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# Overriding Supreme Court Statutory Interpretation Decisions

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# Article

## Overriding Supreme Court Statutory Interpretation Decisions

William N. Eskridge, Jr.†

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As if to debunk the conventional wisdom, the 101st Congress busied itself with efforts to override numerous Supreme Court decisions construing federal statutes.<sup>1</sup> Successful legislation overrode eight recent opinions interpreting federal statutes.<sup>2</sup> Overturning an older decision, another law for the first time rejected a Supreme Court interpretation discriminating against bisexuals, gay men, and lesbians.<sup>3</sup> Even abortive override efforts in the 101st Congress

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1. This Article will use the term "override" to mean any time Congress reacts consciously to, and modifies a statutory interpretation decision. A congressional "override" includes a statute that: (1) completely overrules the holding of a statutory interpretation decision, just as a subsequent Court would overrule an unsatisfactory precedent; (2) modifies the result of a decision in some material way, such that the same case would have been decided differently; or (3) modifies the consequences of the decision, such that the same case would have been decided in the same way but subsequent cases would be decided differently. With only a few exceptions, this Article will not use the term "override" to include statutes for which the legislative history—mainly committee reports and hearings—does not reveal a legislative focus on judicial decisions.

2. *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Finley v. United States*, 490 U.S. 545 (1989); *Coit Indep. Joint Venture v. Federal Sav. & Loan*, 489 U.S. 561 (1989); *United States v. Fausto*, 484 U.S. 439 (1988); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); *Secretary of Interior v. California*, 464 U.S. 312 (1984). Appendix I lists the statutes overriding these decisions.

3. The Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (1990), rewrote the exclusion provisions of the Immigration and Nationality Act, in part to override *Boutillier v. INS*, 387 U.S. 118 (1967), which had interpreted the Act to exclude bisexuals, gay men, and lesbians from the United States.

illustrated Congress' attention to the Court's statutory interpretation cases. Most prominent among the unsuccessful override efforts was the vetoed Civil Rights Act of 1990, which would have overturned nine recent decisions narrowly construing Title VII of the Civil Rights Act of 1964 and related statutes. A similar Civil Rights Act of 1991, however, was enacted into law by the 102d Congress.<sup>4</sup>

Congress' attention to the Court's statutory decisions raises issues that are critically important to statutory interpretation scholarship. Specifically, Congress' recent override activity presents scholars with an opportunity to revisit longstanding academic debates about (1) congressional awareness of, and responsiveness to, Supreme Court decisions in general; (2) political theories that realistically describe both the legislative process and the interaction between the Court and Congress; and (3) the ramifications of the first two debates for the theory and practice of statutory interpretation.

Three obstacles thus far have hindered academic debate on these topics. First, and most important, existing scholarship has not yielded much reliable data about when and how often Congress overrides the Court. Even the leading empirical studies by political scientists are, on the whole, disappointingly incomplete. Second, theoretical literature on the legislative process is divided into opposing viewpoints that fail to recognize alternative approaches. One side views the political process as dominated by rent-seeking interest groups, while the other sees politics as deliberation about the common good. Without a

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4. The proposed Civil Rights Act of 1990 would have overturned *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Technologies Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 754 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Evans v. Jeff D.*, 475 U.S. 717 (1986). Identical bills were introduced in both chambers to override these cases. S. 2104, 101st Cong., 2d Sess. (1990), and H.R. 4000, 101st Cong., 2d Sess. (1990). Congress passed the override bill as amended. The President vetoed the bill, and his veto was sustained by a 66-34 vote in the Senate. 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990). The Civil Rights Act of 1991, which passed Congress in November 1991 and was signed by President Bush on November 21, see Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at A1, overrides these nine decisions, as well as *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991); *West Virginia Univ. Hospitals, Inc. v. Casey*, 111 S. Ct. 1138 (1991); and *Marek v. Chesney*, 473 U.S. 1 (1985).

Also in 1990, the House Judiciary Committee reported a crime control bill that would have overridden at least nine interpretations of the federal habeas corpus statute: *Sawyer v. Smith*, 110 S. Ct. 2822 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990); *Butler v. McKellan*, 494 U.S. 407 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion); *Murray v. Carrier*, 477 U.S. 478 (1986); *United States v. Frady*, 456 U.S. 152 (1982); *Engle v. Isaac*, 456 U.S. 107 (1982); and *Fay v. Noia*, 372 U.S. 391 (1963). See H.R. REP. NO. 681(I), 101st Cong., 2d Sess. 123-35 (1990), reprinted in 1990 U.S.C.C.A.N. 6472, 6528-41. The habeas corpus title of the bill was amended on the floor of the House and, as amended, was dropped in conference with the Senate. Title XI of the proposed Crime Control Act of 1991, H.R. 3371, 102d Cong., 1st Sess. (1991), which passed the House in October 1991, would override some of these decisions.

Also in 1990, the Senate passed a bill that would have overridden the celebrated case of *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (interpreting Clean Air Act to permit companies to balance out pollution levels within large "bubble"). See S. REP. NO. 228, 101st Cong., 2d Sess. 24 (1990), reprinted in 1990 U.S.C.C.A.N. 3385, 3410. This provision was dropped in conference with the House.

consensus, or even dialogue between the competing camps, political science scholarship is not as helpful to legal scholarship as it might be. Third, legal theories touching on the political process do not represent the most up-to-date political science data and theory. Hence, even if reliable empirical data and useful theoretical consensus existed, they would not necessarily inform legal discourse.

Based on more comprehensive empirical evidence documenting congressional responses to the Court's statutory interpretation decisions, this Article presents a revised view of the legislative process and the interaction between the Court, Congress, and the President. It further discusses the implications that this revised discourse has for the theory and practice of statutory interpretation. Part I and the appendices to this Article report the results of an empirical survey of congressional overrides of Supreme Court—as well as lower court—interpretations of federal statutes. It concludes that Congress and its committees are aware of the Court's statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported. Congressional overrides are most likely when a Supreme Court interpretation reveals an ideologically fragmented Court, relies on the text's plain meaning and ignores legislative signals, and/or rejects positions taken by federal, state, or local governments.

The Article then uses the empirical data and case studies to develop a theoretical model that deepens our understanding of the interaction between the Court, Congress, and the President. Part II develops the model by drawing insights from competing distributive and deliberative theories of legislation. The model posits that a dynamic game exists between the Court, the relevant congressional committees, Congress, and the President. In this game, ultimate statutory policy is set through a sequential process by which each player—including the Court—tries to impose its policy preferences. The game is a dynamic one because each player is responsive to the preferences of other players *and* because the preferences of the players change as information is generated and distributed in the game.

Part III applies the data and the sequential game model to rethink legal issues of statutory interpretation. Descriptively, a central theme is that the Court's statutory interpretation decisions are more responsive to the expectations of the current Congress than to those of the enacting Congress. But the Court is also responsive to its own institutional and personal preferences—especially its preference for coherence and predictability in the law. This descriptive analysis provides new insights into several otherwise puzzling doctrines of statutory interpretation, including the Court's invocation of special *stare decisis* for statutory precedents, its willingness to find meaning in legislative inaction, and its reliance on subsequent legislative history.

Normatively, this Article analyzes the Court's traditional role as an important player contributing to the operation of the pluralist political process. The

Court facilitates the operation of pluralism over time by updating statutes to reach new situations, to reflect new values, and to accommodate the current preferences of governing political forces. Current critics, however, believe that the Court should not pay attention to current legislative preferences in statutory interpretation and instead should attend only to statutory text or original intent. This Article argues that the Court's traditional practice survives this objection but is more vulnerable to another objection: that the Court's practice fails to give sufficient attention to interests and perspectives that are unrepresented in our pluralist political system.

#### I. CONGRESSIONAL OVERRIDES OF THE SUPREME COURT'S STATUTORY INTERPRETATION DECISIONS, 1967-90

A number of empirical studies have focused on congressional responses to the Supreme Court's statutory decisions.<sup>5</sup> They conclude that the Court's decisions sometimes generate override bills but that these are few in number. For several reasons, these studies are not as useful as they might be. They take an unsystematic or fragmented approach to statutory overrides and, as a result, do not generate a complete sample. They also either ignore unsuccessful overrides or fail to analyze them systematically. Finally, because of the first two problems, these studies have failed to generate reliable conclusions about the conditions that will provoke an override.

These prior studies have only reinforced assumptions that Congress is generally ignorant of and unresponsive to the Court's statutory decisions.<sup>6</sup> However, since 1975, each Congress has overridden (on average) about a dozen

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5. The main studies are Beth M. Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441 (1983) (legislative responses, including codifications, to Court's labor and antitrust decisions, 1950-72); Beth M. Henschen & Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J.L. & POL. 685 (1989) (same); Thomas R. Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. POL. Q. 493 (1989); Harvey P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377 (1965); Note, *Congressional Reversals of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324 (1958) (21 instances of congressional reversal of Supreme Court decisions, 1945-57) [hereinafter Note, *Congressional Reversals*]; Note, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. (forthcoming 1992) (122 statutes that have overturned or modified Supreme Court constitutional, common law, and statutory decisions, 1804-1990); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Responses to Supreme Court Statutory Decisions* (1991) (unpublished paper on file with the author) (51 congressional responses to Supreme Court's decisions, 1970-88).

This list does not include articles and books that are more casually empirical, anecdotal, or episodic than the standard citations provided above. Some of these articles are most useful, however. See, e.g., Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. L. 301 (1988) (legislative response to decisions impairing state and local interests); Abner J. Mikva & Jeff Bleich, *When Congress Overrides the Court*, 79 CAL. L. REV. 729 (1991) (comparing congressional overrides of the Court during New Deal and during Reagan Administration).

6. Judge Abner J. Mikva of the D.C. Circuit Court of Appeals, a former member of the House of Representatives, claims in Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983), that "most Supreme Court decisions never come to the attention of Congress." See also HARRY WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 11 (1990).

of the Court's statutory decisions.<sup>7</sup> The current study also shows that Congress monitors the Court's statutory decisions with great care, reflected in the fact that after 1975 almost half of the Court's statutory interpretation decisions per year have been or will be the specific focus of congressional hearings.

This part presents the methodology and results of my empirical study.<sup>8</sup> It provides a more complete listing of congressional overrides, explores the failure stories more systematically, and suggests conditions for successful overrides. It provides the empirical context for a richer and more reliable academic discussion of the interaction between the Court, Congress, and the President in statutory interpretation.

#### A. *Congressional Override Legislation, 1967-90*

Previous studies have been faced with what might be an intractable problem. Given the enormous amount of material (thousands of pages of statutes and millions of pages of recorded legislative history) and the failure of the written record to reflect the complete legislative process, we may never have a complete list of all statutes overriding Supreme Court decisions. We can do better than existing lists, however, which for the most part have been compiled through a very casually empirical process.<sup>9</sup>

The *United States Code Congressional and Administrative News* (*U.S.C.C.A.N.*) collects the main committee reports and other materials for most of the public laws enacted by Congress in any given year. Committee reports, including conference committee reports, routinely discuss judicial decisions affected by proposed statutory provisions.<sup>10</sup> My research assistants and I searched the reports printed in the *U.S.C.C.A.N.* for the period 1967 to 1990, noting every time a report said a proposed statutory provision "overruled," "modified," or (in some cases) "clarified" a federal judicial interpretation of a federal statute. I then correlated these references to provisions in the enacted public law, weeding out references to provisions that ultimately were not

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7. This study does not include statutes codifying or accepting the Court's statutory interpretation decisions, statutes responding to the Court's common law or constitutional decisions, or statutes overriding the Court's decisions without evidence that Congress was specifically responding to the Court. Each Congress responded to several Supreme Court decisions in these categories, and including these responses would generate 15-20 override statutes per Congress.

8. The three appendices and the methodological statement at the end of this Article explain this in more detail.

9. See, e.g., Note, *Congressional Reversals*, *supra* note 5, at 1324 n.3 (researcher compiled congressional overrides through "[i]nterviews with members of the Harvard Law School community and a search of written materials" such as the *Congressional Quarterly Almanac* and law review articles); cf. Solimine & Walker, *supra* note 5 (relying mainly on the *Congressional Quarterly Almanac* and anecdotal evidence). The best methodology is found in Henschen & Sidlow, *supra* note 5, at 692 n.30 (examining legislative hearings to pinpoint override bills), although that study is limited to labor and antitrust overrides and to the period 1950-72.

10. For elaborate and detailed bills, such as omnibus tax bills, budget reconciliation bills, and recodifications (such as for bankruptcy and criminal codes), the committee report usually contains, for each section, a statement of existing law, reasons for changing the existing law, and the proposed changes.

enacted or that did not substantially override a decision.<sup>11</sup> I supplemented this method with a more selective search of committee reports reproduced in microfiche by the Congressional Information Service, with an examination of hearings conducted by the House and Senate Judiciary Committees (for part of this period), and with the consultation of secondary sources.

Appendix I lists the Supreme Court and other federal court statutory interpretations that have been the subject of overrides during this period.<sup>12</sup> Table 1 records the number of statutes in each Congress that contained override provisions; the number of Supreme Court statutory interpretation decisions overridden in each Congress, also broken down into recent (ten years or less between decision and override) and older decisions; and the number of lower federal court decisions overridden in each Congress.<sup>13</sup> Appendix I lists these decisions by name.<sup>14</sup>

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11. This method has some gaps. Not all public laws generate committee reports, not all committee reports are reproduced in *U.S.C.C.A.N.* (which also edits the reports), and not all overrides of judicial decisions are reported in committee reports.

12. This study incorporates overrides of lower federal court decisions to add perspective. A broader sample should provide a more reliable picture of changes in congressional responsiveness over time. Further, including lower court decisions gives a better idea of the great variety of subject areas covered by override bills. Finally, the broader sample will be a corrective for the conclusion, discussed in text accompanying *infra* notes 14-15, that Congress is aware of—and overrides many—Supreme Court decisions. The same cannot be said for lower court decisions; Congress tends not to be aware of them and overrides a much smaller percentage of them.

13. Lower federal court decisions include decisions by federal district courts, circuit courts of appeals, magistrates, military tribunals, and specialized federal courts (such as the Tax Court).

14. Table 1 raises an important “counting” problem. A statute overriding a leading Supreme Court or lower court decision also overrides cases following that leading decision. Counting each of the later or collateral decisions, in addition to the leading decision, would inflate artificially the number of overrides. Also, those later cases would prove too difficult to track down. This study seeks to avoid double counting. Therefore, Table 1 treats a series of Supreme Court or lower court decisions standing for the same statutory interpretation as *one* “Supreme Court Decision Overridden” or one “Lower Court Decision Overridden.” On the other hand, Table 1 counts each of two Supreme Court interpretations overridden by a statute when the cases stand for two different propositions or when the cases interpret different statutes or provisions. In borderline cases, the study relied on the treatment in the committee reports: were the two decisions treated as independent, or was one considered a derivative of the other?

TABLE 1. *Congressional Overrides of Federal Statutory Decisions (1967-90)*

CONGRESS	OVERRIDE STATUTES	TOTAL DECISIONS OVERRIDDEN	SUPREME COURT DECISIONS OVERRIDDEN			LOWER COURT DECISIONS OVERRIDDEN
			TOTAL	≤10 YRS.	>10 YRS.	
101st (1989-90)	15	27	9	8	1	18
100th (1987-88)	24	39	12	9	3	27
99th (1985-86)	25	45	18	14	4	27
98th (1983-84)	16	44	15	11	4	29
97th (1981-82)	17	24	8	6	2	16
96th (1979-80)	20	31	8	5	3	23
95th (1977-78)	14	43	19	11	8	24
94th (1975-76)	17	34	12	10	2	22
93d (1973-74)	10	14	7	6	1	7
92d (1971-72)	7	12	8	4	4	4
91st (1969-70)	8	15	2	2	0	13
90th (1967-68)	14	16	6	6	0	10
TOTAL	187	344	124*	92*	32	220

\* The 124 Supreme Court decisions overridden include three decisions overridden in more than one Congress. Altogether, only 121 different decisions were overridden during this period, and only 89 recent (less than or equal to 10 years old) decisions were overridden.

As Table 1 suggests, Congress frequently overrides or modifies statutory decisions by lower federal courts as well as those by the Supreme Court. Where earlier studies have found only three or four Supreme Court decisions overridden by each Congress, this study finds an average of ten per Congress. While some of the difference results from the more thorough count in this study, most of it is explained by a change in Congress' responsiveness over time. The 94th Congress was a turning point. The four Congresses from 1967-74 generated an average of six Supreme Court overrides per Congress, not many more than the numbers uncovered in prior studies. In contrast, the eight Congresses from 1975-90, beginning with the 94th, generated an average of twelve Supreme Court overrides per Congress. When we consider the overrides involving the decisions of all federal courts, the difference is even more dramatic. The 90th through 93d Congresses (1967-74) generated an average of fourteen lower court overrides per Congress, while the 94th through 101st Congresses (1975-90) generated an average of thirty-five lower court overrides per Congress, two-and-one-half times the number for the previous period.

The substantial increase in congressional overrides for lower court decisions reflects a number of obvious developments. First, those years have seen a geometric increase in the number of lower federal court opinions to which Congress might respond. Second, Congress has passed more omnibus statutes, such as reconciliation statutes, statutory reform efforts, and recodifications. Finally, organized interest groups have proliferated, producing more monitoring of judicial decisions that are then brought to Congress' attention. The latter two

reasons also probably play a role in the increase in congressional overrides of the Supreme Court's statutory decisions.<sup>15</sup>

Perhaps the most interesting (and heretofore unappreciated) variable associated with the increased override activity is the growth of congressional committee staff. As part of the legislative reform process in the early 1970's, the staffs of the House and Senate standing committees doubled between 1970 and 1975. Between 1973 and 1975 alone, the House committee staffs increased by two-thirds, and the Senate committee staffs increased by one-third.<sup>16</sup> The numbers are almost as explosive for the judiciary and labor committees, the main committees generating congressional overrides.<sup>17</sup> Staff size in House and Senate committees continued to rise through 1979 and then stabilized (for the House) or declined (for the Senate) in the 1980's. A similarly dramatic increase in the sizes of Members' personal staffs and of the staffs of congressional support agencies also occurred in the first half of the 1970's.<sup>18</sup>

Because staffs are essential to monitoring judicial decisions (often through interest group communications), organizing congressional hearings (a virtual prerequisite for an override), and drafting committee reports and statutes, the dramatic increases in staff levels enable Congress to respond to statutory decisions by the federal judiciary more often. Therefore, it should not be surprising that the leaps in committee staff numbers closely match the burst in congressional override activity. The explosion in staff in the period 1973-75 coincides with the increase in congressional override activity in the period 1975-76. The peak of override activity in the period 1977-78 roughly parallels the peak in committee staff increases at that time. Moreover, the plateau in override activity in the 1980's tracks the leveling off of committee staff.

Although the increased size of committee staffs (especially in the judiciary and labor committees) correlates well with the increased override activity, it is not clear that staff size is the cause—and not the effect—of override activity. The traditional explanation for the surge in congressional staff numbers during

15. The first reason (increased number of decisions) does not apply to the Supreme Court. For purposes of comparison, during the entire period of this study, the Supreme Court issued about 80 statutory interpretation decisions each year.

16. NORMAN J. ORNSTEIN ET AL., *VITAL STATISTICS ON CONGRESS*, 1989-90, at 136 tbl. 5-5 (1990).

17. The House Judiciary Committee staff went from 27 in 1960, to 35 in 1970, to 69 in 1975, to 80 in 1979, and then stabilized at between 75 and 81 in the 1980's. The House Education and Labor Committee staff went from 25 in 1960, to 77 in 1970, to 114 in 1975, and then stabilized at between 119 and 127 in the period since 1975. *Id.* at 137 tbl. 5-6.

The Senate Judiciary Committee staff went from 137 in 1960, to 190 in 1970, to 251 in 1975, to 223 in 1979, and then fell back to between 134 and 141 during the 1980's. The Senate Labor and Human Resources Committee staff grew from 28 in 1960, to 69 in 1970, to 150 in 1975, to 155 in 1979, and then fell back to between 119 and 127 in the 1980's. *Id.* at 138 tbl. 5-7.

18. House Members' personal staffs jumped from 4055 in 1967 to 6939 in 1976, and then increased only incrementally in the 1980's. Senators' personal staffs jumped from 1749 in 1967 to 3251 in 1976, with slow increases after that. *Id.* at 132 tbl. 5-2; *see also id.* at 133 fig. 5-1 (graphic display of dramatic leaps in member and committee staff sizes).

the 1970's emphasizes internal congressional changes.<sup>19</sup> New Democratic Members of Congress in the early 1970's demanded a greater diffusion of power, which placed more authority in subcommittees. The proliferation of subcommittees, and thus of independent power centers, required more staff in the House. The Senate experienced some committee staff increase, but also greatly expanded Members' personal staffs in 1975.<sup>20</sup> This traditional explanation suggests that the increased override activity stemmed from changes internal to Congress.

Another explanation, however, is that congressional staff size—and override activity—increased as a response to divided government.<sup>21</sup> A Democratic Congress has strong incentives to monitor statutory implementation by a Republican Presidency, and increased monitoring requires an augmented staff. Confronted with a Republican Supreme Court after 1971 (four Nixon appointees and later one Ford appointee in place) and an increasingly Republican judiciary in general, the Democratic Congress in the 1970's had an incentive to monitor judicial decisions more carefully than it had in the 1960's. This partisan incentive might have rendered the Democratic leadership in Congress more receptive to demands by Democrats for more power, more subcommittees, and more staff.

This divided-government explanation correlates with some of the data. The boom in congressional overrides started in 1975-78, when enlarged Democratic majorities in Congress (and, after 1976, a Democratic President) became more aggressive in scrutinizing the work of Republican judges. Override activity fell off from 1979-82, as the lower courts were operating with more Democratic appointees.<sup>22</sup> This evidence would support the suggestion that both the staff increases in key committees and the increased override activity resulted from a Democratic Congress' distrust of a Republican judiciary.

This suggestion is not supported by data from the 1980's, however. For example, between 1983 and 1987, override activity sharply increased from the 1979-82 dip, even though the Senate was in Republican hands and a Republican President could exercise a viable veto threat. And congressional override activity has not increased noticeably since 1987, even though the federal judiciary has received even larger numbers of Republican appointees and the Senate has returned to Democratic hands. The evidence from the 1980's correlates very well with the suggestion that staff size has exercised an indepen-

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19. See LEROY N. RIESELBACK, *CONGRESSIONAL REFORM IN THE SEVENTIES* (1977); STEVEN S. SMITH & CHRISTOPHER DEERING, *COMMITTEES IN CONGRESS 194-98* (1984); Lawrence C. Dodd & Bruce I. Oppenheimer, *The House in Transition, in CONGRESS RECONSIDERED 27-32* (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1st ed. 1977).

20. See ORNSTEIN ET AL., *supra* note 16, at 126.

21. This point was suggested to me by Matt Spitzer.

22. In 1979-82, override activity fell significantly from its 1977-78 "high." By then President Carter had appointed more than half of the federal judiciary (albeit no Supreme Court Justices).

dent influence on the level of congressional overrides. Just as staff size reached a plateau in the 1980's, so did override activity.

B. *Congressional Monitoring of Supreme Court Statutory Decisions (Judiciary Committees), 1979-87*

A second difficulty with previous surveys is their inattention to proposed overrides.<sup>23</sup> This is an important feature of the overall picture, in part because an examination of the proposed, but unsuccessful, overrides yields a richer vision of congressional monitoring of the Court's statutory decisions. Is Congress actively aware of the Court's decisions? How does it become aware? For what decisions are serious but unsuccessful override efforts mounted? Why do some efforts fail, while others succeed? The failure stories provide a data base with which the success stories may be compared, giving us clues about the types of overrides likely to pass and the ones more likely to fail.

My study of failed overrides is based on a sampling, rather than a comprehensive search, methodology.<sup>24</sup> About half of the Supreme Court's statutory interpretation decisions in any given Term deal with issues within the jurisdiction of the House and Senate Judiciary Committees.<sup>25</sup> I examined the hearings of these committees during the 96th through 100th Congresses (1979-88), searching for analysis and criticism of specific Supreme Court statutory decisions. Appendix II lists those Supreme Court cases examined in either House or Senate Judiciary Committee hearing during this period. Where applicable, Appendix II also lists the override bill(s) associated with each decision and indicates the fate of each bill. Table 2 presents the data as collected in Appendix II, but correlated with the five Congresses studied.

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23. The only study that attempts to consider proposed overrides is Henschen & Sidlow, *supra* note 5, which is dated (1950-72) and limited to labor and antitrust issues.

24. The approach is dictated by limited human resources. The best way to learn about failed override efforts would probably involve examination of all of the committee hearings for this period. These hearings are collected in the Library of Congress' legislative section in the Jefferson Building. But there are literally thousands of volumes of such hearings for the period in question. Although I found committee hearings fascinating literature, reading them all would take years to do. Life is short, and so I made the decision to limit my research to all the House and Senate Judiciary Committee hearings from 1979 to 1988.

25. Specifically, these issues include general administrative process and freedom of information, immigration, bankruptcy, the antitrust laws, substantive criminal law, federal jurisdiction, federal tort and contract liability, habeas corpus, patent law, copyright and trademark law, and civil rights law. These areas usually constitute the main areas at issue in 40 or more of the Court's statutory decisions each year (see Table 3), about half of the 80 or so statutory decisions the Court hands down annually. Note that there is significant overlap with the jurisdiction of at least one other committee: The labor committees in both the House and Senate share jurisdiction with the judiciary committees for issues of job discrimination under Title VII.

TABLE 2. *Judiciary Committee Scrutiny of Supreme Court Statutory Decisions (1979-88)*

CONGRESS	TOTAL	DECISIONS SCRUTINIZED			DECISIONS OVERRIDDEN AS A PERCENTAGE OF ALL CONGRESSIONAL OVERRIDES
		WITHIN 5 YRS.	WITHIN 5-10 YRS.	OVER 10 YRS.	
100th (1987-88)	52	23	13	16	58% (7/12)
99th (1985-86)	55	27	15	13	39% (7/18)
98th (1983-84)	44	21	15	8	60% (9/15)
97th (1981-82)	65	38	9	18	63% (5/8)
96th (1979-80)	46	15	14	17	50% (4/8)

As Table 2 suggests, more than half of the congressional overrides involved statutory subjects within the jurisdiction of the House and Senate Judiciary Committees. The overrides that have received the most popular and legal attention very often involve statutory policy within these committees' jurisdiction.<sup>26</sup>

Appendix II and the data underlying Table 2 show that a substantial number of Supreme Court decisions, especially recent ones, were the focus of one or more House and Senate Judiciary Committee hearings in each Congress.<sup>27</sup> Table 3 takes a seven-year period of the Court's decisions (1977 through 1983 Terms), records how many decisions were the focus of House and Senate Judiciary Committee hearings, and determines what percentage of each Term's decisions within the committees' jurisdiction were scrutinized. This seven-year period was used because it begins the ten-year period covered by the study of House and Senate Judiciary Committee hearings (see Table 2).

TABLE 3. *Judiciary Committee Scrutiny of Supreme Court Statutory Decisions (1977-1983 Terms)*

COURT TERM	DECISIONS WITHIN COMMITTEE JURISDICTION	DECISIONS SCRUTINIZED	PERCENTAGE SCRUTINIZED
1977 Term	39	18	47%
1978 Term	32	14	44%
1979 Term	43	21	49%
1980 Term	35	12	35%
1981 Term	40	12	30%
1982 Term	43	15	35%
1983 Term	43	13	30%

26. This is especially true of the 101st Congress. About half of the enacted overrides originated with the House or Senate Judiciary Committees, as did the two spectacular failures—the proposed Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess. (1990), and the habeas provisions of the Crime Control Act of 1990, H.R. REP. NO. 681(I), 101st Cong., 2d Sess. 122-36 (1990) (deleted in conference), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6527-41.

27. Note that Table 2 counts several decisions more than once, because they were the focus of hearings in more than one Congress. Hence, the total number of different decisions scrutinized in this period is not the sum of the decisions scrutinized in each Congress.

Table 3 shows that the Judiciary Committees actively hold hearings to evaluate Supreme Court statutory decisions within their jurisdiction. Although as of 1988 the committees had scrutinized only a third of the decisions from the 1980 through 1983 Terms, in a few years the percentage of decisions from that period will probably approach the forty percent or higher figures of earlier Terms.<sup>28</sup> This finding itself is striking.

Additionally, House and Senate Judiciary Committee members and staff seem to be aware of decisions besides those for which hearings are held. The House and Senate Judiciary Committees' knowledge of judicial developments is not unusual when compared with that of other committees, especially the labor committees (Education and Labor in the House, Human Services in the Senate) and the tax committees (Ways and Means in the House, Finance in the Senate). Contrast this data, which shows significant legislative interest in Supreme Court statutory decisions, with Dr. Robert Katzmann's empirical work, which suggests that committee member and staff awareness of lower court statutory interpretations is much more selective than their awareness of Supreme Court interpretations.<sup>29</sup>

Tables 1 through 3 and this Article's underlying research suggest that the Supreme Court's statutory decisions are accessible to Congress. Moreover, this research indicates that key staff members become aware of any significant Supreme Court decision affecting issues within their committee's jurisdiction, but not necessarily every significant lower court decision. Almost half of the Court's decisions are examined over time in "oversight" hearings—committee members, other relevant officials, and representatives of private groups discuss the policies adopted in those decisions. But less than a fifth of the decisions seriously examined by the relevant committees are actually overridden by Congress.

### C. *Supreme Court Decisions Most Likely To Be Overridden by Congress*

A final difficulty with previous studies is their failure to explain convincingly the circumstances under which Congress will override Supreme Court statutory decisions. The rest of this part will make empirical and comparative

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28. This is because the "Decisions Scrutinized" column is cumulative. As the committees examine more decisions each year, they add to the total from prior years.

29. Dr. Robert Katzmann conducted a survey of congressional staff awareness of 15 significant statutory opinions of the D.C. Circuit in 1989. He found the staff unaware of 12 of the 15 decisions, including the four cases within the jurisdiction of the well informed House Subcommittee on Courts, Civil Liberties, and the Administration of Justice. Dr. Katzmann found that "staffs tend to be aware of cases when those cases are so-called major cases, that is, those cases in which the Supreme Court has resolved the matters, or cases in which the losing party, for example, an interest group or trade organization, seeks some sort of relief through the legislative process. Otherwise, the staff member is dependent upon what he or she might glean from the summaries offered by a reporting service if he or she has the time or inclination to peruse them." *Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit*, 124 F.R.D. 241, 323-24 (1988) (remarks of Robert Katzmann).

observations about the characteristics of Supreme Court decisions that render them most likely to be overridden. Part II will then utilize political science theory to develop a model of congressional overrides.

Appendix III compiles some simple information about the 121 Supreme Court statutory decisions overridden in the last twelve Congresses. From the list in Appendix III, Table 4 characterizes the areas of law with the most override activity.<sup>30</sup>

TABLE 4. *Subject Matter of Statutes Overriding Supreme Court Statutory Interpretation Decisions (1967-90)*

SUBJECT MATTER	NUMBER OF OVERRIDES	PERCENTAGE OF TOTAL
Criminal Law	18	15%
Antitrust	11	9%
Civil Rights	11	9%
Bankruptcy	10	8%
Federal Jurisdiction & Procedure	9	7%
Environmental Law	9	7%
Income Tax	8	7%
Copyright, Trademark & Patent Law	8	7%
Intergov't Relations & Federalism	6	5%
Longshoremen & Shipping	6	5%
Federal Torts/Contracts	4	3%
Armed Services & Veterans Affairs	4	3%
Immigration	4	3%
Gov't Employment	3	3%
Freedom of Information	2	2%
Admiralty (Ports)	2	2%
Common Carriers	1	1%
Traditional Labor Law	1	1%
ERISA	1	1%
Banking Regulation	1	1%
Stockyards	1	1%
Social Welfare	1	1%
TOTAL	121	101%

Table 4 demonstrates that the House and Senate Judiciary Committees have jurisdiction over most override efforts. The judiciary committees have primary or exclusive jurisdiction over 54% of the total overrides in this period (criminal law; federal jurisdiction and procedure; antitrust; bankruptcy; copyright, trademark, and patent law; federal torts/contracts; immigration; and freedom of information) and secondary or shared jurisdiction over another 17% of the

30. My methodology for characterizing decisions usually follows the United States Code: civil rights decisions were overridden by changes to title 42; criminal law, title 18; federal jurisdiction and procedure, title 28; bankruptcy, title 11; income tax, title 26; antitrust, title 15; copyright, trademark, and patent law, titles 17, 15, and 35, respectively; armed services and veterans affairs, title 38; longshoremen and admiralty, title 33; immigration law, title 8; environmental law, titles 7, 16 & 42; United States government workers, selected parts of title 5; federal torts and contracts, selected parts of titles 28 and 41, respectively; freedom of information, title 5; labor law and ERISA, title 29; banking regulation, title 12; and stockyards, title 7. The main departure from this methodology is the category of intergovernmental (federal/state) relations, where the statutory overrides occurred in various parts of the United States Code. *See generally Lee, supra* note 5 (in-depth analysis of congressional overrides of decisions affecting state and local governments).

overrides (civil rights in education and the workplace, intergovernmental relations, government employment). The labor committees have primary or exclusive jurisdiction over 13% of the overrides (civil rights in education and the workplace, government employment, traditional labor law, and ERISA). The public works committees and tax committees are also important sources of overrides, with primary jurisdiction over 7% (environmental law) and 7% (income tax) of total overrides, respectively. Altogether, almost nine out of ten overrides are generated from these four committees.

Table 4 also suggests the relative subject matter of override activity. Although statutory overrides of Supreme Court civil rights decisions have received the most publicity, there has been much more override activity for criminal law in this period, and just about as much activity for bankruptcy, federal jurisdiction and procedure, and antitrust law.<sup>31</sup> Given their low visibility in the political system, it may be surprising that cases involving criminal law, bankruptcy, and federal jurisdiction and procedure have generated so many overrides. The significant activity is the result of ambitious codification and reform efforts by judiciary subcommittees responsible for each of those areas of law. In contrast, there has been a surprising lack of overrides in securities law, given the intense public interest and litigation in this area.<sup>32</sup>

When Congress chose to override the Court, it usually did so with relative speed. Almost half of the Supreme Court cases in the study were overridden within two years of their decision (ten were overridden the year they were decided), two-thirds were overridden within five years, and three-fourths within ten years (see Appendix III).<sup>33</sup> To explore more fully the interaction between the Court and Congress, the remainder of this section will focus on the eighty-nine cases overridden within ten years of their decision (see Table 1).<sup>34</sup> Tables 5 through 7 present data describing the division of the Court in these eighty-nine overridden cases, the political characterization, if any, of the Court's division, the mode of reasoning underlying the Court's interpretation, and the nature of the losers in overridden cases (the parties who are likely to petition Congress for an override).

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31. The enactment of the Civil Rights Act of 1991, which overrides 12 Supreme Court decisions (most of which interpret civil rights statutes), make the civil rights category the leading override area for the period 1967-92.

32. Labor law also produced fewer overrides than expected, but this is probably due to the current limits of "traditional labor law" (mainly, the National Labor Relations Act). If "labor law" included discrimination in the workplace, federal employee and civil service issues, federal regulation of state employees, and pension (ERISA) issues, then Table 4 would list more than ten overrides.

33. Most of the cases that were overridden after a relatively long delay involved recodification statutes (especially the Bankruptcy Act of 1978), reconciliation statutes (often overturning old tax decisions), and other omnibus acts covering a number of related issues in one statute.

34. Although 10 years is an arbitrary figure, it is a useful cutoff point for analyzing short-term congressional responses to the Court. Most of the decisions overridden more than 10 years after they were decided were the subject of omnibus reconciliation or recodification bills (see Appendix I) in which the override was not the main focus of the legislation.

Table 5 reports the voting splits among the Justices, to provide information on the divisions within the Court for decisions overridden soon after they were handed down.<sup>35</sup> Table 5 also indicates whether the Court split along identifiable ideological lines in these decisions.<sup>36</sup>

TABLE 5. *Voting and Political Divisions in Supreme Court Decisions Overridden by Congress Within Ten Years of the Court's Decision (1967-90)*

VOTING SPLITS	NUMBER OF OVERRIDES	PERCENTAGE OF TOTAL
4-4 or Memorandum Decisions	6	7%
5-4 Decisions	14	16%
6-3 Decisions	30	34%
7-2 Decisions	15	17%
8-1 Decisions	12	13%
9-0 Decisions	12	13%
TOTAL	89	100%

POLITICAL SPLITS	NUMBER OF OVERRIDES	PERCENTAGE OF TOTAL
Conservative/Liberal	34	38%
Liberal/Conservative	18	20%
No Clean Division	37	42%
TOTAL	89	100%

Table 5 suggests that overridden statutory decisions usually involved issues producing a fragmented, ideologically divided Court. A majority of the overridden decisions involved a 4-4, 5-4, or 6-3 division on the Court, and three-fifths of the decisions reflected an ideological split (usually with Justices Brennan and Marshall opposing Justice (or later Chief Justice) Rehnquist). The tendency for Congress to override identifiably "conservative" Supreme Court decisions significantly more often than identifiably "liberal" opinions is a very recent

35. In determining splits, the study counts concurring Justices as part of the majority even when they did not join the majority opinion. The study counts Justices concurring in part and dissenting in part based on how they voted on the issue for which Congress overrode the Court. Finally, as Table 5 reflects, the study attempts to place decisions with fewer than nine total votes in the most similar category used for full Court decisions. For example, the study places 8-0 decisions (where only eight Justices voted) in the 9-0 decision category.

36. The study follows the standard liberal/conservative characterizations. The usual clue to an ideological split is that consistently liberal Justices were on one side and consistently conservative Justices on the other. The consistently liberal Justices for this study include Chief Justice Warren and Justices Douglas, Brennan, Fortas, Marshall, and (for the 1980's) Blackmun and Stevens. The consistently conservative Justices include Chief Justices Burger and Rehnquist, and Justices Rehnquist, Powell (for the 1970's), O'Connor, Scalia, and Kennedy. I considered Justices Harlan, Stewart, and White to be moderates. Thus, if a Supreme Court opinion in the 1980's finds Chief Justice Burger and Justice Rehnquist in the majority with Justices Brennan and Marshall dissenting, I would identify the opinion as "conservative," while I would categorize a decision with Justice Rehnquist joining Justices Brennan and Marshall in dissent as "no split."

phenomenon, attributable entirely to events of the 1980's.<sup>37</sup> In the last five years covered by the study (1986-90), congressional overrides of identifiably "liberal" Supreme Court statutory decisions all but vanished (three of thirty-eight). Almost half of the overrides (sixteen of thirty-eight) reversed identifiably "conservative" decisions, although a similar number (nineteen of thirty-eight) of the overridden decisions could not be characterized ideologically (see Appendix III).

Table 6 reports the various modes of reasoning underlying the Court's holdings in the overridden decisions, in an attempt to identify those most likely to produce an interpretation that Congress would later reject.<sup>38</sup>

TABLE 6. *The Primary Reasoning in Supreme Court Decisions Overridden by Congress within Ten Years of the Court's Decision (1967-90)*

PRIMARY REASONING	NUMBER OF DECISIONS	PERCENT OF TOTAL
Plain Meaning	23.5	26%
Legislative History	19.0	21%
Canons	16.0	18%
Statutory Precedents	13.5	15%
Purpose & Policy	6.5	7%
Common Law & Constitutional Law	3.5	4%
No Opinion	7.0	8%
TOTAL	89.0	99%

37. Of the 39 Supreme Court decisions of the 1980's that Congress overrode (as of January 1991), 17 were conservative decisions, 16 reflected no clean division, and only 6 were liberal decisions (see Appendix III).

38. The main methodological difficulty involved identifying the Court's *primary* reasoning, for the Court almost never relies on just one reason. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (demonstrating lack of one identifiable reason behind various Court decisions). To determine the Court's primary reasoning, I considered three factors: (1) explicit statements by the Court (for example, if the Court declared that the text was clear and not trumped by the loser's legislative history arguments, the study identified the primary reasoning as plain meaning); (2) the placement and length of the Court's analysis (for example, if the Court began its analysis with a canon of statutory construction and then demonstrated that no other argument offset it, the study identified the primary reasoning as reliance on canons of construction); and (3) the persuasiveness of the Court's analysis and the Court's own apparent confidence in its opinion (if the Court's legislative history argument was subordinate to, but more convincing than, what appeared to be a makeweight textual argument, the study identified the primary reasoning as legislative history). For about a fourth of the Court's decisions, I felt that there was no "primary" reasoning, and in these cases I identified the two main candidates, considering each as one-half of the Court's reasoning for counting purposes.

As set forth in greater detail in the methodological statement preceding the appendices, *infra* text accompanying notes 304-10, the modes of reasoning included: (1) "plain meaning," where the Court relies on the probable meaning of the "plain" text, construed according to standard dictionaries, rules of grammar and syntax, and the overall statutory structure; (2) "legislative history," where the Court relies on the history of the statute before Congress enacted it; (3) "statutory precedents," where the court relies on prior Supreme Court decisions construing the statute or related statutes; (4) "canons," where the Court relies on canons of construction, usually expressed as presumptions or clear statement rules; (5) "purpose and policy," where the Court relies on purpose of the statute and other policy arguments; and (6) "common law and constitutional law," where the Court relies on common law or constitutional decisions to fill gaps in statutory policy.

The most interesting feature revealed by Table 6 is that Congress is much more likely to override "plain meaning" decisions than any other type of Supreme Court statutory decision. When decisions dominated by canons of statutory construction are added to the total of plain meaning decisions, about half of the overrides fall within this category. In contrast, Congress rarely appears to override those interpretations grounded on statutory "purpose."

In an effort to identify the groups that are likely to petition Congress for an override, Table 7 characterizes the groups who "lost" in decisions that later were overridden by Congress.<sup>39</sup>

TABLE 7. "Losing" Groups in Supreme Court Decisions Overridden by Congress within Ten Years of the Court's Decisions (1967-90)

"LOSING" GROUPS	NUMBER OF DECISIONS	PERCENT OF TOTAL
United States & U.S. Departments	22	25%
Organized Business	16	18%
Diffuse Citizenry	10	11%
State & Local Governments	9	10%
Organized Workers	7	8%
Environmentalists	6	7%
Women	4	4%
Disabled	4	4%
Criminal Defendants & Suspects	2	2%
Racial Minorities	2	2%
Noncitizens	2	2%
Veterans Groups	1	1%
The Poor	1	1%
Religious Groups	1	1%
Unclear	2	2%
TOTAL	89	98%

Table 7 suggests that the big "winners" among the "losers"—the groups most likely to persuade Congress to override an adverse Supreme Court decision—are federal, state, and local governments, which together have procured more than one-third (35%) of the overrides of recent decisions. Another 26% were obtained by organized business and labor groups. Less than one-eighth (11%) of the overrides reversed losses for groups that include most Americans—litigants, appellants, consumers, government tort victims, Freedom of Information Act petitioners, and antitrust plaintiffs. These groups are identified as "diffuse citizenry," that is, groups that include, or potentially include, most or all Americans.

39. See methodological statement preceding the appendices, *infra* text accompanying notes 304-12, for an explanation of what or whom I am including in each group listing.

The data presented in Tables 5 through 7 suggest that the typical congressional override will focus on Supreme Court decisions that adjudicate issues producing an ideologically divided vote on the Court and that harm the interests of federal, state, or local governments, or of well-organized interest groups. This is useful information, but does not answer the question: How does the typical overridden Supreme Court decision compare with the typical Supreme Court decision that is *not* overridden? In other words, Tables 5 through 7, standing alone, are of limited utility because they do not compare overridden decisions with decisions that Congress allowed to stand. To facilitate such comparisons, Tables 8 and 9 draw upon the sample (profiled in Table 3 above) of Supreme Court statutory decisions from the 1977 through 1983 Terms.

Table 8 compares the voting splits, ideological divisions, and primary reasoning of three sets of decisions from those Terms: (1) decisions never examined by the House and Senate Judiciary Committees, (2) decisions examined but not overridden, and (3) decisions from those Terms that were within the Judiciary Committees' jurisdiction and were overridden.<sup>40</sup>

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40. Although the third group (decisions overridden from the 1977 through 1983 Terms) is small (18 decisions), its overall percentages roughly match those for all of the overrides in Tables 5 and 6. This finding provides some confidence that the sample is representative.

TABLE 8. *Comparison of Overridden Supreme Court Decisions with Supreme Court Decisions within Judiciary Committee Jurisdiction But Not Overridden (1978-84)*

VOTING SPLIT	TOTAL DECISIONS	DECISIONS NOT SCRUTINIZED	DECISIONS SCRUTINIZED		
			TOTAL	OVERRIDDEN	NOT OVERRIDDEN
9-0 Decisions	85	61 (72%)	24 (28%)	1 (1%)	23 (27%)
8-1 Decisions	33	22 (67%)	11 (33%)	3 (9%)	8 (24%)
7-2 Decisions	36	20 (56%)	16 (45%)	1 (3%)	15 (42%)
6-3 Decisions	65	38 (58%)	27 (41%)	6 (9%)	21 (32%)
5-4 Decisions	56	29 (52%)	27 (48%)	7 (12%)	20 (36%)
<b>TOTAL</b>	<b>275</b>	<b>170 (62%)</b>	<b>105 (38%)</b>	<b>18 (7%)</b>	<b>87 (32%)</b>
<b>POLITICAL DIVISIONS</b>					
Conservative/Liberal	83	49 (59%)	34 (41%)	8 (10%)	26 (31%)
Liberal/Conservative	58	31 (55%)	27 (46%)	7 (12%)	20 (35%)
No Clear Division	134	90 (67%)	44 (33%)	3 (2%)	41 (31%)
<b>TOTAL</b>	<b>275</b>	<b>170 (62%)</b>	<b>105 (38%)</b>	<b>18 (7%)</b>	<b>87 (32%)</b>
<b>PRIMARY REASONING</b>					
Plain Meaning	48.5	29.5 (61%)	19.0 (40%)	6.5 (14%)	12.5 (26%)
Legislative History	42.5	20.5 (48%)	22.0 (52%)	3.0 (7%)	19.0 (45%)
Precedent	104.5	67.0 (64%)	37.5 (36%)	4.0 (4%)	33.5 (32%)
Canons	26.0	15.0 (57%)	11.0 (43%)	3.0 (12%)	8.0 (31%)
Purpose & Policy	37.0	28.5 (77%)	8.5 (23%)	0.5 (1%)	8.0 (22%)
Common Law & Other	16.5	9.5 (58%)	7.0 (42%)	1.0 (6%)	6.0 (36%)
<b>TOTAL</b>	<b>275.0</b>	<b>170.0 (62%)</b>	<b>105.0 (38%)</b>	<b>18.0 (7%)</b>	<b>87.0 (32%)</b>

Table 8 generates several interesting observations. First, decisions subject to judiciary committee scrutiny were much more likely to have a dissenting opinion and to reflect a close division on the Court; this was particularly true of decisions that were ultimately overridden.<sup>41</sup> Not surprisingly, issues that generate division in the Court are the ones most likely to generate serious congressional scrutiny.

