful (and occasionally surprising) model of statutory construction. The costs associated with reputation and time, together with their implications for an overall model of statutory construction, are discussed throughout the remainder of this essay.

(b) Reputation

People like to be liked.[62] Indeed, reputation is often regarded as one of the principal determinants of human decision-making. This should come as no surprise: it is a matter of common experience that people hope to avoid stigma, garner respect, appear clever, achieve fame or "*win friends and influence people.*"[63] Even people who seem to eschew popularity frequently do so with a view to enhancing aspects of their reputation: they are happy to be known as gadflies, malcontents or general pains-in-the-neck provided that they are at least *known*. People generally attempt to increase their influence over others, their prestige, or the esteem in which they are held by relevant members of the community. As a result, reputation functions as a determinant of the choices that we make: when we predict that a given choice will undermine our reputation, we become less likely to make the choice in question. When we think that a given choice will enhance our reputation, we become increasingly likely to make that choice. Indeed, concern for reputation frequently has the effect of deterring us from the choices we would otherwise prefer: I might be most comfortable wearing jeans and a T-shirt every day, but choose to wear a suit and tie in order to

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directly implicated in a dispute. To suggest that judges will *not* experience bias in such cases is to suggest that most people, exhibiting that reasonable apprehension, are wrong. That seems rather presumptuous.

62 R. Posner, supra n. 24, at 13.

63 D. Carnegie, *How to Win Friends and Influence People*, Rev. ed. (New York: Simon & Schuster, 1981).

move my reputation in a particular direction (for example, to generate a reputation as a serious-minded fellow, as a fashionable man, or as a person who can afford expensive clothes). The utility that I lose (as a result of a loss in comfort) is outweighed by the utility that I gain by improving my reputation. In effect, desire for a good reputation constrains the choices that we make.

Judges are not immune from the constraining force provided by the desire to achieve or maintain a good reputation.[64] Indeed, an individual justice's desire to enhance (or at least avoid damage to) his or her reputation is likely to be a major determinant of the judge's interpretative choices. This is not an entirely new idea. Numerous scholars have suggested that judges' decisions are controlled, at least in part, by individual judges' desire to maximize the judge's (good) reputation. Gerhardt, for example, has observed that judges try to protect their reputations by exhibiting *"reluctance to admit they have made mistakes"* on the ground that such admissions *"might make the Justices appear to be indecisive or incompetent"*.[65] Friedman echoes these ideas, noting that judges may make particular decisions – even decisions that conflict with the judges' policy preferences – *"out of a dislike of reversal or the desire to be thought well of by their peers"*.[66]

In *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*,[67] Frederick Schauer considers the impact of 'reputational costs' on the decisions made by judges. According to Schauer:

> *"... there is reason to believe that there are some reference groups that even life-tenured and highly prominent Supreme Court Justices desire to appeal to in a more or less conscious way. It is widely recognized that reputation or esteem provides a powerful money-independent incentive for many people. Perhaps the Justices of the Supreme Court, like the rest of us, care about their reputation, care about the esteem in which they are held by certain reference groups, and care enough such*

64 Note that a judge may hope to enhance (or avoid damage to) the judge's reputation in at least two ways. First, the judge might act to protect (or enhance) his or her personal reputation (perhaps with a view to securing advancement or promotion to a higher court): see F. Schauer, supra n. 15, at 623). Alternatively, the judge may seek to protect his or her reputation indirectly by promoting (or protecting) the reputation of the judicial system, or the particular court on which the judge serves: B. Friedman, supra n. 19, at 324, where Friedman argues that "If not personal reputation, then the Justices might care about the institutional legitimacy of the Court". Jamie Cameron supports this point in "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination", in Huscroft and Brodie (eds.), supra n. 19 at 159. See also M. Gerhardt, supra n. 20 at 954, as well as Coffin and Kattzman "Steps Towards Optimal Judicial Workways: Perspectives from the Federal Bench", (2003) 59 N.Y.U. Ann. Surv. Am. L. 377at 390.

65 M. Gerhardt, supra n. 20 at 953.

66 B. Friedman, supra n. 19 at 297–298.

67 F. Schauer, supra n. 15.

> *that, at the margin or even far from the margin, they seek to conform their behavior to the demands of the relevant esteem-granting (or withholding) or reputation-creating (or damaging) groups."*[68]

Schauer continues:

> *"...one hypothesis would be that Supreme Court Justices [have] moved leftward in order to conform (at an indeterminate level of consciousness) their attitudes to the attitudes of elite reporters and elite law professors, for by doing so they increase the esteem in which they were held by the groups whose esteem they most valued, and they would enhance their current reputation and increase the likelihood that they would be lauded both in their lifetimes and thereafter. ... the Justices, for all that life tenure gives them, are still human, and thus still somewhat vulnerable to the pull of reputation, the desire for esteem, and the wish to avoid public criticism."*[69]

Schauer's hypothesis seems sensible, for it conforms to common experience: people typically avoid (or at least try to hide) actions that are likely to undermine their reputation. There is no reason to believe that judges have immunity from the pull of reputation. Indeed, even judges are willing to admit the importance of reputation as a determinant of their own interpretive choices. According to Justice Posner, for example:

> *"... a potentially significant element of the judicial utility function is reputation, both with other judges, especially ones on the same court – one's colleagues (and here reputation merges with popularity) – and with the legal profession at large."*[70]

