II. The Argument from *Judging under Uncertainty*

A. Textualism plus Deference

In *Judging under Uncertainty*, Vermeule develops two different projects. One is a theory about judicial interpretation. Its goal is to defend a very strict model of judicial decision-making, one I shall refer to in this article as the model of *textualism plus deference*. The other project developed in the book is made up of a series of methodological claims concerning how one should assess and choose different models of judicial decision-making. Its goal, as I shall explain, is to elaborate a *choice-procedure* whose normative force transcends disputes about value and makes it compelling to individuals from radically different political persuasions.

The model of *textualism plus deference* determines that courts apply the “clear, surface meaning” of legal provisions; and when doing so is not possible -- due to vagueness, ambiguities or legal gaps, they should not try to interpret the relevant provision on their own, but rather defer to the interpretation of the text held by a different, more competent governmental institution. In the context of statutory adjudication, such institution is the governmental agency whose expertise concerns the subject-matter of the decision. In the context of constitutional adjudication, legislatures determine the authoritative interpretation of Constitutional clauses that are vague, unclear or express constitutional ideals instead of clear-cut rules.

Vermeule’s defense of textualism plus deference is premised on a particular understanding of judicial decision. According to the book, when the applicable legal
provision is “clear and specific,” it provides a “baseline” level of information for courts to decide a case. In order to determine how courts should interpret legal texts, Vermeule claims, we should first determine what is gained and lost when judges “go beyond the baseline level of interpretation.” Thus, when the relevant legal provision has a clear textual meaning, the question whether the judge should resort to other interpretive methods or sources of authority is subject to a cost-benefit analysis. A similar reasoning applies when there is no interpretive baseline, that is, when there is no clear textual directive about the meaning of the applicable provision. In such situation, we should compare the costs and benefits of having judges or agencies determine the authoritative interpretation of vague or unclear legal provisions.\(^1\)

Courts should adopt *textualism plus deference*, argues Vermeule, because it generates lower costs of participation, lower overall costs of decision-making, and lower rates of judicial mistake than any other available model. In the context of statutory interpretation, costs of participation increase when judges go beyond the application of “surface, clear meaning” of statutory provisions because deviating from easily accessible meaning increases uncertainty about the content of legal rules and widens the scope of arguments

\(^1\) The combination of textualism and judicial deference is also defended, with some modifications, in the context of constitutional adjudication. Constitutional provisions with an “explicit and precise meaning,” he argues, also provide an informational baseline for judicial interpretation. Like in the discussion of statutory interpretation, the issue of how much authority judges should have to interpret the Constitution is dealt with as a matter of calculating the costs and benefits of having them go beyond that baseline. The role of courts in interpreting constitutional provisions is discussed on the assumption that the authority for constitutional review should be allocated according to the relative institutional capabilities of courts and, this time, legislatures. The argument developed in the book starts with a critique of what Vermeule calls “traditional justifications of judicial review.” It then develops into an analysis of the relative advantages of having legislatures and not courts interpret constitutional provisions that are “ambiguous, can be read at multiple levels of generality or embody (...) norms whose content changes over time with shifting public values.” Vermeule proposes to have the authority to interpret the Constitution split between courts and legislatures. While courts would retain the power to apply clear, direct provisions, the application of vague, unclear or “aspirational” Constitutional provisions would be given to legislatures. Not only are they better prepared than courts to understand the consequences of different interpretations, argues Vermeule, they are also better positioned to update constitutional interpretation to shifting public values.
and sources to which lawyers can resort. Vermeule claims that costs of decision-making also increase, because examining other sources of authority and employing other interpretive techniques is overall more costly than simply applying the surface meaning of a text or deferring to the meaning a more capable institution ascribes to it. Finally, rates of mistake increase when judges deviate from *textualism plus deference* because governmental agencies have the institutional resources to make “better decisions at lower costs” than courts. The expertise of their staff, the structure of their decision-making procedures and their policy-oriented behavior allows agencies “to engage in the difficult calculations required to define the best understanding of a statute.” According to Vermeule, agencies can determine better than courts “which procedures for gap filing and which sources of interpretive information provide the greatest marginal benefits (…),” as well as which interpretation of a certain rule will seriously “diminish predictability or unsettle the statutory scheme.”

The defense of textualism plus deference rests on the validity of the methodological claims of the book. Costs of participation, costs of decision-making and rates of mistake are not supposed to be a mere collection of considerations in favor of judicial restraint: they are supposed to be determinant in the choice of interpretive models, obtained and validated as such by the employment of a rigorous methodology. If those methodological principles fail, so does *textualism plus deference*. At the same time, the methodological argument must also stand on its own, open in principle to the possibility of validating different considerations in other circumstances.
From a justificatory point of view, it is not enough that *Textualism plus Deference* is proven to be more cost-effective than other interpretive models. The book must provide an account of its methodological approach showing not only that it has the resources needed to deal with the issue judicial decision-making, but also that it is superior to competing theoretical approaches.