Second, decisions that were overridden were much more likely to have had an ideologically identifiable split on the Court than either decisions not scrutinized or decisions scrutinized but not overridden.<sup>42</sup> For the period in question

41. Specifically, 72% of the 9-0 decisions were not examined by the judiciary committees, but only 52% of the 5-4 decisions were not examined. Putting it another way, 72% of the overridden decisions (13 of 18) reflected 6-3 or 5-4 votes, while only 47% of the examined-but-not-overridden decisions (41 of 87) reflected such votes, and only 39% of the unscrutinized decisions (67 of 170) reflected such votes.

42. Specifically, overridden decisions make up only 2% of the "No Clear Division" decisions, in contrast to the 10% and 12% these decisions constitute in the other two categories. Putting it another way, only 15% (3 of 18) of the overridden decisions reflected "No Clear Division," while 47% (41 of 87) and

(1977-84), the Court as a whole was moderately conservative, and all three groups of decisions reflect that (hence, more identifiably conservative decisions in each category). If Table 8 included data from the late 1980's, when overrides of identifiably liberal decisions all but dried up,<sup>43</sup> the overridden decisions category would probably overrepresent "conservative" decisions, when compared to the other categories.

Third, decisions that were overridden were more likely to have relied on a statute's plain meaning or the canons of construction than either decisions not scrutinized or decision scrutinized but not overridden.<sup>44</sup> Interestingly, decisions scrutinized but not overridden tended to have more legislative history reasoning than the other two categories, while purpose and policy reasoning was greatly overrepresented in the unscrutinized decisions category.

The most dramatic and instructive contrast between the different categories of decisions is revealed in Table 9, which identifies the "losing" groups by category (only for decisions in the 1977 through 1983 Terms).<sup>45</sup>

TABLE 9. *Comparison of "Losing" Groups in Overridden Decisions with "Losing" Groups in Decisions Within Judiciary Committee Jurisdiction, but Not Overridden (1978-84)*

"LOSING GROUP"	TOTAL DECISIONS	DECISIONS SCRUTINIZED			
		DECISIONS NOT SCRUTINIZED	TOTAL	OVERRIDDEN	NOT OVERRIDDEN
Diffuse Citizenry	77	53 (68%)	24 (32%)	1 (1%)	23 (31%)
Organized Business	54	30 (55%)	24 (45%)	1 (2%)	23 (43%)
Criminal Defendants & Suspects	34	24 (71%)	10 (29%)	1 (3%)	9 (27%)
State & Local Gov'ts	34	16 (48%)	18 (53%)	3 (9%)	15 (44%)
United States & U.S. Dep'ts	24	15 (62%)	9 (38%)	5 (20%)	4 (18%)
Racial Minorities	20	17 (85%)	3 (15%)	1 (5%)	2 (10%)
The Poor	7	5 (71%)	2 (29%)	0 (0%)	2 (29%)
Organized Workers	6	3 (50%)	3 (50%)	2 (33%)	1 (17%)
Noncitizens	5	2 (40%)	3 (60%)	1 (20%)	2 (40%)
Environmentalists	4	1 (25%)	3 (75%)	0 (0%)	3 (75%)
Women	2	0 (0%)	2 (100%)	2 (100%)	0 (0%)
Foreign States	1	1 (100%)	0 (0%)	0 (0%)	0 (0%)
Disabled	1	0 (0%)	1 (100%)	1 (100%)	0 (0%)
Not Clear	6	3 (50%)	3 (50%)	0 (0%)	3 (50%)
<b>TOTAL</b>	<b>275</b>	<b>170 (62%)</b>	<b>105 (38%)</b>	<b>18 (7%)</b>	<b>87 (32%)</b>

53% (90 of 170) of the scrutinized-but-not-overridden and unscrutinized decisions, respectively, reflected "No Clear Division."

43. See *supra* text accompanying note 37.

44. Specifically, these are the highest percentages for the "Decisions Overridden" column, next to the lowest for the "Decisions Scrutinized but Not Overridden" column, and middling for the "Decisions Not Scrutinized" column. Justice Stevens recently made this observation in *West Virginia Univ. Hosp., Inc. v. Casey*, 111 S. Ct. 1138, 1153-58 (1991) (Stevens, J., dissenting).

45. See methodological statement preceding the appendices, *infra* text accompanying notes 304-12, for an explanation of what or whom I am including in each group listing.

Table 9 strongly supports the suggestion from Table 7 that federal, state, and local governments are unusually successful in having their Supreme Court losses reversed by Congress.<sup>46</sup> Table 9 also contributes an additional insight: State and local governments are *more* likely than the United States to have their losses scrutinized by Congress, but then much *less* likely to have the losses actually overridden.

Although the numbers are too small to draw strong conclusions, Table 9 suggests that big business (like state and local governments) fares much better at obtaining judiciary committee scrutiny of decisions it loses than it is at obtaining actual overrides. In contrast, organized worker groups (not only unions, but retired persons and federal employees) fare particularly well in overturning adverse decisions. Conversely, diffuse random groups (such as victims of state constitutional violations or federal torts) fare poorly; and criminal defendants and suspects, as well as the poor, have had virtually no success in obtaining overrides. Further, middle class women fare comparatively well when their collective interests are harmed by a statutory decision.

This data provides some basis for generalizing about which Supreme Court statutory decisions stand the best chance of being overridden in the 1990's.<sup>47</sup> (1) They will likely be split decisions in which political ideology provides a basis for the split. (2) For now, conservative Court decisions relying on plain meaning of the statutory text and/or the canons of statutory construction are most likely to be overturned, subject to qualifications to be introduced in the next part of the Article. (3) The most important variables seem to be the identity of the party who lost the case and the identity of the party whose interests the Court's interpretation harms in the long run (often the same). If the ruling harms the federal government's interests, an override is particularly likely. Women, the disabled, state and local governments, environmentalists, and organized workers are also relatively able to command Congress' support for an override, while consumers, litigants, nonbusiness and less wealthy taxpayers, and the poor are much less likely to muster such support.

To illustrate the importance of "who loses the case," consider the following contrast. The Supreme Court's decision in *General Electric Co. v. Gilbert*,<sup>48</sup> interpreting Title VII of the Civil Rights Act of 1964 to permit employment discrimination based upon pregnancy, presented a classic case for an override.

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46. Specifically, 21% of the United States' losses and 9% of the losses for state and local governments were overridden by Congress—much higher figures than those for organized private groups, including big business (2%) and minorities (5%). Putting it another way, 44% (8 of 18) of the "Decisions Overridden" category were ones where federal, state, and local governments lost Supreme Court cases, compared with 22% in the "Decisions Scrutinized But Not Overridden" category (19 or 87) and 17% in the "Decisions Not Scrutinized" category (31 of 170).

47. Caveat: Prediction about the Court/Congress interaction in the 1990's based upon data from the 1980's is risky, so the following conclusions should be discounted appropriately. Also, while each of the three generalizations is true for a majority of the overrides studied (Tables 5-9), a majority of the overrides will not necessarily fit the overall picture painted by *all three* generalizations together.

48. 429 U.S. 125 (1976).

The Court was split (6-3); the split was along ideological lines (conservative over liberal) for which neither Congress nor the President had much sympathy; the decision relied on plain meaning and constitutional precedent; and the decision represented a public defeat for organized women's groups, unions, and the Equal Employment Opportunity Commission. Although employer and insurance groups supported the decision, Congress promptly overrode it. A few years later, in *American Tobacco Co. v. Patterson*,<sup>49</sup> the Court interpreted Title VII to protect post-1964 seniority systems that had a discriminatory impact upon African Americans. Although the Court was even more closely divided (5-4) along ideological lines than it was in *Gilbert*, the *American Tobacco* issue did not even generate override hearings.<sup>50</sup> The critical difference between *Gilbert* and *American Tobacco* lies in the relative clout of the losing groups. The combined efforts of women's groups, unions, and the federal government effected a prompt reversal of *Gilbert* over employer group objections, while African Americans standing alone could not muster sufficient interest to generate hearings on the issues decided in *American Tobacco*.

## II. MODELING THE INTERACTION BETWEEN THE COURT, CONGRESS, AND THE PRESIDENT IN STATUTORY INTERPRETATION

Even the best empirical data is of only limited use without a theoretical framework. Despite the multiplicity of theoretical works analyzing the legislative process, most prior studies of congressional overrides have failed to draw on this literature to help explain and predict overrides. In an effort to remedy this shortcoming, this part will survey the political theories of the legislative process, including the role of interest groups and committees. The section will attempt to synthesize political science and legal scholarship to produce a model that reflects the complexity of the process yet remains capable of generating some useful predictions. It will conclude with a dynamic model of the interaction between the Court, Congress, and the President in statutory interpretation cases. One of the contributions of this Article will be to highlight, through formal and historical analysis, the important (but often unappreciated) role of the President in the override process, especially during periods of divided government.

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49. 456 U.S. 63 (1982).

50. Even though the labor committees of the next Congress held extensive oversight hearings on Title VII, it appears that *American Tobacco* was never even mentioned. See *Oversight Hearings on the Federal Enforcement of Equal Employment Opportunity Laws: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. (1983); *Oversight of the EEOC, 1983: Hearings Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. (1983); see also *Civil Rights Act of 1984: Joint Hearings on S. 2568 Before the Subcomm. on Education, Arts and Humanities and the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. (1984).

Oversimplifying somewhat, one might identify two theoretical traditions for describing the legislative process.<sup>51</sup> The first, the deliberative tradition,<sup>52</sup> conceives of the legislature as deliberating to improve the general welfare or common good. This tradition assumes that legislators are public-regarding—they “desire to participate in formulation of good public policy.”<sup>53</sup> Thus, they fairly arbitrate interest group conflicts, correct market failures, and promote worthy public values in the political community. According to this view, the legislature itself is organized to facilitate the discovery and implementation of good public policy, through the creation of specialized committees. The relationship between the legislature and the other branches of government, including the judiciary, is one of cooperation. Congress sets public-seeking national policy, and the judiciary and the executive implement it.

The cogency of such an optimistic view of the legislative process has steadily eroded, as scholars have shown the process to be frequently private regarding and “rent seeking” (distributing benefits to a group without normative justification).<sup>54</sup> A different “distributive” tradition (often characterized as “public choice” theory) has emerged in political science over the last twenty-five years.<sup>55</sup> This tradition has replaced “a romantic and illusory set of notions about the workings of governments”<sup>56</sup> with more “realistic”—or, perhaps,

51. See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1-93 (1988).

52. The classics in this tradition are ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); WILFRED E. BINKLEY & MALCOLM MOOS, *A GRAMMAR OF AMERICAN POLITICS* (1949); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956). These works set forth a vision of pluralist legislative process in which most viewpoints are represented and legislators solve collective action problems. See also ARTHUR C. FIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1962). This “optimistic pluralism” has been the dominant legal theory for most of the century and was canonized in HENRY H. HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative ed. 1958).

More recent deliberative theories of the legislative process are RICHARD F. FENNO, *CONGRESSMEN IN COMMITTEES* (1973); STEVEN KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* (1987); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984); ARTHUR MAASS, *CONGRESS AND THE COMMON GOOD* (1980).

53. KELMAN, *supra* note 52, at 261.

54. See ELMER E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF* (1935).

55. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974); WILLIAM A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); KENNETH A. SHEPSLE, *THE GIANT JIGSAW PUZZLE* (1978); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

More recent works of significance include BRUCE CAIN ET AL., *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* (1987); MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF THE POLITICAL PROCESS* (1981); WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* (1982); *TOWARDS A THEORY OF THE RENT-SEEKING SOCIETY* (James Buchanan et al. eds., 1980); see also DENNIS C. MUELLER, *PUBLIC CHOICE II*, at 307-47 (1989) (survey).

56. James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE II*, at 11 (James M. Buchanan & Robert D. Tollison eds., 1984).

cynical—views. The distributive tradition views legislation as the distribution of benefits to well-organized interest groups, typically at the expense of (and not in pursuit of) the general welfare.<sup>57</sup> Legislation is, in this view, an economic transaction, in which groups “purchase” governmental benefits from legislators. On the demand side, wealthy established interests are best represented, while the interests of broad categories of the citizenry (consumers, the poor, etc.) are underrepresented.<sup>58</sup> On the supply side, distributive theory assumes that legislators “are single-minded seekers of reelection,”<sup>59</sup> a goal furthered by pandering to well-organized groups (who may provide money and support) at the expense of the general public (which is often ignorant of the costs it bears).<sup>60</sup> The bottom line, some distributive theorists declare, is too much legislation for the benefit of small, established groups, and too little legislation pursuing the more diffuse goal of the general welfare.<sup>61</sup>

Because it lends itself to an analysis that claims some predictive value, distributive theory has attracted the attention of many law professors.<sup>62</sup> But just as distributive theory has attracted increased attention, both political scientists and their counterparts in law have come to realize its limitations.<sup>63</sup>

57. In addition to the sources in *supra* note 55, see Gary S. Becker, *Public Policies, Pressure Groups, and Dead Weight Costs*, 28 J. PUB. ECON. 329 (1985) [hereinafter, Becker, *Public Policies*]; Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

58. See OLSON, *supra* note 55, as elaborated in MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982); SCHATTSCHNEIDER, *supra* note 54, as elaborated in ELMER E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE* 35 (1960) (“The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent . . .”); see also John Ferejohn, *Congress and Redistribution*, in *MAKING ECONOMIC POLICY IN CONGRESS* 131 (Allen Schick, ed., 1983). The best empirical study of interest groups is more restrained in its pessimism. See KAY L. SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

59. FIORINA, *supra* note 55, agrees that legislators’ motivations are more complicated but makes this simplifying assumption in order to work out his powerful analytical model; see also MAYHEW, *supra* note 55, at 5, 16-17 (“focus on the reelection goal” as most realistic perspective on legislative process).

60. See generally FIORINA, *supra* note 55; MAYHEW, *supra* note 55.

61. See HAYES, *supra* note 55; OLSON, *supra* note 55.

62. See, e.g., Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate & Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685 (1991); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Fred S. McChesney, *Regulation, Taxes, and Political Extortion*, in *REGULATION AND THE REAGAN ERA: POLITICS, BUREAUCRACY, AND THE PUBLIC INTEREST* 223 (Roger E. Meiners & Bruce Yandle eds., 1989); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339 (1990).

63. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1990); ROBERT A. KATZMANN, *INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED* (1986); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical & “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990).

Empirical studies of the legislative process do not bear out many of the predictions of distributive theory. For instance, a raw distributive theory does not explain such important statutes as the Civil Rights Act of 1964,<sup>64</sup> the deregulation movement of the 1970's and 1980's,<sup>65</sup> the evolution of environmental statutes,<sup>66</sup> and even such public choice chestnuts as tariff and tax legislation.<sup>67</sup>

There is some truth in both the deliberative and the distributive theories. Distributive theories highlight the role that self-interested groups outside Congress play in affecting the legislative process, while deliberative theories remind us of the importance of the internal processes and the public accountability of legislators. Distributive and deliberative theories might be viewed as complementary, rather than competing. They also share a common problem. Both theories, as traditionally articulated, view "interest"—whether private (distributive) or public (deliberative)—as predefined and *exogenous* to the political process.<sup>68</sup> A more realistic view of the political process views interests (both of groups and of legislators) as *endogenous* to the political process, that is, as shaped by that process.<sup>69</sup>

To conceptualize the lawmaking process, this part draws upon this idea of endogenous interests and expands upon recent work on information theory.<sup>70</sup> Because information theory emphasizes the internal dynamics of Congress in the production of public policy, it is linked to the deliberative tradition. Information theorists argue that Congress is structured to deal with uncertainty about the effect of various policy choices on shared goals and objectives. Congress tries to resolve this uncertainty by delegating information-gathering and deliberating activities to subgroups. Once it is better informed about the consequences of various choices, Congress is better able to set policy. A particularly signifi-

64. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT* (1985).

65. See KINGDON, *supra* note 52.

66. See BRUCE ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1979); E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORGANIZATION 313 (1985).

67. See RAYMOND A. BAUER ET AL., *AMERICAN BUSINESS AND PUBLIC POLICY* (1963) (discussing trade legislation); JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987).

68. See generally William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 747-50 (1991).

69. "Interest" here has three different meanings: (1) interest as a group's or legislator's ultimate goals and objectives; (2) interest as a group's or legislator's belief that a certain measure will contribute to those goals and objectives; and (3) interest as a group's or legislator's willingness to trade off some goals and objectives for others. All of these meanings are endogenous to the political process, although the first meaning is usually more stable over time than are the other two.

70. See generally KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991); Thomas W. Gilligan & Keith Krehbiel, *Organization of Informative Committees by a Rational Legislature*, 34 AM. J. POL. SCI. 531 (1990); Thomas W. Gilligan & Keith Krehbiel, *Collective Choice Without Procedural Commitment*, in *MODELS OF STRATEGIC CHOICE IN POLITICS* 295 (Peter L. Ordeshook ed., 1989). For an interesting twist on the role of information in politics, see Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990).

cant intellectual contribution of information theory is its fluid definition of the public interest as the consensus that emerges at the end of the information-gathering and deliberating process.

This contribution of information theory provides a lesson for the distributive tradition. Heretofore, the distributive viewpoint has suggested that information is merely an expression of an interest group's position and has no independent role in the political process beyond posturing and manipulation. While information is manipulated in the political process, it does place limits on political discourse and contributes to a political dynamic that tangibly affects interest group activity. Like Congress, groups are uncertain about their interests and about how best to achieve them. Groups seek to reduce uncertainty by obtaining relevant information about the consequences of various policies. This information not only helps them to define their preferences, but also allows them to judge whether they can persuade others, perhaps because a particular policy is good for all, or many, sides. In turn, groups respond to, and are often transformed by, information generated by other groups and legislators.

The present study of congressional overrides offers an excellent opportunity to attempt to synthesize the distributive and deliberative traditions, using the insights suggested by information theory. The opportunity is possible because an override story is often a story over time, in which the power of information to influence the behavior of both groups and Congress is most readily apparent. Consider the following example, drawn from this study's collection of overrides.

The Immigration and Nationality Act of 1952 provided that "[a]lliens afflicted with psychopathic personality, epilepsy, or a mental defect" were to be excluded from entry into the United States.<sup>71</sup> The exclusion was originally urged upon Congress by the Public Health Service (PHS) to prevent at least some gay men and lesbians from entering the United States. Reflecting then "modern" views within the medical community, the PHS considered homosexuality a disease, and urged that it be included as a medical basis for exclusion. Congress acquiesced to the PHS's "psychopathic personality" euphemism. No one objected to the provision, in part because the victims—gay men and lesbians—were afraid even to identify themselves, much less to organize politically to oppose such legislation. In *Boutilier v. INS*,<sup>72</sup> the Supreme Court interpreted "psychopathic personality" to mean "homosexuality," even though the medical consensus on this issue had significantly eroded and the excluded alien in the case was actually bisexual, not homosexual.<sup>73</sup> No effort was made to override *Boutilier* because no interest groups opposed the decision.

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71. Immigration and Nationality Act of 1952, § 212(a)(4), 66 Stat. 163, 182 (repealed 1990).

72. 387 U.S. 118 (1967).

73. See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 654 (1990) (providing fuller analysis of this decision).

Much changed in the next decade. New circumstances transformed views on these issues. Especially after the Stonewall Riot in 1969, gay men and lesbians became politically active and sought to dismantle legal disabilities based upon sexual orientation. Through activism and the spread of information about the actual lives of homosexuals and the irrelevance of their sexual preference to their abilities and capacities, gay and lesbian groups in the 1970's persuaded the leading medical organizations to remove homosexuality from the category of disease.<sup>74</sup> This shift was the result of a major struggle within the psychiatric community, recognizing the cogency of long-neglected studies showing sexual preference to be unrelated to mental illness and rejecting the earlier medical consensus that homosexuality is an illness. Reflecting the outcome of this debate within the profession and an emerging literature rebutting earlier medical stereotypes about homosexuality, the PHS (an agency staffed by medical personnel) in 1979 abandoned its original position and announced that it no longer considered homosexuality a medically excludable condition and that homosexuality should no longer operate to exclude gay men and lesbians.<sup>75</sup> Unmoved, the Immigration and Naturalization Service (INS) publicly disagreed with the PHS in the early 1980's but carried on its own internal debate, which resulted in its substantial failure to enforce the exclusion.<sup>76</sup>

In the 1980's, liberal Democrats in Congress repeatedly introduced legislation to override *Boutilier*.<sup>77</sup> Abandoned by the medical community, the PHS, and even the INS (which must have found the exclusion ridiculous to administer), and under sharp attack from the then-organized gay and lesbian community, *Boutilier* no longer enjoyed much support. Efforts to override it gathered momentum in Congress in the late 1980's, as two Members of the House declared themselves to be openly gay, and public sympathy for gay men and lesbians was further spurred by the AIDS epidemic. *Boutilier* was finally overridden in 1990 by bipartisan agreement and without much fuss.<sup>78</sup>

This override story allows information theory to identify interconnections between the distributive and deliberative perspectives on legislation. As the distributive perspective suggests, Congress will generally not override Supreme Court statutory decisions unless a politically salient group presses for an override and unless other relevant groups, especially government officials and

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74. RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 101-78 (1981).

75. Memorandum from Julius B. Richmond, Surgeon General and Assistant Secretary for Health, to Dr. William H. Foege, Director of the Center for Disease Control, and Dr. George I. Lythcott, Administrator of the HSA (Aug. 2, 1979) (on file with author).

76. The INS announced that it would exclude gay men and lesbians only if they made unsolicited declarations of sexual preference to an INS agent. 62 Interpreter Releases 166-67 (INS 1985).

77. See, e.g., S. 2210, 96th Cong., 2d Sess. (1980) (sponsored by Sen. Cranston); H.R. 6303, 96th Cong., 2d Sess. (1980) (Rep. Beilenson and 28 cosponsors by May 20); H.R. 3524, 97th Cong., 1st Sess. (1981) (Rep. Dixon and 29 cosponsors by Oct. 28); S. 1086, 98th Cong., 1st Sess. (1983) (Sen. Cranston).

78. Immigration Act of 1990, Pub. L. No. 649, § 601, 104 Stat. 4978, 5067.

political party leaders, acquiesce in the override.<sup>79</sup> But, contrary to distributive theory as traditionally articulated, interests of relevant groups change over time in response to new information, new arguments, and new frameworks of thought.

In the 1950's and 1960's, the configuration of interests made an override of *Boutillier* inconceivable, but the later outpouring of pro-gay and lesbian information and theory after the Stonewall Riot transformed the relevant private interests. First, gay men and lesbians "came out" in greater numbers and made their interests politically salient. Second, leading professional groups revised their views about homosexuality in response to demands by the gay and lesbian community and to accumulated evidence inconsistent with the old views. Third, government officials changed their positions in response both to new information and to pressure brought upon them by the first two changes.

As the deliberative perspective suggests, Congress will generally not override a Supreme Court decision without painstaking deliberation over whether the decision undermines its policies and whether alternative approaches are desirable. This deliberation usually generates both House and Senate committee hearings. Hearings and informal contacts provide Congress with more information about the consequences of the Supreme Court's decisions and about the alternatives from which Congress might choose. The *Boutillier* issue was the subject of hearings throughout the 1980's, and the hearings reflected the waning appeal of the statutory precedent and the increasingly undesirable policy it represented. Deliberation over time transformed legislative views about what the "public interest" demanded.

Starting with this information-based synthesis of the distributive and deliberative features of politics, the remainder of this part will develop a model of congressional overrides, using *Boutillier* and other case examples from the study. The model is developed in three stages: first, an exploration of the importance of interest groups (broadly defined to include ideological and governmental groups); then, a discussion of the critical role of congressional committees; and, finally, the development of a formal model describing the dynamic interaction between the Supreme Court, Congress, and the President in statutory interpretation cases.

### A. *The Importance of Interest Groups*

The central importance of interest groups best illustrates the distributive features of the legislative override process.<sup>80</sup> Interest groups are important

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79. Recall the contrast at the end of Part I between Congress' reaction to *Gilbert* (a prompt override in response to pressure) and its nonreaction to *American Tobacco* (acquiescence because of interest group opposition).

80. The main sources for the discussion that follows are HAYES, *supra* note 55; OLSON, *supra* note 55; SCHATTSCHNEIDER, *supra* note 54; SCHLOZMAN & TIERNEY, *supra* note 58; Becker, *Public Policies*, *supra* note 57; see also FARBER & FRICKEY, *supra* note 63, at 21-37, for an excellent critical synthesis of

because they bring issues to the attention of Congress, and because they are capable of maintaining issues on the national agenda and blocking legislative initiatives. The distributive possibilities arise in part because interest groups form selectively. Not all potential "interests" form organized groups, and groups have varying arrays of resources and influence. Generally, groups are most likely to be politically salient (i.e., "organized") if they have: (1) a small, cohesive set of members; (2) significant resources or power; and/or (3) a preexisting organizational apparatus to unite them for purposes beyond lobbying and legislation.<sup>81</sup> If some interests are well organized and others are not, there is a risk that organized interests will reap a disproportionate share of government benefits.

Recent political science scholarship suggests that this account has some validity, but contains caveats reflecting the informational features of interest groups.<sup>82</sup> An important caveat is that "interest" needs to be understood as a complex phenomenon—not simply as wealth maximization. Instead, "interest" inevitably reflects an ideological component, an appeal to a group's concept of a good society. Many politically salient interest groups are primarily driven by ideology, including civil rights groups such as the ACLU and NAACP, environmental organizations, free enterprise study institutes, consumer welfare watchdogs, and even political parties.<sup>83</sup> Indeed, in the modern administrative state, the state and groups within the state (such as agencies) are interest groups, and the way in which they define their interests (literally, the "public interest") is intrinsically ideological.<sup>84</sup> Even traditional private economic interest groups go through ideological processes as they decide which issues to stress, allies to seek, and arguments to make. One reason for this process is that an interest group cannot obtain what it wants without persuading other actors—political parties, experts, and legislators and their staff—that it has good reasons supporting the desired legislation.

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this literature.

81. See OLSON, *supra* note 55.

82. This discussion is based upon FARBER & FRICKEY, *supra* note 63, at 21-37; INTEREST GROUP POLITICS 1-69, 162-82 (Allan J. Cigler & Burdett A. Loomis eds., 2d ed. 1986); SCHLOZMAN & TIERNEY, *supra* note 58; Elliott et al., *supra* note 66, at 313; Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); William H. Panning, *Formal Models of Legislative Processes*, in HANDBOOK OF LEGISLATIVE RESEARCH 669 (Gerhard Loewenberg et al. eds., 1985).

83. See JEFFREY M. BERRY, *LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS* (1977); ANDREW S. MCFARLAND, *PUBLIC INTEREST LOBBIES* (1976); SCHLOZMAN & TIERNEY, *supra* note 58, at 28-35; Jeffrey M. Berry, *On the Origins of Public Interest Groups*, 10 J. POL. 392 (1978); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988); John M. Hansen, *The Political Economy of Group Membership*, 79 AM. POL. SCI. REV. 79 (1985); V. Kerry Smith, *A Theoretical Analysis of the "Green Lobby"*, 79 AM. POL. SCI. REV. 132 (1985); David Vogel, *The Public Interest Movement and the American Reform Tradition*, 95 POL. SCI. Q. 607 (1980).

84. See W.M. Crain & Robert E. McCormick, *Regulators as an Interest Group*, in THE THEORY OF PUBLIC CHOICE II, *supra* note 56, at 287.

The case studies and data in my survey of congressional overrides provide evidence supporting the following synthetic view of interest groups in the legislative process. First, interest groups form around shared perspectives, based upon both economic and ideological considerations, in different mixes for different groups. Groups are most likely to organize when they are small, cohesive, and sociopolitically privileged. Diffusion, heterogeneity, and political marginalization render groups less likely to become organized, but sometimes potentially more powerful if organized. Second, interest groups have goals, proposals, and priorities that are determined by both internal and external political processes. Hence, those goals, proposals, and priorities are subject to change as groups acquire new information and feedback from the political process. Third, interest groups cannot secure their distributive goals (benefits for themselves) without providing reliable information to other actors in the legislative process. On any given issue, several groups are potential competitors; to prevail, a group usually must persuade other groups to acquiesce, since intense interest group opposition is fatal to most initiatives. Thus, even an economically driven (traditional) interest group must provide persuasive information and arguments to more ideologically driven groups—including relevant agencies, political parties, the media, and experts—to assure either their neutrality or support.

### 1. *The Agenda-Setting Role of Interest Groups*

Interest groups regularly bring judicial decisions to the attention of Congress and are usually the impetus behind congressional focus on Supreme Court statutory decisions. If no organized interest is (or perceives itself to be) harmed by a recent Supreme Court decision, the decision will probably not provoke a congressional hearing, much less an override. It is for this reason that there were no congressional hearings on the *Boutilier* issue until gay men and lesbians became an organized political force, with important legislative allies, in the 1980's. While many observers criticized *Boutilier*,<sup>85</sup> the decision's validity did not command legislative deliberation until a newly salient group pressed its significance. Contrast the long congressional inattention to *Boutilier* with Congress' immediate attention to controversial civil rights decisions of the 1988 Term.<sup>86</sup> Those statutory cases moved immediately onto the legislative agenda because a rainbow of middle class civil rights groups, as well as the Democratic Party, considered them important.

This phenomenon helps explain why there are relatively few hearings and overrides to protect the interests of criminal defendants and suspects (see Tables

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85. See, e.g., Maurice Roberts, *Sex and the Immigration Laws*, 14 SAN DIEGO L. REV. 9 (1976-77); Thomas R. Byrne, Jr. & Francis M. Mulligan, Note, "Psychopathic Personality" and "Sexual Deviation": *Theoretical Terms or Legal Catch-Alls—Analysis of the Status of the Homosexual Alien*, 40 TEMPLE L.Q. 328 (1967).

86. See *supra* note 4.

7 and 9). The Supreme Court on average decides between three and seven statutory cases per Term involving the rules of habeas corpus for state and federal prisoners, substantive federal criminal law, and rules of federal criminal procedure. The cases won by state and federal governments, which leave criminal convictions intact, rarely generate even a judiciary committee hearing.<sup>87</sup> In contrast, cases lost by state and federal governments, which overturn convictions, readily command judiciary committee hearings and often lead to overrides.<sup>88</sup> In the period of this study, Congress overrode eighteen Supreme Court interpretations of federal criminal statutes;<sup>89</sup> fifteen of the eighteen overrode interpretations adverse to state and federal law enforcement.<sup>90</sup> The reason for this asymmetry is that state and federal law enforcement officials are powerful interests that can command congressional attention, while criminal defendants and suspects are more diffuse, marginalized, and less sympathetic groups.

Much the same story could be told for other relatively diffuse or marginalized groups. Supreme Court decisions hurting the economic interests of consumers, welfare and medicaid beneficiaries, alcoholics, migrant workers, inner-city youth, and the working poor rarely generate legislative interest. These groups are not well organized, and advocacy groups that might represent them tend to reflect an upper-middle-class bias and often lack sufficient resources to pursue many initiatives. In contrast, as suggested in Tables 7 and 9, organized groups are very effective in getting their statutory issues before Congress. The most successful groups are federal, state, and local governments; big

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87. Exceptions to this generalization are issues that tend to affect businesses, such as civil RICO liability, *see Hearings, infra* note 103; well-to-do citizens, such as wiretapping; and organized groups, such as the gun lobby.

88. For example, the judiciary committee hearings on habeas corpus in my study (1979-88) focused in large part on cutting back the remedy. *See Habeas Corpus Reform: Hearings on S. 238 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *Comprehensive Crime Control Act of 1983: Hearings on S. 829 and H.R. 2151 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); *The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *Habeas Corpus Procedures Amendments Act of 1981: Hearings on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

89. *See infra* Appendix I for the overrides of *Carpenter v. United States*, 484 U.S. 19 (1987); *McNally v. United States*, 483 U.S. 350 (1987); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *United States v. Baggot*, 463 U.S. 476 (1983); *United States v. Sells Eng'g Inc.*, 463 U.S. 418 (1983); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983); *Williams v. United States*, 458 U.S. 279 (1982); *Busic v. United States*, 446 U.S. 398 (1980); *United States v. New York Tel. Co.*, 434 U.S. 159 (1977); *United States v. Park*, 421 U.S. 658 (1975); *United States v. Maze*, 414 U.S. 395 (1974); *United States v. United States Dist. Court*, 407 U.S. 297 (1972); *Alderman v. United States*, 394 U.S. 165 (1969); *United States v. Guest*, 383 U.S. 745, 754-55 (1966) (adverse dictum); *United States v. Seeger*, 380 U.S. 163 (1965); *Reilly v. Pinkus*, 338 U.S. 269 (1949); *Williams v. United States*, 327 U.S. 711, 715 (1946) (dictum); *Caminetti v. United States*, 242 U.S. 470 (1917).

90. The three overrides protecting the rights of criminal defendants and suspects all involved issues of interest to mainstream, middle class America. *See* the overrides of *United States v. New York Tel. Co.*, 434 U.S. 159 (1977), where the ACLU and allied groups procured legislation to protect against wiretap abuse, *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983), in which the gun lobby prevailed, and *Caminetti v. United States*, 242 U.S. 470 (1917), in which Congress updated the Mann Act's prohibition to permit greater sexual liberties between consenting adults.

business (routinely represented by the Business Roundtable and the Chamber of Commerce); specific industries (represented by trade associations); unions (the AFL-CIO and individual unions); women (NOW and other groups); the disabled; and environmentalists (Sierra Club and others).

A group's ability to place an issue on the legislative agenda does not ensure that the group will do so. There are many reasons endogenous to the political process why a group might not press a statutory issue that it lost in court. For example, a group may not believe it can prevail on the issue and does not want to deplete valuable political capital or credibility by pressing frivolous positions. After losing an important issue of Title VII interpretation in *American Tobacco v. Patterson* in 1982, civil rights groups did not press for an override,<sup>91</sup> probably because they did not have the votes for an override that benefitted only African-American workers and/or because they did not want to expend political capital to seek relief for an issue that pitted their interests against those of labor unions, which were often political allies in civil rights battles in Congress. In contrast, civil rights groups did press for an override of *Wards Cove Baking Co. v. Atonio*<sup>92</sup> and other 1989 decisions cutting back on Title VII, for several reasons: the cumulative effect of those decisions was felt to be devastating to the overall enforcement of Title VII; the decisions hurt middle class women and minorities as well as working class minorities (the only victims of *American Tobacco*), hence offering opportunities for coalition-building; and there were excellent arguments that the Court was "setting back the clock" in civil rights by retreating from twenty years of more liberal interpretations of Title VII.

## 2. Persistence of Issues on the Legislative Agenda

Interest groups also provide the "push" to keep issues on the legislative agenda. This has both distributive and deliberative features. On the one hand, a determined interest group can press Congress to "stick with" an issue, and organized group activity is essential to keeping an issue on the legislative agenda over time. In the present study, there is not a single congressional override that did not have strong support outside of Congress. Moreover, almost all of the overrides had support from both private interest groups and government groups.

On the other hand, legislative deliberation over time gives the interest group an opportunity to build up a coalition supporting its policy proposal, to educate Congress about the issue and its proposal, and to persuade legislators that its position is justified. Thus, the persistence of the *Boutlier* issue in hearings throughout the 1980's reflected both the gay and lesbian community's com-

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91. There were several Title VII oversight hearings during the year after *American Tobacco*, see *supra* note 50, yet no civil rights group even mentioned the case.

92. 490 U.S. 642 (1989).

mitment to obtaining a benefit for its members and its effort to demonstrate the irrationality of the antihomosexual policy. Similarly, the persistence of civil rights issues on the national agenda, culminating in the Civil Rights Act of 1991, was due in part to a coalition of African-American, women's, and labor groups.

Consider another example. The Supreme Court in *Stencel Aero Engineering Corp. v. United States*<sup>93</sup> held the United States immune from indemnity claims by government contractors sued in tort for defects in products they sold to the United States. Although this statutory decision is hardly one of the more important ones (in either doctrinal or policy terms) of the last several decades, it stimulated more House and Senate Judiciary Committee hearings than any other Supreme Court decision in the period studied. Indeed, there were hearings on the indemnity issue in every Congress from 1979 to 1988.<sup>94</sup> The hearing record suggests the evolution of this issue: Stencel was a big employer in the district of a Member of Congress who introduced the first override bill, presumably as a favor to an important business in his community.<sup>95</sup> That alone would have generated enough hearings for one or two Congresses, but probably not many more. The issue persisted on the legislative agenda, however, not only because it was being "pushed" by the industry trade group and the ABA's Public Contracts Section, but also because it raised an important policy problem: The proliferation of products liability lawsuits against government suppliers, who were prevented from impleading the United States due to the doctrine of sovereign immunity, financially threatened many such companies and raised doubts about their willingness to continue selling to the government. The contractors won the support of allied groups and legislators but met powerful

93. 431 U.S. 666 (1977).

94. For hearings on bills to override *Stencel* and the later, related case of *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), see *Federal Procurement Liability Reform Act of 1987: Hearing on H.R. 2378 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987); *Fair Allocation of Governmental Fault Act: Hearing on H.R. 1623 Before the Subcomm. on Administrative Law and Governmental Operations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *Indemnification of Government Contractors: Hearing on S. 1254 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *Government Contractors' Liability and Indemnification Act: Hearings on H.R. 4083 and H.R. 4199 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) [hereinafter 1984 *House Stencel Hearings*]; *Indemnification of Government Contractors: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983). For exploratory hearings which occurred before a bill was proposed, see *Indemnification of Government Contractors: Hearings Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982). For older hearings on bills merely to override *Stencel*, see *Government Contractors Product Liability Act: Hearing on H.R. 1504 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter 1981 *House Stencel Hearings*]; *Government Contractors Product Liability Act: Hearings on H.R. 5351 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980) [hereinafter 1980 *House Stencel Hearings*].

95. Representative Gudger of North Carolina introduced H.R. 5351, 96th Cong., 1st Sess. (1979), soon after the *Stencel* decision in 1977. He also introduced H.R. 5358, a private bill for relief to Stencel. See 1980 *House Stencel Hearings*, *supra* note 94 (reproducing both bills).

economic counterarguments from the Departments of Justice and Defense.<sup>96</sup> After ten years of deliberation on the issue, it was the Supreme Court, and not Congress, that bailed out the government contractors by giving them a federal “defense” that could be invoked in state law products liability actions.<sup>97</sup>

### 3. *Critical Nature of Interest Group Opposition*

Appendix II suggests that the vast majority of override issues that reach the legislative agenda do not result in legislation. Most Supreme Court decisions scrutinized by congressional hearings are in no danger of being overridden. Just as some interest groups bring issues onto the legislative agenda, other interest groups simultaneously try to ensure that no proposal is actually enacted. Congress is unlikely to pass legislation on an issue that produces a “conflictual” demand pattern, where important interest groups differ sharply over what should be done. Legislation is more likely, however, when a “consensual” demand pattern exists, that is, all the main groups acquiesce in the legislation.<sup>98</sup> Information theory, of course, suggests that demand patterns can change over time. If an originally conflictual demand pattern changes to a more consensual one (through compromise and/or new information), an override is much more likely.

Contrast the override efforts for *Boutilier* and *Stencel*. Bills to override the former had the support of groups with relatively little monetary or voting clout, but *Boutilier* was ultimately overridden in 1990 because no salient group supported the decision. This process required two decades of public education on the nature of homosexuality and on the numbers of individuals in our society who are homosexual. The demand pattern shifted on this issue. Conversely, despite impressive interest group support, *Stencel* was never overridden by Congress because the conflictual demand pattern persisted. The Departments of Defense and Justice and consumer groups opposed the legislation intensely and were never persuaded to support it.

Another example of this latter phenomenon is the legislative reaction to *Illinois Brick Co. v. Illinois*,<sup>99</sup> in which the Supreme Court held that “indirect purchasers” of a product had no standing to sue under the antitrust laws. Because it was perceived as retreating from vigorous enforcement of the antitrust laws and as denying important groups (such as the states) access to treble damage recoveries, *Illinois Brick* yielded a firestorm of protest and

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96. For the best articulation of the suppliers’ arguments, see *1981 House Stencel Hearings*, *supra* note 94. For the government’s counter-arguments, see *1984 House Stencel Hearings*, *supra* note 94.

97. See *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The dissent noted that Congress had been debating that very issue for a decade and had afforded the contractors no relief. *Id.* at 515-16 & n.1 (Brennan, J., dissenting).

98. The above analysis is taken from HAYES, *supra* note 55, at 93-126. See also Michael T. Hayes, *The Semi-Sovereign Pressure Groups: A Critique of Current Theory and an Alternative Typology*, 40 J. POL. 134 (1978).

99. 431 U.S. 720 (1977).

generated a decade of congressional hearings.<sup>100</sup> Although the override effort had strong support from the Department of Justice, the states, consumers' groups, unions, and women's groups, it failed in large part due to the intense opposition of the Business Roundtable, the Chamber of Commerce, and other business groups. This opposition was effective, not because these interest groups were invincible (they were routed in the 1978 override of *Gilbert*, for example), but because their support for the *Illinois Brick* decision was backed by powerful data and economic analysis.<sup>101</sup>

The most important statutory interpretation issues of the last thirty years have produced the most conflict, with important interests and cogent arguments supporting both sides of the case. The Court's most dramatic policymaking decisions have remained untouched by Congress because interested groups are often intensely opposed and proffer powerful but contradictory analytical arguments on how to resolve such issues. This phenomenon is evident on issues such as affirmative action in employment, the home video and audio recording of copyrighted works,<sup>102</sup> the application of criminal racketeering laws to garden variety commercial disputes,<sup>103</sup> and contribution in antitrust cases.<sup>104</sup>

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100. See *The Antitrust Improvements Act of 1986 (Illinois Brick): Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) [hereinafter *1986 Senate Illinois Brick Hearing*]; *Antitrust Fairness Amendments of 1983 and Oversight of Corporate Interlocks: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) [hereinafter *1984 House Illinois Brick Hearings*]; *Taxpayer Antitrust Enforcement Act of 1983 (Illinois Brick): Hearings on S. 915 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. (1983-84); *Restoring Effective Enforcement of the Anti-Trust Laws: Hearings on H.R. 2050 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) [hereinafter *1979 House Illinois Brick Hearings*]; *Antitrust Equal Enforcement Act of 1979: Hearings On S. 1468 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) [hereinafter *1979 Senate Illinois Brick Hearings*].

101. See, e.g., *1979 Senate Illinois Brick Hearings*, *supra* note 100, at 174-89 (statement of Professors Richard Posner and William Landes, arguing that override would retard vigorous antitrust enforcement).

102. Dozens of bills were introduced in anticipation of and in response to *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), in which the Court called upon Congress to enact responsive legislation, but the motion picture industry and other groups were able to head off override bills. See, e.g., *Home Video Recording: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986); *Home Audio Recording Act: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of The Senate Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. (1985-86); *Video and Audio Home Taping: Hearing on S. 31 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); *Copyright Official/Copyright Royalty Tribunal: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); *Home Recording of Copyrighted Works: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *Copyright Infringements (Audio and Video Recorders): Hearings on S. 1758 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. (1981-82).

103. The Department of Justice and the National Association of Attorneys General, for example, opposed the business community's efforts to override *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985). See, e.g., *RICO Reform: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. (1987-88); *Proposed RICO Reform Legislation: Hearings on S. 1758 Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987); *RICO Reform: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. (1985-86); *Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985). Indeed, in the 99th Congress, overwhelming business support propelled the *Sedima* override through the House, 132 CONG. REC. H9377 (daily ed. Oct. 7, 1986), but the Department

In the last twenty-four years, there have been only a handful of overrides in which Congress acted against the strong opposition of an important interest group, and the overrides in those cases required a herculean effort.<sup>105</sup>

This same difficulty confronted the civil rights community's effort to override *Wards Cove*. Notwithstanding support from the Democratic Party, all of the leading civil rights groups, many unions, and consumer groups, the proposed Civil Rights Act of 1990 failed in the 101st Congress primarily because big business and the Republican Party were able to raise opposing policy concerns, such as the possibility of excessive damages and litigation and of employers' setting quotas for minority hiring. Essentially the same legislation became law in the 102d Congress because both big business (in early 1991) and the Republican White House (in October 1991) signaled their willingness to acquiesce in a massive override in return for damage caps and anti-quota reassurances in the legislation.

### B. *The Critical Role of Committees*

The deliberative features of the legislative override process are at first blush most apparent in the critical role played by committees.<sup>106</sup> A difficulty inherent to the legislative process is that policy must be made under conditions of uncertainty. Is the "problem" identified by the groups petitioning Congress really an important social or economic problem not adequately handled by

of Justice stopped the bill on the floor of the Senate. 132 CONG. REC. S16,704 (daily ed. Oct. 16, 1986).