Posner goes on to note that the desire for prestige is *"unquestionably an element of the judicial utility function"*.[71] In his opinion: *"... judges, although they are in no way dependent upon the goodwill of the bar ... are sensitive to their popularity with members of the bar, especially if, as is common, many of their friends are drawn from the bar."*[72]

Chief Justice Antonio Lamer (formerly Canada's top jurist) has made similar assertions, famously arguing that judges may craft opinions with a view to avoiding criticism and achieving popularity. After condemning any brand of criticism that "makes [judges] look stupid",[73] Lamer CJ claimed that harsh

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68 Ibid at 629.
69 Ibid at 630.
70 R. Posner, supra n. 24, at 15.
71 Ibid at 13.
72 Id.
73 F. C. DeCoste, "Introduction", 38 Alberta L. Rev. 607, at 611.

or virulent criticism *"might lead judges to shy away from unpopular decisions – 'the most popular thing to do might become the outcome."*[74] In other words, the desire to be popular might cause judges to change the decisions that they make.

Reputation is particularly important where judges hope to move the law in the direction of their ideological preferences. As we have seen, the Realist Vision suggests that statutory and constitutional interpretation often involve the judge's attempt to move the law in the direction of the judge's policy preferences. The impact of reputation on this process should be clear: It is difficult to cause the law to conform to your own preferences if the legal community thinks you are a buffoon. If the relevant interpretive audience regards your decisions as foolish or unprincipled, or doubts your capacity to interpret legislation in a persuasive and sensible manner, that audience is unlikely to give credence to your decisions. Colleagues on the bench may not be inclined to endorse your interpretations of legislative text. Your decisions may attract widespread criticism, leading subsequent courts to over-rule them. Where this is the case, your political or ideological views are unlikely to be especially influential. In other words, the 'interpretive goal' posited by the Realist Vision is, at least in part, dependent on the ability of the interpreter to be perceived as a credible and authoritative interpreter of the text of legislation.[75]

There are at least two important (and overlapping) ways in which reputation constrains interpretive choices. First, desire for a good reputation might lead a judge to decide, regardless of his or her own policy preferences or views regarding the meaning of legislation, to interpret the relevant statute in accordance with the preferences of the judge's favoured esteem-granting group. If a judge hopes to impress liberal colleagues on the bench, to be cited favourably in left-of-center law reviews and judgments, or to enhance the esteem in which the judge is held by liberal law professors (for example), the judge may attempt to craft a liberal opinion (even in cases in which the judge would otherwise opt for a conservative reading of the legislation). In such cases, the utility lost by deciding a case in a manner that conflicts with the judge's own political preference is outweighed by the utility generated by the judge's expected gains in popularity and respect (among the relevant

74 Ibid, quoting Chief Justice Lamer (as originally quoted in K. Makin, "Lamer Worries About Public Backlash: Angry Reaction Could Affect Judges' Decisions, Chief Justice says", The Globe and Mail ((6 February 1999) A1 at A4).

75 Indeed, it is possible that the desire to push the law in the direction of the judge's policy preferences is simply a corollary of the desire to have a good reputation: power enhances reputation, and the re-shaping of the law in one's own image is an exhibition of power. For this reason, the maximization of a judge's "ideological impact" and the maximization of the judge's good reputation may simply be specific manifestations of the same underlying desire: the desire for social power.

esteem-granting community). In effect, the pull of reputation becomes a constraint on the judge's interpretive decisions. Where a given interpretive choice is likely to harm the judge's reputation in a manner that is relevant to the judge, a judge becomes less likely to make that interpretive choice. Conversely, where a given interpretive choice seems (to the judge) likely to enhance a judge's reputation in ways that are relevant to the judge, the judge is more likely to adopt that interpretation.

The second way in which the pull of reputation might impact upon a judge's interpretive choices relates to the way in which the judge will choose to *justify* interpretive decisions. Rather than reading legislation in a way that (a) conforms to the preferences of the judge's favoured esteem-granting group, but (b) conflicts with the judge's policy preference, the judge might choose to make the interpretive choice that conforms to the judge's policy preference and try to justify that interpretive choice in a manner that will placate the relevant esteem-granting (or esteem-denying) audience. As I said in another context:

> *"If the interpreter feels constrained by the interpretive community (out of a need for acceptance or a desire to gain legitimacy through the support of the relevant audience), the interpreter has less freedom, but is still able to inject his or her own values and prejudices into the interpretive process – at least to the extent that he or she can make these values palatable or persuasive to the relevant audience."*[76]

This is accomplished through the drafting of justificatory reasons for judgment. Viewed in this light, reasons for judgment serve to soften (or even reverse) the reputational impact of decisions that might otherwise appear foolish or unprincipled. Consider, for example, the decision of the Supreme Court of Canada in the *Remuneration Reference* (mentioned in section 2, above). In that case the Court decided that the Constitution protected judicial salaries from reduction by the government. Imagine the public response if the majority judgment in the *Remuneration Reference* had looked like this:

> *"We have been asked to determine whether or not the Constitution, despite its failure to address this issue, protects judicial salaries from reduction by the government. We have decided that it does. So there."*

This cavalier decision seems massively unprincipled, brazenly self-interested, and unlikely to inspire public confidence in the courts. A judgment of this nature could harm judicial reputations. Of course, the *substance* of this cavalier, three-line decision is the same as the Court's actual decision in the *Remuneration Reference*. As Hogg notes, however, the Court in the *Remuneration Reference*

