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# Distrust and Clarify: Appreciating Congressional Overrides

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# Texas Law Review

## *See Also*

### Response

## Distrust and Clarify: Appreciating Congressional Overrides

James J. Brudney<sup>\*</sup>

### I. Introduction

Deborah Widiss continues to make important contributions in an area of statutory interpretation that has been largely neglected: the consequences of congressional overrides. Professor Widiss previously demonstrated how the Supreme Court and lower courts often confine the reach of statutes that purposefully override prior court decisions, thereby reviving aspects of the overridden judicial interpretations as “shadow precedents.”<sup>1</sup> In *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*,<sup>2</sup> Professor Widiss addresses the Supreme Court’s further expansion of judicial power in the aftermath of congressional disapproval. Faced with the override of its textual interpretation in one employment discrimination statute, the Court inferred from this repudiation that it could approach on a clean slate identical but unamended language in a closely related statute.<sup>3</sup> Professor Widiss deftly demonstrates that the Court’s decision to “grow a new head”—ignoring both Congress’s purpose when enacting the override and the Court’s own shadow precedent when

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<sup>1</sup> See Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009).

<sup>2</sup> Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEXAS L. REV. 859 (2012).

<sup>3</sup> See *Gross v. FBL Fin. Servs., Inc.* 129 S. Ct. 2343, 2349, 2351–52 (2009) (Thomas, J.); *id.* at 2356 (Stevens, J., dissenting). For Professor Widiss’s overview of *Gross*, see Widiss, *supra* note 2, at 888–93.

construing the same language—is unjustified in separation-of-powers terms and subversive from a rule-of-law perspective.<sup>4</sup>

Professor Widiss’s analysis focuses on Supreme Court decisions in the employment discrimination area. As she explains, the hydra and shadow-precedent problems are especially likely to arise in this field for two reasons: numerous statutes addressing parallel antidiscrimination concerns tend to be interpreted in *pari materia*, and overrides occur with some frequency.<sup>5</sup> But the Supreme Court’s willingness to minimize or distort the meaning of congressional overrides extends to other areas of law as well.<sup>6</sup>

My Response adopts a Congress-centered view of overrides. It starts from a core premise that these overrides signify Congress’s distrust of the Court.<sup>7</sup> Once Congress concludes that the traditional “faithful agent” norm for construing a statute<sup>8</sup> is inoperative, the breakdown has important implications. When considering the meaning of an override enactment, judges should discount the value of court-centered interpretive assets such as ordinary language analysis or the canons of construction. Indeed, judicial reliance on these textualist resources is often associated with overrides in the first instance.<sup>9</sup> Rather, courts construing new text that reflects Congress’s disapproval of prior judicial interpretation should pay particular attention to congressionally generated evidence explaining the nature and contours of that disapproval. This evidence may appear in a textual statement of findings and purpose, but it is more likely to be part of a conference report, committee report, or other legislative history.

Professor Widiss’s proposed solution to the hydra problem calls for courts to adopt a canon-like rebuttable presumption, applying Congress’s signaled meaning to shared language “so long as the [text in question] can

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<sup>4</sup> See Widiss, *supra* note 2, at 890–900, 908–26.

<sup>5</sup> *Id.* at 878–79; Widiss *supra* note 1, at 536–37.

<sup>6</sup> See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (construing override text that revised a federal jurisdiction statute); *Cleveland v. United States*, 531 U.S. 12 (2000) (construing override text that revised a criminal law statute); *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417 (1995) (construing override text that revised a sovereign immunity statute).

<sup>7</sup> My focus, like that of Professor Widiss, is on overrides of Supreme Court decisions occurring in a relatively short time frame, typically five years or less.

<sup>8</sup> It is well recognized that “[i]n the domain of statutory interpretation, Congress is the master.” *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting). See Widiss, *supra* note 1, at 518–20.

<sup>9</sup> See Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions* 53 *VAND. L. REV.* 887, 900–10 (2009) (reporting that a disproportionate number of federal court decisions interpreting bankruptcy statutes from 1979 to 1998 that were overridden by Congress relied on the textualist method); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 347–48 (1991) (reporting that nearly half the overrides from 1967 to 1990 address decisions in which the Court’s primary reasoning was based on plain meaning or canons of construction, whereas overrides based on statutory purpose are rare); see FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 82 (2009) (summarizing findings from various studies).

reasonably bear” the meaning Congress has identified.<sup>10</sup> In the override setting, this approach seems unduly deferential to the judicial branch. Professor Widiss recognizes that it is hazardous to trust that courts will undertake responsible statutory interpretation on an issue where they have already acted irresponsibly in Congress’s eyes.<sup>11</sup>

My proposal would tether courts more closely to Congress’s expressions of purpose and intent when construing its amended text. As explained below, legislative history accompanying congressional overrides is especially likely to reflect Congress’s institutional views. Any risk that the formulation of these congressional expressions will be unrepresentative or insincere is minimal and can be readily controlled. Moreover, legislative record evidence accompanying override text aptly illustrates why the larger debate about legislative history as an interpretive resource should focus on which factors lend it greater or lesser probative weight, rather than on shopworn arguments about threshold admissibility.