104. Although the leading business groups and the Department of Justice strongly favored overriding the Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and the Court's opinion itself called for a legislative response, the opposition of consumer groups and antitrust attorneys killed override efforts. See, e.g., *The Antitrust Remedies Improvement Act and the Intellectual Property Reform Act of 1987: Hearings on S. 1407 and S. 635 Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. (1987-88); *Individual Treble Damage Liability: Hearing on S. 1300 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. (1981-82); *The Antitrust Equal Enforcement Act: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. (1981-82).

105. See, e.g., the overrides reported in Appendix I for *Grove City College v. Bell*, 465 U.S. 555 (1984) (override intensely opposed by Department of Justice and unsuccessfully vetoed by President); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (override intensely opposed by Business Roundtable and other business groups); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (override opposed by Department of Justice).

106. See JOSEPH COOPER, *CONGRESS AND ITS COMMITTEES: A HISTORICAL APPROACH TO THE ROLE OF COMMITTEES IN THE LEGISLATIVE PROCESS* (1988); see also JOSEPH COOPER, *THE ORIGINS OF THE STANDING COMMITTEES AND THE DEVELOPMENT OF THE MODERN HOUSE* (1970); RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* (1973); KREHBIEL, *supra* note 70; DAVID E. PRICE, *WHO MAKES THE LAWS? CREATIVITY AND POWER IN SENATE COMMITTEES* (1972); STEVEN SMITH & CHRISTOPHER J. DEERING, *COMMITTEES IN CONGRESS* (1984); Gilligan & Krehbiel, *supra* note 70; Thomas W. Gilligan & Keith Krehbiel, *Asymmetric Information & Legislative Rules with a Heterogeneous Committee*, 33 AM. J. POL. SCI. 459 (1989); Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149 (1990); Keith Krehbiel, *Why Are Congressional Committees Powerful?*, 81 AM. POL. SCI. REV. 929 (1987); David E. Price, *Congressional Committees in the Policy Process*, in *CONGRESS RECONSIDERED* (Laurence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985).

existing laws and institutions? If so, what policy alternatives exist? What are the costs and benefits of each? Congressional practice had been to deal with this uncertainty through deliberation and information gathering. Congress early on realized that it could not make informed decisions on the many issues it faced if it confronted and debated all the issues on the floor. Hence, Congress established specialized committees to gather information about problems brought to the legislature, to identify alternative policies, and to make recommendations based upon deliberation of the different perspectives.

This traditional, deliberative understanding of the role of committees has been questioned from a distributive perspective.<sup>107</sup> These scholars argue that the committee selection process is skewed in favor of "preference outliers," that is, Members of Congress whose preferences do not reflect the chamber norm. Thus, if farm state legislators want to sit on the House Agriculture Committee, union supporters choose the House Education and Labor Committee, and military boosters opt for the House Armed Services Committee, all of those committees may consist of legislators whose preferences are much more pro-farmer, pro-union, and pro-military than the preferences of the chamber as a whole. Under this view, committees become means by which government benefits are distributed to interest groups. If the committee is stacked in favor of client groups, the chamber as a whole defers to the committee, and if the committee uses its "gatekeeping" power to set the legislative agenda on issues within its jurisdiction, then interest groups can use their influence to obtain more benefits than the chamber as a whole would desire. This leads to an effective "capture" of the legislative process, as well as of the committees, by the relevant groups.<sup>108</sup>

The distributive perspective reveals a fascinating feature of the committee process, one supported by anecdotal evidence. It is subject to both analytical and empirical doubt, however.<sup>109</sup> Why would a majoritarian chamber tolerate a committee selection process that yielded outlier committees? Why would the chamber defer to such a committee? Distributive theorists respond by emphasizing intensity of preferences. Each legislator is willing to tolerate nonmajoritarian decisions on issues not of great concern for her constituents (and her reelection) in return for satisfaction of her own outlier preferences on issues of great and

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107. See SHEPSLE, *supra* note 55; Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987); see also Gilligan & Krehbiel, *supra* note 106; Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress*, 96 J. POL. ECON. 132 (1988).

108. This is related to the "cozy triangle" literature on the capture of both relevant committees and agencies by regulated interests. See generally RANDALL B. RIPLEY & GRACE A. FRANKLIN, *CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY* 9-12, 55-66 (3d ed. 1984) (occasions and techniques for interaction between Congress and the bureaucracy).

109. The main skeptic is Keith Krehbiel, whose recent book criticizes the evidence developed in SHEPSLE, *supra* note 55, and presents an informational perspective on the committee process. KREHBIEL, *supra* note 70.

intense concern to her constituents.<sup>110</sup> Information theory suggests that this is not in fact what happens: Committees are not populated by preference outliers, and to the extent that outliers do gravitate to certain committees, they are typically met by outliers in precisely the opposite direction.<sup>111</sup> Information theory also suggests that committees do not tend to be "captured" by one set of interests, for otherwise Congress would have insufficient reason to rely on their judgments.

The data and case studies generated by this survey suggest a synthetic view of congressional committees. First, most committees are not dominated by preference outliers. Among the committees most relevant to statutory interpretation issues, the tax committees, banking committees, environmental policy committees, and committees in charge of admiralty law are not now, and probably have not traditionally been, dominated by preference outliers.<sup>112</sup> On some issues at some points in time, the judiciary committees have been preference outliers (left of the chamber median),<sup>113</sup> and the labor committees have been preference outliers for the entire period of this study (left of the chamber median).<sup>114</sup> Second, even if a committee consists of preference outliers on at least some issues, the committee is usually constrained by the preferences of the full chamber, which are not easily evaded. This constraint means that the committee will not normally report a bill that it believes will be defeated on

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110. Weingast & Moran, *supra* note 107, at 771-72.

111. See KREHBIEL, *supra* note 70. For example, just as Democrats who strongly favor civil rights might desire to be on the Judiciary Committees to press the interests of an important constituency, Republicans who favor business interests might want to be on the same committees, for precisely the same reason. Both may be preference outliers, but they will tend to cancel out one another.

112. See *id.* at 129 tbl. 4.6 (deviations of various House committees from House median).

113. Krehbiel argues that for the period 1985-86, the House Judiciary Committee was not much of a preference outlier, though it was to the left of the House median. *Id.* His observation seems borne out by the Committee's performance on the Civil Rights Act of 1990. The Judiciary Committee voted for a favorable report on the bill by a 25 to 12 vote, see Transcript of Judiciary Committee Mark-Up (on file with author), which resembles the favorable vote of 272 to 154 in the House as a whole. See 136 CONG. REC. H6769 (daily ed. Aug. 3, 1990). At the beginning of this study, however, the House Judiciary Committee was a preference outlier (to the left of the chamber median) on civil rights issues. The Committee in 1969 was chaired by the liberal Emanuel Celler and consisted of 15 liberal Democrats, 5 liberal, Eastern Republicans, and 4 Midwestern Republicans who were liberal on civil rights, a total of 24 pro-civil rights votes, against five Southern Democrats (opposed to civil rights) and six conservative Republicans (neutral or reluctant). See 1969 CONG. Q. ALMANAC 66 (listing committee members); WHALEN & WHALEN, *supra* note 64. This was much more liberal than the House as a whole.

The Senate Judiciary Committee today may be at or near the chamber median. By my count, the 1990 Senate Judiciary Committee had average 1988 ADA scores (ratings given by Americans for Democratic Action for "liberal" decisions, with the most liberal rating equaling 100%) of 74% for its Democratic majority and 15% for its Republican minority, about the same as the chamber medians of 72% (Democrats) and 19% (Republicans). See ALMANAC OF AMERICAN POLITICS 1990. At the beginning of this study, the Senate Judiciary Committee, chaired by the conservative Senator Eastland and populated with a number of other Southern Democrats, was probably to the right of the Senate median.

114. KREHBIEL, *supra* note 70, at 128-29 tbl. 4.6 (finding 1985-86 House Education and Labor Committee significantly left of chamber median). By my count, the 1990 Senate Labor and Human Resources Committee had cumulative ADA scores of 88% support for its Democratic members and 26% for its Republican members, significantly to the left of the chamber medians of 72% (Democrats) and 19% (Republicans). See ALMANAC OF AMERICAN POLITICS 1990 (listing committee members and ADA scores).

the chamber floor. Hence, it will either report bills that it believes meet the chamber's preferences, or it will try to change those preferences through information and persuasion. Third, an outlying committee has some power to delay or kill proposals that the chamber would adopt. To be sure, committees occasionally report bills that they oppose in response to demand by the chamber, and the chamber can and will bypass a committee that is bottling up legislation. But most measures are not salient enough for the chamber even to know what its preferences are. Committees can delay or raise the costs of enacting legislation on salient issues and hence discourage legislation at the margin, while in some instances committees can exercise their strategic power (particularly during conference committee) to kill or dilute legislation they do not like.

This theory emphasizes three committee roles in congressional overrides: screening out most override proposals; providing a forum for developing override proposals that will satisfy the chamber median and avoid most interest group conflict; and serving as a policy center that generates arguments and information for shaping, and perhaps changing, the chamber's own initial preferences.

The primary role of congressional committees is to serve as devices to screen out the vast majority of policy proposals submitted to Congress. Committees will kill override legislation for three reasons. First, the committee can discourage an override proposal that the chamber might prefer (the outlier phenomenon). Although this is not nearly as regular an occurrence as distributive theory would suggest, it occasionally affects the prospects of override proposals. For example, the outlier phenomenon was probably the reason there was never a serious legislative effort to override *Griggs v. Duke Power Co.*,<sup>115</sup> in which the Supreme Court interpreted Title VII of the Civil Rights Act to permit disparate impact lawsuits. *Griggs* harmed big business, which saw itself faced with Title VII lawsuits simply for having "bad numbers," and in 1971-72 a majority in Congress probably did not agree with the sweeping reconceptualization of Title VII in *Griggs*.<sup>116</sup> However, the Labor Committees in both chambers were significantly to the left of their chamber medians and probably preferred *Griggs* to any bill their chambers would have passed. Hence, no committee-generated bill contained a *Griggs* provision, and both committees

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115. 401 U.S. 424 (1971).

116. See HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* at 388-91 (1990). Note also that the House in 1971 voted to override judicial interpretations of 42 U.S.C. § 1981 (1988) which hurt the interests of private employers, and a majority of Senators on the floor were prepared to do the same in 1972. See *infra* text accompanying note 188. Essentially the same coalition would have opposed *Griggs*, which, if anything, was a more serious threat to employer interests.

inserted language in their reports for the 1972 amendments to Title VII that strongly approved of *Griggs*.<sup>117</sup>

Second, a much more common phenomenon is a committee's refusal to report an override that it likes but that it believes the chamber will reject. This was probably the case with the efforts to override *Illinois Brick*. Both the Senate and House Judiciary Committees favored an override of the decision in 1979-80, and the Senate Committee reported a bill, which died on the Senate Calendar. Although the Judiciary Committees in both chambers continued to hold hearings on *Illinois Brick* after 1980, the House Judiciary Committee, which strongly favored overriding the decision, never reported an override bill. The probable reason was that it saw virtually no chance for enactment, especially after the pro-business Republicans gained control of the Senate in 1981.<sup>118</sup> Conversely, the Senate Judiciary Committee during the period of Republican control (1981-87) often failed to report override bills that it believed would fail on the floor of the Senate or be killed in the Democratic-controlled House Judiciary Committee.<sup>119</sup>

A final reason a committee will kill an override proposal, especially one that it likes, is its judgment that the proposal is not "ripe" for the chamber's consideration. Committees and subcommittees see their role as building a record for the chamber's consideration of proposed legislation, informing the chamber of the various arguments and interest alignments, and working out a compromise or consensus on the issue. This explains the reluctance of a sympathetic subcommittee of the House Judiciary Committee to report a *Boutilier* override in the early- and mid-1980's. The subcommittee contented itself with building a record against the case without pressing for legislation favoring a controversial group (gay men and lesbians). Finally, the subcommittee acted in the 100th Congress and included the *Boutilier* override in a bill which generally rewrote the bases for exclusion. That bill got through Committee to the full House, which was unable (for agenda and time pressure reasons) to consider it.<sup>120</sup>

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117. See H.R. REP. NO. 238, 92d Cong., 1st Sess. 21-22 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2156-67; S. REP. NO. 415, 92d Cong., 1st Sess. 14 (1971).

118. Rep. Rodino (D-N.J.), Chair of the House Judiciary Committee, poignantly noted in the 1984 House hearings that he and his staff had worked on overriding *Illinois Brick* for eight years. 1984 *House Illinois Brick Hearings*, supra note 100, at 27. The hearings carry with them a sense of "just going through the motions," given the disinclination of Senator Hatch (R-Utah), the Chair of the Senate subcommittee, to permit a bill to get to the Senate. See 1986 *Senate Illinois Brick Hearings*, supra note 100, at 1.

119. See, e.g., *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (habeas corpus reform bill, overriding *Fay v. Noia*, 372 U.S. 391 (1963) and other cases); *Affirmative Action and Equal Protection: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) (override bill for *United Steelworkers v. Weber*, 443 U.S. 193 (1979), approving voluntary affirmative action under Title VII); *Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) (override bill for various decisions imposing "excessive" § 1983 liability on municipalities).

120. The subcommittee held hearings on H.R. 1119 on June 23, 1987. See *Exclusion and Deportation of Aliens: Hearing on H.R. 1119 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987). It reported a clean bill, H.R. 4427,

The *Boutillier* override was then included, without much fuss, in the immigration reform law passed in the 101st Congress.

C. *A Model of the Court/Congress/President Interaction in Statutory Interpretation*

This Article's discussion of general theories of the legislative process, interest groups, and committees lays the foundation for a realistic and theoretically robust model of the interaction between the Supreme Court, Congress, and the President in statutory interpretation. The goal is to construct a model that has some predictive value but that also captures much of the complexity of the legislative process. Specifically, the model must incorporate the dynamic and interactive features of that process, such as the way in which different actors generate information to persuade other actors, while at the same time remaining sensitive to the different preferences of those actors.

For a number of years, positive political theory has been developing equilibrium models of the legislative process' response to agency and executive decisions,<sup>121</sup> but has only recently begun to model the interaction between the Court and Congress.<sup>122</sup> The latter is an area in which law professors may have something to add, because we have done more research in the areas of judicial incentives, preferences, and work product. This Article provides a convenient sample from which to build the outlines of a theory. It shall do so in three sections.

The first section outlines a theory of judicial preferences in statutory interpretation and uses the data from my empirical survey to suggest general relationships between those preferences and committee and legislative preferences in the 1980's and (probably) 1990's. The next section models the interaction between the Supreme Court, Congress, and the President as a sequential game, in which a Court interested in not being overridden can achieve that objective and usually still read its preferences into federal statutes. The last section relaxes that assumption and suggests situations in which the Supreme Court would rationally risk or even prefer statutory overrides of its decisions.

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to the full Judiciary Committee, which reported the bill favorably to the House on August 12, 1988. H.R. REP. NO. 882, 100th Cong., 2d Sess. (1988).

121. See John A. Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORGANIZATION 1 (1991) (Special Issue); Steven Mathew, *Veto Threats: Rhetoric in a Bargaining Game*, 104 Q.J. ECON. 347 (1989); Terry Moe, *An Assessment of the Positive Theory of "Congressional Dominance" of Bureaucracy*, 12 LEGIS. STUD. Q. 475 (1987); Weingast & Moran, *supra* note 107.

122. See John Ferejohn & Barry R. Weingast, *Limitation of Statutes: A Strategic Theory of Interpretation* (paper presented at the Conference on Constitutional Law & Economics, Stanford University) (Oct. 25-27, 1990) (on file with author); Brian A. Marks, *A Model of Judicial Influence on Congressional Policy-making: Grove City College v. Bell (1984)* (1989 unpublished Ph.D. dissertation, Washington University) (on file with author).

### 1. *Supreme Court Preferences in Statutory Interpretation*

What the Supreme Court is trying to do in statutory interpretation has long been a subject of intense controversy, but an emerging academic consensus indicates that statutory interpretation is not dominated by any single approach.<sup>123</sup> The existing literature strongly suggests, for example, that the Court rarely just implements some preexisting "original legislative intent" when it interprets statutes. On the other hand, there is little current academic support for the proposition that the Court simply interprets statutes to implement the Court's own view of what is the best policy. In other words, when interpreting statutes, the Court behaves neither like the traditional vision of a court, nor like the traditional vision of a legislature.

These academic insights are borne out by the Supreme Court's statutory decisions surveyed in this Article, especially those in the survey of decisions from the 1977 through 1983 Terms (Tables 3, 8, and 9). The more than 200 statutory decisions analyzed from that period followed different interpretive methods from case to case. While the Justices emphasized textual plain meaning in some cases, they emphasized legislative history or statutory precedents in others (see Table 5). Indeed, it is often difficult to characterize the approach emphasized in individual decisions, because the Court usually analyzes and relies upon a variety of factors before arriving at a decision.<sup>124</sup>

Notwithstanding the Court's eclectic approach, it is still possible to make some generalizations. This survey, informed by prior scholarship, found that the Supreme Court's interpretation of statutes reflects three different preferences. The first is a preference for implementing the plain meaning of the statutory text (if there is one).<sup>125</sup> Applying the apparent meaning of the text furthers important rule of law values, such as predictability, certainty, and objectivity. The preference for plain meaning is most important for recent and detailed statutes, since they are most likely to have a plain meaning that reflects the preferences of the legislature and sound policy.

The second judicial preference is coherence. The Supreme Court sees itself as preserving, to the extent possible, law's coherence. A reading of the text that

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123. Eskridge & Frickey, *supra* note 38; Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543 (1988); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

124. For a detailed elaboration of this point, see Eskridge & Frickey, *supra* note 38, at 345-62.

125. "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). For other leading, and influential, expressions of this preference, see *Pierce v. Underwood*, 487 U.S. 552 (1988); *TVA v. Hill*, 437 U.S. 153, 173, 195 (1978) (holding that plain language of Endangered Species Act requires court to enjoin completion of a federal dam); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940); *Caminetti v. United States*, 242 U.S. 470, 490 (1917). See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

is coherent with other legal authorities is better than an equally plausible textual reading that is incoherent.<sup>126</sup> It is useful to distinguish between horizontal and vertical coherence, both of which are valued by the Court, but which are often in tension.<sup>127</sup> A reading of the text is horizontally coherent if it makes the best sense of the statute as a whole, is consistent with interpretations of similar statutory provisions, and fits with current judicial and legislative policy presumptions. A reading of the text is vertically coherent if it is consistent with the statute's legislative history, its original design and purpose, and prior judicial interpretations of the text. The Court desires horizontal coherence because it makes current statutory law fit together into a seamless web of law and because it believes citizens will understand and accept such law better than checkerboard law.<sup>128</sup> The Court desires vertical coherence because it suggests a rooted tradition from which the Court declares law and because citizens rely on the prior authorities in making decisions.<sup>129</sup>

The third judicial preference is policy based. The Justices bring to the interpretive task ideological frameworks and policy preferences that inevitably influence the choices made.<sup>130</sup> For example, the Court has strong institutional preferences to avoid decisions and rules that it believes itself incompetent to make or believes will overburden the courts operating under scarce resources. Additionally, the Court will implement canons of statutory interpretation that reflect traditional policy preferences. Canons such as the rule of lenity in criminal cases, presumptions against exemption from antitrust and tax laws, and clear statement rules protecting against unannounced waivers of sovereign immunity are particularly important in statutory interpretation.<sup>131</sup> Finally, in difficult cases (ambiguous statutory text, unhelpful legislative history), the political ideology of the particular Justices makes a difference in their statutory interpretations. Ideology seems to have the most influence in cases dealing with politically charged topics, such as discrimination and military and foreign affairs.

It is instructive to compare the Court's apparent preferences with those of Congress and its committees through analysis of the main areas of override activity in the last twelve Congresses. The Supreme Court in this period has

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126. For an extended discussion of this point, see RONALD DWORIN, *LAW'S EMPIRE* (1986).

127. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 116 (1988).

128. See, e.g., *United States v. Fausto*, 484 U.S. 439 (1988) (inferring congressional abrogation of policy in a related statute, over dissent's reliance on continuity with past policy).

129. This is the policy behind the super-strong presumption against overruling statutory precedents. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 647-49 (1987) (O'Connor, J., concurring in judgment). It also underlies the Court's various legislative inaction doctrines. See, e.g., *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988).

130. See HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald Marshall trans., 2d rev. ed. 1989), analyzed in GEORGIA WARNKE, *GADAMER: HERMENEUTICS, TRADITION AND REASON* (1987). See generally *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* (Sanford Levinson & Scott Mailloux eds., 1989); *Interpretation Symposium*, 53 S. CAL. L. REV. 1 (1985).

131. These and other canons are discussed in William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989), and Sunstein, *supra* note 123.

preferred plain textual meanings, has followed statutory precedents and legislative history unless strongly contradicted, and has been influenced by its concern with a constantly rising caseload, the policies embodied in the canons, and its own conservative ideology. The analysis in this part suggests that Congress and its committees would prefer interpretations that reflected their own political preferences, which are strongly influenced by the Members' own ideological frameworks, their perceptions of constituent preferences, and the pressure and information provided by salient groups, including government groups.

This analysis and the data in Appendix I and Table 4, provides a basis for comparing the preferences of the Court and Congress (during 1967-90) for some of the main policy areas subject to legislative overrides. On the conventional liberal/conservative scale, the Court for most of the period of this study has been more conservative than Congress and its committees on issues involving civil rights, environmental law, federal jurisdiction and procedure, and intergovernmental relations. The Court's relative conservatism in civil rights cases can be attributed to the difficulty of applying old statutes and legislative history to unanticipated problems and to the Court's own strongly conservative preferences about civil rights policy.<sup>132</sup> In contrast, Congress' Democratic majorities have been committed to liberal civil rights enforcement and have been responsive to leading civil rights groups. Similarly, the Democratic Congress is more responsive to environmentalist interest groups than the Court has been. The Court's conservatism in jurisdiction and procedure is mainly due to its institutional policy of interpreting judicial power very conservatively and to its current concerns about excessive caseloads. Congress is not encumbered by these policy limitations and has incentives to provide relevant interest groups greater access to the courts.<sup>133</sup> In cases involving state-federal relations, the Court is strongly influenced by its longstanding commitment to federalism,<sup>134</sup> while Congress is more evenly balanced between its concern for state and local governments and its desire to grant rights and remedies to civil rights, and other, groups.<sup>135</sup>

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132. Generalizations about the preexisting ideology of the Justices are risky. How can we know what they "really" think, when they only claim to say what Congress thinks? Nonetheless, the conventional wisdom among the legal community holds that the Court's preferences on civil rights have moved steadily to the right after 1971. That wisdom receives empirical support from a study of newspaper editorials at the time of Supreme Court appointments. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). Confirming evidence can be found in the Court's drift to the right in constitutional civil rights cases.

133. See, e.g., *Finley v. United States*, 490 U.S. 545 (1989) (expressing institutional reluctance to read federal jurisdiction broadly). Congress promptly overrode *Finley* in the Judicial Improvements Act of 1990, Pub. L. No. 650, § 310, 104 Stat. 5089, 5113-14.

134. See *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400-01 (1991) (creating "clear statement" rule which creates strong presumption against congressional regulation of core state government functions and officials, such as state judges).

135. This contrast shows up clearly in federal cases finding no congressional abrogation of state Eleventh Amendment immunity, and in their prompt overrides by Congress. See *infra* Appendix I (overrides for *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *BV Eng'g v. UCLA*, 858 F.2d 1394 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989)).

Perhaps surprisingly, the Court during this period, on the whole, has been to the left of Congress on issues of substantive criminal law, income tax, and antitrust law. In criminal law, the rule of lenity often impels the Court to demand greater precision from elderly criminal statutes,<sup>136</sup> which Congress, pressured by the Department of Justice, is often willing to provide. Although criminal defendants are not usually represented by well-organized interest groups, tax and antitrust defendants frequently are. This helps explain why the Court is more liberal in those areas: Congress is more immediately responsive than the Court to well-heeled taxpayers and corporate antitrust defendants. And, in each of those areas, the Court, guided by canons against exceptions to tax collection and antitrust policy, has tended to interpret broadly phrased tax and antitrust statutes expansively.<sup>137</sup>

For the period of this study, other statutory areas did not yield predictable divisions between the Court and Congress, for a variety of apparent reasons: There were too few overrides from which to generalize (immigration law, freedom of information law, banking, and traditional labor law). Interest group activity in both the Court and Congress was similarly balanced (bankruptcy law; copyright, trademark, and patent law). The Court's traditions and personal ideologies did not cut strongly in any one direction (bankruptcy law). Moreover, the generalizations made above were and are subject to change over time. For example, in civil rights law, the Court was more liberal than Congress for the early years of this study (1967-71), then shifted right as Congress shifted left (1970's), and has moved even further to the right of Congress in the 1980's.<sup>138</sup>

Notwithstanding these limitations and caveats, what is most striking about this analysis is that one should *expect* Congress and the Supreme Court to have different preferences for statutory interpretation in the large majority of cases. The Court is responsive to the plain meaning and legislative history of statutes even when they are quite old, while Congress is more interested in its own current, rather than historical, preferences. The Court is more concerned about the interconnections in, and overall coherence of, the United States Code than is Congress. The Court's traditions (the canons), institutional concerns, and personal ideological assumptions are significantly different from the interest group pressures on and ideology of Congress. During the period of divided

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136. See *United States v. Kozminski*, 487 U.S. 931 (1988); *McNally v. United States*, 483 U.S. 350 (1987); *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971) (rule of lenity); see also Appendix I (override of *McNally*).

137. See, e.g., *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 388-89 (1981); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975); *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963) (disfavored status of implied antitrust immunities); see also *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943) (disfavored status of implied tax exemptions).

138. See *infra* text accompanying notes 181-209.

government that this country has had since 1969, the ideological differences between the Court and Congress are particularly striking.

If it is true that Congress and the Court often differ markedly in their preferences for the best interpretation of a statute, and if it is further true that interest groups bring about half of the Court's statutory interpretation decisions to the attention of committees generally responsive to Congress' current preferences, then one might have expected many more overrides than have actually occurred in the last twenty-four years. Rather than overriding about five percent of the Court's statutory decisions each year in the 1980's, Congress might have been expected to override several times that number. But that did not happen. For example, in the 101st Congress (1989-90), the Court's habeas corpus decisions, its controversial endorsement of the "bubble concept" in environmental law, and its conservative civil rights decisions were all subject to serious but unsuccessful override attempts.<sup>139</sup>

Why does Congress not override more of the Supreme Court's statutory decisions?<sup>140</sup> The most obvious reason suggested by this study<sup>141</sup> is the existence of conflictual demand patterns. Many Supreme Court statutory decisions involve big stakes and sharply clashing interests. While the losers often have enough clout to bring decisions to the congressional agenda, the winners are also likely to have some influence. In such cases, unless the losers at the Supreme Court level can persuade other groups to be supportive or neutral, their chances of overturning a Supreme Court decision are not promising. This explanation squares with the data generated by the current survey. The Supreme Court's most controversial statutory decisions are usually not overridden because there are strong interest group alignments on both sides of the issues, leaving the Court's decisions firmly intact. The congressional overrides listed in Appendix I tend to involve Supreme Court cases in which the winning interests were not powerful at the time of the override—because the interests are diffuse or outside the political process (decisions benefiting accused criminals) or because the substantive position was weak (*Gilbert*) or had lost force over time (*Boutilier*).

## 2. *Statutory Interpretation as a Sequential Political Game*

The explanation just posited for the relative dearth of overrides is a troubling one in a representative democracy, for it suggests that the Court is often

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139. See *supra* note 4 (describing these failed override attempts).

140. One traditional reason given for Congress' failure to override Supreme Court decisions is that it is "unaware" of them. That is rendered most unlikely by this study's finding that a substantial percentage of the Court's decisions are subjected to committee scrutiny. See Table 3. A more plausible reason is that the legislative agenda is not infinitely elastic, and Congress simply does not have the time and resources to override every statutory decision with which it disagrees. This reason, however, fails to account for Congress' tendency to override the less important Supreme Court decisions.

141. Or, more precisely, by Dan Farber in his comments on an earlier draft of this Article.

able to read its preferences into statutes, against the desires of our nationally elected officials. There is, however, another (perhaps complementary) explanation for the Court's ability to avoid congressional overrides, at least in the short term.<sup>142</sup> The Court is attentive to current congressional (and, as will also be shown, presidential) preferences when it interprets statutes.

To explore this hypothesis, think about statutory interpretation as a sequential political game. The game is played across a linear space—here, the possible interpretations of an existing statute—in which a policy position to the right reflects conservative preferences and one to the left reflects liberal preferences. The Supreme Court makes the first move in the game by choosing a point on the policy line ( $J$ ) which represents the Court's preferences as to the best way to interpret the statute. Once the Court has made the first move, the loser(s) in the case will bring the issue to the attention of the relevant congressional committees, which have a "raw" (preexisting) preference about where the policy should be ( $C$ ). If the committees agree with the Court's position ( $J = C$ ), the game ends.<sup>143</sup> If the committees disagree with the Court, they may continue the game by reporting an override bill to their full chambers. The chambers make the next move, reflecting the raw preferences of the median Member ( $M$ ). Thus, Congress may amend the override bill as it likes, in order to bring it into line with its own preferences.<sup>144</sup> The final move is made by the President ( $P$ ), who can veto an override bill if he or she prefers the Court's policy to that of Congress. The presidential veto is, of course, subject to Congress' ability to override the veto by a two-thirds vote in each chamber.

As thus outlined, each player in the game (Court, committees, Congress, President) naively follows its own preexisting preferences about good policy. But the game as actually played is more complicated, as a matter of both strategy and information. The strategic complication arises because a player usually wants the ultimate statutory policy to reflect its own preferences as much as possible in accordance with the rules of the game. Hence, a committee may disagree with the Court's statutory interpretation but still may fail to report an override bill if it would dislike the policy adopted by the full Congress even more. Stated more formally, the committee will have an "indifference point" ( $C(M)$ ) where the Court can set policy which the committee likes no more and no less than the opposite policy that would be chosen by the full chamber. The Court itself may strategically compromise its original preferences in order to

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142. More than 25% of congressional overrides are for Supreme Court decisions over 10 years old (see Table 1).

143. Here assume that the committee whose jurisdiction covers the Supreme Court's decision has "gatekeeping" power; if it does not report override legislation, Congress has nothing to consider. Also assume that once the gatekeeping committee introduces override legislation, it cannot prevent its chamber from amending it to reflect the chamber's preferences. These are traditional positive political assumptions and are the basis for the works, cited in *supra* notes 121-22, which have most influenced this game theory.

144. This reflects the assumption that the override bill will be considered on at least a partially open-rule basis in Congress, which seems to have been the case during the period of this study. Again, political scientists using such a model, *see* sources in *supra* notes 121-22, make this assumption.

avoid a congressional override, for example, by accommodating the preferences of the President or committees when those players are in a position to protect the Court.

The informational complication arises because each player has some uncertainty about its "raw" (pregame) preferences about statutory policy, and because one object of the game is to gather information that will help resolve its uncertainty about appropriate policy under the statute. Hence, a committee's initial reaction to a Supreme Court statutory interpretation may be skeptical, but after hearings and further information gathering, the committee may decide that the interpretation is defensible or not worth overriding. Under this theory, the Court's ultimate preferences about statutory policy might be influenced by contemporary congressional deliberation and information gathering on the issue.

The above discussion sets forth the broad contours of the "Court/Congress/President Game."<sup>145</sup> Now consider the operation of this sequential game under variations of the players' preferences in concrete policy settings—criminal, tax, and antitrust law, where congressional preferences tend to be more conservative than judicial preferences; jurisdiction and procedure and intergovernmental relations, where congressional preferences have tended to be more liberal than judicial preferences; and civil rights law, where congressional preferences shifted over time from more conservative to more liberal than judicial preferences. Although the discussion is organized around the relative preferences of Congress and the Court, which tend to change fairly slowly and deliberately over time, the preferences of the President, which change more dramatically, are often important in the playing of the game.

a. *The Court/Congress/President Game in Criminal, Tax & Antitrust Law*

Because the Court is influenced by liberal rules of interpretation of criminal, tax, and antitrust statutes, and Congress is more susceptible to conservative interest group pressure (from the Department of Justice, state attorneys general, and private groups), the Court tends to be more liberal than Congress. The judiciary committees during the period of this study tended to be more liberal than their chambers, but not necessarily as liberal as the Court on these issues. Figure 1 maps the relevant preference relationships:

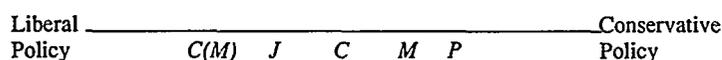


Figure 1. Raw Preferences,  $C(M) < J < C < M < P$   
Equilibrium Result,  $x = J$

145. See William N. Eskridge, Jr., *Reneging on History: Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) (outlining game in civil rights context).

Because of the Court’s willingness to apply the role of lenity against the government when it construes criminal statutes, the Court’s preferences,  $J$ , are usually more liberal than those of the median legislator,  $M$ . The judiciary committees have raw preferences,  $C$ , a little to the left of their chamber medians on such issues, but do not tend to be complete outliers.<sup>146</sup> As the nation’s chief executive officer, the President,  $P$ , tends to be more conservative than Congress ( $P > M$ ).

Given the preference configuration in Figure 1, the Court could interpret the statute to reflect its own raw preferences and not be overridden, even though its preferences are somewhat to the left of those of the chamber ( $J < M$ ). This will be the case so long as the Court’s preferences are at or to the right of the committee’s indifference point, ( $C(M)$ ), that is, the point at which the committee is perfectly indifferent between that point and the chamber median,  $M$ . In that event, the committee has no incentive to report an override bill, since such a bill could be amended to reflect the median Member’s preference,  $M$ , which the committee may find more distasteful than the Court’s policy preference,  $J$ . So the committee would do nothing, and the Court’s preference would be left in place.

This result—no bill for the chamber to consider—endures so long as the Court’s preferences are at or to the right of the committee’s indifference point,  $C(M)$ . Thus, so long as  $C(M) \leq J$ , the Court can simply implement its own preferences and not be overridden. The game changes if the Court’s preferences are to the left of the committee’s indifference point ( $J < C(M)$ ), as diagrammed in Figure 2:

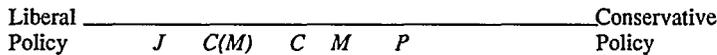


Figure 2. Raw Preferences,  $J < C(M) < C < M < P$   
 Equilibrium Result,  $J \leq x \leq C(M)$

If the Court implements its preferences, it will trigger an override bill from the committee and probable enactment of the chamber’s preferences,  $M$ . The Court can try to avoid this result by either shifting its own preferences far enough to the right so that the committee will not want to override its interpretation ( $x = C(M)$ ,  $J$  shifting right), or by trying to persuade the committee to adjust its own preferences to the left by providing it with useful information about the statute ( $x = J$ , with  $C(M)$ ,  $C$  shifting left).

146. See KREHBIEL, *supra* note 70, at 129 tbl. 4.6.

Note that the figures in the text will simplify Congress into a single chamber, consistent with the political science literature cited in notes 121-22 *supra*.

An example of the phenomenon described in Figure 2 is *United States v. Kozminski*,<sup>147</sup> which interpreted the criminal code's prohibition against "involuntary servitude" to overturn a conviction when much of the evidence of servitude pointed toward psychological pressure rather than physical threats or coercion. The Court's opinion, probably very much to the left of (more protective of criminal defendants than) the probable congressional or committee preferences, reflected traditional judicial preferences in criminal law cases, including attention to the statute's plain meaning, probable original expectations (it was a nineteenth-century statute), and the rule of lenity. But the Court was quick to observe (in dicta) that on retrial the victims' psychological vulnerability would be relevant to the more "overt" coercion allegedly used by the defendants. The Court's apparent willingness to bend its preferences to reflect modern evidence may have been strategic or may have been a genuine effort to accommodate current legislative preferences. In either case, it reflects the fluidity of the Court's preferences, in response to current legislative preferences, on issues of substantive criminal law. Although the Court's opinion was very probably more liberal than were the raw preferences of Congress on this issue, its open accommodation of such views was enough to discourage an override effort.

Note that under the conditions of Figures 1 and 2, the President is not an important player, because he will sign any bill Congress would pass ( $P > M > J$ ). This characterizes the Presidency's position on most issues of criminal and antitrust law for most of this period—but not during the Carter Administration (1977-81), when presidential preferences shifted to the left. Figure 3 reflects the new alignment on at least some criminal law and antitrust issues:

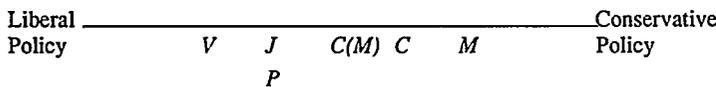


Figure 3. Raw Preferences,  $V < J, P < C(M) < C < M$   
 Equilibrium Result,  $x = J = P$

When the President is aligned with the Court, as in Figure 3, a new point becomes relevant—the "veto median" ( $V$ ), namely, that point in each chamber for which one-third of the legislators are on one side, and two-thirds on the other. Under the game mapped by the raw preferences in Figure 3, the Court could implement its own preferences without fear of an override. Even though the Court's preferences are more liberal than those of the committee's indifference point ( $J < C(M)$ ), the committee will not introduce override legislation: The committee knows that the chamber will not act to pass a bill the President

147. 487 U.S. 931 (1988).

will veto unless the chamber can override the veto. And the committee knows that more than a third of the chamber prefers the Court's interpretation to any interpretation the committee and the chamber prefer ( $V < J < C < M$ ). Knowing that it cannot obtain a better policy through override legislation, the committee does nothing.

b. *The Court/Congress/President Game in Federal Jurisdiction, Governmental Relations, and Environmental Law*

Because the Court's traditions in these areas are restrictive, and Congress is more responsive to liberal group pressures (to expand jurisdiction, reform procedure, expand government accountability to citizens, and protect the environment), the Court tended to be more conservative than Congress in these areas during the period of this study. The judiciary committees (and subcommittees) were, on the whole, to the left of their chamber medians, and hence unaligned with the Court on these issues. Figure 4 maps these preference configurations, under the further assumption that the President is neutral or favors Congress (as was usually the case before 1981):

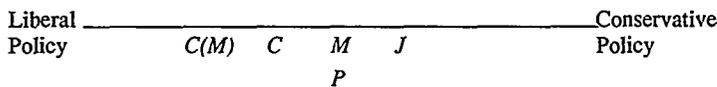


Figure 4. Raw Preferences,  $C < M$ ,  $P < J$   
Equilibrium Result,  $M \leq x \leq J$

As in Figures 1-3, Figure 4 shows the relevant committees,  $C$ , somewhat to the left of the chamber median,  $M$ . Unlike Figures 1-3, Figure 4 shows the Court's raw preferences,  $J$ , to the right of those of the chamber median. The location of the Court's preferences vis-à-vis those of the committee and the chamber significantly affects the game. If the Court simply reads its preferences into the statute, it can expect a congressional override, because the committees prefer any policy to the left of the Court's preferred policy, including the policy Congress would adopt ( $C < M < J$ ). Hence, the committees would report override legislation, which Congress would amend to reflect its policy preferences.

Figure 4 roughly describes the relative preferences of the players in the current debate over habeas corpus reform. The Court has been cutting back on *Fay v. Noia*<sup>148</sup> for the last fifteen years, reflecting its institutional concerns about the large volume of habeas cases handled by federal judges. The House

148. 372 U.S. 391 (1963).

Judiciary Committee, generally to the left of both the Court and the House on these issues, sought to override some of the Court's more conservative decisions in 1990,<sup>149</sup> but its override was amended on the House floor to add more conservative provisions.<sup>150</sup> As amended, habeas reform was killed in conference committee by the House conferees, but new override legislation may be successful in the 102d Congress.<sup>151</sup> The 1990 experience suggests that with most habeas issues, the Court has been able to avoid an override by persuading Congress that its increasingly conservative positions are justified, resulting in a shift to the right by Congress.

The Court can also avoid an override if it shifts its preferences in the direction of the chamber median. An unusually dramatic example of this phenomenon was the Court's actions after *Green v. Bock Laundry Machine Co.*<sup>152</sup> *Green* interpreted the Federal Rules of Evidence to permit impeachment of witnesses in civil trials through prior criminal convictions that did not involve perjury of the witnesses. Although the statutory language was not helpful and due process values cut against the Court's interpretation, the Court made a strong case for its interpretation by referring to a traditional common law rule and Congress' probable intent when it redrafted the Rules in 1974.<sup>153</sup> The Court's preferences were certainly more conservative than those held in the current Congress, however. But the Court immediately accommodated Congress' preferences by transmitting an amended version of the Rule within months of *Green*, pursuant to its authority under the Rules Enabling Act.<sup>154</sup> Although a rule change does not put the Court in a position of "interpreting" a statute, it does suggest that the Court was willing to compromise its preferences expressed in *Green*.<sup>155</sup>

For much of the period of this study (especially after 1981), the preferences of the Presidency are to the right of Congress' preferences on issues of jurisdic-

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149. See H.R. REP. NO. 681(I), 101st Cong., 2d Sess. 123-35 (1990), reprinted in 1990 U.S.C.C.A.N. 6472, 6528-41.

150. The Judiciary Committee realized that it did not have the votes to obtain House approval for its habeas corpus provisions and offered its own "diluting" amendments, which were defeated on the floor of the House. 136 CONG. REC. H8870-76 (daily ed. Oct. 4, 1990). The House then passed the more conservative Hyde Amendment, which substituted a habeas corpus title that was on some issues more conservative than the Supreme Court decisions. *Id.* at H8876-82.

151. H.R. 3371, 102d Cong., 1st Sess., tit. xi (1991), as reported by the House Judiciary Committee substantially cuts back on *Fay v. Noia*'s availability of habeas corpus, but is more liberal than the Hyde Amendment adopted by the House in 1990. As an obvious compromise, the new habeas title survived attack from a similar Hyde Amendment in 1991 that would have overridden *Fay v. Noia* altogether. 137 CONG. REC. H7995-8005 (daily ed. Oct. 17, 1991) (Hyde Amendment defeated, 208-218).

152. 490 U.S. 504 (1989).

153. *Id.* at 511-24. *But cf. id.* at 527 (Scalia, J., concurring in judgment) (relying only on most plausible meaning of plain text of statute, but drawing only one vote).

154. The Court transmitted to Congress a proposed revision of Rule 609 in January 1990. See 110 S. Ct. cxxviii-cxxxvi (1990). The Rule change went into effect in December 1990, when Congress refrained from deferring the Rule's effective date or rewriting the Rule. See 110 S. Ct. c (1990).

155. Note, for example, that the Court arguably lacks the power under the Rules Enabling Act to "repeal" a rule adopted by Congress. If the Court *really* adhered to the *Green* interpretation of congressional intent when redrafting Rule 609, it could not have changed Rule 609 in 1990.

tion and procedure, governmental operation and intergovernmental relations, and environmental policy. Figures 5 and 6 map two versions of this new alignment. Figure 5 describes issues, such as national government operations, where the President is significantly to the right of Congress and somewhat to the right of the Court:

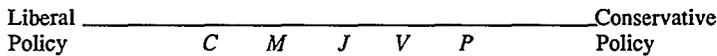


Figure 5. Raw Preferences,  $C < M < J < V < P$   
Equilibrium Result,  $x = J$

Similar to the earlier discussion of Figure 3, when the President's preferences favor those of the Court more than those of Congress, the Court gains greater power to impose its preferences onto statutory policy, because it requires supermajorities in Congress to override both the Court *and* a presidential veto. That is, if the Court's interpretation is at or to the left of the veto median ( $J < V$ ), the relevant committee would tend not to report an override bill, nor would Congress bring the bill to a vote, because the committee and Congress would know that the President's probable veto would be sustained.

An excellent example of this scenario is the ongoing controversy over *Feres v. United States*.<sup>156</sup> There, the Court read the Federal Tort Claims Act to include an immunity from tort suits arising out of military service activities. Congressional hearings through the 1980's were harshly critical of the *Feres* doctrine, especially for medical malpractice in the military, while representatives of the President strongly opposed any effort to override *Feres*.<sup>157</sup> The President apparently had the votes to sustain a veto, for no bill ever passed Congress. The Supreme Court reaffirmed *Feres* in *United States v. Johnson*, reflecting its preference for immunities in military and foreign affairs and for vertical coherence (following precedent). Although the relevant subcommittee

156. 340 U.S. 135 (1950).

157. See *Medical Malpractice Suits for Armed Services Personnel: Hearing on S. 2490 and H.R. 1054 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) [hereinafter 1988 *Senate Feres Hearings*]; *Military Malpractice and Liability for Injuries Resulting from the Atomic Weapons Testing Program: Hearing on H.R. 1054 and H.R. 1341 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987); *The Feres Doctrine and Military Malpractice: Hearing on S. 489 and H.R. 3174 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986); *Military Medical Malpractice: Hearings on H.R. 1161 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *Medical Malpractice Claims by Armed Forces Personnel: Hearing on H.R. 1942 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); *The Feres Doctrine as It Relates to Private Claims: Hearing Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (heated exchanges between members of Congress and the Departments of State and Justice).

chairs railed against *Johnson*,<sup>158</sup> and a *Feres* override limited to medical malpractice claims passed the House, the President's opposition killed Senate override efforts.

Finally, consider Figure 6, which places the raw preferences of both the Court and the President to the right of the veto median in Congress:

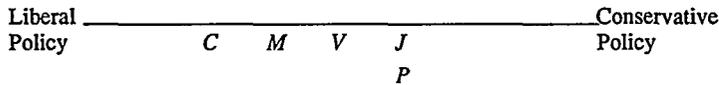


Figure 6. Raw Preferences,  $C < M < V < J, P$   
Equilibrium Result,  $V \leq x \leq J, P$

In this preference configuration, the Court would face an override if it read its raw preferences into the statute. Here, committees have every incentive to report override bills, and Congress could pass a bill setting policy at the veto median,  $V$ , that would not be vetoed, because the President would lack the votes to sustain a veto. The Court would then have two options to avoid an override. It could simply compromise its preferences and adopt an interpretation at or near the veto median ( $x = V$ , with  $J$  shifting left), or it could try to persuade a chamber, or at least the veto median, to shift its preferences to the right in light of information the Court would provide about the statute ( $x = J$ , with  $V$  shifting right). If the Court tries the latter, the President may become a useful ally, as a center of media attention and head of one of the political parties.