76 R. Graham, supra n. 1 at 70.

did not merely say that *"the Constitution protects judicial salaries"* – instead, they *"constructed an elaborate edifice of doctrine with little or no basis in the text in order to protect the power, influence, salaries and perquisites of themselves and their colleagues".*[77] One function of the *"elaborate edifice of doctrine"* was, of course, to make it appear that the Court's decision was rooted in law or in the intentions of the Constitution's framers, and not merely a manifestation of the Court's financial interests.[78] In short, one function of reasons-for-judgment is to protect the reputation of the Court – or, as Kavanagh puts it, to "attract respect and honour for a judge".[79]

In cases involving statutory construction, reasons for judgment are typically designed to generate a particular effect: the appearance that, despite what Realists tell us about judicial interpretation, the judge's interpretive choices are driven by factors that are external to the judge. Specifically, judges deploy their legal skills with a view to "*proving*" that the interpretive outcome they have selected flows inexorably from the language of the statute, from the intention of the legislative author, from the demands of prior decisions or from other authoritative legal sources. In short, the judge attempts to deny the Realist Vision: to prove that his or her decisions are driven by *"the law"*, and not by the judge's own political preferences.

Several leading interpretive scholars have made note of judges' tendency to protect their reputations by attributing their interpretive decisions (which are governed by the judge's policy preferences) to a legislative body. According to Beaulac and Côté, for example, a court's goal in crafting interpretive decisions is *"to downplay the importance of the policy-making role it has to assume, inevitably, when it construes … legislation"*.[80] Beaulac and Côté argue that the goal of this form of judicial rhetoric is to create:

> *"the net impression that statutory interpretation implies simply the discovery or declaration of something which is already there, that the solution owes nothing to the court's policy choices and is entirely determined by the intention of Parliament."*[81]

In short, this form of decision-making (or, more accurately, decision-justifying)

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77 P. Hogg, supra n. 40 at 74.

78 None of this should be taken to suggest that the judges in the *Remuneration Reference* (or other judges, for that matter) do not *buy into* the elaborate edifices of doctrine they construct. The judges are, in my estimation, convinced by what they are writing. They may be convinced by these arguments, however, largely because these arguments confirm the judge's personal preferences. See D. Kennedy, supra n. 27.

79 E. Kavanagh, "The Idea of a Living Constitution" (2003) 6 Can J Law & Jurisprudence 55, at 78.

80 S. Beaulac and P. Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization", (2006) 40 RJT 131, at 162.

81 Ibid.

is designed to make the judge's decisions "*appear to be mere mirrors of the will of the elected assembly*", and to "*let judges attribute to Parliament the solution they select, which furthers the impression that judicial decision-making and justice are impersonal*".[82] Duncan Kennedy agrees, claiming that judicial decisions are designed "to generate a particular rhetorical effect: that of the legal necessity of [the judge's] solutions without regard to ideology".[83] In Kennedy's view: "*[Judges] work for this effect against our knowledge of the ineradicable possibility of strategic behavior in interpretation, by which I mean the externally motivated choice to work to develop one rather than another of the possible solutions to the legal problem at hand.*"[84]

Kennedy goes on to note that judges interpret legislation with a particular goal in mind:

> "*... the goal of establishing that her preferred legislative solution is the correct legal solution. In pursuit of this goal, she has been anything but neutral in using her resources. She has spent a lot of time inventing a strategy, digging through the books, keeping an eye out all the time for random bits of stuff that might be useful in building her argument.*"[85]

In effect, judges protect their reputations by making it seem that ideologically-driven decisions are not, in fact, ideologically driven.[86] If a decision appears foolish or unprincipled, or if the decision appears to coincide with the judge's personal policy preferences, the blame cannot be placed at the feet of the judge. On the contrary, the blame lies with the legislative assembly. In effect, this form of decision (that is, a decision which succeeds in blaming a legislative assembly for the judge's interpretive choices) provides the judge with a form of "*reputational Kevlar*": a barrier against the potential reputational costs that might otherwise flow from the judge's interpretive choices.[87]

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82 Ibid at 168.

83 D. Kennedy, supra n. 27 at 785.

84 Ibid.

85 Ibid at 793.

86 More accurately, the judge wishes to make it seem that the decision is not driven by *the judge's* ideology. The judge may be perfectly happy to have the decision seem to be ideologically driven, so long as the relevant ideology can be attributed to a legislative body.

87 Justice Posner defines this form of opinion (that is, one which "blames" the legislature for the judge's own opinion) as a form of leisure-seeking behavior. According to Posner supra n. 24, at 20), ""Going-along" voting is one example of the influence of leisure-seeking on judicial behavior. Another – once leisure is defined for these purposes, as it should be, as an aversion to any sort of "hassle," as well as to sheer hard work – is the insistence by judges that their decisions are coerced by "the law" and hence that the judge shouldn't be blamed by the losing party or anyone else distressed by the outcome".

As we have seen, the reputational costs that flow from foolish, unprincipled, or brazenly self-interested decisions can be avoided (or at least minimized) through carefully crafted reasons-for-judgment – typically reasons that cast the "*blame*" for a decision on factors external to the judge (namely precedent, legislative intention or the statute's "plain language"). The judge deploys his or her legal and intellectual resources – or "*burns rhetorical fuel*", as it were – in an effort to accomplish twin objectives: to promote the judge's ideological preference while at the same time preserving (or enhancing) the judge's reputation to the greatest extent possible. In effect, the judge sells his or her decision to the relevant interpretive community.