While there is much to be discussed about the conception of textualism plus deference, this article focuses on the second, methodological side of the book. Therefore, I consider Vermeule's conclusions about judicial decision-making and the model he proposes only to the extent they help shed light on the distinctive features or limitations of his methodological theory.
B. The Methodological Argument

The methodological argument of the book can be reconstructed around three sets of ideas:

• First, the commitment to to a consequentialist framework for the analysis of interpretive models and the emphasis on institutional and empirical knowledge in that task (Section I.A). These fundamental commitments are connected to a strong critique of other approaches to the problem of judicial interpretation (Section I.B).

• Second, the adoption of rule-consequentialism, understood to further narrow the type of consequences relevant for choosing a model of judicial interpretation. According to Vermeule, consequentialists should choose whatever interpretive model is shown to maximize the overall value of systemic consequences. (Section II)

• Third, an interpretation of the normative effect of uncertainty with regard to overall systemic effects of interpretive models. Since we lack knowledge about systemic consequences, Vermeule proposes that we resort to a repertoire of techniques of rational decision-making under uncertainty, and claims that doing so validates the type of value-insensitive, non-political choice that leads to textualism plus deference (Section III).

In the sections that follow, I describe each of these ideas in greater detail and point out their limitations.
1. Foundational Commitments

A. Institutionalism, Empiricism and Consequentialism

The cornerstone of Vermeule’s methodological project is a comparative analysis of the institutional capabilities of courts, agencies, and legislatures. Institutionalism is connected in this book to a vigorous critique of what he calls the traditional debate on judicial interpretation. According to the book, every important legal scholar from Bentham to Dworkin, from Richard Posner to William Eskridge has been blind to what should be regarded as a fundamental aspect of their subject-matter: legal interpretation is, above all, an institutional function. In Vermeule’s succinct formula, "the [fundamental] question is not 'how one should interpret a legal text, but rather 'how should particular institutions, with their own capacities, interpret legal texts'."

Such concern with institutional capabilities is combined with the assumption that models of judicial interpretation must be evaluated from a consequentialist point of view. For Vermeule, the evaluation of different models of judicial interpretation should be oriented by an assessment of the consequences they generate, and courts should adopt whatever interpretive model is shown to generate the “best consequences” possible.

Finally, institutional knowledge and consequentialism are associated with empiricism, that is, the belief that empirical knowledge itself can determine the normative criteria according to which models of judicial decision-making should be assessed. [...]
B. The Attack on Non-Consequentialism

1. Non-Consequentialism as a deductive practice

The book’s most recurring criticism of non-consequentialist approaches is that they cannot offer a satisfactory justification for a model of judicial interpretation.

“A typical slippage in interpretive theory,” argues Vermeule, “is the attempt to move directly from high-level concepts or political and moral premises—premises such as a commitment to democracy, or to constitutionalism, or to some jurisprudential theory of law’s authority—to conclusions about institutional arrangements or about interpretive approaches.” That is a mistake, he says, because “empirical and institutional questions always and necessarily intervene between high-level premises, on one hand, and conclusions about the decision-procedures that should be used at the operating level of the legal system, on the other.”

Now, this criticism suggests at least one of two beliefs: that non-consequentialist theories of interpretation ignore or mistake institutional or factual premises, reaching decisions they expect to be applicable to any context; or that the reasoning it uses is defective for the purposes of evaluating models of judicial interpretation ("the attempt to move directly").

Both beliefs are false. First, non-consequentialism does not need to abstract from facts or institutional settings. Imagine, for instance, a non-consequentialist theory that assigns exclusive lawmaking authority to legislators, and justifies it by their being elected in a fair and democratic procedure. Imagine further that this theory supports a minimalist
model of judicial decision according to which judges, lacking electoral legitimacy, should restrict themselves to applying the literal meaning of statutory and constitutional provisions. Even this very simplified theory incorporates assumptions that must concern institutional facts (whether judges are in fact not elected, whether legislators are, whether the electoral procedures are not rigged, etc.). So if Vermeule accepts this theory as an example of non-consequentialism, he cannot reasonably argue that the problem with non-consequentialism is that it necessarily ignores institutional or empirical facts. Even a more specific version of this criticism, charging for example that non-consequentialism ignores certain specific institutional and empirical issues (like institutional capacities or the systemic effects of judicial decisions), cannot hold. Non-consequentialism is a family of theories whose defining characteristic is the refusal that the rightness of an act is always and exclusively determined by a cost-benefit analysis of different courses of action. Nothing in this conception requires the exclusion of either consequences or empirical and institutional data. Vermeule’s criticism thus simply cannot be that non-consequentialist theories completely ignore capacities and systemic effects. It can't be either that the way in which institutional aspects are used in non-consequentialist reasoning does not lead to the interpretive model that produces the best overall results. Such criticism however also fails, because it already assumes that the point of judicial interpretation is to maximize the value of consequences.

