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# Legislative Underwrites

James J. Brudney
*Fordham University School of Law*, jbrudney@law.fordham.edu

Ethan J. Leib
*Fordham University School of Law*, ethan.leib@law.fordham.edu

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# LEGISLATIVE UNDERWRITES

*Ethan J. Leib & James J. Brudney*[*]

*This Article introduces a widespread but virtually unacknowledged practice in Congress and state legislatures. Not only do legislatures* override *judicial decisions when they disagree with judicial rulings and doctrine, they also* underwrite *judicial decisions when they agree with those rulings. For all the literature on the adversarial communication evidenced through legislative overriding, there is not a single paper devoted to legislative underwrites, which reflect more collaborative dimensions of interbranch interaction. This Article begins to fill that void, and in so doing, frames practical and theoretical lessons for legislative, judicial, and scholarly audiences.*

*More specifically, this Article defines the contours of an underwrite and identifies the diversity of underwrite initiatives in Congress and state legislatures. It then normatively evaluates costs and benefits that might flow from a more self-conscious approach to underwrites, analyzing these pros and cons as they operate at pragmatic, doctrinal, and conceptual levels.*



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[*] Ethan J. Leib is the John D. Calamari Distinguished Professor of Law at Fordham University School of Law; James J. Brudney is the Joseph Crowley Chair in Labor and Employment Law at Fordham University School of Law. We are grateful to participants at a Legislation Roundtable at Cardozo Law School and a Fordham Law Faculty Retreat for helpful early comments. We received thoughtful feedback and criticisms from Kate Andrias, Aaron Bruhl, Josh Chafetz, Jesse Cross, Howie Erichson, Bill Eskridge, Abner Greene, Clare Huntington, Joe Landau, Tom Lee, Matthew Lister, Ed Rubin, Aaron Saiger, Amy Sepinwall, Jed Shugerman, Peter Strauss, Steve Thel, Ben Zipursky, and colleagues in workshops at The Wharton School and Fordham Law School. Joanna Sedlak, Steven Schwartz, and Alison Shea delivered valuable research assistance. Fordham Law School provided generous financial support.

## INTRODUCTION

LEGISLATIVE overrides occur when a legislative body tells a court that its interpretation of statutory product is *wrong* for one reason or another.[1] What we call "legislative underwrites" occur when a legislative body gives the judiciary a "hear, hear!" signaling that its interpretation is *right*. We aim in this Article to introduce and describe the previously overlooked frequency of the corollary to overrides and to evaluate this seemingly recurrent practice and its doctrinal

[1] Consider the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (2012)), or the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, § 101, 104 Stat. 978, 978 (codified at 29 U.S.C. § 621 note (2012)). Through these acts, Congress announced that the Supreme Court was wrong in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), respectively. See H.R. Rep. No. 95-948, at 2–3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750–51 (explaining Act's purpose to override *Gilbert*); S. Rep. No. 101-263, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1510; H.R. Rep. No. 101-664, at 6 (1990). Consider also a 2013 amendment to Kansas's Restraint of Trade Act, S. 124, 58th Leg., Reg. Sess. (Kan. 2013), which overrode the 2012 Kansas Supreme Court decision in *O'Brien v. Leegin Creative Leather Products*, 277 P.3d 1062 (Kan. 2012).

consequences. Scholars commonly model the interaction of the branches as a kind of dialogue,[2] but that dialogue is too often seen only through its adversarial lens and not through the more collaborative lens we expose here.

At both the federal and state levels, there are moments of interaction between the branches in which the legislature reminds the judiciary who is boss in matters of statutory interpretation. Generally speaking, this give and take over statutory meaning among legislatures and courts is healthy and necessary for the field of statutory interpretation. Applying traditional constitutional conceptions of legislative supremacy, in which a court's role is to serve as a faithful agent in statutory decisions,[3] such exchange between lawmakers and law interpreters is an essential element in developing effective and democratic policy over time.[4] Whether a legislature enacting an override seeks to restore an earlier understanding of a statute with its pronouncement, or instead makes a prospective policy intervention that effectively abandons a prior judicial decision, such moments of interbranch engagement can serve to calibrate statutory law more carefully at the federal or state levels.

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[2] See generally Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 917 (2013) ("[M]uch interpretive theory and doctrine depends" upon "interpretive dialogue between courts and Congress."). Although for the purposes of this Article, we presume that different forms of interbranch dialogue help structure the theory and practice of statutory interpretation, a forthcoming paper on interbranch dialogue will deliver a more careful analysis of just what it means for institutions to be talking to one another and a more calibrated defense of the use of this trope. See James J. Brudney & Ethan J. Leib, "Interbranch Dialogue" in Statutory Interpretation (forthcoming 2018).