### c. *The Court/Congress/President Game in Civil Rights*

The discussion above has assumed a relatively constant relation between congressional and judicial preferences in the subject areas covered; the big changes in preference configurations for the period of this study have been for the Presidency (compare Figure 1 with Figure 3, and Figure 4 with Figures 5 and 6). Indeed, the Presidency is a relatively more mercurial institution, since a single election can alter its preferences dramatically (as occurred in 1952, 1960, 1968, 1976, and 1980). Preference shifts occur more gradually in Congress and the Court, but they do occur.

For most subject areas, the Court/Congress/President game evolves over time. Not only do the players adjust their raw preferences in the short term to accommodate new information and political pressures, but as their personnel and the political landscape change, the players adjust their absolute preferences and their comparative preferences (relative to one another) over time. This

158. See 1988 *Senate Feres Hearings*, *supra* note 157, at 15-17 (testimony of Rep. Frank to override *Johnson* and adopt the approach of Justice Scalia's dissent in that case).

phenomenon occurs in all subject areas, but has been most dramatic in civil rights policy during this period.<sup>159</sup> During the late Warren Court and early Burger Court (1967-71), the Court's preferences for interpreting civil rights statutes were more liberal than those of Congress and its committees. Figure 1 roughly describes the raw preferences of the players and suggests that the Court then enjoyed relative freedom to read civil rights statutes liberally, without being overridden. During the 1970's, Congress drifted to the left and the Court to the right in their preferences for civil rights policy, and the configuration changed to that shown in Figure 4. As a consequence, the Court was subject to more overrides during that period. After the 1980 election, the President aligned strongly with the Court, and Figures 5 and 6 map the new array of preferences. Protected by the President's veto, the Court more boldly read its raw preferences into civil rights statutes. This culminated in the series of 1989 decisions that have been the subject of override efforts in 1990 and 1991.

Several recent civil rights cases reveal how the Court plays the game as mapped in Figures 5 and 6. In *Patterson v. McLean Credit Union*,<sup>160</sup> the Court interpreted the Civil Rights Act of 1866<sup>161</sup> to provide a cause of action against private employers when they "make or enforce" contracts in ways that discriminate by reason of race, but not when the contract is discriminatory only in actual operation. The Court's opinion was an apparent compromise—on the one hand reaffirming its prior holding that the statute protects African Americans against private refusals to enter contracts, while on the other hand declining to extend its analysis to protect African Americans whose conditions of employment are discriminatory. Based on an amicus brief filed by Members of Congress, which took a very strong position on the first issue but ignored the second, the Court might have believed that such a compromise would satisfy the median Member.<sup>162</sup>

In *Wards Cove Packing Co. v. Atonio*,<sup>163</sup> the Court interpreted Title VII to require that plaintiffs in *Griggs* "disparate impact" cases carry the burden of proving that racial imbalances are the result of specific discriminatory practices. The Court probably realized that its interpretation of Title VII was contrary to the preferences of a substantial majority of legislators in each chamber, but strongly suggested that legislators revise their preferences, lest employers be forced to adopt undesirable quotas.<sup>164</sup> This strategy was probably critical in the defeat of the override effort in the 101st Congress: The President not

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159. The analysis in this paragraph is taken from Eskridge, *supra* note 145, and this point is explored further in Part III.A, *infra*.

160. 491 U.S. 164 (1989).

161. Currently codified at 42 U.S.C. § 1981.

162. The amicus brief argued that *Runyon v. McCrary*, 427 U.S. 160 (1976), should not be overruled, but took no position on the application of *Runyon* to the facts of *Patterson*. Brief for 66 Members of the United States Senate and 118 Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner, *Patterson* (No. 87-107).

163. 490 U.S. 642 (1989).

164. *Id.* at 652.

only vetoed the override bill, but invoked the quota issue and used it to rally enough Republican Senators to sustain his veto. The political landscape has changed with the 102d Congress and the President abandoned that position, permitting Congress to override *Wards Cove* (as well as *Patterson* and the other 1989 decisions).

### 3. *A Theory of Congressional Overrides*

The sequential game developed above explains how the Supreme Court often can avoid congressional overrides of its statutory decisions, even when the raw preferences of the Court and Congress might be very different. The Court/Congress/President game then raises the question: Might the Supreme Court avoid overrides altogether by adroitly playing the game? Probably not. The sequential game theory suggests three situations in which the Court's statutory decisions will be overridden.

First, the Court's interpretations will be overridden when congressional preferences change over time.<sup>165</sup> This is why some of the Court's older decisions, such as *Boutillier*, are overridden.<sup>166</sup> These older decisions may have adequately reflected contemporary congressional preferences, but over time society changed, and congressional preferences changed too. Usually, Supreme Court decisions survive such changed circumstances, either because the new circumstances render the decisions irrelevant or because the decisions work well enough within new social frameworks to be regarded as "harmless errors." Changed circumstances, however, may sometimes render a statutory decision not only obsolete, but counterproductive to current congressional policy or productive of confusion in the law.<sup>167</sup> Often in such cases, especially in connection with comprehensive revision or reform bills, Congress overrides the obsolete interpretation.<sup>168</sup> Such overrides are almost always routine affairs,

165. Of course, the Court's preferences on an issue might also change over time, in which event the Court might consider "overruling" the statutory precedent. For a suggested connection between the Court's willingness to overrule a statutory precedent and Congress' interest in overriding it, see *infra* Part III.A.1.

166. About 25% of the overridden Supreme Court decisions in Appendix I were decisions rendered more than 10 years before the override.

167. This was the case with *Boutillier*, which was overridden because its view of homosexuality as a "disease" was considered obsolete even by relatively conservative legislators. 135 CONG. REC. S5040-42 (daily ed. May 9, 1989) (Sen. Simpson, R.-Wyo.). More importantly, the obsolescence of *Boutillier* was not harmless error, because the PHS (which no longer would cooperate) opposed the INS (which believed *Boutillier* should be occasionally enforced) on this issue, and the circuits were split as to which agency was acting properly. Compare *Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983) (PHS is correct), with *In re Longstaff*, 716 F.2d 1439 (8th Cir. 1983) (INS is correct).

168. Most of Congress' overrides of recent Supreme Court decisions (within 10 years) have been in legislation either limited to the issue in the overridden decision or close to it. Conversely, most of Congress' overrides of Supreme Court decisions that are more than 10 years old have been in omnibus reconciliation bills and in ambitious statutory recodifications. See, e.g., Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (9 overrides, 7 of them older decisions); Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (2 overrides, 1 of them an older decision); Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2598 (4 overrides, 1 an older decision); Longshoremen's & Harbor Workers Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (4 overrides, 3 of them older decisions). These

with no intended criticism of the Court's statutory interpretation. For example, when Congress overrode *Boutilier* as part of its general revision of the immigration law in 1990, the override was treated as a routine policy adjustment, not as an attack on the Court for reading an antihomosexual interpretation into the statute.

Second, the Court may misinterpret congressional preferences or may be unpersuasive in its efforts to inform Congress of constitutional or other concerns. Overrides prompted by such judicial miscalculation usually come swiftly (often within a year or two) and are accompanied by some concern that the Court is not "doing its job." This describes the congressional reaction to *Gilbert*, which interpreted Title VII as not prohibiting pregnancy-based discrimination. The Court rested its decision primarily upon a constitutional precedent which held that depriving women of pregnancy benefits was not gender-based discrimination prohibited by the Equal Protection Clause.<sup>169</sup> The Court's decision also raised the question of whether including pregnancy benefits in a health care package might be unfair to male employees, by providing disproportionately greater health care benefits to female employees. Given Congress' complete failure to deliberate about the sex discrimination provision of Title VII when it enacted the Civil Rights Act in 1964, the Court's opinion raised pertinent constitutional and policy questions that Congress had never considered. Through extensive committee hearings in both chambers, Congress carefully considered the Court's new information to satisfy itself that the Court's concerns were not justified and, therefore, overrode the Court's decision.<sup>170</sup> A similar congressional process responded to the Court's employment discrimination decisions of the 1988 Term (*Wards Cove*, *Patterson*, and others).

Third, and perhaps most importantly, the Court, for institutional reasons, will often invite a congressional override. This point requires elaboration through several examples. In *TVA v. Hill*,<sup>171</sup> the Court interpreted the Endangered Species Act of 1973 to protect the snail darter at the price of halting the nearly complete construction of a \$110 million dam. The Court's opinion emphasized the plain meaning of the statute, for which judicial preferences are quite strong, but it is doubtful that this was the Court's real point. The Court's message was an institutional one: You (Congress) have not provided us (the

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overrides are all collected in Appendix I.

169. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 134-36 (1976) (relying on *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

170. See generally H.R. CONF. REP. NO. 1786, 95th Cong., 2d Sess. 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4765; H.R. REP. NO. 948, 95th Cong. 2d Sess. 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4749 (1978); S. REP. NO. 331, 95th Cong., 1st Sess. (1977); *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. (1977); *Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977).

171. 437 U.S. 153 (1978).

Court) with sufficient policy guidance to enable us to administer a system of exceptions to the facially absolute prohibitions in the Endangered Species Act, nor do we have sufficient information or expertise to create these exceptions ourselves (and some of us do not wish to do so). Both the Court and the dissenters called upon Congress to override the Court's decision by statute.<sup>172</sup> Congress did so immediately, establishing an administrative mechanism to consider exemptions from the Act's prohibitions.<sup>173</sup> The statutory override created an administrative mechanism responsive to the political process, something the Court could not have done. The Court in *TVA* expressed rational, and probably exemplary, preferences when it combined a literal statutory interpretation with a call for congressional override.<sup>174</sup> As the foregoing example demonstrates, the Court will sometimes refuse to interpret a statute broadly, especially when such an interpretation would represent a major policy decision that the Court would be more comfortable allowing Congress to make.<sup>175</sup> At other times, however, such signals by the Court do not result in congressional action.

Also exemplifying such institutional signaling are the Court's decisions that apply constitutionally inspired clear statement rules. The most prominent of these rules is the requirement that any congressional abrogation of the states' Eleventh Amendment immunity be explicit on the face of the statute.<sup>176</sup> In the last two years, the Court has invoked this clear statement rule several times to render federal statutory schemes inapplicable to the states, and Congress in return has overridden some of these decisions.<sup>177</sup> A majority of the Court is not unhappy with this sequence of events because the apparent goal of the clear statement rule is to force Congress to decide the issue of state immunity before the Court will find abrogation of Eleventh Amendment interests. If Congress responds by amending the statute to add the requisite language, the Court's goal has been achieved.

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172. *Id.* at 195 (majority opinion); *id.* at 210 (Powell, J., dissenting).

173. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (creating mechanism); *see also* Energy and Water Development Appropriation Act, Pub. L. No. 96-69, 93 Stat. 437, 449 (1979) (reversing result in *TVA* case).

174. *See* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 338-40 (1989). *But see* DWORKIN, *supra* note 126, at 313-54 (arguing that *TVA* dissenters had "best" interpretation, but not considering this institutional dimension).

175. Congress promptly responded to Supreme Court override invitations in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989) (plain meaning interpretation of ADEA); *Finley v. United States*, 490 U.S. 545 (1989) (refusal to interpret federal jurisdiction statute broadly); *McNally v. United States*, 483 U.S. 350 (1987) (rule of lenity counsels against expansive judicial interpretation of broad federal criminal statutes, especially when federalism concerns are prominent); *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974) (Congress, not Court, should update Copyright Act to reflect new technological developments).

176. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). The Court's finding of no abrogation of the states' immunity against lawsuits brought under the Rehabilitation Act of 1973 was itself overridden by Congress in the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003 100 Stat. 1807, 1845.

177. *See Dellmuth v. Muth*, 491 U.S. 223 (1989), *overridden* by Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 103, 104 Stat. 1103, 1106; *BV Eng'g v. UCLA*, 858 F.2d 1394 (9th Cir. 1988) (following *Atascadero*), *overridden* by Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990).

### III. IMPLICATIONS OF THE COURT/CONGRESS/PRESIDENT GAME FOR STATUTORY INTERPRETATION THEORY AND PRACTICE

The Court/Congress/President game developed in Part II provides a realistic theory of the legislative process and the interaction between the Court, Congress, and the President. This model can also serve as the basis for some interesting observations about general theories, as well as specific doctrines, of statutory interpretation. Statutory interpretation traditionally has been viewed as the Court's implementation of the original intent of the enacting Congress. The theoretical debate of the 1980's, however, debunked this traditional view and argued that statutory interpretation usually is, and should be, dynamic.<sup>178</sup>

The description of the Court's preferences in Part II was based upon the insights of dynamic statutory interpretation theory. This theory argues that when the Court interprets statutes it considers arguments based upon plain meaning, horizontal and vertical coherence, and good policy. The Supreme Court cases surveyed in this Article demonstrate the insights of dynamic statutory interpretation. Congress' original intent was critical to very few of the Court's decisions (a rare example is *Boutilier*). In most cases, the Court emphasized such intrinsically evolutive concerns as precedent, the common law, and the ever-changing canons of statutory interpretation (see Tables 6 and 8). The Court/Congress/President game suggests that the Court is a part of the process by which statutory policy is created and that its policy preferences affect public policy, albeit in different ways than Congress' policy preferences.

In at least one respect, however, the game adds a dimension to the interpretive process that dynamic statutory interpretation theory has thus far neglected. It includes an additional feature for the Court's configuration of preferences—a preference that its decisions not be immediately overridden by Congress. Thus, one of the dynamic factors influencing the Court's interpretation of statutes over time is the signals sent to the Court by subsequent Congresses. That idea turns traditional thinking about statutory interpretation on its head.<sup>179</sup> Where they diverge from the Courts' preferences, the expectations of the current Congress and the President are more important to the Court than are the expectations of the enacting Congress.

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178. See DWORKIN, *supra* note 126; T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 238 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Farber, *supra* note 123; Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987); Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815 (1990); Zeppos, *supra* note 123.

179. See, e.g., David Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). They argue that the independent federal judiciary was created to facilitate interest group behavior and statutory deals, by enforcing those original deals over time. However, they fail to explain why the courts would want to enforce such deals. It seems more plausible that the Supreme Court would assign greater weight to the preferences of the current and future Congresses (which might override the Court's preferences) than to those of the enacting Congress, particularly if, as often happens, that Congress is long departed.

This is a radical hypothesis.<sup>180</sup> The first section of this part will test this hypothesis by analyzing Supreme Court decisions from the last three decades that interpret civil rights legislation. The analysis will demonstrate that this hypothesis more accurately describes the Court's decisions than does traditional (original intent) theory. The second section will present further evidence supporting this theory by examining the Court's practice of selectively overruling statutory precedents, frequently relying on legislative inaction, and occasionally invoking subsequent legislative history when it interprets statutes. The hypothesis provides a useful framework for thinking about these much-criticized doctrines. The final section will defend the Court's deference to current legislative and presidential preferences against the normative objection that the Court should only consider original legislative preferences. But the Court's practice is vulnerable to objections that it is too deferential to normal politics on the whole and is insufficiently critical of current legislative preferences.

#### A. *The Court/Congress/President Interaction in Civil Rights Cases, 1967-90*

Civil rights decisions provide a starting point for testing the robustness of the hypothesis that the Court is more responsive to current than to original legislative expectations. The substantial number of such decisions, their political salience, their generation of a number of congressional overrides (see Table 4) and failed override efforts (see Appendix II), and the relatively discernible preferences of the institutional players make these decisions ideal for study. On the other hand, civil rights decisions may be particularly susceptible to this hypothesis, because the rapid changes in civil rights thinking and experience render original legislative expectations less useful in this area than in others, and because constitutional considerations play an important, but not dominant, role in these cases. Notwithstanding these limitations, the sequential game developed in Part II does go far in explaining the interaction between the Court, Congress, and the President in civil rights cases.<sup>181</sup>

##### 1. *Court/Congress/President Interaction, 1966-71*

During the late Warren Court and early Burger Court eras, the Court's raw preferences in civil rights cases were significantly to the left of those in Congress, and somewhat to the left of those in the gatekeeping (labor and judiciary)

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180. Note that this hypothesis is *not* that the Court is acting in a dishonest fashion or that it is nothing more than a scheming political institution. Surely, few if any of the Justices see their role as avoiding overrides. Rather, the hypothesis is that *as a group* the Court in the past 24 years has more often—perhaps unconsciously—reflected current, as opposed to historical, congressional preferences when it interprets statutes. Also, note that the Court itself may be rethinking this role. See *infra* Part III.C.

181. See Eskridge, *supra* note 145 (analyzing Court's civil rights decisions during this period in more detail).

committees.<sup>182</sup> Thus, the preference configuration sketched in Figure 1 describes the situation between 1967 and 1971. Under the Court/Congress/President game developed in Part II, the preferences of the contemporaneous Congress would not have constrained the Court much, since the Court was protected from legislative override by supportive gatekeeping committees and a very supportive Presidency. In fact, this is what occurred during that period, for the Court not only updated old civil rights statutes to reflect newer legislative preferences, but also interpreted both old and new statutes more liberally than Congress probably would have done on its own.<sup>183</sup> Again, this was possible under the conditions described in Figure 1, because the relevant committees had incentives to protect the Court from overrides. To the extent that the committees' or Congress' raw preferences were subject to persuasion, the Court was backed up by the very persuasive President Lyndon Johnson.

The high point of the Warren Court's liberal interpretation of Reconstruction civil rights laws was *Jones v. Alfred H. Mayer Co.*,<sup>184</sup> which interpreted the Civil Rights Act of 1866, currently codified as 42 U.S.C. § 1982, to provide a remedy for racial discrimination in the sale, leasing, or other conveyance of real or personal property by private parties. *Mayer* essentially overruled the Court's prior understanding that § 1982 only prohibited public laws "providing for discriminatory property arrangements"<sup>185</sup> and was probably contrary to the expectations of the 1866 Congress.<sup>186</sup> It also went well beyond the expectations of the current Congress, which just weeks before *Mayer* had enacted a fair housing statute providing a far less generous remedy to victims of

182. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 445-50 (1983) (preferences of Warren Court); 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 848-49 (1986) (describing Court's solidly liberal preferences after Justice Frankfurter's retirement in 1962); see also GRAHAM, *supra* note 116; WHALEN & WHALEN, *supra* note 64 (House Judiciary Committee and congressional preferences); Barbara Sinclair, *Agenda, Policy, and Alignment Change from Coolidge to Reagan*, in *CONGRESS RECONSIDERED* 291, 301-04 (Laurence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985) (Congress' preferences).

The House Judiciary Committee was strongly to the left of the House as a whole (and maybe as far left as the Warren Court) on some issues under the chairmanship of Representative Celler from 1955 to 1973. See WHALEN & WHALEN, *supra* note 64, at 29-67. The Senate Judiciary Committee through the 1960's was chaired by a Southern conservative and was evenly split between pro- and anti-civil rights Senators. But the Senate Democratic leadership (led by liberal Majority Leader Mansfield) and the Senate Labor Committee were pro-civil rights. See, e.g., 29 *CONG. Q. ALMANAC* 44 (1963).

183. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (interpreting Civil Rights Act of 1964 to prohibit employment practices having "disparate impact" on minorities); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (interpreting Voting Rights Act of 1965 to invalidate de minimis dilution of minority voting); *United States v. Guest*, 383 U.S. 745 (1966) (interpreting Enforcement Act of 1870 to criminalize some private conspiracies to deprive people of civil rights); *Louisiana v. United States*, 380 U.S. 145 (1965) (interpreting Enforcement Act of 1870 in accordance with Court's new Fifteenth Amendment jurisprudence).

184. 392 U.S. 409 (1968).

185. See *id.* at 451-52 (Harlan, J., dissenting).

186. *Id.* at 454-76; see also CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88, PART I*, at 1258-59 (1971); Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 *SUP. CT. REV.* 89 (examining *Mayer* in light of legislative history of 1866 Civil Rights Act).

housing discrimination.<sup>187</sup> But the Court's interpretation was acceptable to the gatekeeping committees in Congress, which protected it from legislative override.<sup>188</sup>

## 2. Court/Congress/President Interaction, 1972-81

The Court's raw preferences in civil rights cases moved sharply to the right after 1971,<sup>189</sup> just as Congress' raw preferences were moving to the left.<sup>190</sup> Thus the preference configuration sketched in Figure 4 is applicable, and the model predicts more tension between the Court and the current Congress. This is precisely what happened. This period saw several important congressional overrides of the Supreme Court's statutory civil rights decisions,<sup>191</sup> mainly because a Court to the right of Congress and even more to the right of the gatekeeping committees had no margin of error in predicting or transforming congressional preferences. In all but one of the overridden decisions, the Court had no signals from Congress as to its current preferences, and therefore simply read its own preferences into the statutes.<sup>192</sup>

More importantly, in several civil rights decisions the Court directly or indirectly suggested that it was adjusting its raw preferences to reflect those of the current, rather than the enacting, Congress. The best example is *Runyon v. McCrary*,<sup>193</sup> which reaffirmed *Mayer* and applied its interpretation of the property rights provision of the 1866 Act (now § 1982) to the contract rights

187. Pub. L. No. 90-284, 82 Stat. 73, 81 (1968); see Eskridge, *supra* note 174, at 340-43.

188. In 1971-72, floor amendments in both the Senate and the House sought to override *Mayer's* interpretation as it pertained to the contracting provision of the 1866 Act (now codified at 42 U.S.C. § 1981). The Senate defeated the floor amendment upon a tie vote in which the tiebreaking Senator agreed to a highly unusual "live pair," 118 CONG. REC. 3373, 3965 (1972), but the House adopted a similar one, 117 CONG. REC. 31973, 32111 (1971). The conference committee, dominated by House and Senate committee members who had opposed the override from the beginning, then quietly dropped the override provision. H.R. CONF. REP. No. 899, 92d Cong., 2d Sess. 17 (1972).

189. When Justices Powell and Rehnquist started casting votes in 1972, the Court's center of gravity moved sharply to the right. See Segal & Cover, *supra* note 132, at 560.

190. See Sinclair, *supra* note 182, at 306-11 (finding big jump in civil liberties support scores for congressional Democrats from 1969-72 to 1981-82).

191. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *overridden* by Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134; *United Airlines v. McMann*, 434 U.S. 192 (1977), *overridden* by Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189; *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *overridden* by Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), *overridden* by Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641.

192. Thus, *Gilbert* interpreted the gender discrimination provisions of Title VII, for which there was no useful legislative history or subsequent congressional action, using reasoning from its constitutional precedent, *Geduldig v. Aiello*, 417 U.S. 484 (1974). Similarly, the Court in *Bolden* had no reliable legislative signals for Congress' expectations in the Voting Rights Act and simply applied its Fifteenth Amendment jurisprudence to the issues. *Alyeska* interpreted the old federal costs statute and *relied* on subsequent congressional signals, namely the enactment of *specific* fee-shifting statutes, to conclude that the general costs statute did not authorize fee shifting generally. Only in *McMann* was there evidence of current congressional preferences, but it consisted of a committee report issued shortly before the Court's opinion was handed down, and after the case was argued.

193. 427 U.S. 160 (1976).

provision of the Act (now § 1981). The Court's willingness to do so, by a seven-to-two vote, was expressly premised upon the Court's belief that Congress in 1971-72 had signaled its approval of the application of *Mayer* to § 1981.<sup>194</sup> Moreover, two of the majority Justices wrote special concurring opinions suggesting that they thought *Mayer* was in fact wrongly decided but that *stare decisis*, reinforced by current expressions of legislative preferences, impelled them to go along with a liberal interpretation of the 1866 Act.<sup>195</sup>

A number of other decisions in the late 1970's relied on the Court's perception of current legislative preferences to reach results that were probably more liberal than the Court's preferences otherwise would have been.<sup>196</sup> Indeed, this hypothesis provides a cogent explanation for *United Steelworkers v. Weber*,<sup>197</sup> which interpreted Title VII to allow voluntary affirmative action. One of the Justices in the *Weber* majority had voted the year before against the constitutionality of state-sponsored affirmative action,<sup>198</sup> and a second Justice explained his vote as a response to societal developments that had overtaken the original congressional expectations.<sup>199</sup> Both of these Justices, and probably others in the majority, conceded the dissent's view that the Court's holding had little support in the original congressional understanding,<sup>200</sup> but were sensitive to the pressures for affirmative action created by *Griggs* and to the approval of *Griggs* voiced by the gatekeeping committees in 1971. For this reason, a Court critical of affirmative action in constitutional cases interpreted the Civil Rights Act of 1964 to allow a much broader range of preferential programs than one would expect.

To generalize this point, the Burger Court produced results in constitutional cases—where there was little chance of an override—that were discernibly more

194. *Id.* at 174-75 & n.11. I consider the evidence of legislative approval cited by the Court to be unreliable. See Eskridge, *supra* note 127.

195. 427 U.S. at 186-89 (Powell, J., concurring); *id.* at 189-92 (Stevens, J., concurring). A third Justice in the majority, conservative Chief Justice Burger, probably would have voted with the dissenters if the Court had split 4-4. It is common knowledge, especially after *The Brethren*, that Chief Justice Burger often voted with liberal majorities simply to control the assignment of the opinion. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 64-65 (1979).

196. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 685-87, 694-708 (1979) (Court split 5-1-3; key argument for majority was apparent congressional assumption that Title IX included private cause of action); *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978) (7-2 Court relied upon recent legislative assumptions to overrule line of § 1983 cases); *United States v. Board of Comm'rs*, 435 U.S. 110, 131-35 (1978) (5-1-3 Court endorsed liberal interpretation of Voting Rights Act, based in part on congressional understanding when Act was renewed in 1975); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (5-1-2 Court allowed affirmative remedies in Title VII cases and relied on discussions underlying 1972 amendments). *But see International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (Marshall, J., dissenting).

197. 443 U.S. 193 (1979).

198. Justice Stewart, the fifth vote in the 5-2 split for *Weber*, was part of the five-Justice majority invalidating the affirmative action plan in *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978). Justices Stevens and Powell, who did not participate in *Weber*, were also part of the *Bakke* majority.

199. *Weber*, 443 U.S. at 209-16 (Blackmun, J., concurring).

200. *Id.* at 228-55 (Rehnquist, J., dissenting). Academics tend to agree with the dissent on this issue. See GRAHAM, *supra* note 116; Farber, *supra* note 123, at 303; Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980).

conservative than the results it reached in analogous cases of statutory interpretation.<sup>201</sup> This fact provides further support for the hypothesis. The Burger Court's greater liberalism in statutory cases cannot credibly be attributed to textual plain meaning or to original legislative expectations, which cut very much against its interpretations, or to any great sympathy for civil rights legislation. Instead, the Court seems, perhaps unconsciously, to have molded its preferences in statutory cases (but not so much in constitutional cases) to accommodate the more liberal preferences of Congress and the President in the late 1970's.

### 3. *Court/Congress/President Interaction, 1981-90*

The Court's behavior after 1981 provides strong support for this hypothesis. There was just one change in the Court's personnel between 1975 and 1986, the replacement of moderately conservative Justice Stewart with the slightly more conservative Justice O'Connor. Hence, the Court's raw preferences remained just about the same throughout that period, and Congress' raw preferences did not markedly change.<sup>202</sup> The significant change was the election of a conservative President. Hence, after 1981, Figures 5 and 6 represent the configuration of raw preferences on civil rights issues.

This hypothesis would predict that the Court would shift to the right in its interpretation of civil rights statutes. The Court would be protected from congressional overrides by a presidential veto, unless the Court took a position that not even a third of either chamber could accept. This is apparently what happened: Within a few years the Court handed down a series of narrowing constructions for Title VII and other recent civil rights statutes,<sup>203</sup> as well as for § 1983 and other nineteenth century civil rights statutes.<sup>204</sup> An examina-

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201. Contrast *Weber* with *Bakke*. The disparity became even stronger in the 1980's. Compare *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (articulating very expansive view of *Weber*) with *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (articulating stingier view of affirmative action in constitutional cases). Also contrast the Burger Court's willingness to look at effects upon racial groups to find actionable discrimination in statutory cases, such as *Griggs*, with its focus only upon intentional conduct to find discrimination in constitutional cases. See *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

202. The Republicans gained control of the Senate from 1981-87, thereby moving Congress to the right. The move, however, was only a small one. For example, although chaired by conservative Republicans Thurmond and Hatch, the Senate Judiciary and Human Resources Committees retained pro-civil rights majorities.

203. See, e.g., *Smith v. Robinson*, 468 U.S. 992 (1984) (6-3 decision) (construing Education of the Handicapped Act and Rehabilitation Act narrowly); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (6-3 decision) (construing Title VII narrowly); *Grove City College v. Bell*, 465 U.S. 555 (1984) (6-3 decision) (construing Title VII narrowly); *Arizona Governing Comm. for Tax Deferred Annuity v. Norris*, 463 U.S. 1073 (1983) (4-1-4 decision) (extending liberal Pregnancy Discrimination Act of 1978 interpretation to insurance companies, but only prospectively); *City of Lockhart v. United States*, 460 U.S. 125 (1983) (6-2-1 decision) (construing Voting Rights Act narrowly); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982) (5-4 decision) (construing exception to Title VII broadly).

204. See *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (6-1-2 decision) (interpreting § 1981 narrowly); *City of Memphis v. Greene*, 451 U.S. 100 (1981) (6-3 decision) (interpreting

tion of all the civil rights statutory decisions during this period reveals a clear overall trend toward more conservative voting divisions on the Court after 1980.<sup>205</sup> Although the Court still handed down some liberal decisions, they tended to be on issues where the Court felt constrained by precedent or where Congress had sent strong signals that conservative results could be overridden by veto-proof margins.<sup>206</sup>

The balance between conservative and liberal interpretations of civil rights statutes shifted to the right after 1981 due to the Court's perception that a conservative President gave it more leeway to reach conservative results.<sup>207</sup> The Court's preferences shifted further to the right after 1986 because of personnel changes,<sup>208</sup> which resulted in six decisions in May and June 1989 (including *Patterson* and *Wards Cove*) that triggered the override efforts in the 101st and 102d Congresses. The conservative Court might have been testing

§ 1982 narrowly).

In May 1981, Senator Hatch's Subcommittee on the Constitution of the Senate Judiciary Committee held hearings on bills to override the Burger Court's liberal interpretations of § 1983 in *Maine v. Thiboutot*, 448 U.S. 1 (1980), and *Owen v. City of Independence*, 445 U.S. 622 (1980). See *Municipal Liability Under 42 U.S.C. § 1983: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1-2 (1981) [hereinafter *Municipal Liability*]. By July of that year, the Supreme Court had narrowed both decisions with fresh, and markedly more conservative, interpretations of § 1983 in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *City of Newport v. Fact Concerns, Inc.*, 453 U.S. 247 (1981). This was noted with enthusiasm in the *Municipal Liability*, *supra*, at 380, 404-06, 444, 450-52, 458.

205. Consider the following data, drawn from the Supreme Court's decisions from the 1977 through 1983 Terms, which were the basis for Table 4:

Interpretations of Modern Civil Rights Statutes	Supreme Court Decisions 1977 to 1979 Terms	Supreme Court Decisions 1980 to 1983 Terms
Liberal	10 Decisions	11 Decisions
Conservative	6 Decisions	12 Decisions
No Clear Division	1 Decision	11 Decisions
Interpretations of Reconstruction Era Statutes		
Liberal	7 Decisions	5 Decisions
Conservative	6 Decisions	14 Decisions
No Clear Division	7 Decisions	9 Decisions

This data suggests that after 1980 the balance of power on the Court shifted toward more conservative interpretations of both modern and nineteenth-century civil rights statutes. The shift is particularly strong for the older statutes, perhaps because they are so open ended that there is more room for the Justices' personal political philosophies to play a critical role.

206. The most notably liberal decisions were *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (reaffirming *Weber*); *School Bd. v. Arline*, 480 U.S. 273 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), all of which relied explicitly upon subsequent congressional signals.

207. The Court did not, of course, always prevail in this period, for it dramatically failed to hit the veto median in *Grove City College v. Bell*, 465 U.S. 555 (1984), which was overridden by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

208. These changes consisted of the replacement of conservative Chief Justice Burger by the more conservative Chief Justice Rehnquist in 1986, of Justice Rehnquist by the more conservative Justice Scalia in 1986, of moderately conservative Justice Powell by the more conservative Justice Kennedy in 1987, and of liberal Justice Brennan by the less liberal Justice Souter in 1990.

Congress to discover the veto median on these issues,<sup>209</sup> which Congress has now provided. Section C of this part will consider another explanation for what the Court was doing in these cases.

B. *Rethinking Doctrines of Statutory Interpretation: Strong Stare Decisis, Legislative Inaction, and Subsequent Legislative History*

The Court/Congress/President game provides a fresh way of thinking about several doctrines of statutory interpretation that scholars have scorned, but that the Court has followed. These are: (1) the super-strong presumption of correctness of statutory precedents; (2) the ratification of an authoritative statutory interpretation by legislative inaction; and (3) the use of subsequent legislative history. The Court's selective invocation of these doctrines follows the pattern suggested by my model. That is, the Court usually will invoke strong stare decisis when the Court has reason to believe that current legislative majorities support the precedent and will tend not to invoke it when there are strong doubts that this is what Congress prefers. The Court will invoke legislative inaction and subsequent legislative history as evidence of statutory meaning when it believes that they provide reliable evidence of current congressional preferences regarding an issue of interpretation.

The hypothesis that the Court is attentive to current congressional and presidential preferences provides an interesting and useful way of thinking about these often-criticized doctrines. In turn, these patterns support the hypothesis that the Court is more responsive to current congressional preferences than to the preferences of the enacting Congress in statutory interpretation cases.

1. *Super-Strong Presumption of Correctness for Statutory Precedents*

The Supreme Court has long held that statutory precedents are entitled to a greater stare decisis effect than either constitutional or common law precedents, in part because Congress and not the Court should have the primary responsibility for overriding statutory precedents.<sup>210</sup> Scholars have been critical of this "super-strong presumption of correctness" for statutory precedents, in part because it is not realistic to expect Congress to know about and

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209. For example, in *Patterson*, the Court unanimously declined to overrule *Runyon*, in response to unequivocal congressional hostility to such a move (signaled in an amicus brief), but gave the decision a narrow reading that the Court might have believed would survive congressional scrutiny. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

210. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-07 (1932) (Brandeis, J., dissenting); see also *Cleveland v. United States*, 329 U.S. 14, 18 (1946); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948).

respond to the Court's statutory precedents,<sup>211</sup> and in part because the Court invokes it so selectively.<sup>212</sup> The empirical study described in this Article suggests that the first criticism has been too harsh. Congress is aware of the Court's statutory decisions and actively considers almost half of them in legislative hearings, but does not respond to most of them.

The second criticism may also be too harsh, because the analysis in this Article suggests an underlying coherence to the Court's invocation of the super-strong presumption. The Court will not overrule a statutory precedent that seems to enjoy support in the current Congress, but will consider overruling a statutory precedent that the Court has reason to believe the current Congress would not protect with an override. In other words, the Supreme Court does abandon the super-strong presumption, but only when it thinks the precedent is no longer politically viable.<sup>213</sup>

Two recent statutory *stare decisis* decisions illustrate this point. In *Patterson*, a unanimous Court reaffirmed *Runyon's* and *Alfred H. Mayer's* interpretations of the Civil Rights Act of 1866, even though several Justices believed those cases were wrongly decided.<sup>214</sup> The Court invoked the super-strong presumption of correctness for statutory precedents, but made it clear that the key reason for its refusal to disturb the precedent was its consistency with Congress' current commitment to ending racial discrimination.<sup>215</sup>

The year before *Patterson*, another unanimous Court overruled a line of statutory precedents involving appellate jurisdiction in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*<sup>216</sup> The Court did not mention either the super-strong presumption of correctness for statutory precedents or the possibility of congressional action, even though several override bills introduced in 1987 were then being given serious congressional consideration.<sup>217</sup> While it is hard to

211. See REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 252-55 (1975); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 425-29 (1988); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388-89 (1988).

212. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1427-39 (1988), lists 26 Supreme Court decisions explicitly overruling statutory precedents between 1961 and 1987, another 24 implicitly overruling statutory precedents, and another 35 significantly curtailing statutory precedents or overruling their reasoning. See also Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (arguing that the Court should never overrule statutory precedents).

213. If this reformulation is correct, the Court's traditional rationale for the super-strong presumption is backwards. If the Court can undo the damage of a statutory precedent that is no longer politically popular, it will overrule the precedent. Only if the Court has reason to believe Congress would still support the precedent will it refuse to reconsider the precedent.

214. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

215. *Id.* at 174. The Court disclaimed reliance on legislative acquiescence, *id.* at 175 n.1, but its invocation of contemporary values is an obvious reference to the values held by Congress as well as the electorate. Although the Court did not rely on the amicus brief filed by dozens of Members of Congress, *supra* note 162, it might have been influenced by the very substantial congressional support for *Runyon*.

216. 485 U.S. 271 (1988) (overruling *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942), and *Enlow v. New York Life Ins. Co.*, 293 U.S. 379 (1935)).

217. Override provisions for the *Enlow-Ettelson* doctrine were included in H.R. 3152, 100th Cong., 1st Sess. (1987), and S. 1482, 100th Cong., 1st Sess. (1987), at the behest of the Judicial Conference. See generally *Court Reform and Access to Justice Act: Hearings Before the Subcomm. on Courts, Civil Liberties,*

tell whether the Court was fully aware of how close Congress was to overriding the old decisions, the Court's eagerness to overrule them—and to deny them any special stare decisis—probably represented its (correct) impression that they enjoyed little or no current legislative support.

The point of this comparison can be generalized. On the one hand, when the Court has explicitly overruled its statutory precedents in the last thirty years, it has usually had good reason to believe that the precedents no longer reflected congressional preferences. Indeed, the Court has often cited inconsistent statutory developments as a reason to overrule such precedents.<sup>218</sup> Even where the Court has not cited subsequent statutory developments, it can sometimes be inferred that negative congressional signals contributed to the Court's willingness to overrule precedents.<sup>219</sup>

It is noteworthy that Congress has never during this period overridden any of the 30 Supreme Court decisions overruling statutory precedents.<sup>220</sup> The most likely override is *Fay v. Noia*,<sup>221</sup> which was an important target of the 1990 habeas revisions deleted in conference committee. Consistent with congressional restiveness over *Fay*, the Court itself has been trimming it back for fifteen years,<sup>222</sup> and the Court's recent habeas decisions track Congress' concern with the federalism values undermined in *Fay*.

On the other hand, when the Court has invoked the super-strong presumption to rebuff a serious challenge to a statutory precedent, there has often been tangible evidence that the precedent enjoyed substantial support in recent Congresses.<sup>223</sup> For example, the Court in *United States v. Johnson*<sup>224</sup> recent-

and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st & 2d Sess. 33 (1987-88). After the Supreme Court overruled these decisions in *Mayacamas*, the general override was dropped by the House Judiciary Committee, though it retained a specific override for Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955), which applied only to arbitration cases. See H.R. REP. NO. 889, 100th Cong., 2d Sess. (1988), reporting H.R. 4807, 100th Cong., 2d Sess. (1988); 133 CONG. REC. E1508 (daily ed. Apr. 23, 1987).

218. See Eskridge, *supra* note 212, at 1427-29 app. A (10 of 26 Supreme Court decisions overruling statutory precedents note subsequent statutory developments as one reason for overruling).

219. For example, the Court's per se invalidation of vertical restraints under the Sherman Act in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), came under increasing fire in Congress during the 1970's and generated a host of proposals to exempt various industries (such as soft drinks and beer) from the per se rule. For proposals protecting the soft drink industry, see H.R. 3567, 97th Cong., 1st Sess. (1979); S. 1483, 95th Cong., 1st Sess. (1975); S. 3421, 94th Cong., 1st Sess. (1973); H.R. 6684, 94th Cong., 1st Sess. (1973); S. 978, 93d Cong., 1st Sess. (1971); H.R. 16,916, 93d Cong., 2d Sess. (1972). This may have contributed to the Court's willingness to overrule *Schwinn* in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Notwithstanding *GTE Sylvania*, Congress still overrode *Schwinn* in the Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, 94 Stat. 939 (1980).

220. See Eskridge, *supra* note 212, at 1427-29 app. A (collecting cases); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Gulfstream Aerospace Corp. v. Mayacamas*, 485 U.S. 271 (1988); *Lee v. Florida*, 392 U.S. 378 (1968).

221. 372 U.S. 391, 435-36 (1963), overruling *Darr v. Burford*, 339 U.S. 200, 208 (1950).

222. Starting with *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977); see *id.* at 94-96 (Stevens, J., concurring); *id.* at 98-99 (White, J., concurring in judgment); *id.* at 102-09 (Brennan, J., author of *Fay*, dissenting).

223. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7 (1987) (refusing to consider overruling *Weber*, because there is no sentiment in Congress to override precedent); *Patsy v. Board of Regents*, 457 U.S. 496, 501 & n.3 (1982) (refusing to reconsider § 1983 precedent, in part because of

ly refused to overrule *Feres* over the objections of a strong dissent. An important reason cited by the Court was Congress' failure, over a forty-year period, to derogate from *Feres* immunity in any way, notwithstanding numerous proposals to do so. As if to confirm the Court's judgment, legislative efforts to override *Feres* through the 1980's have been unsuccessful.

## 2. *Interpreting Legislative Inaction*

The Court has long maintained that "legislative inaction" might ratify or bolster statutory interpretations reached not only by the Supreme Court, but also by lower courts or agencies. Specifically, the Court often gives special deference to an interpretation that Congress has left in place notwithstanding legislative hearings on the issue, reenactment of the underlying statute, and proposals in committee or on the floor to reject that interpretation.<sup>225</sup> Like the Court's special *stare decisis* rule, its legislative inaction rules have been criticized by academics on the grounds that the rules are unrealistic and that the Court only selectively invokes them.<sup>226</sup> Again, these criticisms may be overstated, because the Court's practice has been to invoke the legislative inaction doctrines mainly when it has found some indication that there is insufficient support in Congress for overriding the contested interpretation.

Perhaps the most criticized case invoking special *stare decisis* for statutory precedents and the legislative inaction doctrines is *Flood v. Kuhn*.<sup>227</sup> A badly divided Supreme Court was "loath" to overrule its own Sherman Act precedents giving baseball an exemption from the antitrust laws, "when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."<sup>228</sup> Although the Court's opinion left antitrust law in a state of incoherence (since other professional sports were covered by the antitrust laws), the Court would not act. The precedents were surely ques-

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congressional reliance); *Flood v. Kuhn*, 407 U.S. 258, 281 (1972) (refusing to reconsider Sherman Act precedent, in part because Congress had extensively considered issue and focused attention on expanding precedent rather than overriding it).

For most, and perhaps all, of the other leading decisions explicitly invoking the super-strong presumption, a case can be made that the statutory issue was sufficiently controversial that Congress would not itself have overridden the precedent in dispute. For example, although the Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), did not mention congressional approval of the challenged precedent, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), subsequent hearings suggest that Congress would not have overridden it. See 1979 *House Illinois Brick Hearings*, *supra* note 100.

224. 481 U.S. 681 (1987).

225. See Eskridge, *supra* note 127, at 125-37 (appendices collecting cases).

226. DICKERSON, *supra* note 211, at 181; HART & SACKS, *supra* note 52, at 1394-1401; Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 *HOFSTRA L. REV.* 1125, 1133 (1983); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 *B.U. L. REV.* 737 (1984); Laurence Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 *IND. L.J.* 515 (1982).

227. 407 U.S. 258 (1972).

228. *Id.* at 283-84.

tionable, but the Court perceived that Congress supported them. That was the point of the Court's emphasis on "positive inaction." Congress not only deliberated about baseball's antitrust exemption and failed to override it, but the proposals that enjoyed the most support were ones that would have *expanded* baseball's exemption to other sports and would not have *constricted* the exemption the Court had given baseball.<sup>229</sup> Hence, the Court left the prior interpretation in place. As in other cases, the Court's political instincts were correct, for subsequent legislative hearings in *Flood* revealed little interest in overturning the decision.<sup>230</sup>

A similar point can be made about Supreme Court decisions bolstering agency interpretations by reference to current congressional preferences. Responding to court challenges, the Internal Revenue Service (IRS) in 1970-71 amended its regulations to disallow income tax exemptions to educational institutions that discriminate on the basis of race. The new IRS position was probably not the one that the original enacting Congress would have adopted, but Congress in the 1970's rejected all efforts to reverse the new rules, though it did hamper the agency's efforts to devote significant resources to enforcing the regulation.<sup>231</sup>

In *Bob Jones University v. United States*,<sup>232</sup> a virtually unanimous Supreme Court upheld the agency's antidiscrimination regulation, with heavy reliance on Congress' supportive stance during the 1970's.<sup>233</sup> Like *Flood*, *Bob Jones* drew from the record of Congress' deliberations the inference that Congress was happy with the agency's regulation on its face. A year later, in *Allen v. Wright*,<sup>234</sup> the Court turned back efforts to challenge the agency's

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229. Bills were introduced and hearings held on sports exemptions to the antitrust laws in 1957, 1958, 1959, 1960, 1964, and 1965. Brief for Respondents at 32-36, *Flood* (No. 71-32). Most of the serious proposals sought to expand baseball's exemption to other sports. In 1958, the House passed one such bill, H.R. 10378, 85th Cong., 2d Sess. (1958) (Senate took no action). In 1960 and 1964, a Senate committee recommended similar legislation, and in 1965, the Senate passed a bill expanding baseball's exemption to other sports, S. 950, 89th Cong., 2d Sess. (1965) (House took no action).

230. See *Antitrust Policy and Professional Sports: Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. (1981-82). Although the Department of Justice enthusiastically supported overriding *Flood*, *id.* at 29, no other group backed up the Department's position, and the subcommittee spent most of the hearings exploring issues in other sports.