The "*sale*" metaphor was not selected by accident. A judge's justification of interpretive decisions shares several features in common with a typical sale of goods. First, the seller's goal is utility maximization: where an ordinary seller hopes to maximize utility through profit, the judge hopes to maximize utility through some combination of "*legal impact*" (through the promotion of the judge's policy preferences) and reputation.[88] Second, the judge's attempt to "*sell*" a decision, like a typical sale of goods, gives rise to transaction costs that have an impact on the actions of the seller. In the context of interpretive decisions, the transaction costs involve the judge's time and effort: persuasive judgments do not write themselves.[89] The judge must often spend considerable time and effort crafting a judgment that accomplishes the judge's twin objectives (that is, furthering the judge's policy preferences and protecting or enhancing the judge's reputation). The time it takes to generate such judgments constitutes one of the key determinants of a judge's interpretive choices. Time's impact on a judge's interpretive choices, together with its interaction with the "*reputational costs*" described above, is discussed in the following section of this essay.

(c) Time

While the Realists and the Crits are surely correct in their acknowledgement of the value-laden nature of statutory interpretation, most proponents of the Realist Vision make an important error: they appear to assume that statutory text is *easily* and *infinitely* malleable – that one interpretation of legal language is just as easy to justify as any other interpretation, and that interpretive decisions are accordingly governed entirely by the judge's policy preferences. This is implausible. It seems more

88 As I noted in footnote 76, above, a judge's desire for "reputation" and "legal impact" may be manifestations of the same desire.

89 Even if one believes that law clerks write a judge's decision, the clerk's use of time still counts as an important transaction cost: the clerk's time is a limited resource that is usable by the judge. Having the clerk write a judgment prevents the clerk from using his or her time to accomplish other goals on behalf of the judge.

likely that an interpretation rooted in "*plain meaning*", or a construction that flows intuitively from a statute's literal text, will often be easier to justify than a counter-intuitive meaning that seems to stretch or over-ride the statute's terms.[90] A decision that "*X means X*" is fairly easy to defend, while a decision that "*X means Y*", or "*X means the opposite of X*", could, without significant stage-setting and justification by the judge, undermine the relevant judge's reputation as a competent reader of texts. As a result, an "*obvious*" interpretation may require little or no justification, while a counter-intuitive construction calls for a greater expenditure of the interpreter's time and effort. The relative difficulty involved in justifying competing outcomes is likely to serve as a powerful determinant of interpretive decisions: a rational judge who has no preference between two interpretive outcomes is, all things being equal, likely to choose whatever outcome can be justified most easily.

While it is feasible that a wide array of interpretative possibilities are supported by any legislative text, it is important to recall that statutory interpretation is hard work – indeed, interpretation is particularly labour-intensive when deeply contested texts are being interpreted, as is the case in most appellate litigation and in virtually all disputes involving constitutional text. In these cases, any judge who hopes to achieve the twin goals identified in section 3(b), above (namely, furthering the judge's ideological preferences while preserving or enhancing the judge's reputation) must be prepared to spend whatever resources are needed to explain and justify the judge's interpretive decisions. The primary resource a judge expends when interpreting legislation is time: the judge expends whatever time the judge believes is needed to "*sell*" the judge's decision to the interpretive community.

Time – at least from a mortal's perspective – is a scarce resource. Time spent in pursuit of one activity (such as judging) depletes the time that is available for pursuing other activities (such as leisure). Time devoted to certain aspects of the job of judging (like interpreting constitutions), reduces the time available for other judicial tasks (such as writing judgments in non-constitutional cases, participating in judicial education programs, or engaging in administrative tasks). According to Coffin and Katzmann, the constraints imposed by time can have a significant impact on the work of the judge. Based on extensive empirical data concerning American judges' use of time,[91]

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90 Of course, what qualifies as a statute's "plain meaning" is frequently up for grabs: a meaning that seems plain to some interpreters (when they confront a text through a lens distorted by personal ideology) may qualify as a counter-intuitive – or even unjustifiable – meaning for others (that is, those with different perspectives). These contested cases – that is, cases in which "plain meaning" is unclear – are the primary focus of this paper.

91 The data was drawn a full-year study (conducted in 1988) of the working patterns of all Third Circuit judges and their law clerks. See F. Coffin and R. Katzmann, "Steps Toward Optimal Judicial Workways: Perspectives from the Federal Bench", (2003) 59 N.Y.U. Ann. Surv. Am. L. 377, at 381.

Coffin and Katzmann found that:

> *"The average judge's working year exceeded 2400 productive hours, certainly comparable to the billing hours of most hard-driving law firms. Sixty percent of judge time was devoted to cases; of that thirty-two percent was spent on preparation and forty-eight percent on opinions. Of the almost forty percent spent on non-case activities, court administration activity accounted for seventeen percent of the total recorded judge time, about five percent on national Judicial Conference committee work and continuing education, some eight percent on pro bono community activities, and less than four percent on general preparation (embracing all those activities to maintain professional competence)."*[92]

Coffin and Katzmann went on to note that time constraints exerted significant pressures on most judges:

> *"There are the pressures to which [the judge] seeks to respond: an inexorably rising caseload; the demand for expedition in disposing of appeals; the demand to publish all opinions ...; the rising involvement in administration and committee work ...; the proliferation of congressional oversight inquiries and hearings often resulting in new obligations and reporting requirements; the impact of government-wide ethical restraints, limiting judges' recompense from teaching and barring any compensation for delivering a scholarly address or writing a solidly researched article for a periodical."*[93]

The impact of these pressures, according to Coffin and Katzmann, is to undermine the judge's ability to "*render top quality judicial service*".[94] Leo Levin (former director of the American Federal Justice Center) echoes these observations, noting that the significant time constraints imposed on judges have the effect of compromising the quality of the judgments courts produce. Levin contends that "*Judicial dispositions are not widgets, and at some point the optimal number of decisions per judge may be exceeded. Productivity cannot be increased indefinitely without loss in the quality of justice.*"[95] In short, judges doing the work of "judging" are beset by the problem of scarcity – the scarcity of time. Like all rational actors faced with a problem of scarce resources, judges must make a series of choices concerning how they will employ that scarce resource.