Part II explains the interbranch implications of overrides, and why Congress’s attitude toward a court it has overridden is appropriately one of distrust. Part III considers the options before Congress for alleviating its distrust by clarifying any ambiguity or silence regarding the scope of an override. I agree with Professor Widiss that textual clarification is generally not a realistic alternative. I then discuss why canons or presumptions are no more practicable, and why purposive statements and legislative history—subject to adequate review—should be the preferred option.

## II. Congress’s Expression of Distrust

### A. *The Court’s Failure as Faithful Agent*

The basic constitutional conception of legislative supremacy views Congress as vested with supreme policy-making authority under Article I. The Court’s role in legislative matters is to serve as an honest agent, construing and enforcing the policy directives embodied in statutes.<sup>12</sup> This notion of an honest or faithful agent obviously understates the challenges that judges face when interpreting federal laws. Textualists, intentionalists, and purposivists all agree on the importance of deferring to congressional authority. They differ considerably on the proper approach to their deferential task and, in particular, on how judges may best respect the supremacy of Congress.<sup>13</sup> Still, notwithstanding such differences, there is

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<sup>10</sup> Widiss, *supra* note 2, at 933.

<sup>11</sup> *See id.* at 938.

<sup>12</sup> *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 79 (2001).

<sup>13</sup> *Compare, e.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14–37 (1997) (arguing that textualism and semantic resources best respect legislative supremacy), *and* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L.

broad judicial consensus on the need to carry out congressional directives subject to possible extrinsic limits imposed by the Constitution.

When Congress amends the law to codify rejection of a Supreme Court decision,<sup>14</sup> it concludes that the faithful agent norm has been breached. Override legislation should be viewed as a distinctive subset of lawmaking in general for two reasons. The first is that legislators focus on the work of the judicial branch from a self-consciously institutional perspective. Most problems that capture the attention of the policy community working in and around Congress derive from a broad set of economic, social, scientific, or moral concerns. Solutions to these complex problems typically are proposed by an array of interested entities and individuals with whom Congress regularly interacts. The politics of lawmaking often requires a series of compromise arrangements in order to accommodate these various competing interests.

By contrast, the typical problem giving rise to override legislation is a particular Court decision that the current Congress concludes has erroneously applied a prior congressional rule, standard, prohibition, or entitlement. Legislators are responding in constitutionally aware terms to the exercise of power by a coordinate branch. Their response is to develop and express an understanding of how their own institutional authority has been trammled as part of correcting what they view as the transgression. For this purpose, Congress, and especially the standing committees with subject matter jurisdiction, tend to devote sustained attention to the judicial decision at issue, including a close examination of its reasoning and holding.

The second distinctive trait of override laws is that Congress conveys its considered disapproval of Court action. This disapproval may on occasion be communicated in measured terms, but more often the tone is critical, didactic, or angry.

### *B. Congress's View of the Court's Failure*

As illustrated by the following sample of deliberative statements excerpted from congressional findings, committee reports, and floor statements, Congress does not mince words when enacting an override statute,

- The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear . . . that the exception does not authorize an employer to require or

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REV. 70, 99, 102–03 (2006) (same), with Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848–64 (1992) (arguing that intentionalism and purposive resources must be part of respect for legislative supremacy), and James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1223–24 (2010) (same).

<sup>14</sup> Like Professor Widiss, I focus on overrides of Supreme Court decisions, although what follows is applicable to overrides of lower courts.

permit involuntary retirement of an employee within the protected age group on account of age. In *McMann v. United Airlines*, 98 S. Ct. 244 (1977), the Supreme Court held to the contrary. . . . The conferees specifically disagree with the Supreme Court’s holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.<sup>15</sup>

- [I]n *Finley v United States*, 109 S. Ct. 2003 (1989), the Supreme Court cast substantial doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction. . . . This section would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction.<sup>16</sup>
- Where, as was alleged in [*Lorance v. AT&T Technologies Inc.*, 490 U.S. 900 (1989)], an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. . . .<sup>17</sup> This legislation should be interpreted as disapproving the extension of [*Lorance*] to contexts outside of seniority systems.<sup>18</sup>
- [T]he Supreme Court’s decision [in *Bailey v. United States*, 516 U.S. 137 (1995)] that “use” requires “active employment” has had a significant impact upon federal drug and violent crime prosecutions and convictions across the country. . . . H.R. 424 . . . replaces [the words “uses” or “carries”] with a graded penalty structure for possessing, brandishing or discharging a firearm. The word “possession” has a broader meaning than either “uses” or “carries,” thus reversing the restrictive effect of the *Bailey* decision.<sup>19</sup>
- Once again, the Committee intends to overturn the erroneous interpretation of the Supreme Court [as to the meaning of “subterfuge to evade the purposes of” The Age

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<sup>15</sup> H.R. REP. NO. 95-950 at 8 (1978) (Conf. Rep.), reprinted in 1978 U.S.C.C.A.N. 528, 529 (accompanying the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256).

<sup>16</sup> H.R. REP. NO. 101-734 at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6874 (accompanying the Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650).

<sup>17</sup> S. REP. NO. 101-315, pt. 6, at 54 (1990) (accompanying Civil Rights Act of 1990).

<sup>18</sup> 137 CONG. REC. 29,047 (1991) (Sponsors’ Interpretive Memorandum) (accompanying The Civil Rights Act of 1991, 42 U.S.C. § 1981 (2006)).