If the rejection of non-consequentialism cannot be justified by blindness to facts, could it be justified by the way in which non-consequentialism determines whether an act is wrong or right? Under this view, the way in which non-consequentialism deals with
institutional and empirical issues is fundamentally flawed and thus it cannot provide adequate answers about models of judicial interpretation. The excerpt above would suggest that. According to Vermeule, non-consequentialism inevitably fails to “deduce” models of judicial interpretation from commitments to legitimacy, democracy, constitutionalism, etc. The problem, however, is that this criticism relies on the false assumption that non-consequentialist theories do try to identify and defend the single best form of interpretation under a certain ideal of political organization. There is no reason why non-consequentialist theories would have to conceive the relation between their normative commitments and the interpretive approach they defend as if the latter was the necessary and single institutional embodiment of the former. On the contrary, non-consequentialist theories are often best understood to claim that, given a stable background of political institutions, some political practices are consistent with certain ideals of political organization (such as democracy, rule of law, etc), while others are inconsistent with them. Such claims do not imply nor need to show that no other arrangements could possibly outperform it. All these theories need to do is to offer a compelling argument that their proposed form of judicial interpretation fit certain conception.

2. Non-Consequentialism and the problem of second-best

The second criticism advanced in the book is that non-consequentialism may be “unhelpful” because it cannot offer guidance on the so-called “problems of second-best.” Such problems occur when the implementation of a given interpretive method is so imperfect or costly that “it would be preferable to implement a different method,” a
second-best option. According to Vermeule, problems of second-best are “inevitable” in interpretive theory. “Interpreters situated in particular institutions,” he claims, “make mistakes when implementing any first-best account, and the rate of mistakes will vary with changes in the decision-making procedures the interpreter use, as will the cost of reaching decisions.” For this reason, he argues, any form of evaluation of models of judicial decision-making must be able to deal with second-best options.

At first, there seems to be some truth in these claims. After all, it does seem that non-consequentialism lacks the resources to identify and guide the choice between first-best and second-best options. But the relevant question this time is not whether non-consequentialism actually offers the guidance Vermeule deems indispensable, but whether a theory really needs to provide that type of guidance in order to inform normative reasoning about judicial decision-making.

Second-best is a problem when a person’s concept of justification is such that the relation between interpretive models and their justification allows for the distinction and ordering of those models according to a single measure of worth. Imagine that judges should follow certain interpretive guidelines because these guidelines will produce the greatest welfare in society. This claim must assume that different guidelines may serve the same goal (produce welfare); that their worth is quantifiable and flows from their relation to this goal (how much welfare they produce), and that they can be ordered with regard to that. The problem of second best also presupposes that the worth of different interpretive models can be measured in a way that reflects not only the relation between models and justification, but also the obstacles to the application of each model. Only
through these assumptions can we contrast two orderings of the same interpretive models and see whether the highest ranked in the first ordering is different from the highest ranked in the second. Finally, for the problem of second-best have some significance and be solved, one must believe that interpretive models should be chosen according to the second, cost-sensitive ordering.

Non-consequentialism dispenses with all these assumptions. As we have seen earlier, it denies the claim that an interpretive model must be justified as the single or best possible model under a certain criterion. It also rejects that the value interpretive models should be expressed by an index; that models should be ranked according to an index of that relation; or that one should choose the model ranking best in a cost-sensitive comparison. Vermeule’s argument about second-best thus assumes rather than show that consequentialism is the right approach. Lack of resources to deal with the problem of second-best is not a challenge to non-consequentialism if it requires us to assume that theories of legal interpretation could only justify interpretive methods in a consequentialist way.

[...]

II. Interpretive choice from a "rule-consequentialist" point of view

A. Overall value, systemic consequences

According to Vermeule, models of judicial interpretation must be assessed not only from a consequentialist perspective, but more specifically, from what he calls a “rule-consequentialist” perspective. For him, this has a peculiar meaning. It means that instead
of choosing the interpretive techniques that would make a particular decision generate the best consequences possible, one should actually look for a set of interpretive rules whose unfailing compliance by courts will produce the best consequences overall. Thus, it is not the consequences of cases individually considered, but their aggregate value that should orient one’s choice. Also, one should choose a model of judicial decision-making by considering not the consequences affecting the immediate parties to the case but rather the systemic, societal consequences of its adoption by courts.

B. Indifference towards theories of value

A key aspect in this regard is what I call indifference towards theories of value. Like any other form of consequentialism, rule-consequentialism requires a theory of value that specify what makes consequences good and bad, thus allowing for the assessment of different courses of action. However, Vermeule refuses to adopt a specific theory of value. He believes that, as long as individual judges confront the problem of interpretive approaches from the consequentialist point of view he specified (evaluating the overall, systemic consequences of interpretive models), one may define goodness by whatever set of substantive values he/she happens to have.