231. Specifically, after the IRS issued regulations in 1978-79 placing burdens on schools with low percentages of black students to "prove" their nondiscrimination, Congress attached the Ashbrook Amendment to a 1980 appropriations statute, barring the IRS from implementing the regulations. Other "back door" restrictions followed. See *IRS Tax Exemptions and Segregated Private Schools: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 49-50 (1982) (hearings preceding but cognizant of Court's forthcoming decision in *Bob Jones*).

232. 461 U.S. 574 (1983).

233. *Id.* at 599-602 (majority opinion by Burger, C.J., for eight Justices); see also *id.* at 607 (Powell, J., concurring).

234. 468 U.S. 737 (1984).

refusal to enforce its regulation very vigorously, again in accord with recent congressional signals.<sup>235</sup>

### 3. *Subsequent Legislative History*

In its analysis of a statute's legislative history, the Court sometimes consults legislators' post-enactment statements about the statute.<sup>236</sup> Even defenders of the use of such "subsequent" legislative history have criticized the Court's practice.<sup>237</sup> They argue that the Court invokes it arbitrarily<sup>238</sup> and that such materials are unreliable. However, the Court/Congress/President game developed in this Article suggests an underlying reason for the Court's invocation of subsequent legislative history: The Court is particularly interested in such material if it is persuasive evidence of recent congressional preferences and of the probability of a legislative override.

Thus, while the Court does not rely on subsequent legislative history to illuminate the enacting Congress' expectations, it does consider subsequent history when the history illuminates the probable desires of the current Congress.<sup>239</sup> This is particularly important when the Court's preferences are otherwise substantially to the right of those in Congress (the configuration of preferences in Figures 4 and 6). For example, in 1987, the Supreme Court in *School Board v. Arline*<sup>240</sup> interpreted the Rehabilitation Act of 1973 to prohibit discrimination against a person afflicted with contagious tuberculosis. This was a very liberal interpretation of the statute by a very conservative Court. As the dissenting opinion suggested,<sup>241</sup> the liberal result was hardly compelled by the vague statutory language, the generalized legislative history, or the Court's own precedents. Instead, the Court's opinion rested upon subsequent agency regulations that "were drafted with the oversight and approval of

235. *Allen*, however, was a case of constitutional standing, not statutory interpretation, in which the Court made it difficult for citizens to sue the IRS to force it to enforce its regulation.

236. "[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight and particularly so when the precise intent of the enacting Congress is obscure." *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (citations omitted); see also *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).

237. See Dickerson, *supra* note 226, at 1146; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 205 (1983).

238. Compare cases cited *supra* note 236 with *Mackey v. Lanier Collections Agency & Serv.*, 486 U.S. 825, 840 (1988); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980); *United States v. Price*, 361 U.S. 304, 313 (1960) (leading case, using frequently quoted language that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

239. See, e.g., *Bowen v. Yuckert*, 482 U.S. 137, 148-52 (1987) (interpreting Social Security Act in light of Social Security Disability Benefits Reform Act of 1984); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-35 (1984) (following HEW regulations considered by Congress and not overruled, notwithstanding congressional deliberation and proposals to override regulations); *Cannon v. University of Chicago*, 441 U.S. 677, 686 & n.7 (1979) (relying on subsequent legislative signals to find private cause of action in Title IX).

240. 480 U.S. 273 (1987).

241. *Id.* at 289-93 (Rehnquist, J., dissenting).

Congress," and hence, considered probative.<sup>242</sup> The subsequent legislative history was, in the sequential game modeled here, important to the Court as evidence that Congress (perhaps by veto-proof margins) favored a liberal approach to the Rehabilitation Act.<sup>243</sup> It is also noteworthy that *Arline* came to the Court one year after the Court suffered three reversals of its statutory decisions failing to protect the rights of the disabled.<sup>244</sup>

The Court's refusal to credit subsequent legislative history traditionally has meant that the Court does not consider the legislative history to be a reliable source of current congressional preferences or (for the reasons developed above) that it wants to invite an override. Both reasons were implicated in the Court's refusal to credit subsequent legislative history in *TVA v. Hill*. In *TVA*, the petitioner argued that the Endangered Species Act permitted exceptions for an almost-completed dam, and that Congress' continuing appropriations for the dam after the snail darter problem arose were evidence that Congress did not consider the dam threatened by the Act.<sup>245</sup> The Court ruled that this evidence was not a reliable indicator of congressional preferences, since legislators do not scrutinize appropriations measures for substantive statutory developments. Another probable reason was that the Court believed the best solution of the snail darter and other similar dilemmas was a statutory override, which the Court invited in its opinion.

In sum, this Article's game theory analysis suggests that the Court has used the foregoing doctrines of statutory interpretation in a relatively systematic, rather than haphazard, way. Specifically, the Court's invocation of special stare decisis for statutory precedents, legislative inaction, and subsequent legislative history is a signal that it is readjusting its own preferences to avoid an override—in light of signals from post-enactment Congresses. Moreover, the Court has been quite astute in its perceptions about such evidence, for the Court's decisions relying upon these doctrines are rarely overridden by Congress. The Court's use of these doctrines supports the hypothesis that the Court tends to be more attentive to the preferences of the current Congress than to those of the enacting Congress.

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242. *Id.* at 279 (majority opinion) (relying on *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634-35 (1984)); see also *id.* at 285 n.14 (relying on 1978 amendments to Act).

243. In the Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, § 9, 102 Stat. 28, 31-32, Congress amended the Rehabilitation Act essentially to codify *Arline*. See also Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(a), 102 Stat. 1619, 1620.

244. See Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807 (overriding *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)); Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (overriding *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986)); Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (overriding *Smith v. Robinson*, 468 U.S. 992 (1984)).

245. See Brief for TVA at 7-18, *TVA v. Hill*, 437 U.S. 153 (1978) (No. 76-170) (survey of House and Senate Appropriations Committees' monitoring of dam situation, with full knowledge of snail darter problem).

### C. *Should the Court Be Playing the Court/Congress/President Game?*

If the Court is more responsive to the preferences of the current Congress than to those of the enacting Congress, the question remains: Should the Court be playing such a game? To lawyers, this game may seem like an “unjudicial,” if not highly irregular, way for the Court to carry out its statutory interpretation duties, which have in the legal literature traditionally been characterized as a search for Congress’ “intent” or application of a statute’s “plain meaning.” Even modern scholars of dynamic statutory interpretation are sometimes reluctant to acknowledge the pull of subsequent legislative signals.<sup>246</sup>

But to political theorists and economists this game is not so remarkable. According to traditional political theory, the Court’s willingness to consider current legislative preferences and its desire to avoid legislative overrides rests upon a specific and widely held ideology<sup>247</sup> regarding the Court’s role in our political system.<sup>248</sup> Under this ideology, the Court is part of our nation’s pluralist political system, just as Congress and the President are. Like the other branches, the Court plays a specialized role in the overall lawmaking process, but a role that facilitates rather than obstructs the operation of the pluralist system. The Court is, therefore, not normally “countermajoritarian,” though sometimes it may push our pluralism to make adjustments ensuring the participation of relevant groups (and hence the perpetuation of pluralism and the stability it brings).<sup>249</sup> This vision sees a limited but important role for the Court as constitutional interpreter and a most important role for the Court as statutory interpreter. As statutory interpreter, the Court is a faithful agent of majoritarian policymaking and carries out statutory policies as Congress desires.

An ambiguity rests in the lessons of this traditional ideology. If the Court is to be a facilitator of majoritarian policies, it is unclear which majority it should obey. Should it obey the congressional majority that enacted the statute or the majority in the current Congress, which may not be willing to enact

246. See, e.g., Farber, *supra* note 123 (favoring dynamic statutory interpretation, except where it runs against the clear import of both the plain textual meaning and the original intent of Congress).

247. By “ideology,” I do not mean a crude liberal/conservative political strategy, but a holistic cultural understanding of the power dynamics and institutional roles in our polity.

248. The leading explicit statement is Robert A. Dahl, *Decision Making In a Democracy: The Role of the Supreme Court As a National Policy-Maker*, 6 J. PUB. L. 279, 293-94 (1957), which argues that the Supreme Court is inevitably part of the national political coalition and cannot be expected to perform the “countermajoritarian” functions often expected of it. Dahl’s thesis is implicit in some of *The Federalist Papers*, see, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton), and in much leading scholarship about the role of federal courts, most notably JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980); HART & SACKS, *supra* note 52; RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

249. Thus, the Court might aggressively intervene to ensure that “discrete and insular minorities” are not excluded from the political system, lest they abandon the system and work against its stability. See generally ELY, *supra* note 248 (purpose of judicial review is “representation reinforcing” rather than imposing constitutional values). Under this theory, the Court’s commitment to desegregation in the 1950’s makes sense as a pluralist strategy to ensure participation in politics by all groups in society. Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-26 (1980) (arguing that *Brown* was part of elites’ strategy of co-opting minorities).

anything like the original statute? The Court cannot ignore either Congress. It needs to pay attention to the preferences of the enacting Congress, not just to assert "rule of law" values, but also to reassure interest groups that, when they receive legislation from Congress, their legislative deal will not entirely collapse over time.<sup>250</sup> But the Court also needs to pay attention to the preferences of the current Congress, to facilitate the efficient operation of pluralism. If the Court completely ignored current legislative preferences and interest group configurations, Congress would have to revisit statutes constantly to update them—a job the Court can perform more efficiently for a wide range of issues. Because most of the statutory issues decided by the Court are those for which there is no completely verifiable "deal" in the enacting Congress, the preferences of the current Congress are usually more important for the Court than are the preferences of the enacting Congress.

The evidence suggests that during the time frame of this Article (1967-90), the Court has tacitly followed the ideology just described. This may be changing, however.<sup>251</sup> Voices within the Court itself are openly questioning this traditional ideology, and academics and judges writing about issues of statutory interpretation are criticizing the Court for its practices in the pluralist system. A discussion of the normative desirability of the Court's pluralist ideology first should focus upon the now-ascendant "formalist" ideology. Formalism offers both a critique of the Court's traditional approach and an affirmative new approach. The difficulties with formalism suggest a different, "normative" critique, which argues that the Court ought to challenge the pluralist system more often to protect values not protected by normal politics.

Formalism argues that constitutional "rule of law" values require the Court to follow only the statutory language as understood by both Congress and the President at the time of enactment. Under formalist ideology, the Court's role in statutory interpretation is not to facilitate the dominant political coalition's evolving preferences, but to protect the formal structures of our democracy. This argument places great weight on the Constitution's requirement of bicameralism and presentment before "law" can be changed.<sup>252</sup> Traditionally this critique argued that statutory interpretation is limited to discerning Congress' original intent, but recent voices on the Court, most notably that of Justice

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250. Professors Landes and Posner argue that an independent judiciary might be viewed as protecting the integrity of interest group deals over time. See Landes & Posner, *supra* note 179. This is an important insight but does not tell the whole story.

251. For early soundings, see Richard Pildes, Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

252. U.S. CONST. art. I, § 7 (bicameralism and presentment requirements for Congress to enact "laws"). For stringent formalist application of the bicameralism and presentment requirements to the issues in this Article, see *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in judgment); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 467 (1989) (Kennedy, J., concurring in judgment); *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in judgment); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in judgment).

Scalia, have recast this critique by focusing on the statutory text.<sup>253</sup> Changes in the Court's personnel in the last five years have yielded a Court more sympathetic to such formalist arguments than any other Court since the 1930's.<sup>254</sup>

The formalist group on the Court is not interested in the preferences of the current Congress. Thus, they have vigorously attacked the traditional doctrines by which the Court has explicitly considered post-enactment congressional preferences. Specifically, they have been more prone to revise statutory precedents for which current Congresses are sympathetic,<sup>255</sup> to reject arguments relying on current congressional acquiescence,<sup>256</sup> and to scorn subsequent legislative history.<sup>257</sup> Moreover, this formalist group is much more aggressive in using the canons as critical tools for interpreting statutes, especially those drawn from structural constitutional principles.<sup>258</sup>

Not surprisingly, Congress is more likely to override Supreme Court statutory decisions following such a formalist approach. Appendix III and the summary in Table 6 present systematic evidence of this phenomenon, which has also been noted by Justice Stevens, the Court's staunchest exponent of traditional pluralist ideology.<sup>259</sup> Justice Stevens strongly objects that the Court "do[es] the country a disservice when [it] needlessly ignore[s] persuasive evidence of Congress' actual purpose and require[s] it 'to take the time to revisit the matter' and to restate its purpose in more precise English."<sup>260</sup>

While aware that the Court has often followed the preferences of current Congresses, formalists believe the Court is doing the country a greater service

253. For analytical descriptions of Justice Scalia's jurisprudence of statutory interpretation, see Eskridge, *supra* note 127; Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

254. Justice Rehnquist (who generally favors original intent) was elevated to Chief Justice in 1986; Justice Rehnquist was replaced by Justice Scalia (an ardent textualist); Justice Kennedy (a sometime textualist) replaced Justice Powell (an accommodationist) in 1987. It is not clear how sympathetic newly appointed Justices Souter and Thomas will be to the formalist vision, but it is highly likely that they will be more sympathetic than Justices Brennan and Marshall, whom they replaced. Justices White and O'Connor are sometimes sympathetic to formalist arguments.

255. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 657, 677 (1987) (Scalia, J., dissenting).

256. *See id.* at 672 (Scalia, J., dissenting). Compare Patterson v. McLean Credit Union, 491 U.S. 164, 200 (Brennan, J., concurring in part and dissenting in part) (arguing that *Runyon v. McCrary* ought to receive heightened stare decisis treatment because subsequent Congresses had signaled approval after deliberation and study) with *id.* at 175 n.1 (Kennedy, J.) (refusing to consider evidence of legislative acquiescence).

257. *See, e.g.*, Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989) (Kennedy, J.) ("We have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." (citations omitted)); Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 838-41 (1988) (White, J.).

258. *See* Eskridge, *supra* note 125, at 663-66.

259. *See* West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1153-56 (1991) (Stevens, J., dissenting).

260. *Id.* at 1155 (citation omitted).

when it ignores evidence of subsequent congressional purposes and attitudes. They argue that the Court should refuse to do Congress' job. If a statute falls out of date in relation to newer congressional preferences or newer problems, formalists argue that the Constitution requires any revision of the statute to go through the processes of bicameralism and presentment. The empirical study described in Part I of this Article lends some support for this argument because it shows that Congress is well aware of the Court's statutory decisions and often will override those it disagrees with.<sup>261</sup> Congress already overrides many of the plain meaning decisions<sup>262</sup> and could probably override more decisions if it enlarged the staffs of the judiciary committees and the labor committees in each chamber.<sup>263</sup>

Moreover, several of the case studies described in this Article suggest that formalist ideology has some advantages. Consider the example of employment policies that raise questions of disparate impact and affirmative action. While these issues were not squarely debated or addressed in the Civil Rights Act of 1964,<sup>264</sup> the Court still made the tough policy choices in *Griggs* and *Weber*. Because the gatekeeping committees supported the Court's resolutions, Congress never meaningfully debated these issues. When *Wards Cove* brought *Griggs* and *Weber* into question, these issues moved to the legislative agenda, where they have been discussed hotly. Whatever the legislative resolution of these issues, it may be more satisfying, in a democracy, for the elected legislature rather than the unelected Justices to make and debate the policy choices.

Formalism raises important questions about the Court's traditional accommodationist approach to statutory interpretation and makes an attractive case for a more confrontational approach. However, there are several problems with such a strategy of confrontation. One problem arises out of the nature of formalist reasoning and raises the question of whether the Court's formalists have really made out a case for rejecting the Court's traditional accommodationist attitude. To make its case, formalism must root its argument in an authoritative source. The obvious source for the Court's formalism is the Constitution, but the Constitution offers little if any support for such a vision of statutory interpretation.<sup>265</sup> Nothing in the text of the Constitution provides reliable support for formalism. Article III simply defines the duties of the Supreme Court as entailing the "judicial Power," which tells us little about proper considerations in statutory interpretation. Article I's bicameralism and presentment requirements, much relied upon by the new formalists, tell us nothing

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261. See Tables 1, 2 and 3.

262. See Tables 6 and 8.

263. See Table 4.

264. See GRAHAM, *supra* note 116, for an excellent discussion of the evolution of debate (almost entirely outside Congress) from 1961 to 1971.

265. See Eskridge, *supra* note 125, at 670-78.

about the Court's proper approach to statutory interpretation, as the Court itself suggested in *INS v. Chadha*.<sup>266</sup>

The discussions surrounding the adoption of the Constitution also fail to provide persuasive support for formalism. Indeed, there is some indication that the Framers would have expected the Court to interpret statutes to reflect contemporary policy and reasonableness.<sup>267</sup> Without authoritative support for its ideology of confrontation, the formalist critique is not only incoherent, but presents others with no substantial reason to supplant the Court's traditional ideology of accommodation.

A second problem with the formalist critique is that it requires the Court to act in a more countermajoritarian manner than its traditional approach. Both traditional and formalist ideologies view the Court as Congress' "agent" in statutory interpretation. Like commercial agents in the real world, the Court's role is a subordinate one, implementing directives issued by the principal (Congress) over time. Like principals in the real world, Congress makes the big choices and expects its agent to implement them. The question then becomes one of who is a better agent, the accommodationist who keeps one eye on the principal's current as well as historical preferences, or the formalist, who only has eyes for the principal's original intent or for the plain terms of the written directives? Obviously the principal would rather have the agent who follows the dynamic purpose of his directives, rather than their strict, literal meaning.

This principal-agent analysis has some application to institutions like Congress. When the Court denies civil rights to groups Congress intended to help, or when the Court obstructs a statutory scheme, the damage, even if short term (i.e., there is a quick override), is often irreparable. When the principal is a complex institution like Congress or the President, many mistakes will

<sup>266</sup> 462 U.S. 919 (1983). *Chadha* invalidated the legislative veto as an effort by Congress to make new "laws" without going through bicameral approval and presentment to the President and, therefore, said nothing about the role of the Court to interpret the "laws." Indeed, the Court explicitly approved of highly dynamic executive branch "lawmaking" pursuant to a congressional delegation, because executive activity is regulated under Article II, not Article I. *Id.* at 953 n.16. Obviously, the same point could be made about the Supreme Court's "lawmaking" through statutory interpretation.

<sup>267</sup> The English Humanist tradition of the eighteenth century, which was influential for many of the Framers, emphasized the rule of *Heydon's Case*, 76 Eng. Rep. 637, 638 (K.B. 1584):

the office of all the Judges is always to make such [ ] construction as shall suppress the mischief [addressed by the statute], and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Even much more conservative thinkers such as Blackstone stated that "where some collateral matter arises out of the general words [of a statute], and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity," as in *Heydon's Case*. 1 WILLIAM BLACKSTONE, COMMENTARIES \*91. *The Federalist Papers* echo Blackstone in arguing that courts ought to interpret "unjust and partial" laws by "mitigating the severity and confining the operation of such laws." THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

never be corrected.<sup>268</sup> Because Congress does not have an infinitely elastic agenda, the Court's effort to push more items onto the legislative agenda necessarily pushes other items off of it. It is arguably countermajoritarian for the Court to make Congress legislate repeatedly on matters that Congress thought were closed.

This difficulty is compounded by the democratic process' reliance on the Court's past practice. Since 1937, it appears that the Court has generally been in sync with the pluralist political process in statutory interpretation.<sup>269</sup> During this period, Congress has enacted thousands of statutes, which were surely written and implemented with the baseline assumption that the Court (or, increasingly, an agency) would interpret the statutes over time to carry out Congress' overall goals in a practical fashion. If, as formalists such as Justice Scalia suggest, the Court in the 1990's were to replace its accommodationist philosophy with a more confrontational one, the Court's move would be tantamount to a game of "bait and switch"—one that lures the mark into enacting a statute by holding out the promise of helpful dynamic interpretation (bait), but then eviscerates the statute over time by stingy interpretation (switch).

Consider the following example of bait and switch. The Court has long recognized that Congress can abrogate the states' Eleventh Amendment immunity from lawsuits pursuant to a federal statutory scheme. In 1985, the Court changed the rule to require Congress to make "its intention unmistakably clear in the language of the statute," in order to abrogate Eleventh Amendment immunity.<sup>270</sup> In the last several Terms, the Court relied on this rule to carve the states out of several important statutory schemes.<sup>271</sup>

In *Dellmuth v. Muth*,<sup>272</sup> the Court held that the Education of the Handicapped Act (EHA) of 1975 did not abrogate state immunity. The Court reached this result even though the law imposed substantive obligations directly on the states, included the states in its jurisdictional grant, and included legislative discussion assuming that the states could be sued. After the Supreme Court changed the clear statement rule in 1985, Congress responded in 1986 with a broad textual abrogation of state immunity for statutes protecting the disabled.<sup>273</sup> Yet in *Dellmuth*, the Court held not only that the EHA did not meet the more stringent test for abrogation, but that the 1986 statute made clear

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268. For example, recall the preference configuration described in Figure 1. When the gatekeeping committee of either chamber favors the Court's countermajoritarian interpretation about as much as it favors the chamber's preferred interpretation, it will have few or no incentives to introduce override legislation. In those not insubstantial number of cases, strong countermajoritarian statutory interpretations can survive.

269. This ambitious generalization is based upon the present study, which covers the period 1967-90, and the political science scholarship cited *supra* note 55, as well as Dahl, *supra* note 248, which covers the period before the 1960's. The key date is 1937, the beginning of the end of the *Lochner* era.

270. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), *overridden by* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845.

271. See *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989) (Bankruptcy Act); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (§ 1983).

272. 491 U.S. 223 (1989).

273. 42 U.S.C. § 2000d-7(a)(1) (1988).

Congress' "intent" not to abrogate state immunity in lawsuits filed before 1986.<sup>274</sup> Congress overrode *Dellmuth* in 1990.<sup>275</sup> That Congress had to pass the same statute three times to achieve its original goal is quite striking. Although the new formalists proclaim the "obligation" of the Court "to conduct [its] exegesis [of statutes] in a fashion which fosters the democratic process,"<sup>276</sup> the formalist ideology may undercut the democratic process in many cases.

A final, and related, problem with formalism is that it does not appear to be a "neutral" alternative to the Court's traditional accommodationist ideology. Rather, formalism appears to be structurally biased in ways that are difficult to defend. By requiring Congress to revisit statutes that are imperfectly drafted or that do not precisely address new versions of the problem they were enacted to solve, formalism substantially raises the costs of passing statutes. If statutes are more costly to write and rewrite, fewer of them will exist. Formalism in this way embodies a relatively antigovernmental philosophy. This may reflect the libertarian bias of some formalists<sup>277</sup> or their belief in the distributive theory of politics,<sup>278</sup> both of which are deeply controversial views. In any event, their ideology systematically works against majoritarian regulation.<sup>279</sup>

The present study points to another structural bias in formalism, derived from its pride in kicking statutory issues back to Congress. Tables 7 and 9 suggest asymmetries in Congress' willingness to override Supreme Court statutory decisions. The United States, big business, state and local governments, organized employee groups, women's organizations, and environmentalists are best able to obtain override legislation when they lose Supreme Court statutory cases. More diffuse interests are less able to do this. In other words, a Court that has adopted formalism would systematically benefit established interest groups at the expense of diffuse groups and minorities. Thus, an odd consequence of formalism is that it would considerably strengthen the Court's already strong pro-government bias.

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274. Compare *Dellmuth*, 491 U.S. at 231-32 (majority opinion) (relying solely on plain meaning of statutory text) with *id.* at 238 (Brennan, J., dissenting) (looking to structure and implications of entire statute).

275. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 1103, 104 Stat. 103, 1106.

276. *United States v. Taylor*, 487 U.S. 326, 337 (1988) (Scalia, J., concurring).

277. See, e.g., Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533 (1983) (supporting statutory construction only when statute either plainly addresses problem or requires judges to supply construction).

278. See, e.g., Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) (arguing that judges should attend more to economics of legislative process).

279. The formalists on the current Court add a further bias in their enthusiastic espousal of the *Chevron* doctrine that courts should defer to agency interpretations of statutes they are charged with implementing. This bias suggests their preference for presidential over congressional lawmaking, a preference which is contrary to the structure of lawmaking contemplated in Article I, Section 7 of the Constitution itself. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. (forthcoming 1992).

This last line of analysis suggests a very different critique of the Court/Congress/President game—that the Court’s traditional ideology is too accommodationist and too uncritical of the pluralist system.<sup>280</sup> There are two ways of expressing this critique, one that is “representation reinforcing”<sup>281</sup> and one that is ‘normativist.’<sup>282</sup> The representation-reinforcing version would argue that many interests are left out of our pluralist political system. To enhance our system’s representation of such interests, the Court should act in a countermajoritarian fashion that provides a voice for those who are not heard. The normativist version would argue that certain fundamental values are neglected in the political process, and the Court can protect those values, or at least force attention to them, through statutory interpretation. Since these two expressions are interrelated, this section will simply refer to them both as “normativist.”

A normativist analysis would engage in a statutory interpretation much different from the Court’s traditional approach. Recall *Boutilier v. INS*,<sup>283</sup> in which the Court interpreted the immigration law’s exclusion of people afflicted with “psychopathic personality” as excluding all lesbians, gay men, and bisexuals. The Court’s result strained the “plain meaning” of the statute’s text, but accurately read the political situation in 1967 to suggest that the original anti-homosexual “deal” between the PHS and key players in Congress was still in force.<sup>284</sup> If the Court’s goal was to avoid overrides and mirror the dominant political feelings of the day, then *Boutilier* succeeded.

Yet *Boutilier* was normatively questionable. By going out of its way to interpret an ambiguous statute to exclude lesbians, gay men, and bisexuals,<sup>285</sup> the Court made it easier for the political process to persecute a vulnerable minority, which was virtually invisible in the political process. If ever the interests of lesbians, gay men, and bisexuals were going to be heard in 1967, the Court would have had to supply the forum and a considerable amplifier. Not least of all, *Boutilier* added the sanction of Court-determined “rule of law” to the historical discrimination against gay men, lesbians, and bisexuals in this

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280. *The Federalist Papers* suggest that the role of the Court is to “mitigat[e] the severity and confin[e] the operation” of “partial and unjust” laws. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

281. See ELY, *supra* note 248.

282. See Eskridge & Peller, *supra* note 68, at 743-47; William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 964 (1989) (reviewing ROBERT COVER, ET AL., PROCEDURE (1988)).

283. 387 U.S. 118 (1967).

284. The Court had very good evidence for that supposition. The Ninth Circuit in *Rosenberg v. Fleuti*, 302 F.2d 652 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963), had interpreted the “plain meaning” of the statute not to cover gay men and lesbians. Congress reacted promptly to the decision, with a statute adding “sexual deviation” to the list of exclusions in the Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919. Although the 1965 Act did not apply to *Boutilier*, the recent political signals surely informed the Court’s interpretation.

285. Clive Michael *Boutilier* was not even a “homosexual,” as we now understand the term, but rather was “bisexual.” Unrebutted medical evidence stated that *Boutilier* had sexual relations with both men and women equally. See *Boutilier v. INS*, 363 F.2d 488, 499 (2d Cir. 1966) (Moore, J., dissenting).

country. In short, *Boutilier* was normatively unjustifiable, even if politically expedient. Even at the risk of an override and adverse criticism, the Court should have interpreted the ambiguous statute to protect the interests of the dispossessed and to avoid irrational discrimination.

Normativism is an attractive vision for a Court constantly engaged in statutory interpretation. Like formalism, it confronts the existing political process with discordant statutory interpretations and challenges the process to override. Unlike formalism, normativism carries with it powerful justifications for supplementing or replacing the Court's traditional approach. It succeeds as an alternative for some of the reasons that formalism fails.

Perhaps surprisingly, normativist—rather than either pluralist or formalist—assumptions make the best sense out of the Constitution. The structure of the Constitution itself is strikingly inconsistent with the agency metaphor favored by both pluralist and formalist ideologies. The Court is featured as an independent branch of government, not as a satrapy of Congress. The metaphor that is more consistent with the separation of powers resonant in the Constitution is that of “partnership” rather than “agency.”<sup>286</sup> That is, Congress, the President, and the Court are partners in the creation of public policy, the first making the laws (Article I), the second enforcing the laws (Article II), and the third interpreting the laws (Article III). Article III assures the Court of life tenure and no diminishment of salary, so that the Court has the freedom to reflect upon and criticize the political process as a coequal partner. Alexander Hamilton anticipated normativism in *The Federalist No. 78*, when he argued that a critical role for the Court in statutory interpretation is to interpret “partial and unjust” laws by “mitigating the severity and confining the operation of such laws.”<sup>287</sup>

While normativism may be more consistent with the text, structure, and traditions of the Constitution, it is subject to the other two objections to formalist ideology, namely, countermajoritarian tendencies and nonneutrality. But these objections are not as problematic for normativism as they are for formalism, which claims to be more “democracy-enhancing” and “neutral” than the Court's traditional pluralist ideology. Normativism posits that neutrality is not possible and that countermajoritarianism is necessary to our political process.

An impressive body of legal literature is in the process of justifying normativism as an alternative to the traditional pluralist vision.<sup>288</sup> The empiri-

286. See generally DAVID EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 189-91 (1984).

287. *THE FEDERALIST* NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

288. See, e.g., DWORKIN, *supra* note 126; CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Harold McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83 (1989); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

cal research reported in this Article is relevant to this literature in several ways. To begin with, the override data compiled here, especially that in Tables 7 and 9 (the ability of “losers” in Supreme Court cases to obtain congressional overrides), supports the proposition that our political system is not meaningfully “pluralist.” It lends some support to the views of political scientists who argue that “[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent,”<sup>289</sup> for the poor, the ordinary, and the diffused are seldom heard by our Congress when their interests lose in Supreme Court statutory cases.

But the data suggest a much more complicated political system than one in which the “haves come out ahead.”<sup>290</sup> It is a system in which government “insiders” (federal employees, state and local governments, federal agencies, the executive departments) often do a lot better than “outsiders,” even wealthy outsiders. It is a system in which middle class “minority” groups (noncitizens, women, the disabled) can do better than “established” business interests and diffuse groups such as consumers.

If Hamilton’s words<sup>291</sup> mean anything today, they should at least mean that the Court can serve as the “conscience” of the nation’s pluralism by bringing attention to interests that go unrepresented in Washington and values that are overlooked.<sup>292</sup> A further lesson of the present study is that the Court’s stance significantly affects the way public policy develops in this country.<sup>293</sup> What this Article suggests is that because of the informational features of the Court’s statutory interpretation, the Court can influence political preferences by framing statutory issues in a different way, by presenting those issues in a concrete (and probably unanticipated) factual setting, and by raising arguments of public policy not considered by the political process.

Interestingly, the Court’s traditional practice in statutory interpretation offers traces of a normativist approach in some of its “clear statement rules,” long a mainstay of Anglo-American statutory interpretation.<sup>294</sup> To take the best example, the rule of lenity requires that the Court interpret ambiguous criminal prohibitions in favor of the accused and against the government. This rule serves the representation-reinforcing goal of protecting a relatively powerless group (people accused of committing crimes) and the normativist goal of

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289. SCHATTSCHNEIDER, *supra* note 58, at 35.

290. For example, organized workers (not a big “have” group) do about as well in obtaining overrides as organized businesses (the big “have” group). See Tables 7 and 9. Unions and public employees often obtain overrides, and (perhaps just as important) when such groups intensely oppose an override they have a better track record than do business groups.

291. The Court should interpret “partial and unjust” laws by “mitigating the severity and confining the operation of such laws.” THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

292. A theme best developed in Minow, *supra* note 288.

293. Aside from the usually mentioned reasons that the Court’s interpretation is accepted as the presumptive starting point for any discussion of a statute and that the political process usually defers to the Court’s judgment.

294. See Eskridge, *supra* note 131; Sunstein, *supra* note 123.

injecting due process values of notice, fairness, and proportionality into the political process.<sup>295</sup> The rule of lenity also seems to make a difference in the Court's decisions. For example, the rule appears to trump the Court's traditionally accommodationist attitude toward current congressional preferences.<sup>296</sup> This is normatively attractive, because the rule embodies worthy values and because its beneficiaries are too easily brushed aside in the legislative process.

From a normativist perspective, the problem with the Court's practice is that few of the clear statement rules are as sensible as the rule of lenity. Many of the rules—against waivers of federal sovereign immunity, against federal abrogation of state Eleventh Amendment immunity, against federal regulation of the states—protect values and interests that are already well protected by the national political process. Other rules—against extraterritorial application of federal law and in favor of common law baselines—rest upon outdated, often pre-industrial, assumptions. Still other rules—in favor of groups outside the political process and in favor of proportionality—are good rules that are not authoritatively accepted or regularly invoked by the Court.

Return to *Boutilier*. Boutilier was expelled from the United States because the Court found his sexuality evidence of “psychopathic personality” exclusion in the immigration statute. Justice Brennan dissented from that interpretation and adopted the reasoning of Judge Moore in the lower court.<sup>297</sup> Judge Moore's dissent was a classic normativist move in statutory interpretation, for it focused attention on the facts of the case, subjected the pluralist values to substantive critique, and spoke for the victims whose voices had not effectively been heard in the political process. Had the Supreme Court adopted Judge Moore's position, a congressional override would have been *probable*. But it is *possible* that the political process would have been enlightened—or shamed—by a Court opinion precisely analyzing the medical term “psychopathic personality,” in light of the developing medical literature. Instead, the Court added the sanction of law to poor policy.

One lesson of the theory and practice described in this Article is that the Court can provide leadership to Congress when it can express a perspective that has not been heard. Sometimes by resisting the political process, the Court can transform the preferences of the players, or at least initiate a debate that will, in turn, transform their preferences.

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295. *see generally* ESKRIDGE & FRICKEY, *supra* note 51, at 658-76; J. WILLARD HURST, *DEALING WITH STATUTES* 64-65 (1982); POSNER, *supra* note 248, at 283-84.

296. Congress frequently overrides the Court's lenient interpretations of federal criminal statutes. *See supra* notes 89-90.

297. *Boutilier*, 387 U.S. 118, 125 (1967) (Brennan, J., dissenting) (relying on *Boutilier v. INS*, 363 F.2d 488, 497 (2d Cir. 1966) (Moore, J., dissenting)). Justices Douglas and Fortas filed a separate dissenting opinion, *id.* at 125.

## IV. CONCLUSION

The empirical and theoretical discussion in this Article may contribute to a more systematic analysis of the interaction between the Court, Congress, and the President in the creation of public policy in the United States. Although the data here only pertain to federal statutory interpretation cases, the same analysis could apply to agency lawmaking, federal common law, and federal constitutional law.<sup>298</sup> One point of the analysis is that the Court's role in American lawmaking is intrinsically political and not neutral and that other institutions should be aware of that reality. This analysis has a range of implications for the theory and operation of public policy in this country.

The Court's dynamic statutory interpretation takes on new meaning in light of this study. The evolution of statutes is influenced not just by changing circumstances, but also by changing preferences in the political system. Dynamic statutory interpretation theory has established that the Court does not and cannot tie its interpretive practice meaningfully to original legislative intent. This study suggests, further and perhaps surprisingly, that current legislative expectations are usually more important to the Court than original legislative expectations. Furthermore, these conclusions are defensible against formalist attack, but subject to the normativist reservation that the Court should be more critical of the political preferences to which it defers. Consistent with recent literature, this Article views the canons of statutory interpretation as one mode for the Court's critical reflection.

The analysis in this Article is more important for Congress, which should be thinking more systematically about its dynamic interaction with the Court and the President. To begin with, Congress should be aware that judicial interpretations of the statutes it enacts are not going to be faithful to its original expectations<sup>299</sup>—the Court will be more responsive to the expectations of future Congresses and to values (such as plain meaning and due process) that it particularly treasures. Given this, Congress has much stronger incentives to monitor judicial decisionmaking than it has traditionally realized. Congress' need to monitor judicial decisions is particularly strong in a period of divided government when the Court is aligned with the President on many policy matters.

Moreover, Congress can be assured that most controversial Supreme Court decisions will come to its attention and that the relevant committees do a good job of monitoring Supreme Court decisions. Congress, however, should be

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298. I am currently conducting an empirical study, similar to this one, surveying congressional "responses" (not just overrides) to Supreme Court constitutional decisions.

299. This came as a surprise to some of the Members during former Congressman Kastenmeier's hearings on statutory interpretation in 1990. See *Statutory Interpretation and the Uses of Legislative History: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990).

concerned that it is aware of relatively few lower court decisions. Just as the present study shows impressive congressional activity in connection with Supreme Court decisions, it shows an unimpressive knowledge of and response to the far more numerous lower federal court statutory interpretation decisions. Even a Supreme Court *per curiam* opinion, or a memorandum reflecting an evenly split Court, is more likely to trigger congressional attention than important *en banc* decisions in the federal circuits. Congress needs to monitor these lower court decisions more effectively, and a promising beginning is the trial project by Dr. Robert Katzmann, who is setting up a computer link between the clerk's office of the District of Columbia Circuit and the staffs of the relevant congressional committees.<sup>300</sup>

Congress should also be concerned that its monitoring of Supreme Court statutory decisions yields few overrides. All but one of the six preference configurations explored in this Article (all but Figure 4) reveal the significant power of the Court to read its own raw preferences into statutes without congressional override. This is particularly troubling today, when the raw preferences of Congress and the Court are very far apart, when the Court is becoming a preference outlier without significant dissenting voices, and when the Court's preferences can be backed up by a presidential veto (the divided government problem). Even if a President with preferences similar to those in Congress were elected, Congress could still expect provocatively conservative Supreme Court decisions yielding Court/Congress conflict in the areas of civil rights, environmental law, immigration, government liability for constitutional and ordinary torts, and federal jurisdiction and procedure.

Congress ought to be particularly alert to any movement within the Court toward Justice Scalia's formalist critique of the Court's traditional practice. Given the Court's institutional history, I am not sure that Justice Scalia's formalist vision will make much headway in the Court. But to the extent that it does, there will be much more conflict between the Court and Congress in the 1990's—with more overrides and more acrimony. Congress will search for ways to deal with a Court no longer willing to "play the game." In that event, Congress should consider setting up "councils of revision" specializing in override legislation within the legislature, and should consider transferring primary decisionmaking power to agencies over which Congress has more leverage.

A final conclusion to be drawn from the present analysis is the critical role of the Presidency in statutory interpretation. The President is now truly imperial in issues of statutory interpretation, through two powers given the office by the Constitution—the power to appoint Supreme Court Justices<sup>301</sup> and to veto

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300. This is described in Robert A. Katzmann, *Congress, the Courts and Statutory Cases: A Challenge For Positive Political Theory*, 80 GEO. L.J. (forthcoming Feb. 1992).

301. U.S. CONST. art. II, § 2, cl. 2.

legislation<sup>302</sup>—and one power given the office by the Court—the power of executive agencies to issue presumptively valid interpretations of statutes.<sup>303</sup> Thus, a Presidency that has grown increasingly conservative since 1968 has appointed a Court that is increasingly conservative, has used the veto power to protect at least some of the Court's conservative statutory interpretations (and thereby raise the cost of successful overrides), and has used agency rulemaking as a means for trimming back statutory policy. At this point in our history of divided government, the big winner is the Court/Congress/President game is the President.

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302. *Id.* art. I, § 7, cls. 2-3.

303. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

## A METHODOLOGICAL INTRODUCTION TO THE THREE APPENDICES

The following three appendices report the raw data upon which Tables 1 through 9 and much of the discussion in this Article are based. This introduction describes the methodology used in compiling these appendices, the limits of the methodology, and some of the choices made.

A. *Appendix I: Overrides, 1967-90*

Appendix I collects statutes in the 89th through 101st Congresses in which Congress knowingly overrode federal court interpretations of federal statutes. This Appendix does not report statutory overrides of, or responses to, the Supreme Court's decisions interpreting the Constitution<sup>304</sup> or its common law decisions.<sup>305</sup> The Appendix does report overrides of Supreme Court decisions resting upon both statutory and constitutional grounds.

The *United States Code Congressional and Administrative News* (*U.S.C.C.A.N.*) collects the main committee reports (and sometimes floor explanations) for most of the public laws enacted by Congress in any given year. Committee reports, including conference committee reports, routinely discuss judicial decisions affected by proposed statutory provisions, usually in their section-by-section analyses. My research assistants and I searched the reports printed in *U.S.C.C.A.N.* for the period 1967-90, noting every reference to a Supreme Court or other judicial interpretation of federal statutes that the reports described as being "overruled," "modified," or "clarified" by a provision in the proposed statute. I then correlated these references to provisions in the enacted public law, weeding out references to provisions that did not override a decision in any substantial way or that were not ultimately enacted.

This method has a number of gaps. Not all public laws generate committee reports. Not all of the overrides are reflected in committee reports. Not all committee reports are reprinted in *U.S.C.C.A.N.* To fill in at least some of these gaps, I did an extensive (but not comprehensive) search of committee reports reproduced on microfiche by the Congressional Information Service, examined the hearings conducted by the House and Senate Judiciary Committees in the period 1979-88, and consulted secondary sources.<sup>306</sup>

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304. See, e.g., Veterans Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108-09 (1988) (overriding *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985)); Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (overriding *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)).

305. Federal Employees Liability Reform & Tort Compensation Act of 1988, Pub. L. No. 100-691, 102 Stat. 1568 (overriding *Westfall v. Erwin*, 484 U.S. 292 (1988)); Amendments to Federal Rules of Evidence, Pub. L. No. 93-595, § 1, 88 Stat. 2215, 2236 (1974) (new Rule 803(3)) (overriding *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892)).

306. Particularly helpful was Solimine & Walker, *supra* note 5.

I have made a number of choices that should be explicitly noted. First, I have included as “overrides” statutes that “modified” the holding or reasoning of a federal statutory decision. The statute does not have to have entirely nullified the court’s statutory decision for me to have counted it as an override.<sup>307</sup> So long as key players in Congress were clearly reacting to a statutory decision, I have counted the statute as an override. Generally, I have counted as overrides only those statutes whose legislative history mentions overridden cases by name. I deviated from this policy for a few overrides of Supreme Court cases because the overrides are clearly linked to the Supreme Court cases in the relevant communities of interpretation.<sup>308</sup>

Second, I have not included as overrides statutes that contain legislative history rejecting a federal statutory decision but that did not proceed to change the text of the *United States Code* to override the decision.<sup>309</sup> Nor do I include as overrides statutes only requiring agency reports or agency follow up on the implications of statutory precedents, rather than changing the text of the statutes.<sup>310</sup>

Third, I have not included as overrides statutes that “codified” or “endorsed” federal statutory decisions. There must have been disapproval of the decision or its consequences for the statute to count as an override.<sup>311</sup> A

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307. See, e.g., Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, 94 Stat. 939 (1980) (overriding *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), but only for soft drink industry); Deepwater Port Act of 1974, Pub. L. No. 93-617, 88 Stat. 2126 (overriding procedural rules of *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (overriding *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), but only for Port Act cases).

308. See Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (overriding *Boutillier v. INS*, 387 U.S. 118 (1967), with legislative history only focusing on lower court decision following *Boutillier*); Child Sexual Abuse & Pornography Act of 1986, Pub. L. No. 99-628, § 5(b)(1), 100 Stat. 3511 (overriding *Caminetti v. United States*, 242 U.S. 470 (1971), but not mentioning decision); Firearm Owners' Protection Act, Pub. L. No. 99-308, § 105, 100 Stat. 449, 459 (1986) (overriding *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 109 (1984), but not mentioning decision).

309. For example, the House report for the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106, rejects the Supreme Court's interpretation of ERISA in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). See H.R. REP. NO. 247, 101st Cong., 1st Sess. 55-56 (1989), reprinted in 1989 U.S.C.C.A.N. 1947-49. But there is no change in the statute to reflect this rejection. Hence, I have not included this as a statutory override.

310. See Housing & Community Development Act of 1987, Pub. L. No. 100-242, § 102(b), 101 Stat. 1815, 1820 (calling for Comptroller General report, in response to congressional doubts about *Wright v. Roanoke Dev. & Hous. Auth.*, 479 U.S. 418 (1987) see also 1987 U.S.C.C.A.N. 3461 (Conf. Rep.)); Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (1984) (House Report directs SEC to monitor impact of *Dirks v. SEC*, 463 U.S. 636 (1983), and report back to committee H.R. REP. NO. 98-355, 98th Cong., 2d Sess. 15 (1984), reprinted in 1984 U.S.C.C.A.N. 2288).

311. For example, Congress essentially built upon and expanded upon the Court's decision to protect victims of contagious diseases in *School Board v. Arline*, 480 U.S. 273 (1987), when it enacted the Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, § 9, 102 Stat. 28, 31-32. Although Walker & Solimine, *supra* note 5, count this as a congressional response to *Arline* because the statute expanded *Arline's* holding, I do not count it as an override because there was no congressional disapproval of the decision; Congress was only using it as a “building block” for public policy.

harder choice was whether a statute indirectly “responding” to a decision Congress does not like counts as an override. Generally not.<sup>312</sup>

### B. *Appendix II: Judiciary Committee Hearings, 1979-88*

Appendix II collects the Supreme Court cases that were subject to scrutiny in hearings before the House or Senate Judiciary Committees for the 96th through 100th Congresses (1979-88). The appendix lists Supreme Court decisions (often clustered, if they all relate to the same statutory issue), any override bills aimed at those decisions, and the ultimate disposition of the override bills.

The methodology here was quite simple. I read through the Library of Congress’ collection of House and Senate Judiciary Committee hearings for the 96th through 100th Congresses. The Library of Congress keeps the hearings all together and arranges them in sequential numerical order, so that any gaps in coverage can be readily noted. Obviously, I did not read hearings that were clearly unrelated to statutory interpretation issues (which was about half of them), nor did I read the hearings carefully for substance. I just looked for scrutiny of Supreme Court decisions and studied the more important hearings.

The hearings note and usually reprint the bills on which they are focused, and this was my main source for the override bills. Hence, my study does not report override bills that were not the focus of hearings. On the other hand, I have listed a few cases that were scrutinized in hearings, but for which there were no override bills reported in the hearings. What was important was the House or Senate Judiciary Committees’ scrutiny of Supreme Court statutory decisions.