<sup>19</sup> H.R. REP. NO. 105-344, at 5–6 (1997) (accompanying Pub. L. No. 105-386 (1997), To Provide for Increased Mandatory Minimum Sentences for Criminals Possessing Firearms, and for Other Purposes).

Discrimination in Employment Act]. . . . The Committee regrets that the Supreme Court in [*Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989)] chose not to credit the language of the 1978 Conference Report [accompanying an earlier override], language that appeared in the Congressional Record and was overwhelmingly approved by both Houses of Congress. The Committee hopes that in the future, the Supreme Court will take more seriously such expressions of legislative intent. . . .<sup>20</sup>

- The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, [550 U.S. 618 (2007)], significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.<sup>21</sup>

This series of excerpts indicates how Congress—directly and through its designated deliberative agents—elaborates in reasoned terms its disappointment with Court decisions. In many instances, the override Congress asserts that the enacting Congress would have disapproved as well.<sup>22</sup> Assertions about the intent of an earlier Congress cannot be proven, and they have occasionally given rise to debate as to whether statutory law is being restored or created.<sup>23</sup> Such debate, however, ought not to obscure a basic truth concerning interbranch dialogue in this setting.

Congress determining that the Court erred on a matter of statutory interpretation is analogous to the Court holding that Congress acted in violation of the Constitution. This analogy holds regardless of whether the sanctioning branch purports to act in a restorative or creative manner. In the override setting, the Justices presumably believe they have been faithful to the enacting Congress, and they may even conclude the Court is a victim of

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<sup>20</sup> S. Rep. No. 101-263, at 29 (1990) (accompanying Pub. L. No. 101-433, Older Workers Benefit Protection Act of 1990).

<sup>21</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2 (2009).

<sup>22</sup> See H.R. REP. NO. 110-237, at 15 (2007) (asserting that the 1991 Congress would have rejected the Court's decision in *Ledbetter*); H.R. REP. NO. 103-652, at 169 (1994) (Conf. Rep.) (asserting that override of the Court's decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994), restores original congressional intent).

<sup>23</sup> See, e.g., *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304-07 (1994) (discussing the possible retroactive effect of the 1991 Civil Rights Act override purporting to restore prior law); *West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (criticizing judicial efforts to reconcile or eliminate inconsistencies on a particular subject between earlier and later congresses).

bait-and-switch because the override Congress has a new and different intent. The same dynamic occurs when the Court invalidates an act of Congress. The Justices assert—expressly or implicitly—that invalidation vindicates the supremacy of the Constitution as a steady and seamless source of meaning, while Congress may believe—at times with justification—that it has been victimized by the bait-and-switch of a new constitutional direction.<sup>24</sup>

When one branch negates the considered judgment of another, its message reflects confidence in an area of superior authority.<sup>25</sup> That message, typically delivered in a somber or stern tone, also serves as a reminder to the rebuked branch that a degree of humility is appropriate. Not surprisingly, the rebuked branch may initially bridle at such a reminder. When the Court invalidates a statute, members of Congress often react with expressions of anger or hostility.<sup>26</sup> Ultimately, if Congress decides to revisit the policy area at issue, it does so based on careful attention to the Court's earlier reasoning. This attention is likely to reflect both pragmatic interest in avoiding a second invalidation and a certain respect (albeit at times grudging) for the Court's authority in construing and applying the Constitution.

When Congress overrides a Supreme Court decision, the reaction of the Court is not immediately apparent. The Justices rarely express substantive views outside their opinions, and it typically takes many years before the override statute gives rise to a controversy that reaches the Court. Certain justices have suggested that overrides are part of respectful discourse between the Court and Congress,<sup>27</sup> and at times, the Court's concern to avoid constitutional issues leads it to invite congressional clarification even if this

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<sup>24</sup> See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 98–115 (2001) (demonstrating how the Court after 1995 dramatically altered its approach to reviewing constitutionality of federal statutes under both the Commerce Clause and Section 5 of the Fourteenth Amendment).

<sup>25</sup> Cf. Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011) (discussing serial litigation as a form of ongoing dialogue between agencies and courts). Agency-court dialogue differs from the Congress-Court override setting in important respects. The agency is not “master of a domain” in the same way as Congress is under Article I, as evidenced, *inter alia*, by modern “hard-look” review under the Administrative Procedure Act. See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). Further, dialogue between a court and an agency is typically more tightly confined, focusing on evidence or reasoning for a single agency rule, not analogous circumstances.

<sup>26</sup> See, e.g., 156 CONG. REC. H3443 (daily ed. May 13, 2010) (statement of Rep. Heinrich calling *Citizens United v. FEC*, 130 S. Ct. 876 (2010) a “slap in the face”); 156 CONG. REC. S274–76 (daily ed. Jan. 28, 2010) (statement of Sen. Leahy, sharply critical of the Court's decision in *Citizens United*); 136 CONG. REC. S8643 (daily ed. June 25, 1990) (statement of Sen. Helms decrying Court's decision in *United States v. Eichman*, 496 U.S. 310 (1990)); 136 CONG. REC. H4014–15 (daily ed. June 21, 1990) (statement of Rep. Clement stating that great patriots would decry the Court's decision in *Eichman*).