One would expect that indifference towards theories of value undermined the possibility of identifying the best interpretive model in a way that transcends disagreement about values. Vermeule, however, disagrees. He believes that notwithstanding disagreement about values, we should all come to the conclusion that a single interpretive method, Textualism plus deference, is the best whatever theory of value one adopts.
C. Rule-like interpretive models

These ideas have important implications to the notion of interpretive choice, that is, to the conception of models of judicial decision-making and of how one should evaluate them. Most important among them, the adoption of rule-consequentialism in this context seems to constrains the type of available answers to the interpretive question. In principle, one can reconcile the maximization of the value of overall consequences with models of judicial decision-making that afford courts large freedom in determining the applicable rules in different circumstances. Thus, it would be possible in principle to compare the value of a certain series of cases in which judges decide however they wish, with a different but equivalent series in which they follow specific, very stringent rules of interpretation. After all, although judgment may resort to rules, that does not mean a model of judgment should have a rule-like structure.

Vermeule's understanding of "rule-consequentialism", however, seems to rule out this possibility. We can see that in the way he justifies the adoption of rule-consequentialism. According to him, rule-consequentialism is justified when “imperfect agents may do better overall by following rules.” Judicial decision-making is such a case, he argues, because courts have very strong “information-processing limitations,” and thus are not as well designed as specialized agencies to make decisions that maximize the value of systemic effects. This clarifies the nature of answers Vermeule's choice procedure may

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2 Of course, the results in the latter may vary substantially more if judges were changed.
produce. If one compares models of judicial decision-making on the assumption that judges are inferior decision-makers, that comparison cannot accommodate models that grant courts great freedom. Because courts are poor decision-makers, someone else must call the shots. Vermeule's criteria may be consistent with a model that allows judges to distinguish between two or a few situations in which one applies this or that rule of interpretation. But as the room for the judge's exercise of judgement increases, more difficult it becomes to reconcile a model with the reasons for choosing on the basis of overall results. Overall consequences and unfailing compliance privilege rule-like models.³

D. Institutional capabilities

If Vermeule were right about the facts though, if judges really were inferior decision-makers, would focusing on rule-like models be a problem? In order to answer this question, one should consider the truth and relevance of Vermeule's claim about the institutional capabilities of courts.

³ This may actually come from a misunderstanding of what rule-consequentialism entails. In fact, throughout his discussion of rule-consequentialism, Vermeule conflates two issues. One is about decision-making procedures: how a moral agent should choose to act, or, in this case, how judges should choose to interpret a certain legal text. The other is about what determines the value of an act. Rule-consequentialism is a theory about criteria of goodness, that is, about what makes an act is permissible, required or forbidden. It denies that an individual act’s rightness is determined by the consequences produced directly by that act, and holds, instead, that the rightness of an individual act stems out of the consequences of obeying a rule that prescribes it. In normative philosophy, rule-consequentialism is a reaction to the non-intuitive demands of direct forms of consequentialism (those in which an act’s goodness depends on the consequences of that act alone). It seeks to avoid some of the controversial positions of act-consequentialism by accepting that compliance or acceptance of a certain pre-established rule might outweigh the direct consequences of that act. For instance, in cases where act-consequentialism would have required an agent to kill a person to save four others, rule-consequentialism might counter that demand by stating, for example, that compliance with a rule forbidding murder generates overall greater value than the four lives an act-consequentialist would have saved. Thus, rule-consequentialism did not come to say that a few bad results are fine as long as activity’s overall results are good, but rather to indicate that respect to certain pre-established moral rules could help align consequentialism to recognized moral intuitions. It does not follow from the adoption of rule-consequentialism that one’s every morally relevant act must be pursued according to a certain rule or that one should ignore a priori the outcomes of individual acts.
According to Vermeule, courts are poorer decision-makers than agencies or legislatures because of the limited information-processing capacity and bounded-rationality of the Judiciary. Courts have very limited resources and the very fact that they solve individual disputes makes them less capable of producing decisions with the best systemic consequences possible. Legislatures and agencies, albeit not perfect, would have the necessary expertise and structure to make the “complex calculations” required to generate good systemic consequences. Transferring almost all interpretive authority from courts to agencies and legislatures would make sense under this view because it would turn decision-making into more competent hands and thus achieve overall better consequences at lower costs.

The idea that judges are poor decision-makers is not premised on a broad conception of institutional capability. Judges are often aware of the systemic consequences of individual decisions. For instance, a statute that criminalizes sodomy will produce consequences that many judges find unlawful. These judges know that application of such statute will produce awful consequences not only for one of the parties but also for large groups of citizens. If Vermeule used the conception of institutional capability in a broad, inclusive sense, his model would have to accommodate this. However, Vermeule’s conception of institutional capability already presupposes two important restrictions: the capacity to choose the best interpretive techniques in individual cases does not matter, and the institutional capability of making good decisions is a form of cognitive competence or expertise. The former turns Vermeule’s supposed justification of rule-consequentialism into a circular argument, with no normative value. The latter makes
rule-consequentialism contingent on the assumption that the institution that does better overall in terms of processing information should have determinant interpretive authority – a claim that also lacks justification. Even perfect knowledge of the systemic consequences at stake would not be enough to support alone the idea that agencies should substitute the Judiciary’s judgment. In principle, one could use that knowledge to advise courts about the likelihood of different consequences, while having judges keep their power to decide which is better.