[3] See generally Ethan J. Leib, David L. Ponet & Michael Serota, A Fiduciary Theory of Judging, 101 Calif. L. Rev. 699, 748 (2013) (explaining the conventional view that, in statutory interpretation cases, the judiciary is supposed to be a faithful agent of the legislature); Thomas W. Merrill, Faithful Agent, Integrative, and Welfarist Interpretation, 14 Lewis & Clark L. Rev. 1565, 1566–70 (2010) (summarizing the agency view).

[4] There is some disagreement among Supreme Court Justices about whether the dialogue always takes place in good faith. See generally W. Va. Univ. Hosps. v. Casey, 499 U.S. 83, 113, 115 (1991) (Stevens, J., dissenting) ("On those occasions . . . when the Court has put on its thick grammarian's spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases construing a statute, the congressional response has been dramatically different. . . . In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter.'" (quoting Smith v. Robinson, 468 U.S. 992, 1031 (1984) (Brennan, J., dissenting))). For Justice Stevens, overrides are sometimes little more than rebukes to the courts and, therefore, a waste of legislative energy.

The law review literature is replete with commentaries that explore the practice of overriding, usually on the federal stage.[5] Scholarly writing focuses on conceptual, typological, doctrinal, and empirical work. Of late, this has included developing insight into how to identify conscious or unconscious legislative overrides.[6] Judges, too, focus on the possibility for overrides: majority or dissenting Justices more than occasionally invite Congress to override a statutory decision with which they take issue.[7]

This Article, by contrast, examines the conditions and justifications for when legislatures do or should *underwrite* the textual meaning a court confers upon a statute. We do so for several reasons. First, we wish to encourage greater awareness among legislators, judges, and scholars as to the frequency with which legislatures engage courts in this nonadversarial fashion. Second, we hope to promote doctrinal clarity, inasmuch as recognizing the presence of underwrites has implications, for example, for the weight to be given to statutory stare decisis and legislative inaction. And finally, we want to suggest ways underwrites

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[5] See, e.g., James Buatti & Richard L. Hasen, Response: Conscious Congressional Overriding of the Supreme Court, Gridlock, and Partisan Politics, 93 Tex. L. Rev. See Also 263 (2015); Matthew R. Christiansen & William N. Eskridge, Jr., Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011, 92 Tex. L. Rev. 1317 (2014); Richard L. Hasen, End of the Dialogue? Political Polarization, the Supreme Court, and Congress, 86 S. Cal. L. Rev. 205 (2013); Deborah A. Widiss, Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation, 90 Tex. L. Rev. 859 (2012) [hereinafter Widiss, Hydra Problem]; Deborah A. Widiss, Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides, 84 Notre Dame L. Rev. 511 (2009) [hereinafter Widiss, Shadow Precedents]; Pablo T. Spiller & Emerson H. Tiller, Invitations to Override: Congressional Reversals of Supreme Court Decisions, 16 Int'l Rev. L. & Econ. 503 (1996); William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991); Beth Henschen, Statutory Interpretations of the Supreme Court: Congressional Response, 11 Am. Pol. Q. 441 (1983).

[6] James Buatti and Professor Richard Hasen, for example, argue that it makes sense to ignore "unconscious overrides" in the descriptive analysis of trying to figure out when they occur because only "conscious" overriding shows meaningful legislative-judicial dialogue in our practices of statutory interpretation. See Buatti & Hasen, supra note 5, at 264–65.

[7] See, e.g., Mansell v. Mansell, 490 U.S. 581, 594 (1989) (majority opinion inviting Congress to consider an override); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (same, in a dissenting opinion). See generally Lori Hausegger & Lawrence Baum, Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation, 43 Am. J. Pol. Sci. 162 (1999) (describing and analyzing forty-two invitations to override among Supreme Court majority, concurring, and dissenting opinions in the 1986–90 Terms).

enhance a legislature's authority and legitimacy, such as by foreclosing continued uncertainties in the courts or resistance from agencies regarding the meaning of statutes.

We define a legislative underwrite as action that evidences an express legislative endorsement of a judicial reading of a statute—either by altering or amending statutory text or by being explicit in reliable legislative history accompanying such a statutory amendment. An underwrite is not merely a concurring citation or a summary affirmance; it includes a clear indication of substantive agreement with a specific court decision or an articulated dimension thereof.

We recognize at the outset some possibility of confusion with the term "underwrite" as it is used in the insurance or other commercial context. But we employ the term both because it serves as a textual complement to "override" and because the analogy to insurance captures a useful aspect of our approach. Just as an insurance underwriter accepts liability or responsibility in its policy, thereby guaranteeing payment, so in our setting can a legislature endorse and accept responsibility for a court's statutory decision and analysis, effectively guaranteeing its legitimacy. Indeed, this guarantee may result in a form of "supercharged" precedent in certain institutional settings. Imagine Congress embracing a court decision that serves to foreclose agency intransigence under a new administration, or Congress underwriting a lower court decision that serves to preempt or resolve circuit court conflicts. At the same time, a legislature's summary approval of an identified court decision, rather than its rewriting policy from the ground up, can sometimes be a strategic act—a form of accountability occlusion by using a court's authority to overshadow its own. Even then, however, we classify it as an underwriting as long as there is meaningful engagement with the relevant judicial decision.