<sup>27</sup> See James J. Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg's Eclectic Approach to Statutory Interpretation*, 70 OHIO ST. L.J. 889, 911 (discussing Justice Ginsburg's emphasis on the importance of dialogue rather than diatribe in relations with Congress); *id.* at 915 (discussing specific Ginsburg opinions inviting congressional response).

results in an override.<sup>28</sup> At other times, though, the Court's approach seems to verge on arrogance: override follows judicial insistence that the text is so clear the Court need not consult contextual evidence of Congress's purpose or intent.<sup>29</sup>

Even if—perhaps especially if—the Court was initially overbearing or prideful about its interpretive approach, a proper respect for Congress's superior authority should lead the Justices to pay close attention to Congress's override *reasoning* when construing the subsequent statute. An override signifies that the Court has mischaracterized Congress's enacted meaning as conceived by the override legislators. That context frames the Court's second-stage interpretative task, which is to understand and absorb the full extent of its error. Legislative history can be highly salient in this regard because it helps unpack the nature and contours of Congress's admonishment.<sup>30</sup>

Admittedly, when a controversy involving the meaning of any statute reaches the Court, there are likely to be plausible arguments on each side. Assuming some gap or ambiguity in the override text, the Court must choose to rely on inferences from legislative silence or inaction, on the canons of construction, or on legislative history. From Congress's standpoint, the override context makes the first two interpretive assets suspect and the third one more reliable.

### III. Congress's Options to Clarify

As scholars in law and political science have observed, Congress has become more inclined to override Court decisions since the early 1970s.<sup>31</sup> Factors contributing to heightened legislative scrutiny of federal court decisions include the expansion of professional committee staffs, Congress's

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<sup>28</sup> See generally Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162 (1999).

<sup>29</sup> See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994); *West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991); *Pub. Emp. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 168 (1989).

<sup>30</sup> See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425–26 (1995). See generally Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957 (2007).

<sup>31</sup> E.g. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (overriding two Supreme Court decisions construing the ADA); Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1, 112 Stat. 3469, 3469–70 (overriding the *Bailey* decision); see also Eskridge, Jr., *supra* note 9, at 338 (reporting data indicating that Congress overrode 5.7 Supreme Court decisions on average for each Congress from 1967-1974, but 12.6 decisions per Congress from 1975-1990); Lori Hausegger & Lawrence Baum, *Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation*, in GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990S 224, 228 (1998) (discussing overrides through 1996); Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases 1954–2005*, 82 N.Y.U. L. REV. 1340, 1352–54 (2007) (reporting that 20% of Court's 279 tax decisions in this period triggered an override proposal, and 8% (22 proposals) were enacted).

growing mistrust of the judicial branch, and the emerging recognition of statutes as fundamental norms of governance.<sup>32</sup> Professor Widiss has identified two key interpretive questions faced by courts in the aftermath of these overrides.

First, does Congress's correction of a judicial approach when it revises a statutory provision with respect to one form of conduct carry over to *other related forms of conduct covered under the same statutory provision*? For instance, when Congress decides that pre-Act employee benefit plans permitting involuntary retirement unlawfully evade the purposes of the Age Discrimination in Employment Act, should the revised law extend to other components of pre-Act benefit plans as unlawfully evasive?<sup>33</sup> When Congress decides that the criminal code prohibition against obtaining property by means of fraudulent pretenses applies to the intangible property right to honest services, should the amended law apply to other nontraditional forms of property such as government licenses?<sup>34</sup> Second, does Congress's correction of a judicial approach when it revises a provision in one statute carry over to *identical or very similar language in other related statutes*?<sup>35</sup>

Both of these interpretive questions implicate the meaning of legislative silence or inaction. When Congress is focused on correcting what it perceives as judicial error, why does it not do so in text for related conduct under the same textual provision or for the same conduct in related statutes? And if it fails to include text for these related areas, why should courts extrapolate from Congress's override reasoning, rather than relying on language or structure canons such as *expressio unius* and "meaningful variation" to limit Congress's override to its precise terms?

#### A. *Limitations of Legislative Silence*

In understanding why override text may well not capture the full scope of Congress's disapproval, it is necessary to consider the time frame and context in which an override Congress operates. When rejecting a Court decision, Congress is likely to focus initially on what the Court actually held. Congress's obliteration of the judicial result may simply reflect its conclusion that it has done all that was necessary in text under the

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<sup>32</sup> See JEB BARNES, *OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* 43 (2004); WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 5–8 (2010).

<sup>33</sup> See S. REP. NO. 101-263 at 4, 10 (1990) (discussing the meaning of the 1978 ADEA override provision as extending beyond involuntary retirement to other pre-Act benefit plan provisions).

<sup>34</sup> See Public Corruption Prosecution Improvements Act, S. 401, 112th Cong. (2011) (cosponsored by Senators Leahy (D.) and Cornyn (R.), among others) (seeking to override *Cleveland v. United States*, 531 U.S. 12 (2000), by amending the related mail fraud statute).