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92 Ibid at 387–388.

93 Ibid at 381–382.

94 Ibid at 383.

95 A. Leo Levin, *Managing Appeals in Federal Courts* 3 (Robert A. Katzmann & Michael Tonry eds., 1988), as quoted in F. Coffin and R. Katzmann, supra n. 91 at 378.

How does the scarcity of time impact upon the practice of statutory and constitutional interpretation? As we have seen, both Legal Realists and Economists predict that a rational judge will interpret statutes in whatever way will maximize the judge's utility (or, to translate into the language of the Realists, judges will interpret statutes in ways that give effect to their own preferences). We have seen (in section 3(b), above) that the goal of preference maximization is, in many cases, pursued through the creation of persuasive reasons-for-judgment: reasons designed to "*sell*" the judge's preferred interpretive solution to a relevant esteem-granting (or esteem-denying) group. Time constraints will influence this process: a judge who is faced with interpretive choices must choose between competing interpretations with a view to maximizing the judge's utility, while at the same time balancing the utility gleaned through making any given interpretive choice against the utility cost that flows from the expenditure of time required to sell that interpretation to the community. The interaction of the constraints imposed by time, reputation and the judge's policy preferences controls the outcome of the judge's interpretive choices. Justice Posner gives a useful illustration of the way in which these constraints can influence a judge's decision-making process:

> *"... in a three-judge panel, provided that at least one judge has a strong opinion on the proper outcome of the case, or even that a law clerk of one judge has a strong opinion on the matter, the other judges, if not terribly interested in the case, can simply cast their vote with the "opinionated" judge. This will not be random behavior and will incidentally be leisure-serving. If both indifferent judges vote against the opinionated one, he may write a fierce dissent that will either make them look bad or require them to invest time in revising the majority opinion to blunt the points made by him. Notice that if one indifferent judge decides to go along with the opinionated one, the other indifferent one is likely to go along as well – otherwise he will be forcing himself to write a dissenting opinion, at least given the current norm of explaining a dissenting vote rather than voting without an explanation."*[96]

In this example, the disinterested judges' "*ideological payoff*" from writing reasons-for-judgment (and justifying a particular legal outcome) is fairly low: they are "*indifferent*" about the outcome of the case. As a result, these judges are unwilling to invest significant time and effort in the justification of a particular outcome. The judge who *is* interested in the outcome (Posner's "*opinionated*" judge), by contrast, has an incentive to spend time persuading

96 R. Posner, supra n. 24 at 20.

others to accept the judge's preferred interpretation: the judge has a policy preference concerning the outcome of the case, and accordingly gains utility if that preference becomes law. It appears (from Posner's hypothetical) that the utility this judge generates by ensuring that his preferences become law outweighs the opportunity costs associated with the time it takes to write a judgment giving effect to the judge's preference. As a result, the opinionated judge invests the time required to justify his preferred interpretive outcome.

Assuming only that judges are rational, that their policy preferences play a role in how they interpret legislation, and that time is a scarce resource, we can generalize Justice Posner's example and use price theory to describe the influence of time upon a judge's interpretive choices. In all cases in which a judge is faced with interpretive decisions, the judge will weigh the utility that can be derived through the ideological or reputational gains that are available in a given case against the utility to be derived from other uses of the time that it would take to achieve those gains (say, deciding other cases, engaging in court administration, or spending time with family). Where the "*interpretive payoff*" (that is, the utility gained by furthering the judge's personal preferences) is great, the judge will be willing to spend more time and effort – to burn more "*rhetorical fuel*", as it were – manipulating the law and justifying the outcome sought. The judge is willing to work longer and harder to manipulate a text in cases where the judge's personal preferences are at stake. Where the judge's personal preferences are not implicated in a particular case (or where the predicted ideological and reputational impact of a particular case is low), the judge will be willing to spend less time and effort manipulating the law.[97] This seems sensible: a judge with a particular agenda (say, for example, an anti-poverty agenda) will be more willing to make extraordinary efforts to manipulate the law (for example, justifying a counter-intuitive reading of a statute) in cases where poverty issues are at stake. In a case that does not raise issues implicating the judge's agenda, the judge is more likely to take a less labour-intensive path: to accept a "*plain meaning*" interpretation of the law, to follow precedent, to adopt the reasoning of a court below, or to engage in "*go along voting*" (perhaps where a colleague whose preferences *are* implicated by the relevant case has already crafted a plausible judgment). This leads to a useful prediction: the level of time and effort that a judge will be willing to expend on a given case (or, in other words, the amount of "*rhetorical fuel*" a judge will be willing to burn in the ideological manipulation of the relevant legal materials) should vary with

97 In effect, the scarcity of time reins in a judge's ideological manipulation of text. As Waluchow notes in "Constitutions as Living Trees: An Idiot responds" (2005) 18 Can J L & Jurisprudence 207 at 241, "the requirement that judgments be publicly defended in light of constitutional principle, can sometimes work against any political biases to which judges might be subject".

the degree to which the judge's personal preferences are implicated by the case at hand. In other words, $T_{RF} \sim P_{I,}$ where T_{RF} represents the time a judge is willing to expend constructing convincing legal arguments in order to justify an outcome that coincides with the judge's views, and P_I represents the potential policy impact of a particular case (that is, the ability of the relevant case to advance the judge's preferences). T_{RF} varies with P_I (or, in quasi-mathematical notation, $T_{RF} \sim P_I$). As one quantity rises, the other quantity rises as well.