Apart from the choice of terminology,[8] there are questions about the scope of our underwrite definition. One could envision the range of

[8] One might refer to this kind of legislative endorsement as a "codification" or "ratification." But those familiar terms strike us as incomplete. As we will explain, an underwrite involves some degree of elaboration or explanation accompanying approval in the textual adjustment, the legislative history, or both. Accordingly, a *sub silentio* or unconscious codification or ratification would not amount to an underwrite without a sign of express engagement with the decision purportedly being endorsed. Conversely, a codification may not be necessary if authoritative legislative commentary embraces a court's decision as reflective of current text. In addition, "codification" and "ratification" are more

underwrites more broadly to include statutory endorsements of agency interpretations or to encompass subsequent legislative history "in the air" that attempts to ratify a court decision without being tethered to the process of making, revising, or repealing law that culminates in enactment. Or one could understand underwrites more narrowly to exclude any statements in legislative history. But for the purposes of introducing the category and gaining some analytical and normative traction on it, we draw the metes and bounds of underwrites to focus on explicit enactments or express pronouncements in suitably reliable legislative history. By defining underwrites to require such deliberate and deliberative endorsement of judicial decisions, we remain mindful of the ongoing debate (much of it critical) about the use of legislative inaction as a form of acquiescence that is relevant to courts doing statutory interpretation.[9]

One earlier study found that legislative codifications of statutory decisions occur routinely within the tax area.[10] Other scholars have noted in passing that overrides are sometimes accompanied by partial agreement with court decisions, though without much commentary on how to approach, conceptually or doctrinally, these statements of agreement.[11] In general, however, scholarly attention has focused far more on overrides,[12] with an unstated assumption that underwrites occur

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likely to be used in connection with a legislature's adoption of common law decisions rather than statutory ones, a distinction we will elaborate upon below.

[9] For scholarly skepticism about judicial use of legislative inaction, see, for example, Frank H. Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L. Rev. 422, 427 (1988); William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 69–70 (1988); Robert J. Gregory, The Clearly Expressed Intent and the Doctrine of Congressional Acquiescence, 60 UMKC L. Rev. 27, 29 (1991); Anita S. Krishnakumar, Longstanding Agency Interpretations, 83 Fordham L. Rev. 1823, 1846 (2015); Earl Maltz, The Nature of Precedent, 66 N.C. L. Rev. 367, 390 (1988). For a defense of such use in particular circumstances, see James J. Brudney, Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?, 93 Mich. L. Rev. 1, 75–94 (1994). We return to this issue in our discussion in Part III.

[10] See Nancy C. Staudt, René Lindstädt & Jason O'Connor, Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005, 82 N.Y.U. L. Rev. 1340, 1386–88 (2007).

[11] See Widiss, Hydra Problem, supra note 5, at 860 (discussing Congress's "partial codification and partial override of *Price Waterhouse v. Hopkins*[, 490 U.S. 228 (1989)]"); Christiansen & Eskridge, supra note 5, at 1325, 1358–59 (referencing "codifications").

[12] See Staudt et al., supra note 10, at 1343 ("[T]he extant literature on Congress-Court relations tends to focus exclusively on congressional overrides.").

much less often than their contrarian legislative cousins. Whether that assumption is empirically correct is less important than bringing into view underwrite practices that are occurring without most legal scholars or judges noticing them. And without notice, judges will fail to integrate these underwrites into doctrines of statutory interpretation that they clearly implicate—most notably statutory stare decisis and other doctrines surrounding legislative silence.

In Part I, we introduce the analytical category of legislative underwrites, highlighting certain archetypal approaches in both federal and state legal systems. In establishing the diversity and frequency of underwrites, we anticipate and deflect any scholarly inference that such legislative approval practices are marginal to interbranch interactions.[13] We also address certain complicating aspects of this exchange that make the underwrite category more than a binary one.