<sup>35</sup> This question leads to the problem presented in *Gross*, although as Professor Widiss notes, it is a variation on the challenge of discerning the scope and contours of congressional disapproval. Widiss, *supra* note 2, at 875–79.

circumstances. By adopting a prudent approach with respect to its allocation of lawmaking resources, Congress maximizes its ability to address other important legislative business given the well-recognized institutional constraints on its time and political capital.<sup>36</sup>

In addition, there are important reasons why an override Congress will be unable or unwilling to anticipate a series of collateral consequences in textual terms. One is an inescapable lack of awareness as to future policy developments covered by the text. Legislators overriding a Court decision are unlikely to be able to foresee decades in advance which new forms of property may be fraudulently obtained, or how new components of employee-benefit plans may be discriminatorily administered.<sup>37</sup> No inference should be drawn from Congress's de facto decision to eschew any such efforts at clairvoyance.

Indeed, Congress's committee-based lawmaking structure may at times result in an override Congress failing to recognize subtle differences in contemporaneous textual formulation of shared policy objectives. To take a notable example, standing committees in the mid-1970s drafted a number of new environmental and energy statutes regulating technical and scientific subject matter. Those laws identified expert witness fees separately from attorney fees as part of fee-shifting remedial provisions in the lengthy regulatory text.<sup>38</sup> A different standing committee in the same Congress, drafting stand-alone text focused on overriding a Court decision in order to shift fees for prevailing plaintiffs in civil rights cases, failed to refer explicitly to expert witnesses.<sup>39</sup> Despite ample legislative-history evidence that the drafters sought to cover the full costs of vindicating civil rights in the litigation process, Congress was forced to enact a second override text to clarify that expert witness fees were recoverable.<sup>40</sup>

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<sup>36</sup> See James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 21–26, 84–85 (1994).

<sup>37</sup> See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (overriding *McNally v. United States*, 483 U.S. 350 (1987), on the right to honest services without specifically addressing other intangible property rights); Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189, 189 (overriding *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977) on involuntary retirement without specifically addressing other benefit plan components).

<sup>38</sup> Toxic Substances Control Act, Pub. L. No. 94-469, §§ 19(d), 20(c)(2), 90 Stat. 2003, 2039–40 (1976) (codified at 15 U.S.C. §§ 2618(d), 2619(c)(2) (2006)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 7002(e), 90 Stat. 2795, 2826 (codified at 42 U.S.C. § 6972(e) (2006)); Natural Gas Pipeline Safety Act Amendments of 1976, Pub. L. No. 94-477, § 17(e), 90 Stat. 2073, 2076 (codified at 49 U.S.C. app. § 1686(e) (2006)).

<sup>39</sup> See *West Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 108–11 (Stevens, J., dissenting) (observing that “[t]he Senate Report on the Civil Rights Attorney’s Fees Awards Act of 1976 explained that the purpose of the proposed amendment to 42 U.S.C. § 1988 was ‘to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court’s recent decision’” in *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975)).

<sup>40</sup> Compare *West Va. Univ. Hospitals v. Casey*, 499 U.S. 83, 88–89 (1991) (Scalia, J.) (relying on fee-shifting language from other statutes), with *id.* at 110 (Stevens, J., dissenting) (relying on the

Apart from lack of awareness, an override Congress may conclude that it is too awkward or difficult to codify in anticipation of future controversies. Given the legislative goal of offering useful guidance to judges, agencies, and practicing attorneys, the override Congress may opt for flexible language in order to lessen the chances for erroneous or absurd applications of an overly detailed text. For example, in the complex area of supplemental jurisdiction under 28 U.S.C. § 1367,<sup>41</sup> civil procedure scholars maintained that trying to address “all the foreseeable” as part of an override was likely to yield a text that is “too prolix and baroque for everyday use.”<sup>42</sup> Congress in 1990 settled for a text that was “concededly not perfect” but that did manage “to change the direction taken by the Supreme Court in *Finley* [*v. United States*, 490 U.S. 545 (1989) and] to provide basic guidance (in particular the legislative history’s general approval of pre-*Finley* case law . . .).”<sup>43</sup>

Finally, an override Congress may sensibly decide that when identifying some but not all instances of related conduct or related statutes, it risks opening a Pandora’s Box of unpalatable consequences. As Professor Widiss observes, courts have been willing to draw negative inferences when Congress modifies a closely analogous statute in certain respects but not others, or modifies several comparably worded statutes while leaving additional similar statutes unchanged.<sup>44</sup> Such inferences in effect ascribe to the override Congress a level of omniscience that is highly dubious as a general matter.<sup>45</sup> These negative inferences seem especially disrespectful when Congress has upbraided a court for excessive devotion to literal meaning in the first instance.<sup>46</sup>

Courts and commentators have long raised concerns about attributing any legal significance to legislative silence.<sup>47</sup> Gaps in text may carry

legislative history of the statute at issue). For floor statements from bill managers in both houses, see 122 CONG. REC. 31471 (Sens. Scott and Mathias); 33313–14 (Sen. Tunney); 35122–23 (Rep. Drinan). For the override of *Casey*, see Civil Rights Act of 1991, Pub. L. No. 102-166, § 113(b), 105 Stat. 1071, 1079.

<sup>41</sup> See 28 U.S.C. § 1367(a) (2006) (granting supplemental jurisdiction over other claims within the same case or controversy over which the district courts have original jurisdiction).

<sup>42</sup> Thomas D. Rowe et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 961 (1991).

<sup>43</sup> *Id.*

<sup>44</sup> See Widiss, *supra* note 2, at 893–900 (discussing the 1991 CRA and a single minor Amendment to the ADEA); *id.* at 923 n.371 (discussing the 2009 Ledbetter Act that amended four statutes but not the FMLA).