But even more importantly, why should anyone, in particular a consequentialist, think of institutional capabilities this way? What should really count for consequentialists is the potential of a certain distribution of decision-making authority to produce a legal system aligned to their conception of the good. After all, even if the approach defended by Vermeule seeks to transcend considerations of value, a pure instrumentalist would not conceive the desirable institutional capability as neutral towards the values the law should produce. No matter how perfect agencies are in making complex calculations, one cannot assume that it will produce systemic consequences aligned to his conception of the good. If Vermeule were to establish a value-transcending standard for the evaluation of judicial decision-making models, one would expect him to start with the most value-embracing conceptions possible. Yet the very idea of institutional capability, foundational to his approach, turns out to be a highly disputed, controversial notion, for which no justification is offered.

4 See my comments about Uncertainty, below.
E. The meaning of "systemic"

A similar problem affects the notion of “systemic” consequences. One way of understanding it is to take “systemic” to be an inclusive concept whose adoption expands the class of relevant consequences to every actual consequence of an interpretive model. If that is the case, it means only that one should not pick and choose which consequences to take into account: all consequences actually produced are important. But if this conception were applied consistently throughout the book, it could not support the model of Textualism plus Deference. If uncertainty is supposed to justify the exclusion of systemic consequences, the same cannot be said about non-systemic consequences, like the consequences to the litigating parties. Furthermore, even if we accept Vermeule’s account of the limitations of the judiciary in figuring out systemic consequences, it is reasonable to assume that judges could decide on the basis of these more immediate results. If neither general uncertainty nor judicial limitations can justify the exclusion of consequences to the parties, these should be taken into account in a consequentialist approach to judicial decision-making. If Vermeule wants to reach a non-political justification of Textualism plus Deference though, he must define “systemic consequences” as a class of consequences that does not include consequences to the parties. That, however, would mean that a consequentialist would have to dismiss an important category of outcomes from the evaluation of interpretive models. Such view is not only in tension with the consequentialist assumptions of the book -- it also calls for a justification the book never presents.
F. Deviations for marginal gains

Finally, the rule-consequentialist evaluation of interpretive models proposed by Vermeule also fails to deal with the possibility of deviations for marginal gains. Vermeule’s portrait of models of judicial interpretation is one of rules that should be unfailingly complied with by courts. The consistent compliance with those rules however is threatened by the possibility that occasional deviation may increase marginal gains.

Suppose that a certain judge decides to approach the problem of interpretive choice from the perspective of rule-consequentialism. Imagine also that she believes a very constrained form of textualism will improve the overall consequences of her decisions. That judge might still have reasons to think that, in certain cases, a textualist approach would produce an inferior result. How should she behave in those cases? Should she stick to her textualist approach? Or should she decide that particular case using a different method, thus marginally increasing the value of her decisions? While Vermeule’s argument demands that she remains faithful to textualism, the book offers no convincing reasons for that.

In fact, her commitment to consequentialism may actually require her to do otherwise. The possibility that textualism is occasionally inferior may lead the judge to review her overall belief that textualism leads to the best possible overall consequences. She might recast it into something like this: the best consequences are produced by textualism, except in situations A, B, and C, in which I know by experience that textualism is not the best option. Now, the more situations like these she experiences or learns, the more refined her conception of the best consequences would have to become.
and, thus, it would become increasingly different from the consequences of the simple, concise rule she had initially adopted. The judge’s view of her duty might consequently change from accepting a certain interpretive approach for the sake of its overall results to rejecting it, not because she has changed her views about the criterion of rightness, but exactly because of her allegiance to it.

[...]

III. Uncertainty and its normative implications

The final set of ideas in Vermeule's methodological argument consists in an interpretation of the normative impact of uncertainty about the systemic effects of interpretive models. We currently lack scientifically obtained, empirical knowledge about the systemic and overall consequences of interpretive models. According to Vermeule, uncertainty would make academics and judges alike face a "stalemate of empirical intuitions," that is a situation in which “a given set of empirical findings may support one interpretive method while other set supports a different one.” We can't know now, maybe will never know with certainty the systemic effects of different models of judicial interpretation.

A. Decision-making under uncertainty

Uncertainty is claimed to have two large implications for theories of legal interpretation. First, it reinforces the need of empirical knowledge and sets an agenda for academic research. Thus Vermeule suggests that the debate about interpretation should steer away from conceptual discussions about the legitimacy of courts and their function,
and towards comparative analyses of institutional capabilities and empirical research about the effects different allocations of interpretive discretion yield. If Vermeule is correct about uncertainty, scholars have a long-term, daunting research agenda to explore before judges and institutional designers can obtain the necessary information on the overall, systemic effects of different interpretive methods. But we cannot rely on them in the short-term, because the “range of relevant variables is too large, [and] the society-wide scope of the variables too complex,” one may expect we won’t acquire that knowledge any time soon.