In Part II, we furnish our most direct normative analysis of legislative underwrites. In examining possible costs and benefits, we consider reasons disfavoring and favoring the practice that operate on pragmatic, doctrinal, and jurisprudential levels. We also discuss certain vulnerabilities that may limit the scope and meaning of underwrites as applied by "downstream" statutory interpreters. While sensitive to the costs and vulnerabilities, we ultimately defend a coherentist perspective, which tends to support underwriting's contribution to policy development that is cooperative and rational, thereby enhancing its legitimacy.[14]

Finally, in Part III, we discuss the interplay between underwrites and key interpretive doctrines that invoke legislative silence, specifically statutory stare decisis and the reenactment rule. In addition, we offer preliminary thoughts on certain settings in which underwrites may be

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[13] See Henschen, supra note 5, at 444 (finding that, of 176 bills introduced in Congress between 1950 and 1978 reacting to Supreme Court labor and antitrust decisions during this period, eleven percent were designed to enact or supplement a Court decision, whereas eighty-nine percent were designed to reverse or modify a decision). The ratio of bills introduced is of course not equivalent to the ratio of bills that became law. Still, Professor Henschen's findings from an earlier period suggest that lack of scholarly attention to underwrites may be in part grounded on empirical assumptions, ones we do not attempt to evaluate here.

[14] This is a core feature of "The Legal Process." See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); William N. Eskridge, Jr. & Philip P. Frickey, The Making of *The Legal Process*, 107 Harv. L. Rev. 2031, 2042–45 (1994).

especially valuable. Even if a reader ends up weighing the costs and benefits differently than we do, the analysis in Part II will have important implications for how to approach the doctrines we discuss in Part III. We close the Part by identifying several institutional mechanisms at the federal level that might make underwrites more salient in ongoing interbranch exchanges. We conclude that, when underwrites are done well, bringing them to light is generally good for the rule of law and legal development.

Ultimately, we hope to illuminate for legislators, judges, and scholars another part of the grammar of interbranch dialogue. In doing so, we reveal a new set of opportunities and challenges, allowing legislatures and courts to develop statutory law together.

## I. LEGISLATIVE UNDERWRITES AND WHAT THEY MEAN

In this Part, we first identify and explain what we count as an underwrite (Section I.A). We then furnish numerous examples of legislative underwrites at both federal and state levels, suggesting that legislatures confer these endorsements with enough frequency to command analysis, notwithstanding the lack of scholarly attention to this form of interbranch exchange (Section I.B). Finally, we recognize additional factors that may contribute nuance or complexity to the underwrite category—in particular, differences among underwrites that are central rather than peripheral to a statute's development, as well as underwrites that are accompanied by overrides (Section I.C).

### *A. Underwrites' Domain*

We define underwrites to include both enacted text that cross-references decided cases, as well as authoritative legislative history that is created during an enactment process and that endorses a prior judicial decision on a matter of statutory interpretation. The legislative body may endorse decisions of a relevant jurisdiction's highest court, or it may highlight lower court decisions that it believes correctly captured statutory meaning.[15]

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[15] For an example of a legislative underwrite of a lower level court, consider *Blanchard v. Bergeron*, 489 U.S. 87, 91–92 (1989), which references the Senate and House Committee Reports on the Civil Rights Attorney's Fees Awards Act of 1976. Those committee reports, in turn, explicitly invoked factors relevant to determining a reasonable attorney's fee, set forth in a U.S. Court of Appeals for the Fifth Circuit opinion, *Johnson v. Georgia Highway*

There are several ways in which enacted laws can clearly underwrite judicial decisions. First, legislatures can write a provision in a statute that directly cites to or quotes from a judicial opinion, with relevant explanation. These textual underwrites may occur in a preamble, findings section, purpose section, or within the substantive law itself.[16] To be sure, underwrites within statutory texts need not necessarily endorse *statutory* judicial decisions. Rather, the practice can be thought to include underwrites of constitutional adjudications, treaty interpretations, and common law decisions (though the latter are more routinely called "codifications") as well. In what follows, however, we focus on *statutory* underwriting: when a legislature underwrites a statutory interpretation decision. These sorts of underwrites implicate a distinctive analysis, and the conclusions one reaches about statutory underwrites do not necessarily carry over into underwriting practices for other types of judicial decisions.[17]

But underwriting as we understand it also can occur within the legislature without encoding the legislative approval into enacted statutory text. For example, House and Senate committees, or a joint committee of both the House and Senate, can place clear statements into

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*Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). The House report described key *Johnson* factors to be considered, while the Senate report identified several district court decisions as having "correctly applied" the *Johnson* factors, citing *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); and *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974). H.R. Rep. No. 94-1558, at 8–9 (1976); S. Rep. No. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913.

[16] See, e.g., Cherokee, Choctaw, and Chickasaw Nations Claims Settlement Act, 25 U.S.C. § 1779 (2002) (citing and discussing Indian treaty cases *United States v. Cherokee Nation*, 480 U.S. 700 (1987), and *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), in congressional findings); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b) (seeking explicitly to endorse the constitutional law announced in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in congressional purposes provisions); American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a(a) (acknowledging and asserting a workaround for *Employment Division v. Smith*, 494 U.S. 872 (1990), in a congressional findings and declarations provision); Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387a-1(2)(E) (2009) (instructing the Secretary of Health and Human Services, in a substantive provision of the law, to ensure that regulation of tobacco products comports with First Amendment law in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)).