<sup>45</sup> See *supra* notes 37–40 and associated text (describing examples of override Congresses that lacked foresight). See generally William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171 (2000) (explaining that it is unrealistic to assume that Congress is like a single draftsman that knows about all other enacted statutes when it modifies a single law).

<sup>46</sup> See *supra* note 9.

<sup>47</sup> See *Prostar v. Massachi*, 239 F.3d 669, 678 (5th Cir. 2001) (pointing out that congressional silence is not a good interpretive guide because it could be caused by “unawareness, preoccupation,

probative weight in certain limited circumstances,<sup>48</sup> but for all the reasons discussed above, these gaps are weak candidates to be given presumptive significance in an override setting.

### B. *Shortcomings of the Canons*

Language canons, resting on the problematic assumption that statutes can be self-defining,<sup>49</sup> are also an unsatisfactory option in the override context. As background norms, they allow courts to assign controlling weight to what judges regard as conventional usage. The privileging of courts' linguistic puzzle-solving abilities over Congress's efforts at deliberative communication during the lawmaking process is troubling in this setting. While one may accept *arguendo* that courts as a general matter do not act primarily from ideological motives, judicial policy preferences loom larger in areas of override frequency such as civil rights and criminal law.<sup>50</sup> Courts surely do care about institutional legitimacy, as Professor Widiss observes,<sup>51</sup> but the pattern of overrides with respect to civil rights and criminal statutes suggests that the Justices' ideological orientation may not infrequently trump institutional concerns.<sup>52</sup>

Beyond such general considerations, there are familiar problems with the particular language canons touted as clarifying override texts. The *expressio unius* canon is invoked to provide meaning when an override Congress modifies regulation of one item under a statutory provision yet not others. But this canon presumes a level of congressional awareness and

or paralysis"). See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988); Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. MIAMI L. REV. 375 (1992).

<sup>48</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (attributing significance to nonaction by Congress); *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 629 n.7 (1987) (same).

<sup>49</sup> See Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L. Q. 1085, 1089 (1995).

<sup>50</sup> See Eskridge, Jr., *supra* note 9, at 344 (reporting that 15% of congressional overrides from 1967–1990 involved criminal law; civil rights and antitrust were the next highest subject areas at 9% each). For subsequent overrides in the criminal and civil rights areas, see, e.g., note 21 (addressing a 2009 override in civil rights) and note 31 (addressing 1994 and 1997 overrides in criminal law and 2008 override in civil rights).

<sup>51</sup> See Widiss, *supra* note 2, at 938.

<sup>52</sup> With respect to civil rights, it is noteworthy that the early Rehnquist Court was overridden on numerous high profile decisions in the 1990 Older Workers Benefit Protection Act and the 1991 Civil Rights Act, and the Roberts Court in its initial period suffered a similar well publicized fate in the Lilly Ledbetter Fair Pay Act of 2009. The overridden decisions generally relied on language canons and rejected or ignored legislative history. See *Pub. Emp. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 168 (1989); *West Va. Univ. v. Casey*, 499 U.S. 83, 99 (1991); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J. dissenting); *Casey*, at 115 (Stevens, J., dissenting) ("In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.").

comprehensive foresight in the drafting process that is questionable when Congress is focused on rejecting a particular judicial outcome.<sup>53</sup> Similarly, the “meaningful variation” canon is relied on to justify an inference that Congress knowingly limited its error correction to conduct in a single statute. As Professor Widiss convincingly explains, this inference of intentionality is generally unwarranted.<sup>54</sup> Finally, there is the “whole code” canon, encouraging courts to ascribe consistent meaning to certain terms that appear in unrelated titles of the U.S. Code.<sup>55</sup> Such reliance on remote interstatutory references has been singled out for criticism because it is so clearly prone to judicial manipulation (and also because it can unsettle bodies of federal law not before a court).<sup>56</sup> The Supreme Court’s reliance in *Gross* on language from statutes addressing organized crime and consumer protection to determine the meaning of ADEA text is a classic instance of such subjective, ends-oriented analysis.<sup>57</sup>

In contrast to the language canons invoked regularly by the Supreme Court to shape the meaning of override statutes, Professor Widiss’s proposed canonical presumption is more sensitive to this setting. Nonetheless, her suggestion—for a fresh interpretation that is “consistent with the meaning Congress signaled it ascribes to the relevant language, *so long as the preexisting language can reasonably bear such meaning*”<sup>58</sup>—would allow courts to trump Congress’s signals based on judges’ own version of what is reasonable textual analysis. Implicit in Professor Widiss’s presumption is a belief that Congress can define the scope of its override in sufficiently concrete textual terms, and that courts will act faithfully to implement its more concrete definitional approach.<sup>59</sup> In the override context, this level of trust is laudable but misplaced. As we have already seen, Congress has a range of sound reasons to be less than fully concrete in its override text, and courts in the override setting have established a record of deviating from their role as faithful agent.<sup>60</sup>

### C. *Potential of Legislative History*

This is not the place to revisit at length arguments about why legislative history is pragmatically valuable or constitutionally privileged as an

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<sup>53</sup> See *supra* text accompanying notes 36–46; RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 277–82 (1985).