I determined the ultimate fate of the override bills primarily through the LEGISLATE computer service at the Library of Congress. Unhappily, this service leaves much to be desired. Sometimes, for example, an override bill is left to die in committee, while an equivalent provision is inserted into another bill, through amendment or so forth; LEGISLATE does not catch these developments. I have caught as many of these anomalies as possible (often through reference in subsequent hearings), but gaps no doubt remain.

### C. *Appendix III: Characteristics of Overridden Supreme Court Decisions*

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312. For example, the Supreme Court in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lightings, Inc.*, 376 U.S. 234 (1964), ruled that federal patent law preempted most state regulation of sound recordings, even though federal law did not itself provide protection. Congress responded by amending federal patent law to protect sound recordings. Although Congress amended the statute specifically in response to the Supreme Court decisions and did not like the policy resulting from those decisions, see H.R. REP. NO. 487, 92d Cong., 1st Sess. (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1577-78, I have not included this action as an override of the Supreme Court decisions because the statutory amendment left their rulings completely in place (state law remained preempted). I consider this a very close call.

Appendix III lists the 121 overridden Supreme Court decisions collected in Appendix I, indicates in parentheses the dates of the decisions, and indicates in brackets the dates of the congressional overrides. In the three remaining columns, Appendix III makes some crude characterizations of those decisions. Most of the characterizations are self-explanatory, but a few words are in order.

### 1. *Voting Split*

The “voting split” column reports how the Court divided, with the Court majority being first, followed by the number of dissenters, followed by the number of Justices concurring only in the judgment (if applicable). Hence, “7-2” means there were seven Justices in the majority and two in dissent; “6-2-1” means there were six Justices in the majority, two in dissent, and one concurring in the judgment. I have characterized the ideology of the voting split in brackets. Ideology is measured in conventional terms, with Justices Brennan and Marshall as “liberals” and Justice Rehnquist as a “conservative.” If the Court divided ideologically and the conservatives won (Rehnquist in the majority, Brennan and Marshall in dissent), I have reported “Con./Lib.” If the Court issues no opinion, was unanimous, or did not split along ideological lines (e.g., Brennan and Rehnquist vote together), I have signified that as “No Split.”

### 2. *Primary Reasoning*

The “primary reasoning” column reports the most important justification invoked by the Court to support its interpretation of the statute. The choices are:

- *Plain Meaning*, when the Court relies on the most natural meaning of the statutory text, in light of standard rules of syntax and grammar, accepted dictionaries, and the structure and other provisions of the statute (the whole act).
- *Legislative History*, when the Court relies on the discussion (usually within Congress) surrounding the enactment of the statute.
- *Precedents*, when the Court relies on its own precedents interpreting the statute or related statutes.
- *Canons*, when the Court relies on the canons of statutory construction, traditional presumptions, and clear statement rules of statutory interpretation.
- *Purpose*, when the Court relies on the policy or purpose of the statute.
- *Common Law*, when the Court relies on common law baselines.

Sometimes, it was hard to determine the Court's "primary" basis for decision. In such instances, I usually list the two most important justifications

### 3. *Winners/Losers*

The "winners/losers" column reports my characterization of the groups that essentially won and lost each case, measured in terms of the decision's effect upon their interests. Often this corresponds to the parties in the case (for example, the United States), but sometimes I have extrapolated from the parties to the groups that are more generally helped or hurt by the decision. I have tried to be conservative in these extrapolations.

I have identified the raw "groups" whose "interests" are harmed by each Supreme Court decision. The raw groups identified are:

- *United States*, when the government or one of its agencies or officers lost the case against a criminal defendant, government contractor, tort victim, regulated industry, taxpayer, etc. (I have not counted the U.S. as the losing interest when it intervened to support a private interest's interpretation.) Interests represented by the Solicitor General (at the Court) and executive agencies or departments (in Congress) fall within this category.
- *Diffuse Citizenry*, when the case harmed the interests of most or all Americans in a similar or random way, including decisions against the interests of government tort victims, antitrust plaintiffs, FOIA applicants, consumers, and general litigants. Interests represented by the Consumer's Union, Common Cause, or the ACLU fall within this category.
- *Organized Business*, when the case harms the interests of a well organized industry or trade group. Interests represented by the Chamber of Commerce, the Business Roundtable, or a more specialized industry group fall within this category.
- *State & Local Government*, when state and local governments directly lost cases against criminal defendants, constitutional tort victims, antitrust plaintiffs or defendants, etc. Interests represented by the Association of State and Local Governments, or Association of State Attorney Generals fall within this category.
- *Organized Workers*, when a decision injured the interests of unions, retired workers, or government employees. Interests represented by AFL-CIO and specific unions, American Association of Retired Persons, or government employee unions fall within this category.
- *Women*, when a decision injured the interests of women as a group. Interests represented by the National Organization for Women, various ad hoc groups, or Planned Parenthood fall within this category.

- *Disabled*, when a decision injured the interests of Americans who have physical or mental disabilities. Interests represented by the ACLU or various special groups fall within this category.
- *Environmentalists*, when a decision failed to protect the environment. Interests represented by the Sierra Club, Environmental Defense Fund, Natural Resources Defense Council, etc. fall within this category.
- *Veterans*, when a decision failed to protect Americans who served in the armed forces. Interests represented by Veterans of Foreign Wars or various special issue groups fall within this category.
- *Noncitizens*, when a decision made it harder for noncitizens to enter into or remain in this country. Interests represented by the Immigration Bar fall within this category.
- *Minorities*, when a decision failed to recognize or enforce a statutory right or remedy sought by a group traditionally discriminated against because of its race, ethnicity, or sexual orientation. Interests represented by the Lawyers' Committee on Civil Rights and the ACLU (generally), the NAACP and Urban League (African Americans), MALDEF (Mexican Americans), Human Rights Campaign Fund (lesbians and gay men) fall within this category.
- *The Poor*, when a decision upheld or created a role disproportionately affecting people below the poverty line. Interests represented by the ACLU and specialized issue groups fall within this category.

## APPENDIX I

CONGRESSIONAL OVERRIDES OF JUDICIAL INTERPRETATIONS OF  
FEDERAL STATUTES (1967-1990)

CONGRESSIONAL OVERRIDES	SUPREME COURT DECISION	PRIMARY REASONING
101ST CONGRESS		
Judicial Improvements Act of 1990, Pub.L.No. 101-650, § 310, 104 Stat. 5089, 5113-14 (1990)	Finley v. United States, 490 U.S. 545 (1989)	Gap in federal jurisdiction rules. 1990 U.S.C.C.A.N. 6873-76 (H.R. Rep.)
Immigration Act of 1990, Pub.L.No. 101-649, § 601, 104 Stat. 4978, 5067 (1990)	Matter of Longstaff, 716 F.2d 1439 (5th Cir. 1983); also <i>Boutilier v. INS</i> , 387 U.S. 118 (1967)	Outdated health-based rules. 1990 U.S.C.C.A.N. 6736 (H.R. Rep.)
Crime Control Act of 1990, Pub.L.No. 101-647, 104 Stat. 4789 (1990)		
§ 3102, 104 Stat. at 4916	<i>In re Cain</i> , 96 B.R. 115 (Bankr. N.D. Ohio 1988), et al.	Bad policy. 1990 U.S.C.C.A.N. 4069-70 (S. Rep.)
§ 3103, 104 Stat. at 4916	Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990)	Bad policy. 1990 U.S.C.C.A.N. 6570-71 (H.R. Rep.); <i>id.</i> at 4071 (S. Rep.)
Independent Safety Board Act Amendments of 1990, Pub.L.No. 101-641, § 3, 104 Stat. 4654 (1990)	<i>Woulfe v. United States</i> , No. 89-7822 (N.D. Ill. Nov. 20, 1989)	Bad interpretation. 1990 U.S.C.C.A.N. 6380 (S. Rep.)
Antitrust Amendments Act of 1990, Pub.L.No.101-588, § 2, 104 Stat. 2879 (1990)	<i>TRW, Inc. v. FTC</i> , 647 F.2d 942, 948 (9th Cir. 1981), et al.	Bad policy. 1990 U.S.C.C.A.N. 4104 (S. Rep.)
Inventions in Outer Space, Pub.L.No. 101-580, 104 Stat. 2863 (1990)	<i>Decca Ltd. v. United States</i> , 191 U.S.P.Q. 439 (Ct.Cl. 1976); see <i>Deepsouth Packing Co. v. Laitram</i> , 406 U.S. 518, 531 (1972)	Bad policy. 1990 U.S.C.C.A.N. 4060-61 (S. Rep.)
Copyright Remedy Clarification Act, P.L.No. 101-553, 104 Stat. 2749 (1990)	<i>BV Engineering v. UCLA</i> , 858 F.2d 1394 (9th Cir. 1988), et al.; see <i>Atascadero St. Hosp. v. Scanlon</i> , 473 U.S. 234 (1985)	Bad interpretation based upon bad Supreme Court cases. 1990 U.S.C.C.A.N. 3950-55 (H.R. Rep.)
Clean Air Act, Amendments, Pub.L.No. 101-549, 104 Stat. 2399 (1990)		
§ 101(c)(3), 104 Stat. at 2406-07	<i>Abramowitz v. EPA</i> , 832 F.2d 1071 (9th Cir. 1987)	Bad policy. 1990 U.S.C.C.A.N. 3408 (S. Rep.)
§ 228(b), 104 Stat. at 2507-08	<i>Ced's Inc. v. EPA</i> , 745 F.2d 1092 (7th Cir. 1984)	Bad policy. 1990 U.S.C.C.A.N. 3509 (S. Rep.)
§ 228(d), 104 Stat. at 2510-11	<i>United States v. Hill Petroleum</i> , No. 85-0184C (W.D. La. July 29, 1986)	Bad policy. 1990 U.S.C.C.A.N. 3512 (S. Rep.)
§ 701, 104 Stat. at 2679 (new § 113(e))	<i>United States v. SCM Corp.</i> , 667 F. Supp. 1110 (D.Md. 1987); <i>United States v. Kaiser Steel</i> , No.82-2623-IH (C.D.Cal. Jan. 17, 1984)	Bad policy. 1990 U.S.C.C.A.N. 3749 (S. Rep.)
§ 706, 104 Stat. at 2682	<i>West Penn Power Co. v. EPA</i> , 860 F.2d 581 (3d Cir. 1988)	Bad interpretation. 1990 U.S.C.C.A.N. 3755 (S. Rep.)
§ 707(g), 104 Stat. at 2683	<i>Gwaltney v. Chesapeake Bay Foundation</i> , 484 U.S. 49 (1984)	Bad policy. 136 CONG. REC. S18040 (daily ed. Oct. 24, 1990) (explanation of conference agreement)
§ 707(h), 104 Stat. at 2683-84	<i>New York v. Thomas</i> , 613 F. Supp. 1472 (D.D.C. 1985), <i>rev'd on other grounds</i> , 802 F.2d 1443 (D.C. Cir. 1986)	Bad policy. 1990 U.S.C.C.A.N. 3758 (S.Rep.)
National Defense Authorization Act for FY 1991, Pub.L.No. 101-510, § 555, 104 Stat. 1485, 1569-70 (1990)	Unnamed judicial decisions interpreting Uniformed Servs. Former Spouses Protection Act	Bad interpretation. 1990 U.S.C.C.A.N. 3166 (Conf. Rep.)

Omnibus Budget Reconciliation Act of 1990, Pub.L.No. 101-503, 104 Stat. 1388 (1990)

§ 6208, 104 Stat. at 1388-307 to -308

§ 11323(a), 104 Stat. at 1388-464

Education of the Handicapped Act Amendments of 1990, Pub.L. No. 101-476, § 103, 104 Stat. 1103, 1106 (1990)

Older Workers Benefit Protection Act, Pub.L. No. 101-433, 104 Stat. 978 (1990)

Radiation Exposure Compensation Act, Pub.L.No. 101-426, 104 Stat. 920 (1990)

Civil Service Due Process Amendments, Pub.L.No. 101-376, 104 Stat. 461 (1990)

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L.No. 101-73, 103 Stat. 183 (1989)

§ 212(a), 103 Stat. at 225-30 (new § 11(d)(3)-(7))

§ 212(a), 103 Stat. at 240

§ 902, 103 Stat. at 450-53

§ 903, 103 Stat. at 453-57

Secretary of the Interior v. California, 464 U.S. 312 (1984)

Commissioner v. Danileson, 378 F.2d 771 (3d Cir. 1967), et al.

Dellmuth v. Muth, 491 U.S. 223 (1989)

Public Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989)

United States v. Allen, 816 F.2d 1417 (10th Cir. 1987); Begay v. United States, 591 F. Supp. 991 (D.Ariz. 1984), aff'd, 768 F.2d 1059 (9th Cir. 1985)

United States v. Fausto, 484 U.S. 439 (1988)

Coit Indep. Joint Venture v. FSLIC, 489 U.S. 561 (1989)

Continental Cas. v. Allen, 710 F.Supp. 1088 (N.D. Tex. 1989)

Larimore v. Comptroller of the Currency, 789 F.2d 1244 (7th Cir. 1986)

Stoddard v. Board of Gov'rs, 868 F.2d 1308 (D.C. Cir. 1989)

Bad policy. 1990 U.S.C.C.A.N. 2675-77 (Conf. Rep.)

Confusing caselaw. 1990 U.S.C.C.A.N. 2351-53 (H.R. Rep.)

Bad interpretation and bad policy. 1990 U.S.C.C.A.N. 1734 (H.R. Rep.)

Bad interpretation. 1990 U.S.C.C.A.N. 1510, 1522-23, 1534-35 (S. Rep.)

Unfair interpretation. 1990 U.S.C.C.A.N. 1370-71 (H.R.Rep.)

Bad policy. 1990 U.S.C.C.A.N. 698 (H.R.Rep.)

Address concerns raised by Supreme Court. 1989 U.S.C.C.A.N. 214-15 (H.R. Rep.)

Bad policy. 1989 U.S.C.C.A.N. 212-13 (H.R. Rep.)

Confusion in law. 1989 U.S.C.C.A.N. 264 (H.R. Rep.)

Confusion in law. 1989 U.S.C.C.A.N. 264-65 (H.R. Rep.)

#### 100TH CONGRESS

Marine Mammal Protection Act Amendments of 1988, Pub.L.No. 100-711, § 2, 102 Stat. 4755 (1988)

Insider Trading & Securities Fraud Enforcement Act of 1988, Pub.L.No. 100-704, 102 Stat. 4677 (1988)

§ 3(b)(2), 102 Stat. at 4680

§ 5, 102 Stat. at 4680-81

Patent & Trademark Office Authorization, Pub.L.No. 100-703, § 201, 102 Stat. 4674, 4676 (1988)

Judicial Improvements & Access to Justice Act, Pub.L.No. 100-702, 102 Stat. 4642 (1988)

§ 501, 102 Stat. at 4652

Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795 (D.C.Cir. 1988)

Carpenter v. United States, 484 U.S. 19 (1987)

Moss v. Morgan Stanley, 719 F.2d 5 (2d Cir. 1983)

United States v. Morton Salt, 338 U.S. 632 (1950)

Bowen v. Massachusetts, 487 U.S. 879 (1988); Hohri v. United States, 482 U.S. 64 (1987)

Bad policy. 1988 U.S.C.C.A.N. 6162, 6178-79 (H.R. Rep.)

Issue unresolved by equally divided Court. 1988 U.S.C.C.A.N. 6047 (H.R. Rep.)

Bad policy. 1988 U.S.C.C.A.N. 6075-76 (H.R. Rep.)

Bad policy. *Patent Licensing Reform Act of 1988: Hearing Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 67 (1988)*

Confused/unclear law. 1988 U.S.C.C.A.N. 6012-14 (H.R. Rep.)

§ 801, 102 Stat. at 4657	United States v. Evans, 526 F.2d 701 (5th Cir. 1976); United States v. Hill, 480 F. Supp. 1223 (S.D. Fla. 1979)	Bad policy. 1988 U.S.C.C.A.N. 6024 (H.R. Rep.)
§ 1007, 102 Stat. at 4667	In re Cement & Concrete Antitrust Litigation, 515 F. Supp. 1076 (D.Ariz. 1981)	Excessively technical policy. 1988 U.S.C.C.A.N. 6029 (H.R. Rep.)
§ 1019, 102 Stat. at 46	Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955)	Clarification of outdated rule. 133 CONG. REC. E1509 (daily ed. Apr. 23, 1987)
Anti-Drug Abuse Act of 1988, Pub.L.No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988)	McNally v. United States, 483 U.S. 350 (1987)	Bad policy. 134 CONG. REC. S17376 (daily ed. Nov. 10, 1988)
Ocean Dumping Ban Act of 1988, Pub.L.No. 100-688, 102 Stat. 4139 (1988)	City of New York v. EPA, 543 F. Supp. 1084 (S.D.N.Y. 1981)	Bad policy. 1988 U.S.C.C.A.N. 5869-70 (S. Rep.)
Veterans' Judicial Review Act--Veterans' Benefits Improvement Act of 1988, Pub.L.No. 100-687, Tit. II & III, 102 Stat. 4105, 4109-22 (1988)	Traynor v. Turnage, 485 U.S. 535 (1988)	Bad policy. 1988 U.S.C.C.A.N. 5801-04 (H.R. Rep.)
Trademark Law Revision Act of 1988, Pub.L.No. 100-667, 102 Stat. 3935 (1988)		
§§ 128-130, 102 Stat. at 3944-45	Blau Plumbing, Inc. v. S.O.S. Fix-it, Inc., 781 F.2d 604 (7th Cir. 1986); Standard Terry Mills Inc. v. Shen Mfg. Co., 803 F.2d 778 (3d Cir. 1986)	Resolve split in circuits and update statute. 1982 U.S.C.C.A.N. 5601-02 (S. Rep.)
§ 132, 102 Stat. at 3946	Bernard Food Indus. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969)	Bad policy. 1988 U.S.C.C.A.N. 5603 (S. Rep.)
Satellite Home Viewer Act of 1988, Pub.L.No. 100-667, 102 Stat. 3935 (1988)	Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982); Pacific & Southern Co. v. SBN, 694 F. Supp. 1565 (N.D. Ga. 1988)	Unanticipated policy problem. 1988 U.S.C.C.A.N. 5616 & 5642 (two H.R. Repts.)
Technical & Miscellaneous Revenue Act of 1988, Pub.L.No. 100-647, § 3041, 102 Stat. 3342, 3640-41 (1988)	Peterson Est. v. Comm'r, 90 T.C. #18 (1988), et al.	Bad policy. 1988 U.S.C.C.A.N. 4977 (S. Rep.)
McKinney Homeless Assistance Amendments Act of 1988, Pub.L.No. 100-628, § 1006, 102 Stat. 3224, 3265 (1988)	Drake v. Pierce, 698 F. Supp. 1523 (W.D. Wash. 1988)	Bad policy. 1988 U.S.C.C.A.N. 4477-78 (Conf. Rep.)
Review of Tribal Constitutions & Bylaws, Pub.L.No. 100-581, 102 Stat. 2938 (1988)	Coyote Valley Band of Pomo Indians v. United States, 639 F. Supp. 165 (E.D. Cal. 1986)	More flexible policy. 1988 U.S.C.C.A.N. 3909 (S. Rep.)
Intellectual Property Licenses in Bankruptcy, Pub.L.No. 100-506, 102 Stat. 2538 (1988)	Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 765 F.2d 1043 (4th Cir. 1985)	Bad policy. 1988 U.S.C.C.A.N. 3201-02 (S. Rep.)
Indian Gaming Regulatory Act, Pub.L.No. 100-497, 102 Stat. 2467 (1988)	California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	Rationalizing federal law. 1988 U.S.C.C.A.N. 3072-76 (S. Rep.)
Indian Self-Determination & Education Assistance Act Amendments of 1988, Pub.L.No. 100-472, § 206, 102 Stat. 2285, 2294-95 (1988)	Busby Sch. of the N. Cheyenne Tribe v. United States, 8 Ct.Cl. 596 (1985); Appeals of Papago Indian Tribe of Ariz., IBCA-1962 & 1966 (1986)	Unequal application of federal law. 1988 U.S.C.C.A.N. 2653-55 (S. Rep.)
Abandoned Shipwreck Act of 1987, Pub.L.No. 100-298, 102 Stat. 432 (1988)	Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978), et al.	Split in courts, bad policy. 1988 U.S.C.C.A.N. 371 (H.R. Rep.)
Prescription Drug Marketing Act of 1987, Pub.L.No. 100-293, § 4, 102 Stat. 95, 96 (1988)	United States v. Park, 421 U.S. 658 (1975)	Unfair policy. 1988 U.S.C.C.A.N. 59-60 (S. Rep.)

Civil Rights Restoration Act of 1987, Pub.L.No. 100-259, 102 Stat. 28 (1988)	Grove City College v. Bell, 465 U.S. 555 (1984); Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 635-36 (1984) (leaving issue open)	Bad interpretation. 1988 U.S.C.C.A.N. 3-6 (S. Rep.)
Computer Security Act, Pub.L.No. 100-235, § 8, 101 Stat. 1724, 1730 (1987).	SDC v. Mathews, 542 F.2d 1116 (9th Cir. 1976).	Bad interpretation, bad policy. 1987 U.S.C.C.A.N. 3157, 3183 & nn.44-45.
Foreign Relations Authorization Act, FY 1988-89, Pub.L.No. 100-204, 101 Stat. 1331, 1399 (1987).	Reagan v. Abourezk, 85 F.2d 1043 (D.C. Cir. 1986).	Constitutional concerns. 1987 U.S.C.C.A.N. 2357 (S. Rep.) & 2423 (Conf. Rep.).
Omnibus Budget Reconciliation Act of 1987, Pub.L.No. 100-203, 101 Stat. 1330 (1987)		
§ 9307(d), 101 Stat. 1330-357	AMP, Inc. v. United States, 820 F.2d 612 (3d Cir. 1987)	Policy coherence. 1987 U.S.C.C.A.N. 2313-614 (H.R. Rep.)
§ 9343(c), 101 Stat. at 1330-372	Calfee, Halter & Griswold v. Comm'r, 88 T.Ct. No. 35 (1987).	Bad interpretation. 1987 U.S.C.C.A.N. 2313-1636 (H.R. Conf. Rep.).
§ 10103, 101 Stat. 1330-86	Porter v. Comm'r, 88 T.Ct. No. 28 (1987)	Unfair policy. 1987 U.S.C.C.A.N. 2313-654 (H.R. Rep.)
§ 10222, 101 Stat. 1330-410 to -411	Woods Inv. Co. v. Comm'r, 85 T.Ct. 274 (1985).	Unfair policy. 1987 U.S.C.C.A.N. 2313-703-705 (H.R. Rep.), 2313-1706-1709 (Conf. Rep.)
§ 10225, 101 Stat. 1330-413	Textron, Inc. v. United States, 561 F.2d 1023 (1st Cir. 1977)	Unfair tax policy. 1987 U.S.C.C.A.N. 2313-711 (H.R. Rep.) & 2313-1717 (Conf. Rep.)
§ 10402, 101 Stat. 1330-431 to -432	Estate of John G. Boykin, 53 T.C.M. 345 (1987)	Unfair policy. 1987 U.S.C.C.A.N. 2313-658 to -660 (H.R. Rep.) & 2313-1740 to -1743 (Conf. Rep.)
Criminal Fine Improvements Act, Pub.L.No. 100-185, § 3, 101 Stat. 1279 (1987)	United States v. King, 824 F.2d 313 (4th Cir. 1987); United States v. Mayberry, 774 F.2d 1018 (10th Cir. 1985)	Policy coherence. 1987 U.S.C.C.A.N. 2140 (H.R. Rep.)
Competitive Equality Banking Act, Pub. L. No. 100-86, 101 Stat. 552 (1987)		
§ 101(a), 101 Stat. at 554	Unnamed 11th Circuit case	Bad policy. 1987 U.S.C.C.A.N. 497 (S. Rep.)
§ 108, 101 Stat. at 579	M&M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir. 1977)	Bad policy. 1987 U.S.C.C.A.N. 533 (S.Rep.), 612 (Conf. Rep.)
Water Quality Act, Pub.L.No. 100-4, 101 Stat. 7 (1987)		
§ 306, 101 Stat. at 35-36	Chemical Mfrs. Ass'n v. NRDC, 470 U.S. 116 (1985)	Bad policy. 1987 U.S.C.C.A.N. 22-25 (floor remarks)
§ 406(e), 101 Stat. at 73	NRDC v. EPA, 790 F.2d 289 (3d Cir. 1985)	Policy fairness. 1987 U.S.C.C.A.N. 40 (floor remarks)
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Nat'l Defense Auth. Act for FY 1987, Pub.L.No. 99-661, § 952, 100 Stat. 3816, 3945-49 (1986)	Cutter-Hammer, Inc. v. United States, 416 F.2d 1306 (1969); United States v. Rogerson, 785 F.2d 296 (Fed. Cir. 1986)	Policy unfairness, bad interpretation. 1986 U.S.C.C.A.N. 6462-63 (S. Rep.) & 6568-69 (Conf. Rep.)
Health Programs, Pub.L.No. 99-660, § 2122, 100 Stat. 3743 (1986)	Givens v. Lederle, 556 F.2d 1341 (5th Cir. 1977), et al.	Bad policy. 1986 U.S.C.C.A.N. 6368 (H.R. Rep.)
Sexual Abuse Act of 1986, Pub.L.No. 99-654, § 2, 100 Stat. 3660, 3660-63 (1986)	Williams v. United States, 327 U.S. 711 (1946)	Bad policy. 1986 U.S.C.C.A.N. 6188 & nn.15-16, 6194-6200 (H.R. Rep.)
Criminal Law & Procedure Technical Amendments Act of 1986, Pub.L.No. 99-646, 100 Stat. 3592 (1986)		

§ 61, 100 Stat. at 3614	United States v. Dawlett, 787 F.2d 771 (1st Cir. 1986)	Bad policy. 1986 U.S.C.C.A.N. 6153 (H.R. Rep.)
§ 63, 100 Stat. at 3614-15	United States v. Lopez-Flores, 592 F.Supp. 1302 (W.D.Tex.1984)	Bad policy. 1986 U.S.C.C.A.N. 6153 (H.R. Rep.)
§ 68, 100 Stat. at 3616	United States v. Carpenter, 611 F.2d 113 (5th Cir. 1980); United States v. Cubert, 548 F.2d 1355 (9th Cir.1977)	Split in circuits. 1986 U.S.C.C.A.N. 6155-56 (H.R. Rep.)
Emergency Wetlands Resources Act of 1986, Pub.L. No. 99-645, § 501, 100 Stat. 3582, 3590 (1986)	United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985)	Bad policy. 1986 U.S.C.C.A.N. 6128 (S.Rep.)
Futures Trading Act of 1986, Pub.L.No. 99-641, § 103, 100 Stat. 3556, 3557 (1986)	CFTC v. Nahas, 738 F.2d 487 (D.C. Cir. 1984)	Bad policy. 1986 U.S.C.C.A.N. 6010 (H.R. Rep.)
Child Sexual Abuse & Pornography Act of 1986, Pub.L. No. 99-628, § 5(b)(1), 100 Stat. 3510-11 (1986)	Caminetti v. United States, 242 U.S. 470 (1917), aff'd, Cleveland v. United States, 329 U.S. 14 (1946)	Outdated policy. 1986 U.S.C.C.A.N. 5958 (H.R. Rep.)
Immigration Reform & Control Act of 1986, Pub.L.No. 99-603, 100 Stat. 3359 (1986)		
§ 112, 100 Stat. at 3381-83	United States v. Anaya, 509 F.Supp. 2289 (S.D. Fla.), aff'd, 685 F.2d 1272 (11th Cir. 1982)	Bad and ambiguous policy. 1986 U.S.C.C.A.N. 5669-70 (H.R. Rep.)
§ 315(b), 100 Stat. at 3439-40	INS v. Phinpathya, 464 U.S. 183 (1984)	Bad policy. 1986 U.S.C.C.A.N. 5728 (H.R. Rep.)
Quiet Title Actions, Pub.L.No. 99-598, 100 Stat. 3351 (1986)	Block v. North Dakota, 461 U.S. 273 (1983)	Bad policy. 1986 U.S.C.C.A.N. 5643-44 (H.R. Rep.)
Age Discrimination in Employment Amendments of 1986, Pub.L.No. 99-592, 100 Stat. 3342 (1986)	Johnson v. Mayor & City Council of Baltimore, 472 U.S. 353 (1985)	Clarify policy. 1986 U.S.C.C.A.N. 5632, 5639 (H.R. Rep.); also 131 CONG. REC. S14044 (daily ed. Oct. 24, 1983)
Freedom of Information Reform Act of 1986, §§ 1801-1804 of the Anti-Drug Abuse Act of 1986, Pub.L.No. 99-570, 100 Stat. 3207, 3207-48 (1986)	Sladek v. Bensinger, 605 F.2d 899 (5th Cir. 1979), et al.	Bad policy. <i>Freedom of Information Act: Hearing Before the Subcomm. on Technology &amp; the Law of the Senate Comm. on the Judiciary</i> , 100th Cong., 2d Sess. 60 & n.38
	Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978) (en banc), et al.	Bad policy. <i>Freedom of Information Act: Hearing Before the Subcomm. on Technology &amp; the Law of the Senate Comm. on the Judiciary</i> , 100th Cong., 2d Sess. 62
False Claims Amendments Act of 1986, Pub.L.No. 99-562, 100 Stat. 3153 (1986)		
§ 2(7), 100 Stat. at 3153-54	Olson v. Mellon, 4 F.Supp. 947 (W.D.Pa.1933), aff'd, 71 F.2d (3d Cir. 1934)	Split in circuits. 1986 U.S.C.C.A.N. 5283-84 (S. Rep.)
	United States v. Aerodex, Inc, 469 F.2d 1003 (5th Cir. 1972)	Bad policy. 1986 U.S.C.C.A.N. 5284 (S. Rep.)
	United States v. Azzarelli Constr. Co., 647 F.2d 757 (7th Cir. 1981), et al.	Bad policy. 1986 U.S.C.C.A.N. 5286-87 (S. Rep.)
§ 5, 100 Stat. at 3158	United States v. Ueber, 299 F.2d 310 (6th Cir. 1962), et al.	Bad policy. 1986 U.S.C.C.A.N. 5295-96 (S. Rep.)
§ 6, 100 Stat. at 3159-68	United States v. Sells Eng'g Co., 463 U.S. 418 (1983); United States v. Baggot, 463 U.S. 476 (1983)	Bad policy. 1986 U.S.C.C.A.N. 5298-99 (S. Rep.)
Tax Reform Act of 1986, Pub.L.No. 99-514, 100 Stat. 2085 (1986)		

§ 631, 100 Stat. at 2269-75	General Utilities & Operating Co. v. Helvering, 296 U.S. 200 (1935)	Bad policy. See 1986 U.S.C.C.A.N. 4286-87, 4292-93 (Conf. Rep.)
§ 821, 100 Stat. at 2372	Orange & Rockland Utils. v. Comm'r, 86 T.Ct. No. 14 (1986), et al.	Bad policy. 1986 U.S.C.C.A.N. 4410-12 (Conf. Rep.)
§ 1004, 100 Stat. at 2388	Miller v. Comm'r, 733 F.2d 399 (6th Cir. 1984), et al.	Bad policy. 1986 U.S.C.C.A.N. 4430-31 (Conf. Rep.)
§ 1501, 100 Stat. at 2732-43	Asphalt Prods. Co. v. Comm'r, 796 F.2d 843 (6th Cir. 1986)	Bad interpretation. 1986 U.S.C.C.A.N. 4870 n.3 (Conf. Rep.)
§ 1535, 100 Stat. at 2750	DeMartino v. Comm'r, T.C. Memo. 1986-263, et al.	Bad interpretation and bad policy. 1986 U.S.C.C.A.N. 4884 (Conf. Rep.)
<b>Electronic Communications Privacy Act, Pub.L.No. 99-508, 100 Stat. 1848 (1986)</b>		
§ 101(b)(2), 100 Stat. at 1850	Boddie v. ABC, 731 F.2d 333 (6th Cir. 1984), et al.	Constitutional problems. 1986 U.S.C.C.A.N. 3571 (S. Rep.)
§ 301(a), 100 Stat. at 1868-72	United States v. New York Tel. Co., 434 U.S. 159 (1977), et al.	Constitutional problems and bad policy. 1986 U.S.C.C.A.N. 3556, 3567-68 (S. Rep.)
<b>Rehabilitation Act Amendments, Pub.L.No. 99-506, 100 Stat. 1807 (1986)</b>		
<b>Superfund Amendments &amp; Reauthorization Act of 1986, Pub.L.No. 99-499, 100 Stat. 1613 (1986)</b>		
§ 114, 100 Stat. at 1652-53	Exxon Corp. v. Hunt, 475 U.S. 355 (1986)	Bad policy. 1986 U.S.C.C.A.N. 3318 (Conf. Rep.)
§ 127(d), 100 Stat. at 1693	Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)	Bad policy. 1986 U.S.C.C.A.N. 3352-53 (Conf. Rep.)
<b>Air Carrier Access Act of 1986, Pub.L.No. 99-435, 100 Stat. 1080 (1986)</b>		
<b>Handicapped Children's Protection Act of 1986, Pub.L. No. 99-372, 100 Stat. 796 (1986)</b>		
<b>Judicial Improvements Act of 1985, Pub.L.No. 99-336, § 3, 100 Stat. 633, 637 (1986)</b>		
<b>Firearm Owners' Protection Act, Pub.L.No. 99-308, § 105, 100 Stat. 449, 459 (1986)</b>		
<b>Comprehensive Omnibus Budget Reconciliation Act of 1986, Pub.L.No. 99-272, § 11007(a), 100 Stat. 82, 244 (1986)</b>		
<b>California-Nevada Boundary, Pub.L.No. 99-200, 99 Stat. 1663 (1985)</b>		
<b>Dep't of Defense Auth. Act, 1986, Pub.L.No. 99-145, § 512, 99 Stat. 583, 623-27 (1985)</b>		
<b>Equal Access to Justice Act, Extension &amp; Amendment, Pub.L.No. 99-80, 99 Stat. 183 (1985)</b>		
§ 1(a), (c), 99 Stat. at 183-84	Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), et al.	Bad interpretation. 1985 U.S.C.C.A.N. 139-41 (H.R. Rep.)
	United States Dep't Transp. v. Paralyzed Veterans of America, 477 U.S. 597 (1986)	Policy fairness. 1986 U.S.C.C.A.N. 2329-30 (S. Rep.)
	Smith v. Robinson, 468 U.S. 992 (1984); also Marek v. Chesney, 473 U.S. 1 (1985) (overridden in part)	Bad interpretation. 1986 U.S.C.C.A.N. 1799 (Conf. Rep.)
	Lambert Run Coal Co. v. B&O R. Co., 258 U.S. 377 (1922), aff'd in Franchise Tax Bd v. Construction Trust, 463 U.S. 1, 24 (1983)	Obsolescent rule. 1986 U.S.C.C.A.N. 1553 (H.R. Rep.)
	Dickerson V. New Banner Inst., Inc., 260 U.S. 103 (1983)	Bad policy. 1986 U.S.C.C.A.N. 1354-55 (H.R. Rep.)
	In re Bastian Co., 45 Bankr.L.Rep. 717 (W.D.N.Y. 1985)	Bad interpretation. 1986 U.S.C.C.A.N. 699 (H.R. Rep.)
	California v. Nevada, 447 U.S. 125 (1980)	Litigation inappropriate. § 1, 99 Stat. 1663
	Doughtery v. Lehman, 688 F.2d 158 (3d Cir. 1982)	Bad policy. 1985 U.S.C.C.A.N. 484-85 (H.R. Rep.)

§ 1(c)(2), 99 Stat. at 184	Fidelity Constr. Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983)	Bad policy. 1985 U.S.C.C.A.N. 144 (H.R. Rep.)
§ 2, 99 Stat. at 184-85	Tulalip Tribes of Washington v. FERC, 749 F.2d 1367 (9th Cir. 1984)	Bad policy. 1985 U.S.C.C.A.N. 145 (H.R. Rep.)
§ 2(c)(2)(G), 99 Stat. at 185	Auke Bay Concerned Citizens' Advisory Council v. Marsh, 755 F.2d 717 (9th Cir. 1985)	Overly technical approach. 1985 U.S.C.C.A.N. 146 (H.R. Rep.)
§ 2(c)(2)(H), 99 Stat. at 185	Cases holding EAJA inapplicable to condemnation proceedings (no list)	Bad policy. 1985 U.S.C.C.A.N. 147 (H.R. Rep.)
Export Administration Amendments Act of 1985, Pub.L.No. 99-64, § 113(5), 99 Stat. 120, 148-50 (1985)	United States v. Swarovski, 557 F.2d 40 (2d Cir. 1977)	Bad policy. 1986 U.S.C.C.A.N. 126 (Conf. Rep.)

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Patent Law Amendments of 1984, Pub.L.No. 98-622, 98 Stat. 3383 (1984)		
§ 101, 98 Stat. at 3383	Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972)	Bad policy. 1984 U.S.C.C.A.N. 5828 (section-by-section floor analysis)
§ 103, 98 Stat. at 3384	In re Clemens, 622 F.2d 1029 (C.C.P.A. 1980); In re Bass, 474 F.2d 1276 (C.C.P.A. 1973)	Bad policy. 1984 U.S.C.C.A.N. 5833-34 (section-by-section floor analysis)
Trademark Clarification Act, Pub.L.No. 98-620, § 102, 98 Stat. 3335 (1984)	Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316 (9th Cir. 1982)	Bad interpretation, and bad policy. 1984 U.S.C.C.A.N. 5720-27 (S. Rep.)
Trade & Tariff Act of 1984, Pub.L.No. 98-573, § 210(a), 98 Stat. 2948, 2977 (1984)	United States v. Heraeus-Amersil, Inc., 671 F.2d 1356 (C.C.P.A. 1982)	Bad policy. 1984 U.S.C.C.A.N. 5027 (H.R. Rep.)
Cable Communications Policy Act of 1984, Pub.L.No. 98-549, § 5, 98 Stat. 2779, 2802-03 (1984)	Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980)	Bad policy. 1984 U.S.C.C.A.N. 4745-52 (floor colloquy)
Local Government Antitrust Act of 1984, Pub.L.No.98-544, 98 Stat. 2750 (1984)	Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light, 435 U.S. 389 (1978)	Bad interpretation and bad policy. 1984 U.S.C.C.A.N. 4603-08 (H.R. Rep.)
Central Intelligence Information Act, Pub.L. No. 98-477, § 2(c), 98 Stat. 2209, 2211-12 (1984)	Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979); Painter v. FBI, 615 F.2d 689 (6th Cir. 1980)	Bad interpretation and bad policy. 1984 U.S.C.C.A.N. 3786-88 & 3791 (H.R. Rep.)
Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, 98 Stat. 1837 (1984)		
§ 212(a), 98 Stat. at 2000	United States v. Segal, 549 F.2d 1293, 1301 (9th Cir. 1977)	Bad reasoning. 1984 U.S.C.C.A.N. 3309-10, 3312 (S. Rep.)
	Smith v. United States, 143 F.2d 228 (9th Cir. 1944)	Bad policy. 1984 U.S.C.C.A.N. 3320 (S. Rep.)
§ 1005, 98 Stat. at 2138-39	Busic v. United States, 446 U.S. 398 (1980); Simpson v. United States, 435 U.S. 6, 10 (1978)	Bad policy. 1984 U.S.C.C.A.N. 3490, 3493 n.3 (S. Rep.)
§ 1103, 98 Stat. at 2143	United States v. Brown, 688 F.2d 596 (9th Cir. 1982)	Bad policy. 1984 U.S.C.C.A.N. 3509 (S. Rep.)
§ 1104, 98 Stat. at 2143-44	United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976), et al.	Bad policy. 1984 U.S.C.C.A.N. 3510-11 (S. Rep.)
§ 1106, 98 Stat. at 2145	United States v. Kaplan, 586 F.2d 980 (2d Cir. 1978), et al.	Bad policy. 1984 U.S.C.C.A.N. 3514 (S. Rep.)
§ 1107, 98 Stat. at 2145-46	Williams v. United States, 458 U.S. 279 (1982); United States v. Maze, 414 U.S. 395 (1974)	Bad policy. 1984 U.S.C.C.A.N. 3517-19 (S. Rep.)
§ 1109(a), 98 Stat. at 2147-48	United States v. Bedwell, 456 F.2d 448 (8th Cir. 1972)	Bad policy. 1984 U.S.C.C.A.N. 3521 (S. Rep.)

§ 1204(a), 98 Stat. at 2152	United States v. Lember, 319 F.Supp. 249 (E.D. Va. 1970)	Bad policy. 1984 U.S.C.C.A.N. 3538 (S. Rep.)
§ 1206, 98 Stat. at 2153	United States v. Sam Goody, Inc., 675 F.2d 17 (2d Cir.1982), et al.	Bad policy. 1984 U.S.C.C.A.N. 3541-44 (S. Rep.)
§ 1503(2), 98 Stat. at 2182	Playboy Enterprises v. Baccarat Clothing Co., 692 F.2d 1272 (9th Cir. 1982)	Bad policy. 1984 U.S.C.C.A.N. 3631-32 (S. Rep.)
Longshore & Harbor Workers' Compensation Act Amendments of 1984, Pub.L.No. 98-426, § 4, 98 Stat. 1639, 1641 (1984)	Washington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925 (1984)	Bad interpretation. 1984 U.S.C.C.A.N. 2774 (Conf. Rep.)
Drug Price Competition & Patent Term Restoration Act, Pub.L.No. 98-417, § 202, 98 Stat. 1585, 1603 (1984)	Roche Prods. v. Bolar Pharmaceutical Co., 733 F.2d 858 (Fed. Cir. 1984)	Bad policy. 1984 U.S.C.C.A.N. 2678-79 (H.R. Rep.)
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Deficit Reduction Act of 1984, Pub.L.No. 98-369, 98 Stat. 494 (1984)		
§ 65, 98 Stat. at 584	Comm'r v. Kelly, 293 F.2d 904 (5th Cir. 1961)	Bad policy. 1984 U.S.C.C.A.N. 1536 (Conf. Rep.)
§ 77, 98 Stat. at 595-97	Starker v. United States, 602 F.2d 1341 (9th Cir. 1979)	Bad policy. 1984 U.S.C.C.A.N. 895-98 (H.R. Rep.)
§ 79, 98 Stat. at 597	Raphan v. United States, 3 Ct.Cl. 457 (1983)	Bad policy. 1984 U.S.C.C.A.N. 899-900 (H.R. Rep.)
§ 82, 98 Stat. at 598	Edward L. Stephenson Trust v. Comm'r, 81 T.C. 22 (1983)	Bad policy. 1984 U.S.C.C.A.N. 902-03 (H.R. Rep.)
§ 91, 98 Stat. at 598-601	Harold v. Comm'r, 192 F.2d 1002 (4th Cir. 1951); Crescent Wharf v. Comm'r, 518 F.2d 772 (9th Cir. 1975)	Bad policy. 1984 U.S.C.C.A.N. 915 (H.R. Rep.)
§ 95, 98 Stat. at 616	Insilco Corp. v. Comm'r, 73 T.C. 589 (1980)	Bad policy. 1984 U.S.C.C.A.N. 1585-86 (Conf. Rep.)
§ 131, 98 Stat. at 662-64	Dittler Bros. v. Comm'r, 72 T.C. 896, 915 (1979)	Bad policy. 1984 U.S.C.C.A.N. 969, 971 (H.R. Rep.)
§ 159, 98 Stat. at 696	United States v. Williams, 644 F.2d 696 (8th Cir. 1981)	Bad policy. 1984 U.S.C.C.A.N. 1689 (Conf. Rep.)
§ 172(a), 98 Stat. at 699-703	Beaton v. Comm'r, 664 F.2d 315 (1st Cir. 1981); J. Simpson Dean v. Comm'r, 35 T.C. 1083 (1961), et al.	Bad policy. 1984 U.S.C.C.A.N. 1019-21 (H.R. Rep.)
	Greenspun v. Comm'r, 72 T.C. 931, aff'd, 670 F.2d 123 (9th Cir. 1982)	Bad policy. 1984 U.S.C.C.A.N. 1699-1712 (Conf. Rep.)
§ 211(a), 98 Stat. at 740-41	Comm'r v. Standard Life & Accid. Ins. Co., 433 U.S. 148 (1977)	Bad policy. 1984 U.S.C.C.A.N. 1072-73 (H.R. Rep.) & 1748-53 (Conf.Rep.)
§ 421, 98 Stat. at 793-95	United States v. Davis, 370 U.S. 65 (1962)	Bad policy. 1984 U.S.C.C.A.N. 1134-35 (H.R. Rep.) & 1804 (Conf. Rep.)
§ 1026, 98 Stat. at 1031	Diedrich v. Comm'r, 457 U.S. 191 (1982)	Fairness adjustment. 1984 U.S.C.C.A.N. 1328-29 (H.R. Rep.) & 1929-30 (Conf. Rep.)
§ 1051, 98 Stat. at 1044-45	Kamanski v. Comm'r, 477 F.2d 452 (9th Cir. 1973)	Bad policy. 1984 U.S.C.C.A.N. 1329-32 (H.R. Rep.) & 1952 (Conf. Rep.)
Bankruptcy Amendments & Federal Judgeship Act of 1984, Pub.L.No. 98-353, 98 Stat. 333, 390-91 (1984)	NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984)	Bad policy. 130 CONG. REC. 14851-52 & 17151-59 (1984)
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- FCC Authorization Act of 1983, Pub.L.No. 98-214, § 4, 97 Stat. 1467-68 (1983)
- Supplemental Approps. Act of 1983, Pub.L.No. 98-63, ch. VII, 97 Stat. 301, 323-24 (1983)
- Social Security Amendments of 1983, Pub.L.No. 98-21, § 327, 97 Stat. 65, 126-27 (1983)
- Misc. Tax & ERISA Provisions, Pub.L.No. 97-473, § 301, 96 Stat. 2605, 2611-12 (1982)
- Futures Trading Act of 1982, Pub.L.No. 97-444, 96 Stat. 2294 (1982)
- § 101, 96 Stat. at 2294-96
- § 225, 96 Stat. at 2315-16
- NRC Authorization Act, Pub.L.No. 97-415, § 12, 96 Stat. 2067, 2073-74 (1982)
- Antitrust Reciprocity Act, Pub.L.No. 97-393, 96 Stat. 1964 (1982)
- Endangered Species Act Amendments of 1982, Pub.L.No. 97-304, § 5, 96 Stat. 1411, 1421-22 (1982)
- Communications Amendments of 1982-National Telecommunications and Information Administration, Pub.L.No. 97-259, 96 Stat. 1087, 1099 (1982)
- Dep't of Defense Authorization Act of 1983, Pub.L.No. 97-252, § 1002, 96 Stat. 718, 730-35 (1982)
- Tax Equity & Fiscal Responsibility Act of 1982, Pub.L.No. 97-248, 96 Stat. 324 (1982)
- § 224, 96 Stat. at 485-90
- § 228, 96 Stat. at 493
- Voting Rights Act Amendments of 1982, Pub.L.No. 97-205, § 3, 96 Stat. 131, 134 (1982)
- Federal Tort Claims-National Guard, Pub.L.No. 97-124, 95 Stat. 1666 (1981)
- Immigration & Nationality Act Amendments of 1981, Pub.L.No. 97-116, § 8, 95 Stat. 1611, 1616 (1981)
- Dep't of Defense Authorization Act of 1982, Pub.L.No. 97-86, § 905, 95 Stat. 1099, 1114-16 (1981)
- Western Broadcasting Co. v. FCC, 674 F.2d 4 (D.C. Cir. 1982)
- Meade Township v. Andrus, 695 F.2d 1006 (6th Cir. 1982)
- Rowan Companies, Inc. v. United States, 452 U.S. 247 (1981)
- Agsalud v. Standard Oil of Calif., 454 U.S. 801 (1981), aff'g mem., 633 F.2d 760 (9th Cir. 1980)
- Board of Trade of the City of Chicago v. SEC, 677 F.2d 1137 (7th Cir. 1982)
- Board of Trade of the City of Chicago v. CFTC, 605 F.2d 1016 (7th Cir. 1979)
- Sholly v. United States Nuclear Regulatory Comm'n, 651 F.2d 780 (D.C. Cir. 1980) (per curiam)
- Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978)
- Defenders of Wildlife, Inc. v. Endangered Species Scientific Auth., 659 F.2d 168 (D.C. Cir. 1981)
- Reston v. FCC, 492 F.Supp. 697 (D.D.C. 1980)
- McCarty v. McCarty, 453 U.S. 210 (1981)
- Kimbell-Diamond Milling Co. v. Comm'r, 14 T.C. 74, aff'd, 187 F.2d 718 (5th Cir. 1951)
- Rickey v. United States, 592 F.2d 1251 (5th Cir. 1979)
- City of Mobile v. Bolden, 446 U.S. 55 (1980)
- Maryland v. United States, 381 U.S. 41 (1965)
- Reid v. INS, 420 U.S. 619 (1975); INS v. Errico, 385 U.S. 214 (1966)
- United States v. Banks, 383 F.Supp. 368 (D.S.D. 1974); United States v. Jaramillo, 380 F.Supp. 1375 (D. Neb.), appeal dismissed, 510 F.2d 808 (8th Cir. 1975)
- Bad policy. 1983 U.S.C.C.A.N. 2232 (H.R. Rep.)
- Bad policy. 1983 U.S.C.C.A.N. 1309 (S. Rep.)
- Bad reasoning. 1983 U.S.C.C.A.N. 183 (S. Rep.), 299-300 (H.R. Rep.), 438 (Conf. Rep.)
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- Bad policy. 1982 U.S.C.C.A.N. 4595 (S. Rep.) & 4603 (Conf. Rep.)
- Interpretation violates agency agreement. 1982 U.S.C.C.A.N. 3889, 3929 (H.R. Rep.)
- Bad policy. 1982 U.S.C.C.A.N. 3906-09 (H.R. Rep.)
- Bad policy. 1982 U.S.C.C.A.N. 3598 (S. Rep.)
- Bad policy. 1982 U.S.C.C.A.N. 3495, 3500-01 (H.R. Rep.)
- Bad policy. 1982 U.S.C.C.A.N. 2829 (H.R. Rep.) & 2869 (Conf. Rep.)
- Bad policy. 1982 U.S.C.C.A.N. 2304 (Conf. Rep.)
- Unfair policy. 1982 U.S.C.C.A.N. 1570 (Conf.Rep.)
- Bad policy. 1982 U.S.C.C.A.N. 1309-14 (Conf. Rep.)
- Bad policy. 1982 U.S.C.C.A.N. 1319 (Conf. Rep.)
- Bad interpretation. 1982 U.S.C.C.A.N. 179, 193-204 (S. Rep.)
- Bad policy. *Federal Tort Claims Act: Hearings Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary, 97th Cong., 1st & 2d Sess. 34, 86-88 (1981-82).*
- Confusing Court precedents. 1981 U.S.C.C.A.N. 2593-94 (H.R. Rep.)
- Bad policy and update old statute. 1981 U.S.C.C.A.N. 1788, 1790 (H.R. Rep.)