[17] For example, underwrites of a constitutional decision may have to yield to altered or evolved judicial understandings of the same constitutional issue on account of a dominant conception of judicial supremacy in the field of constitutional law. See infra Subsection II.C.5.

relevant reports accompanying a piece of legislation, indicating explicit approval of a court decision.[18] Again, one can imagine that underwrites in these reports might include authoritative endorsement of constitutional law, treaty law, or common law decisions in legislative history.[19] Still, we think the statutory context is distinctive because of

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[18] See, e.g., H.R. Rep. No. 92-238, at 5 n.1, 8, 21 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141 n.1, 2144, 2156 (citing with approval, inter alia, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Weeks v. Southern Bell Telephone Co.*, 408 F.2d 228 (5th Cir. 1969); and *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969)); S. Rep. No. 92-415, at 5 n.1, 8 n.4 (1971) (same). There has been some question as to whether Congress was underwriting *Griggs* in its 1972 amendments to the Civil Rights Act of 1964 because these committee reports were attached to a bill that was never passed, the Equal Opportunity of Employment Act of 1971. The substitute bill that became the 1972 amendments differed from the earlier bill principally with respect to the enforcement mechanism for the newly empowered EEOC: cease and desist orders modeled on the National Labor Relations Board ("NLRB") (earlier bill) versus judicial enforcement in district court (substitute bill). See Herbert Hill, The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law, 2 Indus. Rel. L.J. 1, 47–51 (1977). Although the substitute bill that became the 1972 amendments did not contain language ratifying *Griggs*, leading proponents of both versions consistently cited *Griggs* with approval during the House and Senate floor debates. Compare Katherine J. Thomson, The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold, 8 Indus. Rel. L.J. 105, 105–06 (1986) (arguing that the 1972 amendments were a codification of *Griggs*), with Michael Evan Gold, Reply to Thomson, 8 Indus. Rel. L.J. 117, 117 (1986) (denying that Congress accepted *Griggs* in 1972). See generally L. Camille Hébert, Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive *Wards Cove* and the Civil Rights Act of 1990?, 32 B.C. L. Rev. 1, 42–45 (1990) (discussing the 1972 Act's legislative history on this point). We find the Thomson-Hébert arguments more persuasive than Gold's, but for our purposes it is more important to show that Congress can deliberately and expressly endorse decisions in the most reliable forms of federal legislative history than it is to establish whether the 1972 amendments to the Civil Rights Act of 1964 should be read as an underwrite of *Griggs*.

Another example may be found in the House Report to the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779. See H.R. Rep. No. 98-934, at 96 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4733 (ratifying a regulatory approach to cable service endorsed by courts in the following cases: *New York State Cable Commission v. FCC*, 669 F.2d 58 (2d Cir. 1982); *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); and *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972)). Note here that the legislature is underwriting judicial cases, which themselves underwrite agency action. As we explain in this Section, we exclude direct endorsement of agency action from our analyses to follow.

[19] Consider the Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075. The House's committee report drew freely on Supreme Court cases applying common law concepts that the House was purporting to codify in the new legislation. See, e.g., H.R. Rep. No. 60-2222, at 2, 4, 8–9 (1909). The Senate's committee report was identical. See also S. Rep. No. 60-1108, at 2, 4, 8–9 (1909). At the state level, one might consider New York's Field Code a

the relatively clear norm of legislative supremacy in U.S. statutory law, which does not apply as forcefully in the other contexts.

To be sure, formalists of certain stripes would not consider as legally relevant any action taken by a legislature that is not enacted as legislation through requisite procedures.[20] Accordingly, such formalists would not admit any legislative history as a legal underwriting. Our view is that, because committee reports are the gold standard for reliable legislative history—and they are the place that would be most natural for legislators to discuss judicial decisions—it is reasonable to include in the underwrite category such legal analysis by legislators from both chambers when the reports are in agreement.

There are, however, certain other types of more indirect actions or omissions that do not qualify as forms of underwriting under our approach. Most prominently, mere legislative silence in the face of a judicial decision is insufficient to deem a decision endorsed by a relevant legislature. Of course, it is well known that judges sometimes take silence to be a form of acquiescence.[21] Whatever one thinks of the legal relevance of legislative inaction, we are not treating the absence of articulated support for judicial interpretations as a form of underwriting. We also exclude instances of mere reenactment, which are often treated by the judiciary as *sub silentio* endorsements of courts' reigning statutory interpretations that precede the reenactment.[22] As we are

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codification project of the common law (that both ratifies common law and overrides it, too). See generally Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (1981) (analyzing various so-called "codification movements" in the states); Stephen N. Subrin, David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision, 6 Law & Hist. Rev. 311 (1988) (providing analysis of Field's thinking). Whether codification of common law decisions should be thought of as a species of underwrites ultimately is not pertinent to our discussion of statutory underwrites here.