The implications of price theory's prediction that T_{RF} will vary with P_I should be straightforward. A judge whose passions are fueled only by privacy issues (for example) will be willing to spend more time and effort manipulating the law of privacy than she will on cases involving probate fees (or other non-privacy issues). In the latter class of cases, she may see no need to be innovative, no need to "*push the envelope*", or no need to depart from the obvious course of precedent or the statute's 'literal' text. In short, she will be willing to spend less time crafting and selling interpretive arguments than she would in a case that implicated privacy concerns. A judge whose passions are fueled by the desire to promote racial equality will be willing to spend more time on racial equality cases (or on cases where race relations are somewhat relevant) than on cases that do not relate to that particular social agenda. Less charitably, judges whose salaries are in jeopardy might – if they value their own income – be willing to spend significant time and effort constructing "*an elaborate edifice of doctrine with little or no basis in the [relevant statute's] text in order to protect the power, influence, salaries and perquisites of themselves and their colleagues*",[98] as Canada's top Court did in the *Remuneration Reference*. In short, a judge will be willing to spend more time and effort on cases that will allow the judge to further his or her preferences. The judge seeks a return-on-investment when he or she spends time engaged in the task of interpreting statutes. That return is measured in policy impact (or associated reputational gains), and the level of investment is measured in time. A typical judge will seek the highest return in exchange for the lowest fruitful investment: a judge will tend to invest his or her time in cases that help the judge further his or her own policy goals.

While the notion that $T_{RF} \sim P_I$ seems to coincide with price theory's sensible assumptions regarding the way in which rational judges will behave, it would be nice to test this hypothesis against observed judicial behavior. While no scientific studies have gathered data for the purpose of exploring this hypothesis, a comparison of judicial behavior in different interpretive contexts may be instructive. If, for example, judges show a marked tendency

98 P. Hogg, supra n. 40, at 74.

to (a) avoid counter-intuitive (or "*difficult to justify*") constructions in cases where the likely ideological and reputational payoff is fairly low, while (b) showing the opposite tendency (that is, frequently straining literal language or giving effect to counter-intuitive constructions) in cases where the ideological and reputational stakes are higher, we will have made some progress in verifying the hypothesis that $T_{RF} \sim P_I$. Happily, we do observe this pattern if we compare the Supreme Court of Canada's approach to the interpretation of constitutional text with the same court's approach to the interpretation of income tax legislation.[99] When interpreting constitutional laws (where the ideological and reputational stakes are high)[100] Canadian judges openly over-ride the intention of the constitution's framers, supplement (or over-ride) the constitution's text, and freely manipulate the text with a view to furthering judges' personal policy preferences. When interpreting tax laws, by contrast – where the ideological and reputational stakes are markedly lower[101] – Canadian judges typically assert that "In interpreting sections of the Income Tax Act, the correct approach ... is to apply the plain meaning rule".[102] In other words, Canadian judges show a tendency to avoid counter-intuitive construction (that is, constructions that are relatively difficulty to justify) in tax cases, while frequently pursuing counter-intuitive constructions in cases involving constitutional text.

There are a number of reasons why judges may show a tendency to prefer "*plain meaning*" (or "*intuitive constructions*", which take relatively little

99 The pattern observed with respect to the interpretation of constitutional laws is also observed in the interpretation of Human Rights enactments: as a result, one cannot conclude that the "supremacy" or special nature of the constitution is the sole determinant of the court's interpretive practice. See R. Graham, "Right Theory, Wrong Reasons" (2006) 34 SCLR (2d) 169.

100 While tax statutes and constitutional texts both qualify as "fundamental elements" of a nation's body of public law (that is, constitutional documents establish the 'plan' for a society, while tax statutes establish the method of paying for and implementing that plan), the ideological gains arising from the interpretation of constitutional texts are much greater than the gains one could achieve through the interpretation of income tax statutes. To the extent that a judge succeeds in infusing the text of a constitutional law with his or her own ideology, *all laws* in the relevant jurisdiction (due to the supremacy of constitutional text) must now comply with the judge's ideology. The "ideological impact" of interpreting tax statutes, by contrast, is more localized, typically affecting only the administration of the tax statute. This is, perhaps, why relatively few jurists have achieved renown through their interpretation of income tax laws, while numerous judicial reputations are built on the strength of the judge's interpretation of constitutional text. Moreover, any ideological impact achieved through the manipulation of income tax is likely to be short-lived (when compared to the ideological impact achieved through constitutional construction): see footnote 101, below.

101 One reason that the "ideological stakes" are relatively low in most cases involving fiscal legislation relates to the frequency with which fiscal statutes are amended: a judge may go to great lengths infusing the text with his or her own personal views, only to see the text amended following the next annual budget. Constitutions, by contrast – particularly bills of rights – are amended fairly infrequently. As a result, ideological influence achieved through constitutional construction is likely to give rise to longer-term policy impact and longer-term reputational gains.