Military Justice Amendments of 1981,  
Pub.L.No. 97-81, 95 Stat. 1085 (1981)

§ 4, 95 Stat. at 1038

United States v. Furgason, 6 MJ.  
844 (CMR 1979), et. al.

Unfair policy. 1981 U.S.C.C.A.N.  
1521 (S. Rep.)

§ 5, 95 Stat. at 1088-89

United States v. Larnear, 3 MJ. 76  
(CMA 1977)

Bad policy. 1981 U.S.C.C.A.N. 1517-  
18 (S. Rep.)

Lacey Act Amendments of 1981,  
Pub.L.No. 97-79, 95 Stat. 1073 (1981)

§ 2(a), 95 Stat. at 1073

United States v. Wingate, No. 76-  
20M (M.D. Fla. June 18, 1976)

Bad interpretation. 1981  
U.S.C.C.A.N. 1752 (S. Rep.)

§ 2(d), 95 Stat. at 1073

United States v. Molt, 599 F.2d 1217  
(3d Cir. 1979)

Bad policy. 1981 U.S.C.C.A.N. 1753  
(S. Rep.)

Marine Mammal Protection Act,  
Pub.L.No. 97-58, § 2(2), 95 Stat.  
979, 981 (1981)

People of Togiak v. United States,  
470 F.Supp. 423 (D.D.C 1979)

Bad policy. 1981 U.S.C.C.A.N. 1470  
(H.R. Rep.)

Omnibus Budget Reconciliation Act of  
1981, Pub.L.No. 97-35, 95 Stat. 357  
(1981)

§§ 1118(e)(3) & 1119(d), 95 Stat.  
at 631-32, 633

Gebbie v. United States R.R.  
Retirement Bd., 631 F.2d 512 (7th  
Cir. 1980)

Bad policy. 1981 U.S.C.C.A.N. 1224-  
26 (Conf. Rep.)

§ 2312, 95 Stat. at 853

Burns v. Alcalá, 420 U.S. 575 (1975)

Bad policy. 1981 U.S.C.C.A.N. 780-  
81 (S. Rep.)

Economic Recovery Tax Act of 1981,  
Pub.L.No.97-34, 95 Stat. 172 (1981)

§ 266, 95 Stat. at 265-66

Consolidated Freight Lines, Inc. v.  
Comm'r, 37 BTA 576 (1938), aff'd,  
101 F.2d 813 (9th Cir. 1938)

Special relief. 1981 U.S.C.C.A.N.  
206 (S. Rep.)

§ 507, 95 Stat. at 333

Teh v. Comm'r, 260 F.2d 489 (9th  
Cir. 1952); Comm'r v. Pittston Co.,  
252 F.2d 344 (2d Cir. 1958)

Bad policy. 1981 U.S.C.C.A.N. 266-  
67 (S. Rep.)

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Miscellaneous Revenue Act of 1980,  
Pub.L.No. 96-605, § 107, 94 Stat.  
3521, 3524 (1980)

Comm'r v. Kowalski, 434 U.S. 77  
(1977)

Unfair policy. 1980 U.S.C.C.A.N.  
7311 (S. Rep.)

Pub.L.No. 96-598, § 1, 94 Stat. 3485,  
3485-86 (1980)

Great Olympic Tire Co. v. U.S., 597  
F.2d 449 (5th Cir. 1979)

Bad policy. 1980 U.S.C.C.A.N. 7201-  
02 & n.2 (S. Rep.)

Pub.L.No. 96-596, § 2, 94 Stat. 3469,  
3469-74 (1980)

Adams v. Comm'r, 72 T.C. 81  
(1979)

Bad policy. 1980 U.S.C.C.A.N. 7191-  
92 & n.4 (S. Rep.)

Bankruptcy Tax Act of 1980,  
Pub.L.No. 96-589, § 5(f), 94 Stat.  
3389, 3406 (1980)

Meyer v. Comm'r, 383 F.2d 883 (8th  
Cir. 1967)

Bad policy. 1980 U.S.C.C.A.N. 7058  
& n.9 (S. Rep.)

Alaska National Interest Lands  
Conservation Act, Pub.L.No. 96-487, §  
1323, 94 Stat. 2371, 2488 (1980)

Utah v. Andrus, Civ. 79-0037 (D. Ut.  
Oct. 1, 1979)

Legal uncertainty. 1980 U.S.C.C.A.N.  
5254 (S. Rep.)

Federal Question Jurisdictional  
Amendments Act of 1980, Pub.L.No.  
96-486, 94 Stat. 2369 (1980)

Snyder v. Harris, 294 U.S. 332  
(1969)

Unfair policy. 1980 U.S.C.C.A.N.  
5064 & n.2 (H.R. Rep.)

Equal Access to Justice Act, Title II of  
the Small Business Export Expansion  
Act of 1980, Pub.L.No. 96-481, 94  
Stat. 2321, 2325-30 (1980)

Peolo v. Farmers Homes Admin., 562  
F.2d 744 (D.C. Cir. 1977), et al.; also  
Aiyeska Pipeline v. Wilderness  
Soc'y, 421 U.S. 240 (1975)

Bad policy. 1980 U.S.C.C.A.N. 4996,  
also 4985 (H.R. Rep.)

Installment Sales Revision Act of 1980,  
Pub.L.No. 96-471, 94 Stat. 2247 (1980)

§ 2(a), 94 Stat. at 2247-51

Kirschenmann v. United States, 488  
F.2d 270 (9th Cir. 1973), et al.

Confusion in law. 1980 U.S.C.C.A.N.  
4702-04 & n.4 (S. Rep.)

	Baltimore Baseball Co. v. United States, 481 F.2d 1283 (Ct.Cl. 1973)	Bad policy. 1980 U.S.C.C.A.N. 4704-05 & n.8 (S. Rep.)
§ 2(a), 94 Stat. at 2247-48	Pacific Nat'l Co. v. Welch, 304 U.S. 191 (1938)	Bad policy. 1980 U.S.C.C.A.N. 4705-06 & n.10 (S. Rep.)
§ 2(a), 94 Stat. at 2248-50	Rushing v. Comm'r, 441 F.2d 593 (5th Cir. 1971), et al.	Confusion in law. 1980 U.S.C.C.A.N. 4707-09 (S. Rep.)
§ 2(a), 94 Stat. at 2250	J.K. Griffith, 73 T.C. No. 76 (Feb. 28, 1980)	Bad policy. 1980 U.S.C.C.A.N. 4712-13 & n.22 (S. Rep.)
§ 2(a), 94 Stat. at 2253	Miller v. Usry, 160 F.Supp. 368 (W.D. La. 1958)	Bad policy. 1980 U.S.C.C.A.N. 4721 (S. Rep.)
Staggers Rail Act of 1980, Pub.L.No. 96-448, 94 Stat. 1895 (1980)		
§ 226, 94 Stat. at 1930-31	Atchison, Topeka & Santa Fe R.R. v. ICC, 617 F.2d 485 (7th Cir. 1980)	Bad policy. 1980 U.S.C.C.A.N. 4151 (Conf. Rep.)
§ 506, 94 Stat. at 1956	Maloolf v. United Transp. Union, No. 78-3797 (E.D.Pa. Mar. 27, 1980)	Bad interpretation. 1980 U.S.C.C.A.N. 4166 (Conf. Rep.)
Customs Courts Act of 1980, Pub.L.No. 96-417, § 201, 94 Stat. 1727, 1728-30 (1980)	Sneaker Circus v. Carter, 566 F.2d 396 (2d Cir. 1977); Consumers Union v. Comm. for Implementation of Textile Agreements, 561 F.2d 872 (D.C. Cir. 1977), et al.	Bad policy. 1980 U.S.C.C.A.N. 3741 (H.R. Rep.)
Antitrust Procedural Improvements Act of 1980, Pub.L.No. 96-349, 94 Stat. 1154 (1980)		
§ 2, 94 Stat. at 1154-56	United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979)	Need for legislative elaboration. 1980 U.S.C.C.A.N. 2716 (H.R. Rep.)
§ 3, 94 Stat. at 1156	Kiefer v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968), et al.	Bad policy. <i>Antitrust Procedural Improvements &amp; Jurisdictional Amendments: Hearings Before the Subcomm. on Monopolies &amp; Commercial Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 23 &amp; n.60 (1979)</i>
§ 4, 94 Stat. at 1156-57	TWA v. Hughes, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973)	Bad policy. 1980 U.S.C.C.A.N. 2769 (H.R. Rep.)
§ 5, 94 Stat. at 1157	Illinois v. General Paving Co., 590 F.2d 630 (7th Cir. 1979)	Bad policy. 1980 U.S.C.C.A.N. 2754 (H.R. Rep.)
§ 6, 94 Stat. at 1157-58	United States v. American Building Maintenance Indus., 422 U.S. 271 (1975)	Remove anomaly in law. 1980 U.S.C.C.A.N. 2732 (H.R. Rep.)
Soft Drink Interbrand Competition Act, Pub.L.No. 96-308, 94 Stat. 939 (1980)	United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); see Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)	Need clarification for one industry. 1980 U.S.C.C.A.N. 2373-74 (H.R. Rep.)
Civil Rights of Institutionalized Persons Act, Pub.L.No. 96-247, 94 Stat. 349 (1980)	United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979); United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977)	Bad policy. 1980 U.S.C.C.A.N. 789 (S. Rep.)
Pub.L.No. 96-170, 93 Stat. 1284 (1979)	District of Columbia v. Carter, 409 U.S. 418 (1972)	Update statutory policy. 1979 U.S.C.C.A.N. 2609-10 (H.R. Rep.)
Pub.L.No. 96-135, 93 Stat. 1056 (1979)	Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir. 1970)	Bad policy. 1979 U.S.C.C.A.N. 2077 (H.R. Rep.)
Dep't of Justice Appropriation Act, FY 1980, Pub.L.No. 96-132, § 14, 93 Stat. 1040, 1048 (1979)	Clay Simmons v. United States, No. 77-75-5 (D.N.Mex.)	Bad interpretation. 1979 U.S.C.C.A.N. 2039-40 (S. Rep.)
Dep't of Defense Authorization Act, 1980, Pub.L.No. 96-107, § 801(a), 93 Stat. 803, 810-11 (1979)	United States v. Russo, 1 M.J. 134 (CMA 1975); also United States v. Harrison, 5 M.J. 476, 481 (CMA 1978), et al.	Bad policy. 1979 U.S.C.C.A.N. 1827-28 (S. Rep.)

Panama Canal Act of 1980, Pub.L.No. 96-70, § 1411, 93 Stat. 452, 485 (1979)	United Fruit Co. v. Panama Canal Co., 243 F.Supp. 410 (D.Canal Zone 1965)	Bad policy. 1979 U.S.C.C.A.N. 1067 (H.R. Rep.)
Energy and Water Development Appropriation Act, 1980, Pub.L.No. 96-69, Tit. IV, 93 Stat. 437, 449 (1979)	TVA v. Hill, 437 U.S. 153 (1978)	Bad policy. H.R. Conf. Rep. No. 388, 96th Cong., 1st Sess. (1979)
Trade Agreements Act of 1979, Pub.L.No. 96-39, § 101, 93 Stat. 144, 181-82 (1979)	Voss Int'l v. United States, C.D. 4801 (May 7, 1979)	Bad policy. 1979 U.S.C.C.A.N. 480 (S. Rep.)

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Endangered Species Act Amendments of 1978, Pub.L.No. 95-632, § 7, 92 Stat. 3751, 3752-60 (1978)	TVA v. Hill, 437 U.S. 153 (1978)	Need for more flexible policy. 1978 U.S.C.C.A.N. 9453, 9460-63 (H.R. Rep.)
Revenue Act of 1978, Pub.L.No. 95-600, § 365, 92 Stat. 2763, 2854-55 (1978)	Bongiovanni v. Comm'r, 470 F.2d 921 (2d Cir 1972); Thatcher v. Comm'r, 533 F.2d 114 (9th Cir. 1976)	Split in the circuits. 1978 U.S.C.C.A.N. 6946-48 (S.Rep.)
Bankruptcy Reform Act of 1978, Pub.L.No. 95-598, 92 Stat. 2549 (1978)		
§ 101, 92 Stat. at 2449-50	In re Freight Drivers Local 600, 3 Bankr.Ct. Dec. 528 (E.D.Mo.1977)	Bad policy. 1978 U.S.C.C.A.N. 6266 (H.R. Rep.)
§ 101, 92 Stat. at 2555	Toucey v. N.Y. Life Ins. Co., 314 U.S. 1 (1941)	Bad policy. 1978 U.S.C.C.A.N. 5815 (S. Rep.) & 6274 (H.R. Rep.)
§ 101, 92 Stat. at 2557	In re Bank of Crowell, 53 F.Supp. 682 (N.D. Tex. 1931)	Bad policy. 1978 U.S.C.C.A.N. 6157-58 (H.R. Rep.)
§ 101, 92 Stat. at 2564	Massachusetts Mut. Life Ins. Co. v. Brock, 405 F.2d 429 (5th Cir. 1968)	Bad policy. 1978 U.S.C.C.A.N. 6442, 6511 (floor debate)
§ 101, 92 Stat. at 2564	In re Beverly Crest Convalescent Hosp., Inc., 548 F.2d 817 (9th Cir. 1976)	Bad policy. 1978 U.S.C.C.A.N. 6286 (H.R. Rep.)
§ 101, 92 Stat. at 2579-80	In re Illinois Art Indus., Inc., 27 F. Supp. 334 (W.D.Mich. 1939)	Bad policy. 1978 U.S.C.C.A.N. 6153 (H.R. Rep.)
§ 101, 92 Stat. at 2584	United States v. Embassy Restaurant, 359 U.S. 29 (1958)	Bad policy. 1978 U.S.C.C.A.N. 5855 (S. Rep.) & 6313 (H.R. Rep.)
§ 101, 92 Stat. at 2590-91	Birkett v. Columbia Bank, 195 U.S. 345 (1904)	Bad policy. 1978 U.S.C.C.A.N. 6453 (S. Rep.) & 6522 (H.R. Rep.)
§ 101, 92 Stat. at 2591	In re Waller, 494 F.2d 447 (6th Cir. 1974), et al.	Bad policy. 1978 U.S.C.C.A.N. 5865 (S. Rep.) & 6320 (H.R. Rep.)
§ 101, 92 Stat. at 2591	Tinker v. Colwell, 139 U.S. 473 (1902)	Bad policy. 1978 U.S.C.C.A.N. 5865 (S. Rep.) & 6320-21 (H.R. Rep.)
§ 101, 92 Stat. at 2594	Lines v. Frederick, 400 U.S. 18 (1970); Lockwood v. Exchange Bank, 190 U.S. 294 (1908)	Bad policy. 1978 U.S.C.C.A.N. 5868 (S. Rep.) & 6324 (H.R. Rep.)
§ 101, 92 Stat. at 2595-96 & 1601-02	Fort Pitt Coal & Coke Co. v. Diser, 239 F. 443 (6th Cir. 1917)	Bad policy. 1978 U.S.C.C.A.N. 6160 (H.R. Rep.)
§ 101, 92 Stat. at 2596	In re Federals, Inc., 553 F.2d 509 (6th Cir. 1977)	Bad policy. 1978 U.S.C.C.A.N. 6456 (H.R. Rep.) & 6525 (S. Rep.)
§ 101, 92 Stat. at 2598-99	In re King Porter Co., 446 F.2d 722 (5th Cir. 1971)	Bad policy. 1978 U.S.C.C.A.N. 5875 (S. Rep.) & 6330 (H.R. Rep.)
§ 101, 92 Stat. at 2599-2600	DuBay v. Williams, 417 F.2d 1277 (9th Cir. 1966); Grain Merchants v. Union Bank & Savs., 408 F.2d 209 (7th Cir. 1969)	Bad policy. 1978 U.S.C.C.A.N. 5874-75 (S. Rep.) & 6330 (H.R. Rep.)
§ 101, 92 Stat. at 2619	In re Rosenbaum Grain Corp., 112 F.2d 315 (7th Cir. 1940)	Bad policy. 1978 U.S.C.C.A.N. 5892 (S. Rep.)

§ 101, 92 Stat. at 2624	American United Mut. Life Ins. Co. v. City of Aron Park, 311 U.S. 138 (1940)	Bad policy. 1978 U.S.C.C.A.N. 6465 (H.R. Rep.) & 6534 (S. Rep.)
§ 101, 92 Stat. at 2632	St. Joe Paper Co. v. Atlantic Coast Line, 347 U.S. 298 (1954)	Bad policy. 1978 U.S.C.C.A.N. 5905 (H.R. Rep.)
§ 101, 92 Stat. at 2635	Aladdin Hotel Corp. v. Bloom, 200 F.2d 627 (8th Cir. 1953)	Bad policy. 1978 U.S.C.C.A.N. 6367 (H.R. Rep.)
§ 213, 92 Stat. at 2661	United States v. Kras, 409 U.S. 434 (1973)	Bad policy. 1978 U.S.C.C.A.N. 6404 (H.R. Rep.)
Contract Disputes Act of 1978, Pub.L.No. 95-563, 92 Stat. 2383 (1978)		
§ 10(a), 92 Stat. at 2388	United States v. Bianchi & Co., 373 U.S. 709 (1963)	Bad policy. 1978 U.S.C.C.A.N. 5239-40 (S. Rep.)
§§ 8(g) & 14(h), 92 Stat. at 2387 & 2390	S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972)	Bad policy. 1978 U.S.C.C.A.N. 5237-38 (S. Rep.)
Pregnancy Discrimination Act of 1978, Pub.L.No. 95-555, 92 Stat. 2076 (1978)	General Elec. Co. v. Gilbert, 429 U.S. 125 (1976)	Bad interpretation and bad policy. 1978 U.S.C.C.A.N. 4750-52 (H.R. Rep.)
Foreign Intelligence Surveillance Act of 1978, Pub.L.No. 95-511, 92 Stat. 1783 (1978)	United States v. United States Dist. Court, 407 U.S. 297 (1972)	Fill in statutory gap. 1978 U.S.C.C.A.N. 3910-16 (S.Rep.)
Airline Deregulation Act of 1978, Pub.L.No. 95-504, § 30, 92 Stat. 1705, 1731 (1978)	Hughes Tool Co. v. TWA, 409 U.S. 363 (1973)	Bad policy. 1978 U.S.C.C.A.N. 3754 (H.R. Rep.) & 3792 (Cong. Rep.)
Pub.L.No. 95-502, Title III, 92 Stat. 1693, 1702-03 (1978)	Clarence LaBelle Post No. 217 v. United States, 580 F.2d 270 (8th Cir. 1978), et al.	Bad policy. 1978 U.S.C.C.A.N. 3716-17 (H.R. Rep.)
Income Taxes, Fringe Benefits, Regulations, Pub.L.No. 95-427, § 3, 92 Stat. 996, 996-97 (1978)	Comm'r v. Kowalski, 434 U.S. 77 (1977)	Fairness. 1978 U.S.C.C.A.N. 2512-13 (H.R. Rep.)
Regional Rail Reorganization Act of 1973 Amendments, Pub.L.No. 95-597, 92 Stat. 2547 (1978)	In Re Erie Lackawanna Ry. Co., 548 F.2d 621 (6th Cir. 1977)	Bad policy. 1978 U.S.C.C.A.N. 5781-82 (S. Rep.)
Age Discrimination in Employment Act Amendments of 1978, Pub.L.No. 95-256, 92 Stat. 189 (1978)		
§ 2, 92 Stat. at 189	McMann v. United Airlines, 434 U.S. 192 (1977)	Bad interpretation. 1978 U.S.C.C.A.N. 529 (Conf. Rep.)
§ 4(b), 92 Stat. at 190-91	Ott v. Midland-Ross Corp., 523 F.2d 1367 (6th Cir. 1975), et al.	Bad policy. 1978 U.S.C.C.A.N. 515 (S. Rep.) & 533-34 (Conf. Rep.)
§ 4(c), 92 Stat. at 191	Usery v. Sun Oil Co., 423 F.Supp. 125 (N.D. Tex. 1976)	Bad policy. 1978 U.S.C.C.A.N. 516 (S. Rep.) & 534-35 (Conf. Rep.)
Clean Water Act of 1977, Pub.L.No. 95-217, §§ 61 & 67(b), 91 Stat. 1566, 1598, 1606 (1977)	Minnesota v. Hoffman, 543 F.2d 1198 (9th Cir. 1976)	Bad interpretation. 1977 U.S.C.C.A.N. 4393 (S. Rep.)
Food & Agriculture Act of 1977, Pub.L.No. 95-113, 91 Stat. 913 (1977)		
§ 1301, 91 Stat. at 962-63 (new § 5(d))	Hein v. Burns, 402 F.Supp. 398 (S.D.Iowa 1975), rev'd, 429 U.S. 288 (1977), et al.	Bad interpretation and bad policy. 1977 U.S.C.C.A.N. 2003-05 (H.R. Rep.)
Ibid.	Compton v. Tennessee Dep't of Pub. Welf., 532 F.2d 561 (6th Cir. 1976)	Bad policy. 1977 U.S.C.C.A.N. 2003 (H.R. Rep.)
Ibid.	Thomas v. Butz, No. 73-336 (D.Ariz. Jan. 20, 1976)	Bad policy. 1977 U.S.C.C.A.N. 2012 (H.R. Rep.)
Clean Air Act Amendments of 1977, Pub.L.No. 95-95, 91 Stat. 685 (1977)		
§ 116, 91 Stat. at 711	Hancock v. Train, 426 U.S. 167 (1976)	Bad interpretation. 1977 U.S.C.C.A.N. 1277-78 (H.R. Rep.)

§ 120, 91 Stat. at 720	Northern States Power Co. v. State of Minn., 447 F.2d 1143 (8th Cir. 1971), <i>aff'd</i> , 405 U.S. 1035 (1972)	Bad policy. 1977 U.S.C.C.A.N. 1524 (Conf. Rep.)
§ 127, 91 Stat. at 731 ff.	Fri v. Sierra Club, 412 U.S. 541 (1973), <i>aff'g</i> by equally divided Court, 344 F. Supp. 253 (D.D.C. 1972)	Preserve decision against possible Supreme Court reconsideration. 1977 U.S.C.C.A.N. 1183 (H.R. Rep.), also 1479 (views Reprs. Devine et al.)
§ 305, 91 Stat. at 772-77	Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972)	Address concerns implicit in these decisions. 1977 U.S.C.C.A.N. 1397-98 (H.R. Rep.)
§ 305(c)(3), 91 Stat. at 776	Investment Co. Inst. v. Board of Gov'rs, 551 F.2d 1270 (D.C. Cir. 1977) ( <i>dicta</i> )	Bad policy. 1977 U.S.C.C.A.N. 1401 (H.R. Rep.)
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Federal Land Policy and Management Act of 1976, Pub.L.No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976)	United States v. Midwest Oil Co., 236 U.S. 459 (1915)	Bad policy. 1976 U.S.C.C.A.N. 6203 (H.R. Rep.)
Pub.L.No. 94-577, 90 Stat. 2729 (1976)	Wingo v. Wedding, 418 U.S. 461 (1974)	Bad interpretation. 1976 U.S.C.C.A.N. 6164-66 (H.R. Rep.)
Pub.L.No. 94-574, 90 Stat. 2721 (1976)		
§ 1, 90 Stat. at 2721	Litell v. Morton, 445 F.2d 1207 (4th Cir. 1971), et al.	Bad policy. 1976 U.S.C.C.A.N. 6131 n.33 (H.R. Rep.)
§ 3, 90 Stat. at 2721-22	Town of East Haven v. Eastern Airlines, 28 F. Supp. 507 (D. Conn. 1968)	Bad policy. 1976 U.S.C.C.A.N. 6139 (H.R. Rep.)
Pub.L.No. 94-568, 90 Stat. 2697 (1976)	McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972)	Bad policy. 1976 U.S.C.C.A.N. 6057-58 (S. Rep.)
The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L.No. 94-559, 90 Stat. 2641 (1976)	Alyeska Pipeline Serv.Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)	Bad policy, fill "anomalous gaps" in civil rights. 1976 U.S.C.C.A.N. 5909-12 (S. Rep.)
Copyrights Act, Pub.L.No. 94-553, 90 Stat. 2541 (1976)		
§ 101, 90 Stat. at 2541-44	White-Smith Publ. Co. v. Apollo Co., 209 U.S. 1 (1908)	Bad policy. 1976 U.S.C.C.A.N. 5665 (H.R. Rep.)
§ 110, 90 Stat. at 2549-50	Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) ( <i>reasoning</i> )	Bad policy. 1976 U.S.C.C.A.N. 5700-01 (H.R. Rep.)
§ 108, 90 Stat. at 2546-48	Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975), <i>aff'g</i> by an equally divided Court, 487 F.2d 1345 (Ct. Cl. 1973)	Bad policy. 1976 U.S.C.C.A.N. 5688-92 (H.R. Rep.)
§ 111, 90 Stat. at 2550-58	Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 39 U.S. 390 (1968)	Bad policy. 1976 U.S.C.C.A.N. 5703 (H.R. Rep.)
§ 411, 90 Stat. at 2583	Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co., 260 F.2d 637 (2d Cir. 1958)	Bad policy. 1976 U.S.C.C.A.N. 5773 (H.R. Rep.)
Pub.L.No. 94-489, 90 Stat. 2358 (1976)	Descomp v. Sampson, 377 F.Supp. 254 (D. Del. 1974), et al.	Bad interpretation. 1976 U.S.C.C.A.N. 5212 (H.R. Rep.)
Pub.L.No. 94-464, 90 Stat. 1985 (1976)	Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974)	Bad policy. 1976 U.S.C.C.A.N. 4445-46 (S. Rep.)
Tax Reform Act of 1976, Pub.L.No. 94-455, 90 Stat. 1520 (1976)		
§ 208, 90 Stat. at 1541-42	Various unnamed Tax Court decisions	Bad policy. 1976 U.S.C.C.A.N. 2992-96 (H.R. Rep.)
§ 601(a), 90 Stat. at 1569-72	George H. Newi, T.C. Memo. 1969-131, <i>aff'd</i> , 432 F.2d 998 (2d Cir. 1970)	Split authority. 1976 U.S.C.C.A.N. 3050-56 (H.R. Rep.) & 3576-82 (S. Rep.)

§ 1051, 90 Stat. at 1643-47	Burke Concrete Accessories, Inc., 56 T.C. 588 (1971)	Bad policy. 1976 U.S.C.C.A.N. 3151-52 & n.42 (H.R. Rep.) & 3710 n.36 (S. Rep.)
§ 1201(a), 90 Stat. at 1660-67	Tax Analysts & Advocates v. IRS, 505 F.2d 350 (D.C. Cir. 1974)	Bad policy. 1976 U.S.C.C.A.N. 3209-12 (H.R. Rep.)
§ 1204(b), 90 Stat. at 1696-97	Laing v. United States, 496 F.2d 853 (2d Cir. 1974)	Bad policy. 1976 U.S.C.C.A.N. 3197-99 (H.R. Rep.) & 3793 (S. Rep.)
§ 1306(a), 90 Stat. at 1717-20	Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); Alexander v. "Americans United" Inc., 416 U.S. 752 (1974)	Harsh policy. 1976 U.S.C.C.A.N. 3179-80 & n.4 (H.R. Rep.) & 4009-12 (S. Rep.)
§ 2009(a), 90 Stat. at 1893	United States v. Byrum, 408 U.S. 125 (1972)	Bad interpretation and incoherence with tax policy. 1976 U.S.C.C.A.N. 3418-19 (H.R. Rep.)
§ 2009(d), 90 Stat. at 1896	Estate of Bray v. Comm'r, 396 F.2d 452 (6th Cir. 1968), et al.	Unfair policy. 1976 U.S.C.C.A.N. 3425-26 (H.R. Rep.)
§ 2101(b), 90 Stat. at 1899	Park Place, Inc., 57 T.Ct. 767 (1972)	Bad interpretation. 1976 U.S.C.C.A.N. 3826 (S. Rep.)
Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L.No. 94-435, 90 Stat. 1383 (1976)		
§ 102, 90 Stat. at 1384-87	United States v. Union Oil Co. of Calif., 343 F.2d 29 (9th Cir. 1965)	Bad policy. 1976 U.S.C.C.A.N. 2615 (H.R. Rep.)
§ 301, 90 Stat. at 1394-96	California v. Frito-Lay, 474 F.2d 774 (9th Cir. 1973)	Bad policy. 1976 U.S.C.C.A.N. 2574-78 (H.R. Rep.)
§ 302(3), 90 Stat. at 1396	Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir. 1928)	Bad policy. 1976 U.S.C.C.A.N. 2588-90 (H.R. Rep.)
Pub.L.No. 94-416, 90 Stat. 1275 (1976)	New Mexico v. United States, 148 F.Supp. 508 (D.N.M. 1957)	Bad policy. 1976 U.S.C.C.A.N. 2369-71 (H.R. Rep.)
Government in the Sunshine Act, Pub.L.No. 94-409, 90 Stat. 1241 (1976)		
§ 5(b), 90 Stat. at 1247-48	Administrator v. Robertson, 422 U.S. 255 (1972)	Bad interpretation. 1976 U.S.C.C.A.N. 2204-05 (H.R. Rep.) & 2250 (Conf. Rep.)
§ 5(c), 90 Stat. at 1247-48	Aviation Consumer Action Project v. Washburn, 535 F.2d 101 (D.C. Cir. 1976)	Bad policy. 1976 U.S.C.C.A.N. 2262 (Conf. Rep.)
Wild and Scenic Rivers Act, Pub.L.No. 94-407, 90 Stat. 1238 (1976)	North Carolina v. FPC, No. 74-1941 (D.C.Cir. 1976)	Bad policy. 1976 U.S.C.C.A.N. 2174 (H.R. Rep.)
Overseas Citizens Voting Rights Act of 1975, Pub.L.No. 94-203, 89 Stat. 1142 (1975)	Hardy v. Lomenzo, 349 F.Supp. 617 (S.D.N.Y. 1972)	Bad policy. 1975 U.S.C.C.A.N. 2361 (H.R. Rep.)
Pub.L.No. 94-83, 89 Stat. 424 (1975)	Conservation Soc'y v. Secretary, 508 F.2d 927 (2d Cir. 1974)	Practical problems. 1975 U.S.C.C.A.N. 869-70 (S. Rep.)
Voting Rights Act of 1965 - Extension, Pub.L.No. 94-73, § 402, 89 Stat. 400, 404 (1975)	Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 471 U.S. 240 (1975)	Bad policy. 1975 U.S.C.C.A.N. 807-10 (S. Rep.)
Securities Acts Amendment of 1975, Pub.L.No. 94-29, 89 Stat. 97 (1975)		
§ 17(3), 89 Stat. at 155	In re Nat'l Student Marketing Corp., 368 F.Supp. 1311 (J.P.M.L. 1973)	Bad policy. 1975 U.S.C.C.A.N. 251-55 (S. Rep.)
§ 28(1), 89 Stat. at 164-65	Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971)	Bad policy. 1975 U.S.C.C.A.N. 249 (S. Rep.)

## 93D CONGRESS

Magnuson-Moss Warranty - FTC Improvement Act, Pub.L.No. 93-637, 88 Stat. 2183 (1974)

§ 201, 88 Stat. at 2545	Bunte Bros. v. FTC, 312 U.S. 349 (1941)	Bad policy. 1974 U.S.C.C.A.N. 7712-13 (H.R. Rep.)
§ 202, 88 Stat. at 2193-98	National Petroleum Refiners Ass'n v. FTC, 340 F.Supp. 134 (D.D.C. 1972), rev'd 482 F.2d 672 (D.C.Cir. 1973)	Bad policy. 1974 U.S.C.C.A.N. 7715 (H.R. Rep.)
1974, Pub.L.No. 93-627, 88 Stat. 2126 (1974)	Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) (overridden for Port Act claims only); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (similar)	Bad policy. 1974 U.S.C.C.A.N. 7556-57 (S. Rep.)
Pub.L.No. 93-600, 88 Stat. 1955 (1974)	Fleishmann Distiller Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)	Bad policy. 1974 U.S.C.C.A.N. 7133-36 (S. Rep.)
Pub.L.No. 93-512, 88 Stat. 1609 (1974)	Edwards v. United States, 334 F.2d 360 (5th Cir. 1964)	Bad policy. 1974 U.S.C.C.A.N. 6222 (H.R. Rep.)
Freedom of Information Act Amendments of 1974, Pub.L.No. 93-502, §§ 1(b)(2) & 2(a), 88 Stat. 1561, 1561-62, 1563 (1974)	EPA v. Mink, 410 U.S. 73 (1973)	Bad interpretation. 1974 U.S.C.C.A.N. 6272 (H.R. Rep.) & 6290 (Conf. Rep.)
Antihijacking Act of 1974, Pub.L.No. 93-366, § 104(b), 88 Stat. 409, 411 (1974)	United States v. Pliskow, 354 F.Supp. 369 (E.D. Mich.), aff'd, 480 F.2d 957 (6th Cir. 1973)	Bad policy. 1974 U.S.C.C.A.N. 3979-80 (H.R. Rep.)
	United States v. Clark, 19 C.M.A. 62 (1969)	Bad policy. 1974 U.S.C.C.A.N. 3980 (H.R. Rep.)
Energy Supply & Environmental Coordination Act of 1974, Pub.L.No. 93-319, 88 Stat. 246 (1984)	Buckeye Power, Inc. v. EPA, No. 72-1628 (6th Cir. 1973)	Bad policy. 1974 U.S.C.C.A.N. 3286 (H.R. Rep.)
Fair Labor Standards Amendment of 1974, Pub.L.No. 93-259, § 6(a)(1)-(2), 88 Stat. 55, 58-59 (1974)	Employees of the Dep't of Pub. Health v. Missouri, 411 U.S. 279 (1973)	Bad policy. 1974 U.S.C.C.A.N. 2853 (H.R. Rep.)
Pub.L.No. 93-201, 87 Stat. 838 (1973)	Gulf Canal Lines v. United States, 386 U.S. 348 (1967) (per curiam), aff'g, 258 F.Supp. 864 (S.D. Tex. 1966)	Bad policy. 1974 U.S.C.C.A.N. 2925 (S. Rep.)
Trans-Alaska Pipeline Authorization Act, Pub.L.No. 93-153, 87 Stat. 576 (1973)	Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973)	Bad policy. 1973 U.S.C.C.A.N. 2417-19 (H.R. Rep.)
92D CONGRESS		
Longshoremen's & Harbor Workers Compensation Act Amendments of 1972, Pub.L.No. 92-576, § 18, 86 Stat. 1251, 1263 (1972)	Seas Shipping Co. v. Sieracki, 328 U.S. 25 (1946)	Unfair policy. 1972 U.S.C.C.A.N. 4702-05 (H.R. Rep.)
	Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956)	Bad policy. 1972 U.S.C.C.A.N. 4702-04 (H.R. Rep.)
	Jackson v. Lykes Bros. S.S. Co., 386 U.S. 371 (1967); Reed v. S.S. Yaka, 373 U.S. 410 (1963)	Unfair policy. 1972 U.S.C.C.A.N. 4705 (H.R. Rep.)
Pub.L.No. 92-415, 86 Stat. 652 (1972)	Anthony Grace & Sons, Inc. v. United States, 345 F.2d 808 (Cl.Ct. 1965), rev'd, 384 U.S. 424 (1966)	Bad policy. 1972 U.S.C.C.A.N. 3118 (S. Rep.)
Pub.L.No. 92-140, 85 Stat. 391 (1971)	Capitol Records, Inc v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955)	Regulatory gap. 1971 U.S.C.C.A.N. 1577 (H.R.Rep., DOJ Letter)
Equal Employment Opportunity Amendment of 1972, Pub.L.No. 92-261, § 217, 86 Stat. 103, 104 (1972)	Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971), aff'g by an equally divided Court, 429 F.2d 325 (6th Cir. 1970)	Bad policy. 118 CONG. REC. 1861-62 (1972) (House); <i>id.</i> at 228 (Senate)
Revenue Act of 1971, Pub.L.No. 92-178, 85 Stat. 497 (1971)		

§ 307, 85 Stat. at 524	"A recent court case" (unnamed)	Bad policy. 1971 U.S.C.C.A.N. 1863 (H.R. Rep.), 1976 (S. Rep.), 1065 (Conf. Rep.)
§ 312, 85 Stat. at 526	"Recent court decisions" (unnamed)	Bad policy. 1971 U.S.C.C.A.N. 1981 (S. Rep.), 1066 (Conf. Rep.)
Amendments to the Military Selective Service Act of 1967, Pub.L.No. 92-129, 85 Stat. 348 (1971)	Toussie v. United States, 397 U.S. 112 (1970)	Bad policy. 1971 U.S.C.C.A.N. 1455-56 (S. Rep.)
Pub.L.No. 92-79, 85 Stat. 285 (1971)	United States v. Carver, 260 U.S. 482 (1923); Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co., 310 U.S. 268 (1940)	Bad policy. 1971 U.S.C.C.A.N. 1367-68 (H.R. Rep.)

## 91ST CONGRESS

Pub.L.No. 91-679, 84 Stat. 2063 (1970)	Louise M. Scudder, 48 T.C. 36, 41 (1967)	Unfair policy. 1970 U.S.C.C.A.N. 60 90-91 (S. Rep.)
Investment Company Amendments Act of 1970, Pub.L.No. 91-547, 84 Stat. 1413-36 (1970)	Investment Co. Inst. v. Camp, No. 1083-66 (D.D.C. Sept 27, 1967)	Legal uncertainty. 1970 U.S.C.C.A.N. 4907 (S. Rep.)
Pub.L.No. 91-467, § 7, 84 Stat. 990, 992-93 (1970)	Unnamed lower court decisions	Split in circuits. 1970 U.S.C.C.A.N. 4161-62 (H.R. Rep.)
Organized Crime Control Act of 1970, Pub.L.No. 91-452, 84 Stat. 922 (1970)		
§ 201(a), 84 Stat. at 926-28	In re McElrath, 248 F.2d 612 (D.C. Cir. 1957)	Bad policy. 1970 U.S.C.C.A.N. 4018 (H.R. Rep.)
§ 702(a), 84 Stat. at 935-36	Alderman v. United States, 394 U.S. 165 (1968)	Bad policy. 1970 U.S.C.C.A.N. 4027 (H.R. Rep.)
Pub.L.No. 91-376, § 8(a), 84 Stat. 787, 790 (1970)	Wellman v. Whittier, 259 F.2d 163 (D.C. Cir. 1958), et al.	Bad interpretation. 1970 U.S.C.C.A.N. 3729-31 (H.R. Rep.)
Newspaper Preservation Act of 1970, Pub.L.No. 91-353, 84 Stat. 466 (1970)	Citizen Publishing Co. v. United States, 394 U.S. 131 (1969)	Unfair, bad policy 1970 U.S.C.C.A.N. 3547 (H.R. Rep.)
Pub.L.No. 91-350, 84 Stat. 449 (1970)	Kyer v. United States, 369 F.2d 714 (Ct. Cl. 1966), et al.	Regulatory gap. 1970 U.S.C.C.A.N. 3477-79 (H.R. Rep.)
Pub.L.No. 91-376, § 8(a), 84 Stat. 787, 790 (1970)	Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967), et al.	Bad interpretation. 1970 U.S.C.C.A.N. 3729-31 (H.R. Rep.)
Tax Reform Act of 1969, Pub.L.No. 91-172, 83 Stat. 487 (1969)		
§ 121, 83 Stat. at 536-49	University Hill Found., 51 T. Ct. 548 (1969)	Bad policy. 1969 U.S.C.C.A.N. 1690-91 (H.R. Rep.) & 2092-93 (S. Rep.)
§ 121(b), 83 Stat. at 537-44	Various unnamed court decisions	Split in courts. 1970 U.S.C.C.A.N. 2103 (S. Rep.), 2405 (Conf. Rep.)
§ 414, 83 Stat. at 612	Various unnamed court decisions	Split in courts. 1970 U.S.C.C.A.N. 2181 (S. Rep.), 2423 (Conf. Rep.)
§ 504, 83 Stat. at 632-33	Santa Fe R. v. United States, 378 F.2d 72 (7th Cir. 1967)	Unfair policy. 1970 U.S.C.C.A.N. 2221 (S. Rep.), 2430 (Conf. Rep.)
§ 516(b), 83 Stat. at 646	Maurer v. United States, 284 F.2d 122 (10th Cir. 1960)	Confusion in law. 1969 U.S.C.C.A.N. 1810-12 (H.R. Rep.) & 2240-41 (S. Rep.)
§ 516(c), 83 Stat. at 647	Moberg v. Comm'r, 305 F.2d 800 (5th Cir. 1962), et al.	Split in circuits. 1969 U.S.C.C.A.N. 1813-17 (H.R. Rep.) & 2241-46 (S. Rep.)