[20] The most notable adherent of this type of formalism was Justice Scalia. See generally Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17 (Amy Gutmann ed., 1997) (repudiating the use of legislative history as irrelevant to determining the legislature's "objectified" intent). Prominent defenses of this view can be found in John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70 (2006); Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)); and John F. Manning, Why Does Congress Vote on Some Texts but Not Others?, 51 Tulsa L. Rev. 559 (2016) (reviewing the same).

[21] See, e.g., Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987); Flood v. Kuhn, 407 U.S. 258, 283–84 (1972).

[22] See Pierce v. Underwood, 487 U.S. 552, 567 (1988); Haig v. Agee, 453 U.S. 280, 300–01 (1981); Lorillard v. Pons, 434 U.S. 575, 580–81 (1978); Gregory, supra note 9, at 33.

aiming to identify and examine the costs and benefits associated with deliberative engagement rather than implied signals and presumptions, we exclude many sounds of silence from the legislature. We would also exclude mere citation with no explanation from a legislature about the element of a judicial decision that it is endorsing. We shall say more about the doctrines of acquiescence and their relationship to underwriting in Part III.

We also do not treat as underwrites in this Article statutes that directly approve agency regulations. Rather, we isolate for consideration legislative-judicial interaction in a relatively conscious and pure form, although we do discuss certain implications for agency authority resulting from underwritten judicial decisions.[23] One can certainly make a case for considering underwrites of agency decisions (whether rules, adjudications, or more informal guidances). Congressional committee staff care a good deal about what agencies do. And unlike courts, agencies interact with congressional committees on a regular basis; those committees also engage in active oversight of agency operations. Not surprisingly, underwrites of agency statutory interpretations appear to occur with some frequency.[24] There is no question that mapping the "trialogue" among administrators, courts, and legislatures would be a valuable goal.[25]

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[23] See infra Sections II.B, III.A (discussing the impact of judicial underwrites on the doctrine of agency nonacquiescence).

[24] See, e.g., Bipartisan Budget Act of 2015, Pub. L. No. 144-74, § 603, 129 Stat. 584, 597–98 (codified at 42 U.S.C. § 1395l(t) (Supp. III 2016)) (underwriting the definition of dedicated hospital emergency department, set forth in 42 C.F.R. § 489.24(b), in connection with the statutory regulation of off-campus hospital outpatient departments); 42 U.S.C. § 1395y(c)(2)(A) (2012) (underwriting the definition of identical, related, or similar drug, set forth in 21 C.F.R. § 310.6, as part of the statutory exclusion of Medicare coverage for certain drug products); Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 978, 979 (1990) (codified at 29 U.S.C. § 623 (2012)) (underwriting employee benefit plan payment rules set forth in 29 C.F.R. § 1625.10, as they were in effect on June 22, 1989). Statutory interpretation routinely takes place in all three branches, and the full "trialogue" ultimately must account for agency interpretation as well. See generally Matthew C. Stephenson, Statutory Interpretation by Agencies, *in* Research Handbook on Public Choice and Public Law 285 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (examining the role of agencies as statutory interpreters); Peter L. Strauss, When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 Chi.-Kent L. Rev. 321 (1990) (same).

[25] For one effort to think through the "trialogue" on the (perhaps even more complex) European stage, see Fabrizio Cafaggi, On the Transformations of European Consumer Enforcement Law: Judicial and Administrative Trialogues, Instruments and Effects, *in*

Yet it is challenging enough to address the benefits and costs of underwrites involving legislatures and courts throughout the judicial hierarchy. Underwrites of agency regulations implicate additional complexities, such as whether a legislature may constrain courts to adhere to executive branch interpretations the courts have never examined, and the impact of such underwrites on existing doctrines of agency deference. Leaving those important questions for another day, we focus here on the core exchanges between courts and legislatures engaged in expressly bilateral interaction, not triangulation with the executive branch. Legislative-judicial dialogue is central to the field of statutory interpretation. That is where we start, exposing a modality this dialogue takes that is too often ignored.

### *B. Examples of Statutory Underwrites*

#### *1. Underwrites by Congress*

In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"),[26] Congress altered the framework for invoking preemption by the National Bank Act against state law claims. Congress had last stated a position on preemption in the 1864 Act,[27] giving the Office of the Comptroller of the Currency ("OCC") delegated authority to implement the Act and practical authority to preempt state law.[28] Ultimately, in the 1996 case of *Barnett Bank of Marion County v. Nelson*,[29] the U.S. Supreme Court evaluated a state law prohibition on banks that sell insurance. In holding that the state law was preempted as it applied to a national bank, the Court emphasized that state laws could not "impair significantly" a national bank's powers under the National Bank Act.[30] Then, in the Gramm-Leach-Bliley Act of 1999, Congress passed an explicit endorsement of the Court's work in *Barnett Bank*, citing the case within the text of the statute and incorporating language from the case, as follows:

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Judicial Cooperation in European Private Law 223 (Fabrizio Cafaggi & Stephanie Law eds., 2017).