Unlike academics, Vermeule says, judges cannot engage in a long-term project investigating the relation between interpretive methods and its effects on systemic outcomes. So the second implication he draws from uncertainty is that we must determine the best model of judicial interpretation right now, on the basis of very limited empirical knowledge. If it is true that courts already have a limited capacity to process information and that uncertainty prevents us all from knowing the systemic consequences of their decisions, how should they proceed while waiting for the empirical knowledge that would allow them finally to choose the interpretive model that leads to the best consequences under their own theory of value? Should they leave their consequentialist commitments behind? Substitute an overall account of consequences for a more manageable set? Give up the whole idea of an interpretive choice?

According to Vermeule, none of these. Judges should keep their commitment to consequentialist premises and adopt a repertoire of decision-making techniques designed specifically for boundedly rational agents who act under conditions of uncertainty. The
reasoning is that, given uncertainty, a judge who has adopted Vermeulean premises has no sure way of finding out which interpretive model will lead to the systemic consequences he values the most. Such person would have to make a decision with the limited information currently available, and to do so, he would do better by employing a series of techniques that have been designed to deal with uncertainty in decision-making.

B. From uncertainty to textualism plus deference

The important issue in this part of the argument is not whether principles of rational decision-making may be incorporated into the evaluation of interpretive models. It is whether the way they are actually employed by Vermeule is methodologically justified.

The principle of insufficient reason plays a crucial role in the book. That principle, according to Vermeule, determines that in situations of uncertainty one may ignore unknown consequences insofar as there could be, for each of them, an equally possible consequence with the same weight and opposite value. Since we cannot account with certainty for the overall consequences of any model of judicial interpretation, the reasoning goes, the principle of insufficient reason would authorize us to discount all uncertain consequences and focus our decision on what will surely follow the adoption of this or that model. The assessment of competing interpretive models would thus be restricted to a value-neutral institutional analysis. Vermeule uses the principle to exclude considerations of value from the choice of interpretive models on the grounds that since these considerations depend on an assessment of uncertain consequences, they require information we simply do not have. Some of the costs of allocating greater interpretive
authority to courts are certain, he claims, while benefits, that is, valuable consequences, remain “merely conjectural.”

Thus, techniques specifically designed to inform decision-making under uncertainty are used by Vermeule to claim that choosing interpretive models should be based on the value-neutral capabilities of different public institutions. But contrary to the book's argument, the decision to incorporate techniques of rational decision-making does not necessarily lead to the discarding of value-sensitive outcomes. There is a number of reasons for this.

First of all, those techniques do not give prominence to the principle of insufficient reason and cost-benefit analysis. In fact, they comprise many other principles for choice, such as “choose the first to satisfy,” “pick, do not choose,” etc. Therefore, the choice of this or that technique must be justified properly, and even if one accepted all assumptions of the book's argument, they could not explain why one would have to choose the same techniques Vermeule did. Second, and most importantly, the employment of a principle of insufficient reason does not necessarily translate into the non-political, value-neutral procedure proposed by Vermeule – and that has nothing to do with the institutional features of courts.

Moving from consequentialism to a value-neutral choice procedure would require either the assumption that value-neutral choice should be preferred over more costly, but value-sensitive alternatives; or the assumption that there is no option but to decide on the basis of a value-neutral conception of institutional capability. The latter assumption is false. The former involves an unlikely and controversial normative decision.
It is very unlikely that individuals who see judicial decision-making as an intrinsically value-sensitive phenomenon will opt for the value-neutral route proposed by Vermeule -- in particular if those individuals have chosen the consequentialist principles advocated earlier in the book. It makes sense only if a consequentialist's concern with *finding the best interpretive method* overshadows his/her concern with *producing the best consequences*.

But there is no reason why this should be so. On the contrary, given that choosing the model that maximizes the overall value of systemic consequences is an impossible task, it is not unreasonable to think that a consequentialist judge would prefer a more costly but consequence-driven model (one, e.g. that gives judges more interpretive freedom) over a cheaper but value-neutral alternative. At least until those costs are lower than the benefit produced in individual cases.

Moreover, there are important reasons to adopt more inclusive views about acceptable models. As I mentioned before, "uncertainty" means that there currently is no empirical knowledge about the consequences of “large-scale interpretive choices,” that is the results produced by unfailing compliance with a set of interpretive rules. It concerns a causal relation between interpretive models and systemic outcomes. But who said that interpretive models can be understood to produce better or worse overall decisions? That is, why should one assume a strong causal link between those models and the quality of judicial decisions without taking into account the quality of the rules that should be interpreted? Lack of knowledge about that causal connection may occur simply because there is no such strong causal connection, because the method alone is not determinant of
the outcome. One can always look back to particular decisions and determine whether they were good or bad in accordance to a defined standard. We can even say that had the judge used a different interpretive method, he'd arrived at a better decision. But this comparison is only possible because we understand the decision as the result of a judgment that involves three elements: facts, interpretive method, and the law. There is no a priori reason why the interpretive method, even if indispensable to particular decisions, is the causal determinant of the consequences in a series of decisions.