<sup>54</sup> See Widiss, *supra* note 2, at 874.

<sup>55</sup> See Buzbee, *supra* note 45, at 221; Widiss, *supra* note 2, at 874.

<sup>56</sup> Buzbee, *supra* note 45, at 234–40.

<sup>57</sup> See *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009); Widiss, *supra* note 2, at 875.

<sup>58</sup> Widiss, *supra* note 2, at 933 (emphasis added).

<sup>59</sup> *Id.* at 933–38.

<sup>60</sup> See *supra* text accompanying notes 15–21 (reproducing six examples of congressional criticism of Supreme Court reasoning as part of the override process); *supra* note 31 and accompanying text (discussing the substantial increase in overrides since 1974).

interpretive asset.<sup>61</sup> Judges and scholars advocating for its use recognize that the reliability of legislative record evidence in any given case depends on its level of presumptive trustworthiness for members who were seeking to understand the text on which they voted. Because the primary audience for explanations of bill support found in committee reports and key floor statements is other legislators and their staffs, the question responsible judges effectively ask is how likely these explanations are to have been noticed, understood, and accepted by the prototypical “reasonable member of Congress” who voted for enactment.<sup>62</sup>

Professor Widiss has warned that in our textualist era, many judges construing override language refuse to consult legislative history at all.<sup>63</sup> I will bracket for now the possibility that such a categorical refusal to consider Congress’s designated work product amounts to gravely irresponsible judicial behavior.<sup>64</sup> Even for legislative history skeptics, however, expressions of disapproval accompanying a congressional override are worthy of serious attention.

For a start, consider that traditional pragmatic concerns—stemming from the perceived risk of manipulative insertion or readily overlooked commentary—will have little or no foundation. An override provision is a direct, institutionally conscious response to a judicial decision. In rejecting the court’s position, Congress critically engages both the court’s holding and its reasoning. As the excerpts in subpart II(B) make clear, override legislative history is focused on explaining and elaborating congressional disapproval. It seems perverse for any court to ignore entirely such detailed discussion of what an override provision is meant to accomplish.

The presumptive relevance of override legislative history does not mean that all such history is equally probative. Several questions should be considered when assigning appropriate weight to committee report or floor commentary amplifying the basis of Congress’s disapproval. One factor is whether the override text itself was controversial or divisive among members. If legislators are deeply divided on the scope of what is being overridden, legislative history explaining the override is not likely to reflect institutional consensus.<sup>65</sup> Conversely, if legislators are unanimous or close

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<sup>61</sup> See generally Boudreau et. al., *supra* note 30; Breyer, *supra* note 13; Brudney, *supra* note 13.

<sup>62</sup> This is the same prototypical reasonable member who, “by a benign fiction,” is assumed to understand both ordinary linguistic meaning and the surrounding body of law into which a text must be integrated. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring); see Brudney, *supra* note 36, at 76–78.

<sup>63</sup> See Widiss, *supra* note 1, at 563.

<sup>64</sup> See James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1292–94 & n.249 (2009) (reporting positions taken by numerous senators from both parties that courts should pay attention to legislative history as a general matter).

<sup>65</sup> A classic example is legislative history accompanying the 1991 Civil Rights Act override of *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). See 137 CONG. REC. 28855–56 (1991)

to unanimous, then explanations summarizing the purpose or meaning of override text deserve to be taken more seriously.<sup>66</sup>

A second factor is whether the override commentary is expressed in readily comprehensible terms. The more clearly a committee report or floor explanation elaborates on the intended scope or contours of an override, the more weight courts should attach. One example is the 1978 conference report that accompanied override of *McMann* stating that “[t]he conferees specifically disagree with the Supreme Court’s holding *and reasoning*,” and then explaining that no benefit plan provisions are exempt from the Act “[simply] by virtue of the fact they antedate the act or these amendments.”<sup>67</sup> Another example, emphasized by Professor Widiss, is the House committee report accompanying the 1991 Civil Rights Act. Judiciary committee members made clear their intention that the amendment to Title VII overriding *Price Waterhouse* should be used by courts as a basis for construing mixed-motive provisions in numerous other workplace antidiscrimination laws that had regularly been interpreted as consistent with Title VII.<sup>68</sup> Although these two illustrations involve override commentary setting forth a broad scope, Congress also may express a clear intent that override text be narrowly applied. In overriding the Court’s *Finley* decision in 1990, Congress stated in both committee reports that the text was meant to reject *only* that decision while otherwise codifying and preserving pre-*Finley* understandings as to the contours and limits on supplemental jurisdiction.<sup>69</sup>

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(statement of Sen. Danforth) (noting the conflicting interpretive memoranda inserted in the Congressional Record on the precise meaning of the *Wards Cove* override provisions, and adding “a court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us”).

<sup>66</sup> For example, the Judicial Improvements Act of 1990, Pub. L. No. 101-650 (overriding the *Finley* decision) passed the House by a vote of 87-18 and passed the Senate by voice vote. See *Bill Summary and Status 95<sup>th</sup> Congress (1977-78) HR 5383* THOMAS (LIBRARY OF CONGRESS), <http://thomas.loc.gov/cgi-bin/bdquery/z?d101:HR05316:@@X>. The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (overriding the decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977)), passed the House by a vote of 359-4 and passed the Senate by a vote of 88-7. See *Bill Summary and Status, 95<sup>th</sup> Congress (1977 - 1978), HR5383*, THOMAS (LIBRARY OF CONGRESS). While the risk of strategically planted explanations exists even for near-unanimously approved laws, it is *de minimis* with respect to such targeted, self-conscious discussions.