[26] Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of 12 U.S.C. (2012)).

[27] 12 U.S.C. §§ 85, 86 (1864).

[28] Id. § 93(a) (2012).

[29] 517 U.S. 25 (1996).

[30] Id. at 33, 37.

> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution . . . to engage . . . in any insurance sales, solicitation, or crossmarketing activity.[31]

Congress again endorsed the *Barnett Bank* standard more generally in Dodd-Frank:

> State consumer financial laws are preempted, only if . . . in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law.[32]

And this was not the only explicit underwrite in Dodd-Frank. Congress also sought to endorse a 2009 decision by the Supreme Court which held that the OCC was unreasonable in trying to preempt the power of states to investigate national banks in enforcing their own laws (known as "visitorial powers").[33]

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[31] 15 U.S.C. § 6701(d)(2)(A) (2012).

[32] 12 U.S.C. § 25b(b)(1)(B) (2012). While engaging in this underwrite, Congress overrode the decision in *Watters v. Wachovia Bank*, 550 U.S. 1, 12, 21 (2007), which, although it reaffirmed *Barnett Bank*, also extended national bank provisions—including its preemption regime—to subsidiaries of national banks. See 12 U.S.C. § 25b(e) (2012) ("[A] State consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law."); see also id. § 25b(b)(2) (forswearing from preempting applicability of state law to subsidiaries); id. § 25b(h)(2) (same).

[33] See 12 U.S.C. § 25b(i)(1) ("In accordance with the decision of the Supreme Court of the United States in Cuomo v. Clearing House Assn., L.L.C. (129 S. Ct. 2710 (2009)), no provision of title 62 of the Revised Statutes which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State to bring an action against a national bank in a court of

A potentially more familiar underwrite in the statute books comes from the Civil Rights Act of 1991.[34] This overhaul of the nation's civil rights laws is probably best known as an *override* statute because it takes direct aim at an unusually high number of previous Supreme Court decisions that Congress took to be too restrictive in their interpretations of statutory employment discrimination protections.[35] However, the purposes section of the Act[36] also underwrote an important Supreme Court case from 1971, *Griggs v. Duke Power Co.*,[37] which established the "disparate impact theory" of employment discrimination as actionable under the Civil Rights Act of 1964.[38] In this regard, the text of the enacted 1991 law contained an unambiguous underwrite of *Griggs*. In short, in all of the aforementioned instances, Congress was

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appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law.").

[34] Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981(a) (2012)).

[35] See H.R. Rep. No. 102-40(II), at 2–4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694–96 (discussing, inter alia, rejections of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (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); and *Marek v. Chesny*, 473 U.S. 1 (1985)).

[36] Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991). Section 3 of the Act reads in full:

> SEC. 3. PURPOSES.
>
> The purposes of this Act are—
>
> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
>
> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);
>
> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and
>
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Id. The U.S. Code includes this enacted text as a note. See 42 U.S.C. § 1981 note (2012).

[37] 401 U.S. 424, 431 (1971).

[38] Pub. L. No. 88-352, §§ 703(a)–(b), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2 (2012)).

quite clear in enacted text that it was endorsing a Supreme Court reading of statutory product.

In other instances that we would also consider underwrites, Congress can pass laws containing statutory findings that for one reason or another do not make their way into the U.S. Code and do not specifically name the cases being underwritten. For example, in the Insider Trading and Securities Fraud Enforcement Act of 1988, Congress put into its findings that "the [Securities and Exchange] Commission has, within the limits of accepted administrative *and judicial construction of such rules and regulations*, enforced such rules and regulations vigorously, effectively, and fairly."[39] Although Congress chose not to define insider trading statutorily beyond what the Securities Exchange Act of 1934 set in motion in Section 10(b),[40] it clearly was endorsing the "misappropriation doctrine" the courts had developed, finding that trading on misappropriations of material nonpublic information constitutes violations of the Act (per SEC Rule 10b5-1,[41] which implemented the Exchange Act).

There is no real question that Congress was using the findings of the 1988 Act to underwrite the "judicial construction" that preceded it, specifically, the misappropriation doctrine.[42] To the extent there was any confusion, a relevant committee report made the underwrite plain.[43] And although a number of justices seemed sympathetic to the misappropriation theory of insider trading in *Chiarella v. United States* in 1980,[44] the underwrite effectuated by Congress in 1988 was focused

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[39] Pub. L. No. 100-704, § 2, 102 Stat. 4677, 4677 (codified at 15 U.S.C. § 78u-1 note (2012)) (emphasis added).