102 *Friesen v. Canada* [1995] 3 SCR 103, at 113 (per Major J., for the majority).

time to justify or explain) when interpreting tax statutes while showing greater willingness to spend time explaining and justifying counter-intuitive constructions of constitutions. These reasons relate to the differing costs and benefits that arise in these distinct interpretive contexts. First (as noted above), the possibility of long-term ideological and reputational gain is greater when judges interpret constitutional text than it is when they interpret fiscal statutes: this gives the judge a greater incentive to expend time and effort manipulating constitutions in the direction of the judge's personal preferences. As a result, the "*benefit*" of ideological-manipulation in the constitutional context is likely to seem (to the judge) greater than the benefit of ideologically-manipulating the text of fiscal laws. Second, the "*cost*" of textual manipulation may be greater in the income tax context. Tax statutes are typically drafted in exceedingly precise and detailed language, while constitutional texts (particularly those that deal with fundamental rights) are couched in vague and open-textured terminology. All things being equal, a vague and open textured phrase[103] is more easily manipulated than precise and specific language: in other words, a counter-intuitive reading of tax statutes (that is, an interpretation that strays from plain meaning) will, in most cases, take more time and labour to justify[104] than a counter-intuitive reading of a constitutional text (for example, a reading that conflicts with the framer's expectations).[105] As a result, the "*return on investment*" (for the judge) in the

103 On the nature of vagueness and its implications for statutory construction, see R. Graham, supra n. 1, chapter 4, "Vagueness and Ambiguity".

104 A second reason that courts may find it harder to manipulate the text of tax statutes than the text of constitutions relates to the courts' own perception of their relative institutional competence (vis-à-vis the legislative or executive arms of government) when it comes to the interpretation and application of the relevant body of law. Canadian courts see themselves as less competent than the legislative or executive branches in the interpretation and application of statues involving financial matters, and therefore often grant significant deference to government interpretations of laws dealing with such matters: see (for example) *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 and *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557. By contrast, the Court appears to perceive itself as superior to the legislative or executive branches in the interpretation and application of statutes dealing with human rights, and therefore grants the government little difference when interpreting such enactments (see, for example, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982). Indeed, the Court suggests that it has a particular advantage over the other branches of government when it comes to the application and interpretation of constitutional text, effectively granting other government actors no deference when interpreting the text of the constitution. For a discussion of the relevant jurisprudence, see R. Graham, supra n. 99. If one assumes that expertise with an enactment's subject matter lessens the difficulty (or lowers the learning-curve) associated with the manipulation of the language of that enactment, one can safely conclude that the courts would typically have a harder time manipulating the text of fiscal statutes than they would manipulating constitutions.

105 More importantly, perhaps, courts face a greater likelihood of "interpretive error" in the interpretation of tax statutes, particularly where they attempt to justify deviations from plain meaning. Let us assume, for the moment, that tax statutes are typically more complex than constitutions, and that courts have less institutional expertise with respect to the language of tax statutes than the financial advisors retained by the government in the drafting of tax enactments. Further assume (as the

interpretation of constitutional laws is (on average) far greater than the return on investment the judge receives by spending time interpreting tax statutes: a judge who seeks policy-preference gains through the interpretation of constitutional text may anticipate potentially large gains with a relatively small investment of time. A judge who seeks similar gains through the interpretation of income tax statutes may anticipate smaller (and shorter term) gains that require a significant investment of the judge's time. As a result, judges interpreting tax statutes can be expected to take a less labour-intensive path, embracing "*plain meaning*" or intuitive constructions (regardless of the judges' personal policy preferences), while judges working in the constitutional realm should be expected to go to greater lengths to over-ride intuitive meaning in pursuit of ideological goals. As we have seen, Canadian judges exhibit this pattern of behavior, lending support to price-theory's intuitive prediction that $T_{RF} \sim P_I$: the level of time and effort a judge is willing to expend on a given case (or, in other words, the amount of "rhetorical fuel" a judge is willing to burn in the ideological manipulation of the relevant law) varies with the degree to which the judge's personal preferences are implicated by the case at hand. Conversely, a judge's willingness to manipulate the law in the direction of the relevant judge's preferences will decrease as the interpretive costs rise.

The comparison of Canadian tax jurisprudence with the practices of courts interpreting constitutional texts not only supports the hypothesis that $T_{RF} \sim P_{I,}$ it also reveals some of the specific costs and benefits to which judges respond in accordance with the predictions of price theory. Specifically, it shows that a judge's willingness to endorse counter-intuitive interpretations of a text varies inversely with the level of precision and complexity exhibited by the language of the relevant enactment. This makes sense: it is harder (and therefore more costly) to manipulate a precise and complex piece of legislation than it is to manipulate a vague and open-textured text. As a result, to the extent that legislators wish to minimize the judiciary's ideological-manipulation of statutory text, or to minimize the extent to which the court will give effect to counter-intuitive constructions of legislation, legislators have an incentive to increase the level of specificity and precision in the

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courts appear to assume) that the courts have *greater* expertise than the legislature when it comes to interpreting constitutions. If these assumptions are correct, then there is a greater likelihood that a court's counter-intuitive reading of a tax enactment is demonstrably wrong (in the sense of that construction being demonstrably inconsistent with other provisions of the enactment) than there is that a court's interpretation of a constitution is demonstrably wrong. If courts are protective of their reputations (as we suggested in section 3(b), above), then they are likely to "tread lightly" in the interpretation of income tax statutes, for fear that the court's interpretation will be proven incorrect. They would experience less "fear" with respect to the interpretation of constitutional text, and would accordingly be more willing to interpret constitutions in a counter-intuitive manner where doing so could further the judges' personal preferences.

language of the statutes and the Constitutions that they pass.[106] The effect of increased specificity is to elevate the cost (to the judge) of pursuing counter-intuitive interpretations of the relevant legislation. Judges are the consumers of competing interpretive outcomes, and will tend to act as ordinary consumers when they make consumption choices – a higher relative cost (or a lower relative benefit) will reduce consumer demand. As consumers of competing interpretive outcomes, judge will tend to choose whatever interpretive outcomes cost the least while giving effect to those that benefit them the most.