<sup>67</sup> The Conference Committee report is quoted in full. See *supra* text accompanying note 15. The Court subsequently declined to rely on this override history, which led to a second override on the same point of law. See *supra* note 20 and accompanying text.

<sup>68</sup> See Widiss, *supra* note 2, at 885-86 (quoting a House Judiciary Committee Report stating that the Committee intends for related statutes to be interpreted consistently with Title VII as amended). The Court in *Gross* ignored this legislative history.

<sup>69</sup> See *supra* note 16 and accompanying text. The Court rejected relying on this legislative history, and instead construed the 1990 override text as altering pre-existing law in additional respects. Compare *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567-71 (2005) (Kennedy, J.), with *id.* at 572-77 (Stevens, J., dissenting).

A third factor affecting probative weight is whether the override commentary is consistent with the larger purpose or thrust of the statute. In the 1991 Civil Rights Act, Congress overrode or modified as many as eleven Supreme Court decisions in a single law.<sup>70</sup> Congress also made clear in text that one of its main purposes was to respond to these recent Court decisions “by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”<sup>71</sup> This expansive remedial framework should not be enough on its own to overcome unequivocal evidence of a narrower legislative intent regarding a particular court decision, as set forth in text or case-specific override commentary. At the same time, when Congress expresses a broad-based determination to undo constraints imposed by the Court in an entire area of law, that larger purpose should tilt the interpretive scales, especially when it is consistent with clearly expressed override commentary on the disapproved decision.<sup>72</sup>

Finally, there are certain overarching limits on the weight attributable to override commentary. One is an override text that expresses in positive terms—not through negative inferences from gaps or ambiguities—the precise contours or limits of Congress’s disapproval.<sup>73</sup> Another is the applicability of the substantive canon of constitutional avoidance. If construing an override text and accompanying commentary one way would raise serious doubts as to its constitutionality, and an alternative construction is not plainly contrary to Congress’s intent, the Court may choose the alternative even if the “avoided” construction has some support in the

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<sup>70</sup> See Ruth Colker, *The Mythic 43 Million Americans With Disabilities*, 49 WM. & MARY L. REV. 1, 17 & n.60 (2007) (listing nine decisions overridden by the Civil Rights Act of 1991). Two more decisions were overridden in the 1991 Act. See Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 109, 113(b), 105 Stat. 1071, 1077–79 (amending Title VII so that it applies extraterritorially, thereby overriding the Court’s holding in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), and amending the statute that the Court held excluded expert fees in *West Va. Univ. Hosps. v. Casey*, 499 U.S. 83 (1991), so that it explicitly includes expert fees).

<sup>71</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071.

<sup>72</sup> See Widiss, *supra* note 2, at 899–900. Conversely, if the override provision is a small and discrete part of a larger statute with a separate thrust, then such purposive considerations should carry less weight. See, e.g., Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (overriding *McNally v. United States*, 483 U.S. 350 (1987), by defining “a scheme or artifice to defraud” to include “a scheme or artifice to deprive another of the intangible right of honest services”).

<sup>73</sup> See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, §§ 2, 7, 102 Stat. 28, 28, 31 (“The Congress finds that (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad institution-wide application of those laws as previously administered. . . . Nothing in the amendments made by this Act shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before enactment of this Act.”).

legislative history.<sup>74</sup> The avoidance canon has drawn criticism from judges and scholars and it is surely susceptible to abuse.<sup>75</sup> Still, for present purposes it is enough to observe that a court faithfully seeking to avoid invalidation of an override text may at times impose limits on the scope of Congress's expressed intentions.<sup>76</sup>

#### IV. Conclusion

In two well-crafted articles, Professor Widiss has unmasked the Court's recent pronounced tendency to disrespect Congress in the override setting. Her critique of the *Gross* decision is devastatingly effective, and in her proposed solution, she is inclined to privilege congressional signals over judicial ones when construing the scope and meaning of override text.<sup>77</sup> My Response has built on her inclination, arguing that override legislative history is entitled to special weight when contrasted with textual silence and language canons. The fact that some justices are unwilling to consider this (or any other) legislative history is disturbing but hardly dispositive. From the perspective of legislative supremacy and judicial responsibility, it is time to renounce such zeal in the override context.

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<sup>74</sup> See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–78 (1988).

<sup>75</sup> See, e.g., POSNER, *supra* note 53, at 285; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 640–45 (1992) (criticizing the Court for selectively using the clear statement rule to protect some constitutional values but not others); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (1995) (lamenting the fact that interpreting a statute to avoid constitutional questions frequently results in an interpretation that the drafters would not have preferred).

<sup>76</sup> See *Skilling v. United States*, 130 S. Ct. 2896, 2927–31 (2010) (construing an override amendment of a wire-fraud statute to avoid unconstitutional vagueness by limiting the amendment to cover only bribes and kickbacks rather than the wider honest-services category that Congress intended).

<sup>77</sup> See Widiss, *supra* note 2, at 933.