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Perhaps the problem lies in how the issue of choice is framed. The successive specifications of Vermeule’s choice-procedure may be understood as the gradual exclusion of criteria that might guide value-sensitive choice. First, he rules out any approach that is not consequentialist (that is does not seek to maximize value); Second, he takes rule-consequentialism to exclude choice based on non-systemic effects (like effects to the parties) or non-aggregated results (that is, particular cases). When the problem of uncertainty is posed, all that remains is the resolve to deal with the problem of judicial interpretation as the choice, once and for all, of a rule-like interpretive model. The move towards that resolve is greater than the desire to produce good consequences.

The fundamental issue here is that none of the previous specifications can be explained in purely methodological terms, nor can it be justified normatively -- except in terms of a non-political, value-neutral enterprise. Neither arbitrariness nor the adoption of such normative justification will serve Vermeule ends because the value-transcendence
he hopes to achieve depends on developing a choice procedure on the basis of "empirical, institutional" facts, not arbitrary choices or controversial decisions.

[...]
C. Non-Political, Value-Transcendent Justification of Political Institutions

The book’s methodological propositions can be summarized thus:

1. We should choose interpretive models exclusively on the basis of the consequences they generate and reject all non-consequentialist considerations and non-maximizing approaches.

2. We should choose whatever model maximizes the overall value of systemic consequences, and we cannot accept models that give judges freedom to decide on the basis of the consequences of the case at hand (whether systemic or to the parties in that case) because of their “limited information-processing capabilities” and “bounded rationality.”

3. We don't know for sure the overall, systemic consequences of this or that interpretive model. As a result, we should follow techniques of rational decision-making under uncertainty, and these techniques compel us to choose among interpretive models on the basis of their adequacy to an institution’s value-neutral capabilities.

In this Part B of the article, I have tried to show why these propositions cannot ground a normatively attractive or methodologically compelling framework for the analysis of judicial decision-making.

The concern with a value-transcendent, non-political form of justification permeates the book's entire argument, and perhaps is the most important aspect of *Judging under Uncertainty*. Vermeule himself takes it to be a major contribution of his theory. As he
puts it, a “central aim of [his project] is to suggest, and to show, that consequentialists can make progress on interpretive theory by bracketing high-level disagreements about competing value theories.”

The notion that a particular model of judicial activity can be justified in a way that transcends value-related disagreements marks a fundamental difference between Vermeule's project and recent efforts to review the role of judges on the basis of empirical data. Take for instance Mark Tushnet’s and Ran Hirschl’s empirical studies on comparative constitutional law. These authors use empirical information in connection with an explicit normative take on institutional design. They adopt clearly political and substantive parameters to ask whether and to what extent different constitutional systems affect the enjoyment of rights.

Also, compare Vermeule’s theory with other conservative legal thinkers’. Scalia, for instance, also advocates a very constrained form of judicial activity. He parts with Vermeule, however, because his originalism is premised on a political theory about the legitimacy of different institutional actors, while *Textualism plus Deference* expressly denies any role to that category. The meaning of a constrained form of judicial activity is completely detached from understanding it as a political institution.

Also different from Bentham. (…)

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Moreover, the pursuit of a non-political, value-transcendent justification also locates Vermeule’s project within a larger trend in legal scholarship. (…)
The project of legal theory shared by Sunstein, Eric Posner and Vermeule works at two different levels. On the one hand, it promotes neutrality towards substantive theories of value, that is, it seeks to provide criteria for choice without taking sides on disputes about which values should the legal system make concrete. Value transcendence, in this case, corresponds to the assumption that the choice-procedure developed in the book is compelling whatever substantive values one thinks the law should express. The choice-procedure developed in the book is thus expected to transcend first-order disagreements and justify a single institutional model of judicial interpretation.

On the other hand, the project disconnects the justification of political institutions from considerations of its political character -- political not in the sense of interest-based disputes, but as a distinctive sphere of activity. Thus Vermeule's disdain for political principles such as constitutional democracy, rule of law, legitimacy, etc. Political institutions, under this view, not only can, but should be fully understood and assessed without those abstract and controversial categories.

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The book oscillates between two explanations of its value-neutral, non-political approach. On the one hand, that approach is as the consequence of a decision to privilege agreement. This is developed by Sunstein: incompletely theorized agreements, second-order decisions, bracketing high-level principles, etc. The problem is that agreement about employing non-political criteria is not reached regardless of first order considerations. On the contrary, [...]