## 90TH CONGRESS

Military Justice Act of 1968, Pub.L.No. 90-632, 82 Stat. 1335 (1968)

§ 2(17), 82 Stat. at 1339	United States v. Cleveland, 15 C.M.A. 213 (1965), et al.	Unfair practice. 1968 U.S.C.C.A.N. 4511 (S. Rep.)
§ 2(24), 82 Stat. at 1341	United States v. May, 10 C.M.A. 358 (1959)	Unjust policy. 1968 U.S.C.C.A.N. 4513-14 (H.R. Rep.)
False Representations by Mail Act, Pub.L.No. 90-590, 82 Stat. 1153 (1968)	Reilly v. Pinkus, 338 U.S. 269 (1959)	Bad policy. 1968 U.S.C.C.A.N. 4295 (H.R. Rep.), 4293 (Postim. Gen'l), 4299 (Att'y Gen'l)
Pub.L.No. 90-537, 82 Stat. 885 (1968)	Arizona v. Calif., 373 U.S. 546 (1963)	Elaborate on Supreme Court decree. 1968 U.S.C.C.A.N. 3668-69 (H.R. Rep.); see <i>id.</i> at 3735 (dissenting view, that law all but negates Supreme Court decree)
Pub. L.No. 90-535, 82 Stat. 885 (1968)	Streett v. United States, 331 F.2d 151 (8th Cir. 1964)	Bad policy. 1968 U.S.C.C.A.N. 3654-55 (H.R. Rep.)
Pub.L.No. 90-514, 82 Stat. 867 (1968)	World Airways, Inc. v. Pan American World Airways, Inc., 391 U.S. 461 (1968), aff'g by an equally divided Court, 380 F.2d 1770 (2d Cir. 1967)	Split circuits, confused law. 1968 U.S.C.C.A.N. 3595 (H.R. Rep.)
Pub.L.No. 90-446, 82 Stat. 474-75 (1968)	Denver Union Stock Yard Co. v. Prod'rs Livestock Marketing Ass'n, 356 U.S. 282, 289 (1958)(reasoning not result)	Bad policy. 1968 U.S.C.C.A.N. 2866-67 (S. Rep.) & 2868 (Dep't Agric.)
Pub.L.No. 90-433, 82 Stat. 448-49 (1968)	Northwest Agric. Coop Ass'n, Inc. v. ICC, 350 F.2d 252 (9th Cir. 1966)	Bad policy. 1968 U.S.C.C.A.N. 2768-69 (H.R. Rep.), 2777 (Sec'y Army) & 2774-75 (Dep't Ag.)
Pub.L.No. 90-369, 82 Stat. 279 (1968)	In re Noland, 185 F.Supp. 948 (D.Neb. 1960)	Unfair policy. 1968 U.S.C.C.A.N. 2446 (S. Rep.)
Civil Rights Act of 1968, Pub.L.No. 90-284, § 101, 82 Stat. 73-77 (1968)	United States v. Guest, 383 U.S. 745, 754-55 (1966) (dicta)	Clarify law. 1968 U.S.C.C.A.N. 1840-41 (S. Rep.)
Pub.L.No. 90-237, 81 Stat. 765 (1967)		
§ 2(a), 81 Stat. at 765	National Coun. of Am.-Sov. Friendship, Inc. v. SACB, 322 F.2d 375 (D.C. Cir. 1963)	Clarify legislative intent. 1967 U.S.C.C.A.N. 2669-70 (H.R. Rep.)
§ 10(b), 81 Stat. at 768-71	Labor Youth League v. SACB, 322 F.2d 364 (D.C.Cir. 1963)	Solve mootness problem. 1967 U.S.C.C.A.N. 2673-75 (H.R. Rep.)
Pub.L.No. 90-158, 81 Stat. 516 (1967)	Lane v. Haytian Corp. of Am., 117 F.2d 216 (2d Cir. 1941)	Bad policy. 1967 U.S.C.C.A.N. 2009-10 (S. Rep., quoting H.R. Rep.)
Pub.L.No. 90-123, 81 Stat. 362 (1967)	United States v. Scoratow, 137 F.Supp. 620 (W.D. Pa. 1956)	Bad policy. 1967 U.S.C.C.A.N. 1761 (H.R. Rep.)
Pub.L.No. 90-108, 81 Stat. 275-78 (1967)	Feeley v. District of Columbia, 387 F.2d 216 (D.C. Cir. 1967); Smith v. District of Columbia, 387 F.2d 233 (D.C. Cir. 1967)	Gap in law. 1967 U.S.C.C.A.N. 1742 (H.R. Rep.)
Military Selective Service Act of 1967, Pub.L.No. 90-40, § 1(7), 81 Stat. 100, 104 (1967)	United States v. Seeger, 380 U.S. 163 (1964)	Bad policy. 1967 U.S.C.C.A.N. 1333-34 (H.R. Rep.) & 1359-60 (Conf. Rep.)

## APPENDIX II

SUPREME COURT DECISIONS SCRUTINIZED IN HOUSE & SENATE  
 JUDICIARY COMMITTEE HEARINGS  
 (1979 - 1988)

This Appendix lists Supreme Court statutory interpretation decisions subject to hearings in the House or Senate Judiciary Committees and Subcommittees, which considered overruling or modifying the decisions. No effort was made to find every bill that responded to a Supreme Court decision; only those bills that were the subject of hearings are listed. The Appendix covers the ten-year period of the 96th through 100th Congresses.

SUPREME COURT DECISIONS	OVERRIDE BILLS (CONGRESS)	ULTIMATE DISPOSITION OF OVERRIDE BILLS
Bowen v. Massachusetts, 487 U.S. 879 (1988); United States v. Hohri, 482 U.S. 64 (1987)	H.R. 3152 (100C)	Pub. L. No. 100-702 (1988)
Forrester v. White, 484 U.S. 219 (1988); Stump v. Sparkman, 435 U.S. 349 (1978)	Senate Hearings (100C)	No bill
McNally v. United States, 483 U.S. 350 (1987)	H.R. 3089 (100C) H.R. 3050 (100C)	Bills die Subcomm., override included in Pub. L. No. 100-690 (1988)
	S. 2793 (100C) S. 1898 (100C) S. 1837 (100C)	Similar to House
United States v. Stanley, 483 U.S. 669 (1987); United States v. Johnson, 481 U.S. 681 (1987)	S. 2490 (100C)	Dies Subcomm.
Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987)	S. 1523 (100C)	Comm. reports, dies Senate Calendar
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987)	S. 1523 (100C) H.R. 4920 (100C)	Comm. reports, dies Senate Calendar Dies Subcomm.
Cargill, Inc. v. Montfort of Colo., Inc., 479 U.S. 104 (1986)	S. 1407 (100C)	Dies Subcomm.
Kelly v. Robinson, 479 U.S. 104 (1986)	House Hearings (100C)	No Bill
United States v. Mechanik, 475 U.S. 66 (1986)	H.R. 2515 (100C) H.R. 5367 (99C)	Dies Subcomm. Dies Comm.
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986); Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922)	H.R. 941 (100C) S. 443 (100C)	Dies Subcomm. Dies Subcomm.
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)	S. 1523 (100C)	Comm. reports, dies Senate Calendar
	H.R. 3240 (100C) H.R. 2983 (100C) H.R. 4920 (100C) H.R. 4923 (100C)	All 100C House bills die Subcomm.

	H.R. 2943 (99C) H.R. 5445 (99C)	Passes House but dies on Senate floor
United States v. Shearer, 473 U.S. 52 (1985); Chappell v. Wallace, 462 U.S. 296 (1983); Feres v. United States, 340 U.S. 135 (1950)	H.R. 1054 (100C)  S. 2490 (100C)	Passes House dies Senate Subcomm. Dies Subcomm.
	H.R. 1161 (99C) H.R. 3174 (99C) S. 489 (99C)	H.R. 3174 passes House dies Senate Comm.
United States v. Varig Airlines, 467 U.S. 797 (1984)	H.R. 3872 (100C)	Dies Subcomm.
Pulliam v. Allen, 466 U.S. 522 (1984); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980)	S. 1512 (100C) S. 1515 (100C) S. 1482 (100C)	Dies Subcomm. Dies Subcomm. <i>Pulliam</i> override deleted from Pub. L. No. 100-702
	S. 1794 (99C) S. 1795 (99C)	Dies Subcomm. Dies Comm.
Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983); Maher v. Gagne, 448 U.S. 122 (1980)	S. 1580 (99C) H.R. 3181 (99C)	Dies Subcomm. Dies Subcomm.
	H.R. 5757 (98C) S. 2802 (98C)	Dies Subcomm. Dies Subcomm.
Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984)	H.R. 585 (100C)  S. 430 (100C)  H.R. 5293 (99C)	Passes House, dies Senate Comm. Comm. reports but dies Senate floor Dies Comm.
Grove City College v. Bell, 465 U.S. 555 (1984); Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984); North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982)	S. 557 (100C)  H.R. 700 (99C)	Pub. L. No. 100-259 (1988) Comm. reports but dies House Calendar
	S. 431 (99C) H.R. 5490 (98C)	Dies Comm. Passes House, dies Senate floor Dies Comm.
	S. 2568 (98C)	
NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984)	H.R. 4908 (98C) H.R. 5174 (98C)	Pub. L. No. 98-353 (1984)
Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)	H.R. 2911 (99C) S. 1739 (99C)	Dies Subcomm. Dies Subcomm.
	H.R. 175 (98C) H.R. 1029 (98C) H.R. 1030 (98C) S. 31 (98C) S. 33 (98C) S. 175 (98C)	All 98C bills die Subcomm. or Comm.
	H.R. 5705 (97C) S. 1758 (97C)	Dies Subcomm. Dies Comm.
INS v. Phinpathya, 464 U.S. 183 (1984)	H.R. 4823 (99C)	Pub. L. No. 99-603 (1986)
Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); United States v. Loew's, Inc., 371 U.S. 38 (1962); International Salt Co. v. United States, 332 U.S. 392 (1947)	H.R. 557 (100C) S. 438 (100C)	Dies Subcomm. Passes Senate, dies House Comm.
Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983)	House Hearings (99C)	No Bill
United States v. Sells Engineering, Inc., 463 U.S. 418 (1983); United States v. Baggott, 463 U.S. 476 (1983)	H.R. 3340 (99C) S. 1676 (99C)	Pub. L. No. 99-562 (1986)

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983)	Senate Hearings (100C)	No bill
Block v. North Dakota, 461 U.S. 273 (1983)	H.R. 2484 (99C) H.R. 3917 (98C) S. 2750 (98C)	Pub. L. No. 99-598 (1986) Dies Subcomm. Dies Comm.
Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983)	H.R. 2378 (100C) H.R. 1623 (99C) H.R. 4083 (98C) H.R. 4199 (98C) H.R. 5883 (98C) S. 1839 (97C)	Dies Subcomm. Dies Subcomm. Clean bill Clean bill Dies Comm. Dies Subcomm.
Williams v. United States, 458 U.S. 279 (1982); United States v. Maze, 414 U.S. 395 (1974)	H.R. 5405 (98C) H.R. 5872 (98C) S. 1762 (98C)	Pub. L. No. 98-473 (1984)
Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979)	H.R. 1766 (100C) S. 808 (100C)	Dies Subcomm. Dies Subcomm.
United States Dep't of State v. Washington Post Co., 456 U.S. 595 (1982)	S. 774 (98C)	Passes Senate, dies House Gov't Ops. Comm.
Engle v. Isaac, 456 U.S. 107 (1982); Rose v. Lundy, 455 U.S. 509 (1982); United States v. Frady, 456 U.S. 152 (1982); Wainright v. Sykes, 433 U.S. 72 (1977)	S. 238 (99C) S. 829 (98C) H.R. 4419 (97C) H.R. 6050 (97C) S. 653 (97C) S. 2216 (97C)	Dies Comm. Dies Subcomm. Dies Subcomm. Dies Subcomm. Dies Subcomm.
White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982)	H.R. 5757 (98C) S. 2802 (98C)	Dies Subcomm. Dies Subcomm.
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of LaFayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	H.R. 6027 (98C) S. 1578 (98C)	Pub. L. No. 98-544 (1984)
Polk County v. Dodson, 454 U.S. 312 (1981)	S. 829 (98C)	Dies Subcomm.
Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981)	H.R. 2953 (100C)	Comm. reports, dies House floor
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)	House Hearings (98C)	No Bill
United States v. Turkette, 452 U.S. 576 (1981)	H.R. 2517 (99C) H.R. 5445 (99C) H.R. 1647 (97C) H.R. 4711 (97C)	Passes House, dies Senate floor Dies Subcomm. Dies Subcomm.
Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)	S. 635 (100C) S. 1300 (99C) S. 380 (98C) H.R. 1242 (97C) H.R. 4072 (97C) H.R. 5794 (97C) S. 995 (97C)	Dies Subcomm. Comm. reports, dies Senate Calendar Dies Subcomm. Dies Subcomm. Dies Subcomm. Comm. reports, dies Senate floor
City of Milwaukee v. Illinois, 451 U.S. 304 (1981)	House Hearings (99C) H.R. 2867 (98C) H.R. 6307 (97C)	No Bill Comm. reports, but override dropped from Pub. L. No. 98-616 (1984) Passes House, dies Senate floor

Delta Air Lines v. August, 450 U.S. 346 (1981)	H.R. 5757 (98C) S. 2802 (98C)	Dies Subcomm. Dies Subcomm.
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)	H.R. 3152 (100C)	Cohen override deleted in Comm.
Sumner v. Mata, 449 U.S. 539 (1981)	H.R. 6050 (97C) S. 2216 (97C)	Dies Subcomm. Dies Subcomm.
EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1981); Udall v. Tallman, 380 U.S. 1 (1965)	S. 1080 (98C) H.R. 746 (97C)	Dies Senate Calendar Comm. reports, dies House Calendar
	S. 1080 (97C)	Passes Senate, dies House Calendar
Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176 (1980); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); Brulotte v. Thys Co., 379 U.S. 29 (1964)	H.R. 1155 (100C) S. 1200 (100C)	Zenith override dropped from bills
Maine v. Thiboutot, 448 U.S. 1 (1980); Miller v. Youakim, 440 U.S. 125 (1979); Van Lare v. Hurley, 421 U.S. 338 (1975); Townsend v. Swank, 404 U.S. 282 (1971); King v. Smith, 392 U.S. 309 (1968)	H.R. 4086 (100C)	Dies in Subcomm.
	S. 436 (99C) S. 584 (97C)	Dies Subcomm. Dies Subcomm.
United States v. Raddatz, 447 U.S. 667 (1980)	S. 653 (97C)	Dies Subcomm.
Diamond v. Chakrabarty, 447 U.S. 303 (1980)	House Hearings (100C)	No Bill
Standefer v. United States, 447 U.S. 10 (1980)	H.R. 1647 (97C) H.R. 4711 (97C) H.R. 6915 (96C)	Dies Subcomm. Dies Subcomm. Comm. reports
Board of Regents v. Tomanio, 446 U.S. 478 (1980)	S. 990 (97C)	Dies Subcomm.
Busic v. United States, 446 U.S. 398 (1980); Simpson v. United States, 435 U.S. 6 (1978)	H.J. Res. 648 (98C) S.J. Res. 356 (98C)	Pub. L. No. 98-473 (1984)
	H.R. 6915 (96C)	Comm. reports
City of Mobile v. Bolden, 446 U.S. 55 (1980)	H.R. 3112 (97C) H.R. 3198 (97C) S. 1992 (97C)	Pub. L. No. 97-205 (1982)
Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979)	H.R. 595 (98C) H.R. 3142 (98C)	Dies Comm.
	H.R. 24 (97C) H.R. 7034 (97C) S. 1775 (97C)	Clean bill Dies Comm. Dies Comm.
Owen v. City of Independence, 445 U.S. 622 (1980)	S. 436 (99C) S. 585 (97C)	Dies Comm. Dies Subcomm.
Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Forsham v. Harris, 445 U.S. 169 (1980)	S. 1730 (97C) S. 1751 (97C)	Comm. reports, dies Senate Calendar
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	House Hearings (100C)	No Bill
Ferri v. Ackerman, 444 U.S. 193 (1979)	H.R. 3004 (99C)	Pub. L. No. 99-651 (1986)
	H.R. 3233 (98C) H.R. 4307 (98C) S. 2420 (98C)	Override dropped from Pub. L. No. 98- 479 (1984)
	S. 829 (98C) H.R. 3060 (97C) S. 2617 (96C)	Dies Subcomm. Dies Subcomm. Dies Comm.
United Steelworkers v. Weber, 443 U.S. 193 (1979); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978)	S. J. Res 41 (97C)	Dies Subcomm.

Moore v. Sims, 442 U.S. 415 (1979); Younger v. Harris, 401 U.S. 37 (1971)	S. 990 (97C)	Dies Subcomm.
Ulster County Ct. v. Allen, 442 U.S. 190 (1979)	S. 1437 (97C)	Comm. reports, dies Senate floor
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	S. 774 (98C)	Passes Senate, dies House Gov't Ops. Comm.
	S. 1247 (97C) S. 1730 (97C) S. 1751 (97C)	Comm. reports, dies Senate Calendar
Dalia v. United States, 441 U.S. 238 (1979)	H.R. 1647 (97C) H.R. 4711 (97C)	Dies Subcomm. Dies Subcomm.
	S. 1717 (96C) S. 1815 (96C)	Passes Senate, dies House Subcomm.
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	House Hearings (96C)	No Bill
Broadcast Music, Inc., v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)	S. 698 (100C) H.R. 3521 (99C) S. 1980 (99C)	Dies Subcomm. Dies Subcomm. Dies Subcomm.
Quern v. Jordan, 440 U.S. 332 (1979); Edelman v. Jordan, 415 U.S. 651 (1974)	S. 990 (97C)	Dies Subcomm.
Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978)	H.R. 1046 (96C)	Override dropped from Pub.L.No. 96-82 (1979)
NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)	S. 1751 (97C)	Comm. reports, dies Senate Calendar
Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978)	S. 585 (97C)	Dies Subcomm.
City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)	S. 2477 (96C)	Dies Subcomm.
United States v. Culbert, 435 U.S. 371 (1978)	H.R. 6915 (96C)	Comm. reports
J.W. Bateson Co. v. United States, 434 U.S. 586 (1978)	H.R. 3356 (100C)	Dies Subcomm.
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	Senate Hearings (97C)	No Bill
Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978)	S. 816 (97C)	Pub. L. No. 97-393 (1982)
United States v. New York Tel. Co., 434 U.S. 159 (1977)	H.R. 3378 (99C) H.R. 4952 (99C) S. 1667 (99C)	Pub. L. No. 99-508 (1986)
	H.R. 6343 (98C) H.R. 6915 (96C)	Dies Subcomm. Comm. reports
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)	H.R. 1108 (99C) S. 412 (99C)	Dies Subcomm. Comm. reports, dies Senate Calendar
	S. 1680 (98C)	Dies Comm.
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968)	S. 2481 (99C) H.R. 2244 (98C) S. 915 (98C)	Dies Comm. Dies Subcomm. Dies Comm.
	H.R. 2060 (96C) H.R. 2204 (96C) S. 300 (96C)	Dies Comm. Dies Comm. Comm. reports, dies on Senate Calendar
Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977)	H.R. 2378 (100C) H.R. 1623 (99C) S. 1254 (99C) H.R. 4083 (98C) H.R. 4199 (98C) H.R. 5883 (98C)	Dies Subcomm. Dies Subcomm. Dies Comm. Clean bill Clean bill Dies Comm.

Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977) (cont'd)	S. 1839 (98C) H.R. 1504 (97C) S. 1839 (97C) H.R. 5351 (96C) H.R. 5358 (96C)	Dies Comm. Dies Subcomm. Dies Subcomm. Dies Subcomm. Dies Subcomm.
Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1976)	S. 506 (96C)	Comm. reports, dies Senate floor
Department of the Air Force v. Rose, 425 U.S. 352 (1976)	S. 1751 (97C)	Comm. reports, dies Senate Calendar
Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Linda R.S. v. Richard D., 410 U.S. 614 (1973)	S. 680 (96C)	Dies Comm.
Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3 (1975); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)	H.R. 4087 (100C)	Comm. reports but override dropped from Pub. L. No. 100-702 (1988)
United States v. American Building Maintenance Indus., 422 U.S. 271 (1975)	H.R. 4049 (96C) S. 390 (96C)	Pub. L. No. 96-349 (1980)
Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)	H.R. 5612 (96C) S. 3186 (96C) S. 265 (96C)	Pub. L. No. 96-481 (1980)
United States v. Feola, 420 U.S. 671 (1975)	H.R. 6915 (96C)  S. 1723 (96C)	Comm. reports, dies House Calendar Dies Comm.
Reid v. INS, 420 U.S. 619 (1975); INS v. Errico, 385 U.S. 214 (1966)	H.R. 4327 (97C)  H.R. 5087 (96C) S. 1763 (96C)	Pub. L. No. 97-116 (1981)  Dies Subcomm.
F.D. Rich Co. v. United States, 417 U.S. 116 (1974)	H.R. 3356 (100C)	Dies Subcomm.
Zahn v. Int'l Paper Co., 414 U.S. 291 (1973)	H.R. 4807 (100C)	Comm. reports, but override dropped from Pub. L. No. 100-702 (1988)
United States v. Enmons, 410 U.S. 396 (1973)	H.R. 1514 (98C) S. 462 (98C) H.R. 3047 (97C) S. 613 (97C) S. 1722 (96C)	Dies Subcomm. Dies Comm. Dies Subcomm. Dies Subcomm. Comm. reports, dies Senate Calendar
Kleindienst v. Mandel, 408 U.S. 753 (1972)	H.R. 1119 (100C) H.R. 4427 (100C)	Comm. reports but dies House Calendar
Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, 346 U.S. 356 (1953); Federal Baseball Club v. National League, 259 U.S. 200 (1922)	H.R.3287 (97C)	Dies Subcomm.
Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972)	H.R. 5041 (98C) H.R. 4526 (98C) H.R. 4814 (98C) S. 1535 (98C) S. 1841 (98C)	Pub. L. No. 98-462 (1984)
United States v. Bass, 404 U.S. 336 (1971)	S. 1722 (96C)	Comm. reports, dies Senate Calendar
United States v. Campos-Serrano, 404 U.S. 293 (1971)	S. 1722 (96C)	Comm. reports, dies Senate Calendar

Lear, Inc. v. Adkins, 395 U.S. 653 (1969)	H.R. 4529 (98C) S. 1535 (98C) S. 1841 (98C)	Override dropped from Pub. L. No. 98- 462 (1984)
Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968); Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213 (1966)	H.J. Res. 478 (98C) H.R. 1878 (98C) S. 47 (98C)  H.R. 4374 (97C)  S. 1593 (97C)  H.R. 6899 (96C)	Pub. L. No. 98-237 (1984)  Passes House, dies Senate Calendar Comm. reports, dies Senate Calendar Comm. reports, dies House Calendar
United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)	H.R. 3567 (96C) H.R. 3573 (96C) S. 598 (96C)	Pub. L. No. 96-308 (1980)
Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. United Mine Workers, 330 U.S. 258 (1947)	H.R. 1647 (97C) H.R. 4711 (97C)  H.R. 6915 (96C)  S. 1722 (96C)	Dies Subcomm. Dies Subcomm.  Comm. reports, dies House Calendar Comm. reports, dies Senate Calendar
Boutillier v. INS, 387 U.S. 118 (1967)	H.R. 1119 (100C) H.R. 4427 (100C)  H.R. 4509 (98C) H.R. 5227 (98C)	Comm. reports but dies House Calendar [Override adopted Pub. L. No. 101-649 (1990)]  Dies Subcomm. Dies Subcomm.
FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); FTC v. Consolidated Foods, 380 U.S. 592 (1965)	H.R. 4247 (99C) S. 2160 (99C)	Dies Subcomm. Dies Comm.
Maryland v. United States, 381 U.S. 41 (1965)	H.R. 3799 (97C) S. 267 (97C)  S. 1858 (96C)	Pub. L. No. 97-124 (1981)  Passes Senate, dies House Comm.
Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963)	H.R. 6050 (97C) S. 2216 (97C)	Dies Subcomm. Dies Subcomm.
Rosenberg v. Fleuti, 374 U.S. 449 (1963)	H.R. 2921 (100C)	Dies Subcomm.
Scales v. United States, 367 U.S. 203 (1961); Dennis v. United States, 341 U.S. 494 (1951)	S. 1722 (96C)	Comm. reports, dies Senate Calendar
Toth v. Quarles, 350 U.S. 11 (1955)	S. 1722 (96C)	Comm. reports, dies Senate Calendar
Baltimore Contractors v. Bodinger, 348 U.S. 176 (1955); Ettelson v. Metropolitan Life Ins., 317 U.S. 188 (1942); Enelow v. New York Life Ins., 293 U.S. 379 (1935)	H.R. 3152 (100C) H.R. 4807 (100C)	<i>Bodinger</i> override adopted in Pub. L. No. 100-702 (1988); other overrides dropped in conference
United States v. Harriss, 347 U.S. 612 (1954)	H.R. 81 (96C) H.R. 128 (96C) H.R. 1979 (96C) H.R. 2302 (96C) H.R. 2497 (96C) H.R. 2613 (96C)	All bills die in Comm.
Brown v. Allen, 344 U.S. 443 (1953)	S. 1762 (98C) S. 238 (99C) S. 829 (98C) H.R. 6050 (97C) S. 2216 (97C)	Clean bill Dies Comm. Dies Subcomm. Dies Subcomm. Dies Subcomm.

Kawakita v. United States, 343 U.S. 717 (1952)	S. 1722 (96C)	Comm. reports, dies Senate Calendar
Feres v. United States, 340 U.S. 135 (1950)	H.R. 1054 (100C) H.R. 1161 (99C) H.R. 3174 (99C) S. 489 (99C) H.R. 1942 (98C)	Passes House, dies Senate subcomm. Clean bill Passes House, dies Senate Comm. Dies Comm. Dies Subcomm.
United States v. Morton Salt, 338 U.S. 632 (1950)	H.R. 1647 (97C) H.R. 4711 (97C)	Dies Subcomm. Dies Subcomm.
Pinkerton v. United States, 328 U.S. 640 (1946)	H.R. 1647 (97C) H.R. 4711 (97C) H.R. 6915 (96C)	Dies Subcomm. Dies Subcomm. Comm. reports, dies House Calendar
Williams v. United States, 327 U.S. 711, 715 (1946); Mills v. United States, 164 U.S. 644, 648-49 (1896)	H.R. 596 (99C) H.R. 4745 (99C) H.R. 4876 (98C) H.R. 6284 (98C)	Pub. L. No. 99-654 (1986) Clean bill Comm. reports, override dropped from final legislation
	H.R. 5703 (97C) H.R. 6915 (96C)	Comm. reports but dies House Calendar Comm. reports but dies House Calendar
Screws v. United States, 325 U.S. 91 (1945)	H.R. 1647 (97C) H.R. 4711 (97C) H.R. 6915 (96C) S. 1722 (96C)	Dies Subcomm. Dies Subcomm. Comm. reports, dies House Calendar Comm. reports, dies Senate Calendar
Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942)	H.R. 4972 (100C)	Pub. L. No. 100-703 (1988)
Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)	S. 1996 (100C)	Dies Subcomm.
United States v. Norris, 300 U.S. 564 (1937)	S. 1722 (96C)	Comm. reports, dies Senate Calendar
Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936)	S. 1639 (97C) S. 1722 (96C)	Dies Comm. Comm. reports, dies Senate Calendar
Hudson v. United States, 272 U.S. 451 (1926)	S. 1981 (96C)	Comm. reports, dies Senate Calendar
John Bad Elk v. United States, 177 U.S. 529 (1900)	S. 1722 (96C)	Comm. reports, dies Senate Calendar
Keck v. United States, 172 U.S. 434 (1899)	H.R. 6915 (96C)	Comm. reports, dies House Calendar
Davis v. United States, 160 U.S. 469 (1895)	H.R. 1329 (98C) H.R. 1280 (98C) H.R. 3336 (98C) S. 1762 (98C) S. 829 (98C)	Clean bill Clean bill Comm. reports, dies House floor Clean bill Dies Subcomm.

## APPENDIX III

SUPREME COURT STATUTORY DECISIONS OVERRIDDEN BY CONGRESS  
(1967 -1990)

This Appendix lists Supreme Court statutory interpretation decisions that were overridden by the 96th through 100th Congresses. The full citations to these decisions, and to their override statutes, can be found in Appendix I. This Appendix III then provides further information about these Supreme Court decisions.

DECISION [OVERRIDE YEAR]	VOTING SPLIT [POL. SPLIT]	PRIMARY REASONING	WINNERS/LOSERS
<i>Davenport</i> , 1990 [1990]	7-2 [No Split]	Plain Meaning	Persons Accused of Welfare Fraud/ State Collections Agencies and Creditors
<i>Betts</i> , 1989 [1990]	7-2 [Con./Lib.]	Plain Meaning	Employer Pension Plans/Retired Employees
<i>Dellmuth</i> , 1989 [1990]	5-4 [Con./Lib.]	Plain Meaning & Canons	States/Disabled Children
<i>Coit</i> , 1989 [1990]	7-2-0 [No Split]	Plain Meaning	Creditors of Failed Savings & Loans/FSLIC
<i>Finley</i> , 1989 [1990]	5-4 [Con./Lib.]	Plain Meaning	U.S./Tort Victims with Claims against U.S. & Local Gov't
<i>Traynor</i> , 1988 [1988]	4-3 [Con./Lib.]	Legislative History & Canons	Veterans Admin./Alcoholic Veterans
<i>Fausto</i> , 1988 [1990]	5-3 [Con./Lib.]	Plain Meaning & Canons	U.S./Federal Employees
<i>Bowen</i> , 1988 [1988]	5-1-3 [Con./Lib.]	Legislative History	States/HHS
<i>McNally</i> , 1987 [1988]	7-2 [No Split]	Legislative History & Canons	Allegedly Fraudulent State Officials/Dep't of Justice
<i>Gwaltney</i> , 1987 [1990]	6-3 [Lib./Con.]	Plain Meaning	Industrial Polluters/ Environmentalists & EPA
<i>Cabazon Band</i> , 1987 [1988]	6-3-0 [No Split]	Canons	Indian Tribes/States
<i>Hohri</i> , 1987 [1988]	8-0 [No Split]	Legislative History	Federal Circuit/Federal Courts of Appeals & Confused Litigants
<i>Carpenter</i> , 1987 [1988]	4-4 [Not Recorded]	No Opinion	People Accused of Securities Fraud/U.S. & SEC
<i>Paralyzed Veterans</i> , 1986 [1986]	6-3 [Con./Lib.]	Plain Meaning	Airlines/Disabled Passengers
<i>Exxon Corp.</i> , 1986 [1986]	7-1 [No Split]	Legislative History	U.S. & Industrial Polluters/States & Environmentalists
<i>Marek</i> , 1985 [1986]	6-3 [Con./Lib.]	Canons	§ 1983 Defendants/ § 1983 Plaintiffs
<i>NRDC</i> , 1985 [1987]	5-4 [Con./Lib.]	Legislative History & Canons	EPA & Manufact'rs/ Environmentalists
<i>Johnson</i> , 1985 [1986]	9-0 [No Split]	Legislative History	Local Firefighters/State & Local Gov'ts

<i>Atascadero</i> , 1985 [1986]	5-4 [Con./Lib.]	Plain Meaning & Canons	States/Disabled Workers
<i>Block</i> , 1985 [1986]	8-1 [No Split]	Legislative History & Canons	U.S./States
<i>Grove City</i> , 1984 [1988]	7-2 [Con./Lib.]	Purpose & Plain Meaning	Colleges with Gender Discrimination/Female Students & Women's Groups
<i>Darrone</i> , 1984 [1988]	9-0 [No Split]	Precedent	Issue Unresolved - Winners/Losers Unclear
<i>Phinpathya</i> , 1984 [1986]	6-3 [Con./Lib.]	Plain Meaning	INS/Immigrants Leaving U.S. Temporarily
<i>Robinson</i> , 1984 [1986]	6-3 [Con./Lib.]	Legislative History	Local School Districts/Disabled Children
<i>Sec'y Interior</i> , 1984 [1990]	5-4 [Con./Lib.]	Legislative History	Dep't Interior & Oil & Gas Interests/State & Environmentalists
<i>Washington Metro.</i> , 1984 [1984]	6-3 [No Split]	Purpose	Gov't Contractors/Employees of Subcontractor Injured on Job
<i>Bildisco</i> , 1984 [1984]	5-4 [Con./Lib.]	Plain Meaning	Failing Companies/Unions & Employees
<i>Dickerson</i> , 1983 [1986]	5-4 [No Split]	Plain Meaning & Purpose	Dep't of Justice & Gun Control Advocates/Convicts with Expungements
<i>Sells</i> , 1983 [1986]	5-4 [Lib./Con.]	Legislative History	Grand Jury Witnesses Investigated/Dep't of Justice
<i>Baggott</i> , 1983 [1986]	8-1 [Lib./Con.]	Legislative History	Grand Jury Witns. Investigated/IRS
<i>Diedrich</i> , 1982 [1984]	8-1 [No Split]	Precedents	IRS/Donors Property Relying on Text & Lower Courts
<i>City of Boulder</i> , 1982 [1984]	5-3 [Lib./Con.]	Precedents	Antitrust Plaintiffs/Local Gov'ts
<i>Williams</i> , 1982 [1984]	5-4 [Lib./Con.]	Canons	Check Kiting Defendants/Dep't of Justice & Banks
<i>Rowan</i> , 1981 [1983]	6-3 [Con./Lib.]	Plain Meaning & Legislative History	Employers/IRS & Employees
<i>Agsalud</i> , 1981 [1982]	Memorandum [No Split]	No Opinion	Employers in Hawaii/Hawaii & Employees
<i>McCarty</i> , 1981 [1982]	8-1 [No Split]	Plain Meaning & Legislative History	Retired Military Personnel/Spouses Owed Support & States
<i>Sea Clammers</i> , 1981 [1986]	7-2 [No Split]	Precedents	Industrial Polluters/Environmentalists
<i>California v. Nevada</i> , 1980 [1986]	9-0 [No Split]	Practical Construction	California/Nevada
<i>Busc.</i> , 1980 [1984]	6-3 [Lib./Con.]	Legislative History	Felons with Firearms/Dep't of Justice
<i>Bolden</i> , 1980 [1982]	4-2-3 [Con./Lib.]	Constitutional Precedents	White Voters in South/Black Voters
<i>City of Lafayette</i> , 1978 [1984]	5-4 [Lib./Con.]	Plain Meaning & Canons	Antitrust Plaintiffs/Local Gov'ts
<i>Pfizer</i> , 1978 [1982]	5-3 [Lib./Con.]	Purpose & Canons	Foreign States/Antitrust Defendants

<i>TVA v. Hill</i> , 1978 [1978, 1979]	6-3 [Lib./Con.]	Plain Meaning	Environmentalists/TVA & Tennessee
<i>Simpson</i> , 1978 [1984]	8-1 [Lib./Con.]	Legislative History & Canons	Felons with Firearms/Dep't of Justice & Banks
<i>New York Tel.</i> , 1977 [1986]	6-3 [Con./Lib.]	Plain Meaning & Legislative History	Dep't of Justice/Criminal Suspects Subject to Wiretaps
<i>Standard Life</i> , 1977 [1984]	6-2-0 [No Split]	Plain Meaning	Insurance Comps. & NAIC/IRS
<i>Kowalski</i> , 1977 [1980]	7-2 [No Split]	Canons	IRS/State Troopers & Employees with Meal Allowances
<i>McMann</i> , 1977 [1978]	7-2 [Con./Lib.]	Plain Meaning & Legislative History	Employers/Older Employees
<i>Hancock</i> , 1976 [1978]	7-2 [Lib./Con.]	Legislative History & Canons	Federally Owned Facilities/Environmentalists
<i>Gilbert</i> , 1976 [1978]	6-3 [Con./Lib.]	Constitutional Precedents	Employers/Female Employees
<i>Park</i> , 1975 [1988]	6-3 [No Split]	Precedents	Corporate Officials/Dep't of Justice
<i>Reid</i> , 1975 [1981]	6-2 [Con./Lib.]	Plain Meaning	INS/Illegal Aliens with Children in U.S.
<i>Alcala</i> , 1975 [1981]	7-1 [Con./Lib.]	Plain Meaning & Purpose	States/Pregnant Women on Welfare
<i>Alyeska</i> , 1975 [1976 & 1980]	5-2 [Con./Lib.]	Plain Meaning & Canons	Corporate & Gov't Defendants/Small Claim & Civil Rights Plaintiffs
<i>Wilkins</i> , 1945 [1976]	4-4 [No Split]	No Opinion	Researchers & Academics/ Publishers & Authors of Copyrighted Works
<i>American Building</i> , 1975 [1980]	6-3 [Con./Lib.]	Plain Meaning	Local Companies/Dep't of Justice & Antitrust Plaintiffs
<i>Aiken</i> , 1975 [1976]	6-1-2 [Con./Lib.]	Precedents	Radio & T.V. & Receivers/Copyright Holders
<i>Bob Jones</i> , 1974 [1976]	8-0 [No Split]	Plain Meaning	IRS/§ 501 Exempt Institutions
" <i>Americans United</i> ," 1974 [1976]	7-1 [No Split]	Plain Meaning	IRS/§ 501 Exempt Institutions
<i>Maze</i> , 1974 [1984]	5-4 [No Split]	Precedents	Bank Card Fraud Defendants/Dep't of Justice & Banks
<i>Teleprompter</i> , 1974 [1976]	6-3 [No Split]	Precedent	Radio & T.V. & Receivers/Copyright Holders
<i>Wingo</i> , 1974 [1976]	7-2 [Lib./Con.]	Precedent & Canons	Habeas Claimants/Fed'l Magistrates
<i>Eisen</i> , 1974 [1974]	6-3 [Con./Lib.]	Plain Meaning & Precedents	Corporate Defendants/Small Claim Plaintiffs
<i>Mink</i> , 1973 [1974]	5-3 [Con./Lib.]	Plain Meaning	Executive Branch/ Citizens Seeking Information & Members Congress
<i>Missouri</i> , 1973 [1974]	8-1 [No Split]	Legislative History & Canons	States/State Employees
<i>Zahn</i> , 1973 [1974]	6-3 [Con./Lib.]	Precedents	Corporate Defendants/Small Claim Plaintiffs

<i>Sierra Club</i> , 1973 [1976]	4-4 [No Record]	No Opinion	Environmentalists/ Industrial Polluters
<i>Hughes Tool</i> , 1973 [1976]	6-2 [Lib./Con.]	Precedent	Antitrust Defendants/ Antitrust Plaintiffs
<i>Kras</i> , 1973 [1978]	5-4 [Con./Lib.]	Legislative History & Precedent	Creditors & U.S./Indigents
<i>Carter</i> , 1972 [1979]	9-0 [No Split]	Legislative History	District of Columbia/Victims Const'l Torts
<i>Deepsouth</i> , 1972 [1984]	5-4 [Lib./Con.]	Common Law & Canons	Holders of Combination Patents/Extraterritorial Competitors
<i>Byrum</i> , 1972 [1976]	6-3 [No Split]	Precedents	Taxpayers with Trusts/ IRS
<i>Robertson</i> , 1972 [1976]	5-2-2 [Con./Lib.]	Canons	FAA/Citizens Seeking Info.
<i>S &amp; E Contractors</i> , 1972 [1978]	5-3 [Con./Lib.]	Purpose	Gov't Contractors/U.S.
<i>United States District Court</i> , 1972 [1978]	5-3-0 [No Split]	Plain Meaning & Legislative History	Persons Subject to Suveillance/Dep't of Justice & FBI
<i>Dewey</i> , 1971 [1972]	Mem. [No Split]	No Opinion	Companies/ Religious Employees
<i>Toussie</i> , 1970 [1971]	6-3 [Lib./Con.]	Canons	Draft Dodgers/Selective Service
<i>Lines</i> , 1970 [1978]	4-2 [No Split]	Purpose	Working Bankrupts/ Creditors
<i>Citizen Publishing</i> , 1969 [1970]	6-1-1 [Lib./Con.]	Precedents	Dep't of Justice & Antitrust Plaintiffs/Failing Newspapers
<i>Snyder v. Harris</i> , 1969 [1980]	7-2 [Con./Lib.]	Precedents	Defendants/ Plaintiffs with Small Claims
<i>Fortnightly</i> , 1968 [1976]	5-1 [No Split]	Purpose	Radio & T.V. & Receivers/Copyright Holders
<i>Pan Am</i> , 1968 [1968]	4-4 [No Record]	No Opinion	Not Clear
<i>Svenska</i> , 1968 [1984]	8-0 [No Split]	Canons	Antitrust Plaintiffs/Shipping Cartels
<i>Alderman</i> , 1968 [1971]	5-1-3 [Con./Lib.]	Constitutional Precedents	Dep't of Justice/ Co- Defendants of Wiretapped Defendants
<i>Fleishmann</i> , 1967 [1974]	8-1 [No Split]	Canons	Random Litigants/Same
<i>Lykes Bros.</i> , 1967 [1972]	7-2 [Lib./Con.]	Precedent	Longshoremen/ Shipowners
<i>Boutillier</i> , 1967 [1990]	6-3 [Con./Lib.]	Legislative History	INS/Bisexuals, Gay Men, Lesbians
<i>Schwinn</i> , 1967 [1980]	5-2 [Lib./Con.]	Legislative History	Dep't of Justice & Retailers/ Manufacturers with Vert. Arrangem'ts
<i>Gulf Coastal</i> , 1967 [1974]	9-0 [No Split]	No Opinion	ICC/ Water Carriers
<i>Errico</i> , 1966 [1981]	6-3 [Lib./Con.]	Purpose & Legislative History	Illegal Aliens w/Relatives in U.S./INS
<i>Guest</i> , 1966 [1968]	6-3 [Con./Lib.]	Canons & Precedent	Private Persons Attacking Civil Rights Workers/ Civil Rights Victims

<i>Carnation</i> , 1966 [1984]	9-0 [No Split]	Canons & Legislative History	Antitrust Plaintiffs/Shipping Industry
<i>Seeger</i> , 1965 [1967]	9-0 [No Split]	Legislative History	Conscientious Objectors/Selective Service
<i>Maryland v. United States</i> , 1965 [1984]	8-1 [No Split]	Legislative History	U.S./National Guard Personnel Injured in Tort
<i>Arizona v. Calif.</i> , 1963 [1968]	4-2-1 [No Split]	Legislative History	Dep't Interior & U.S./Various State Water Claimants
<i>S.S. Yaka</i> , 1963 [1972]	7-2 [Lib./Con.]	Precedent	Longshoremen/Shipowners
<i>Bianchi</i> , 1963 [1978]	7-2 [No Split]	Legislative History	Federal Dep'ts/ Federal Contractors
<i>Davis</i> , 1962 [1984]	7-0 [No Split]	Purpose & Canons	IRS/Divorcing Couples
<i>Denver Union</i> , 1958 [1968]	6-3 [Lib./Con.]	Canons	Market Agencies at Stockyards/Stockyard Companies
<i>Embassy</i> , 1958 [1978]	6-3 [Con./Lib.]	Precedents	Employers/Union Welfare Funds & Employees
<i>Ryan Stevedoring</i> , 1956 [1972]	5-4 [Con./Lib.]	Purpose	Shipowners/Contractors
<i>Bodinger</i> , 1955 [1988]	6-1-2 [Con./Lib.]	Precedent	Random Litigants/same
<i>St. Joe Paper</i> , 1954 [1978]	4-3 [No Split]	Legislative History & Purpose	Creditors & Rivals for Rail Merger/ICC & Railroads Wanting Merger
<i>Pinkus</i> , 1949 [1968]	8-0 [No Split]	Plain Meaning & Precedent	Mail Order Shippers/Post Office & Dep't of Justice
<i>Sieracki</i> , 1946 [1972]	5-3 [Lib./Con.]	Purpose & Precedent	Stevedores Employed by Indep. Contractor/Shipowner
<i>Williams</i> , 1946 [1986]	9-0 [No Split]	Precedent	Alleged Rapists/ Victims of Rape
<i>Morton Salt</i> , 1941 [1988]	8-0 [No Split]	Precedent & Purpose	Patent Holders/ Patent Licenses
<i>Toucey</i> , 1941 [1978]	5-3 [No Split]	Canons	Random Litigants/Same
<i>Bunte Bros.</i> , 1941 [1974]	6-3 [Con./Lib.]	Practical Construction	Local Businesses/FTC
<i>Aron Park</i> , 1940 [1978]	9-0 [No Split]	Practical Construction	Creditors in Bankruptcy/Debtors
<i>Signal Oil</i> , 1940 [1971]	9-0 [No Split]	Purpose	Supplies to Ships/ Ship Owners
<i>Welch</i> , 1938 [1980]	7-0 [No Split]	Plain Meaning	IRS/Companies Selling Lots Under Installment Sales
<i>General Utilities</i> , 1935 [1986]	9-0 [No Split]	Canons	Taxpayers/IRS
<i>Carver</i> , 1923 [1971]	9-0 [No Split]	Plain Meaning	Shipowners/ Suppliers to Ships
<i>Lambert</i> , 1922 [1986]	8-0 [No Split]	Practical Construction	Random Litigants/Same
<i>Caminiti</i> , 1917 [1986]	6-3 [No Split]	Plain Meaning	United States/ Defendants Accused of Fornication
<i>Midwest Oil</i> , 1915 [1976]	5-3 [No Split]	Practical Construction	President & Environmentalists/ Western Oil Developers
<i>Apollo Co.</i> , 1908 [1976]	9-0 [No Split]	Precedents & Legislative History	Makers of Player Pianos & Music Rolls/Composers

<i>Lockwood</i> , 1903 [1978]	9-0 [No Split]	Plain Meaning	Bankrupt Persons/Creditors & Banks
<i>Birkett</i> , 1904 [1978]	9-0 [No Split]	Practical Construction	Bankruptcy Creditors/Debtors
<i>Tinker</i> , 1902 [1978]	6-3 [Con./Lib.]	Precedents	Bankrupt's Spouse Judgment Creditor/ Business Creditors