§ Conclusion

I've always hated it when papers rooted in microeconomics feebly conclude with the observation that "*more data are required*". It's usually true, but I still hate it. In the present context, it is obviously true that more data would be helpful in the creation of a thorough model of interpretive choice: it would be helpful to know more about the impact of reputation on specific interpretive choices, and it would be useful to have specific data concerning a typical judge's use of time. If the model that I have proposed is an accurate account of judicial behavior, the case for the collection of these data should be clear.[107] Even without these data, however, the model I have proposed supports at least three conclusions.

First, this model helps to explain the basic determinants of the decisions judges make when they interpret legislation. The Realist Vision explains that judges interpret statutes and Constitutions with a view to implementing the judges' policy preferences. This insight is not revolutionary. We have, however, answered a good question: what factors tend to "*rein in*" a judge's pursuit of his or her ideological agenda? As we have seen, two prime factors (or two major determinants of the judge's interpretive choices) are reputation and time. Judges typically care about the esteem in which they are held by specific esteem-granting (or esteem-destroying) groups. Where this is the case, the judge will either (a) moderate his or her ideological manipulation of text by accommodating the views of the relevant group, or (b) craft reasons-for-

106 Of course, legislative drafters are not immune from the pull of price theory: it is more difficult and time consuming to draft a specific and complex law than it is to draft an open textured statute. As a result, legislators will only do so where the gains associated with more specific statutes (say, for example, avoidance of judicial activism) outweigh the costs associated with the time it takes to draft and agree upon specific legislative text.

107 I shall leave aside, for now, the case to be made for the collection of data concerning potential appointments to the bench. While this paper makes it clear that such data would be useful in predicting the interpretive practices of prospective judges, the value of such data may be overmatched by the cost of acquiring it. Moreover, such data would be suspect in many cases: to the extent that our data is based on the judge's own self-interested statements (conducted through an appointment-hearing, for example), such statements are likely to be unreliable.

judgment designed to insulate the judge from reputational costs. Where the judge chooses option (b), the judge is constrained by time. A judge who is concerned with his or her reputation (or the reputation of the judiciary in general) will tend to manipulate the law in the direction of his or her own policy preferences only where the relevant ideological payoff justifies the amount of time and effort it takes to justify that decision in a manner that will persuade the relevant esteem-granting group. In a nutshell, this is how judges interpret legislation.

The second thing we have learned (which is really a broader version of the first) relates to post-modern claims concerning language. At the outset of this essay, I noted that post-modern theorists rarely ask why language works. They are adept at pointing out the vulnerability of language to the unsettling free-play of deconstruction, but rarely address the issue of why, despite this inherent vulnerability, language is so effective in conveying information. I think that we have laid the groundwork for an answer to this question. Language works because we typically have an interest in interpreting language in conventional ways. We avoid most attempts to pointlessly deconstruct everyday language because doing so would often lead to confusion, frustrate our expectations or make us look foolish or unprincipled to others. While we could undertake a deconstructive romp through the tax code, or unravel the layers of meaning underlying a statement of claim, we tend to refrain from doing so. Our self interest, frequently rooted in such base concerns as reputation and time, keeps us from trying to destabilize the texts that we confront. Instead, we tend to do our best to interpret texts in accordance with the intention of those who wrote them (or those with the power to generate authoritative meanings), for doing so can lead to predictable outcomes and preserve our reputations. Generally speaking, achieving predictable outcomes (and maintaining a good reputation) maximizes our utility. As a result, self-interest has the effect of pushing us toward conventional and intuitive interpretations of language, while leading us away from any counter-intuitive meanings that a deconstruction of the relevant language might reveal.

Finally, I think that we have learned something about legal theory. Specifically, we have seen the intersection of post-modern legal theories and the economic analysis of the law. It is (to me at least) somewhat remarkable that the rhetoric of the Realists, the Crits and the other supporters of the Realist Vision of statutory interpretation is so similar to the rhetoric of microeconomics. Proponents of the Realist Vision of statutory construction share the economists' view that the courts' interpretation of legal language is a value-laden process. Legal Realists and Crits point out that all interpretation is an exercise in ideological manipulation. Economists support this view,

pointing out that all judges are engaged in self-interested utility maximization, even when judges interpret legislation. Once we augment the Realist Vision with the intuitive assumption that the manipulation of legal text is a difficult and time consuming activity, the Realist Vision of statutory construction coincides perfectly with the economic depiction of constrained utility maximization. Although Crits and economists might use markedly different language to describe judicial behavior (and make different value judgments when assessing it), they are telling the same story: a story about constrained judicial preference maximization through the manipulation of legislative text. For me, the degree of consistency between the work of Crits and the analysis put forward by economists is a very welcome discovery. Crits and economists rarely pay sufficient attention to each other's scholarly work. Given the similarity of their views regarding statutory and Constitutional interpretation, it is time that they began to work together.