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On the other hand, the approach is seen as a consequence, not of a method that recognizes the limitations imposed by uncertainty, but of employing that method to justify certain institutions, with their particular features. This is Vermeule's idea. "For empirical and institutional reasons," claims Vermeule, "a range of value theories converge on the operational level, yielding similar recommendations about the decision-procedures judges should use." This occurs, he says, "not because competing value theories are themselves dispensable in principle, but because the differences between them turn out to make little difference on the ground." Neutrality this time is not as much desirable as it is (so-to-speak) required. This view is not vulnerable to the same charges as the agreement-based rationale for neutrality. The difficulty in this case is to show that the method itself or the description of relevant institutional aspects does not involve arbitrary choices.

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As I tried to show, the argument of the book cannot stand without the book's non-political, value-transcendent premises. At the same time, those premises are inextricable from the book's normative and methodological shortcomings. They shape the arguments used in support of every major methodological principle developed in the book. Every step towards the proposed choice procedure can be understood as an attempt to isolate and discard value-sensitive criteria. This corrupts those methodological principles and the choice procedure. For they cease to be seen as a requirement of "empirical and institutional" facts, and become dependent on views about the law that are no less
disputed than conceptions of democracy or legitimacy. In this case, value-neutrality as an attempt to escape disagreement is bound to fail. […] 
A Note about Mistake

Vermeule argues that besides keeping costs of participation and decision making low, the adoption of Textualism plus Deference would also reduce the rate of mistakes in judicial activity. In order to support this claim, largely based on the idea that courts’ processing information capacities are inferior to agencies’ and legislatures’, Vermeule offers us an analysis of how the Supreme Court mishandled legislative history and thus failed to capture the real intent of the Congress in Holy Trinity. He argues that instead of legislative history, a textual reading of the relevant statute would have accurately produced legislative intent.

The conception of mistake underlying this analysis is that mistakes consist in deviations from legislative intent. This generates three kinds of problems.

First, legislative intent cannot be assumed to be the point of judicial interpretation of statutes without begging a fundamental conceptual issue.

Suppose we accept that Holy Trinity was wrongly decided, that a textual reading is more likely to get to legislative intent, and that judges in general, and not only in this case, are not prepared to use correctly legislative history. It might be the case that Textualism plus Deference (an interpretive procedure that prohibits the use of legislative history, emphasizes textual understanding and deference to the legislatures’ own interpretation of the statute) is in fact likely to reduce the probability of that type of mistake.
This notion of mistake, however, raises important issues concerning Vermeule’s argument. First, there is the question whether his analysis in this case actually supports the claim that courts are poorer decision-makers than legislatures and agencies. His “case study” argues that the Supreme Court misunderstood legislative history in the Holy Church case. But the argument, whose persuasiveness is itself disputed, cannot easily be generalized to the claim that courts systematically mishandle legislative history, much less to the claim they are likely to make mistakes using other types of non-textual interpretation.

Second, and more importantly, Vermeule’s conception of mistake assumes a very controversial understanding of the purpose of judicial decision-making. Even if there was proof that courts misuse legislative history and thus fail to capture legislative intent, that does not necessarily mean one should agree that this is the type of judicial mistake we need to reduce. Capturing legislative intent may sound like a reasonable conception, independent from larger political assumptions, something we could all agree as the core of statutory interpretation. To be sure, failure in this sort of task would frustrate the very point of adjudication for those who believe that legislatures are the only legitimate source of law and that the application of the law should take individual statutory provisions as sufficient sources for judicial decision. For them, finding a solution that will improve accuracy in capturing legislative intent is indeed the major task of judicial reform. But for others, failures in capturing legislative intent may be a much less relevant problem. Instead of seeking a mechanism to improve the courts’ or other institutional agents’ capacity of getting those intentions right, they would seek instead a solution that would
help make concrete law’s underlying ideals of social organization. Still others may reject the whole idea of a value-neutral way of determining judicial failure.

The most interesting aspect of Vermeule’s conception of mistake is that it plays against the book’s fundamental commitments to consequentialism and value-subjectivism. Think of judicial mistakes in the way Vermeule had initially suggested consequentialists should think: as deviations from the outcomes they believe the law should produce. Under this view, a judge would have reasons to adopt an interpretive method only to the extent that that method helps achieve outcomes that fit his own theory of value. If one wants to convince an individual judge that legislatures and agencies are institutionally better suited to take responsibility over the systemic consequences of laws, one would have to show that legislatures and agencies are capable of producing good outcomes under her particular theory of value. Arguing that Textualism plus Deference reduces mistakes about legislative intent in general would simply miss the point.

Furthermore, a judge’s commitment to [Textualism plus Deference] is contingent on the convergence of the outcomes she values and those actually produced by legislators and agencies. In the abstract, one might wonder whether Textualism plus Deference would lead to overall good or bad consequences. But once Textualism plus Deference is applied to actual legal provisions, one soon realizes whether the consequences of judicial decisions are in line with one’s own values. The need of such convergence could only be dismissed if judges were unable to make any connection between what deference to the legislature entails and their own assessment of the judicial decisions. Naturally, this is not the case.