[40] See Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j(b) (2012)).

[41] 17 C.F.R. § 240.10b5-1 (2015).

[42] Pub. L. No. 100-704, § 2, 102 Stat. at 4677. See Stephen M. Bainbridge, Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition, 52 Wash. & Lee L. Rev. 1189, 1233 (1995) ("Congress's action amounts to an express legislative endorsement of the misappropriation theory."); Steve Thel, Statutory Findings and Insider Trading Regulation, 50 Vand. L. Rev. 1091, 1111 (1997).

[43] See H.R. Rep. No. 100-910, at 8–10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6045–47. There was no Senate report associated with this legislation.

[44] 445 U.S. 222 (1980); see id. at 239 (Brennan, J., concurring in the judgment) (stating that "a person violates § 10(b) whenever he improperly obtains or converts to his own benefit nonpublic information"); id. at 240–45 (Burger, C.J., dissenting) (advocating a broad application of the misappropriation theory); id. at 246 (Blackmun & Marshall, JJ., dissenting) (suggesting that § 10(b) encompasses the misappropriation theory).

most directly on judicial construction in the circuit courts.[45] As it underwrote one case from the U.S. Court of Appeals for the Second Circuit (and plenty of work by the SEC), Congress also explicitly overrode another Second Circuit decision that was less supportive of the misappropriation theory.[46]

Our last example of a congressional underwrite is taken from "pure" legislative history accompanying an enactment, but it involves the gold standard thereof. This arises when the text of the enacted law does not obviously endorse a judicial interpretation of a statute, but the House and Senate reports associated with the enacted law make explicit that a prior judicial interpretation should be followed and that statutory meaning is to be rendered consistent with this statutory decision of a high court. An example of this form of underwrite comes from Congress's comprehensive revision of the Copyright Act in 1976.[47]

The previous overhaul of the nation's copyright statutes—repealed and superseded by the 1976 Act—was in 1909.[48] Much case law intervened over the ensuing decades, some of which Congress sought to underwrite, some of which it sought to override. Most clearly, both the House[49] and the Senate[50] reports that accompanied the 1976 Act

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[45] See H.R. Rep. No. 100-910, at 10 (citing United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986), aff'd on securities law counts by an equally divided court, 484 U.S. 19 (1987)), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6047.

[46] See id. at 26–27, *reprinted in* 1988 U.S.C.C.A.N. 6043, 6063–64 ("[T]he codification of a right of action for contemporaneous traders is specifically intended to overturn court cases which have precluded recovery for plaintiffs where the defendant's violation is premised upon the misappropriation theory. See[,] e.g., *Moss v. Morgan Stanley*, 719 F.2d 5 (2d Cir. 1983). The Committee believes that this result is inconsistent with the remedial purposes of the Exchange Act, and that the misappropriation theory fulfills appropriate regulatory objectives in determining when communicating or trading while in possession of material nonpublic information is unlawful."). This example highlights Congress's agreement (and disagreement) with a court decision. We acknowledge, of course, that this area of law is very much driven by agency activity and rules in the SEC. But, as we explained, we are not focusing on the legislature's direct endorsement of agency positions or on the legislature's effort to signal to the courts about how they should assess the validity of agency positions.

[47] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–810 (2012)).

[48] Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

[49] H.R. Rep. No. 94-1476, at 54–55, 105 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5667–68, 5720.

[50] S. Rep. No. 94-473, at 53, 86–87 (1975) ("In accordance with the Supreme Court's decision in *Mazer v. Stein*, 347 U.S. 201 (1954), works of 'applied art' encompass all original pictorial, graphic, and sculptural works that are intended to be or have been

discussed and endorsed the Supreme Court's 1954 decision in *Mazer v. Stein*.[51] In that case, the Court held copyrightable a statuette design that was part of a lamp base, notwithstanding the possibility that its utility could bring it within the scope of design patent protection and outside the scope of copyright.[52] The reports discussed the case, approving its rationale that useful articles could still receive some copyright protection (when the applied art was separable from the utilitarian aspects of the item), and stating unequivocally that courts construing the new version of the statute should continue to apply it the way the Supreme Court had applied the old 1909 version to find copyrightability within useful articles.[53]

### *2. Underwrites by State Legislatures*

As is true for Congress, underwrites by state legislatures appear in text, legislative history, and both. The examples we identify below come from four geographically diverse states and address doctrinal areas of

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embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection. . . . Section 113 deals with the extent of copyright protection in 'works of applied art.' The section takes as its starting point the Supreme Court's decision in *Mazer v. Stein*, 347 U.S. 201 (1954), and the first sentence of subsection (a) restates the basic principle established by that decision. The rule of *Mazer*, as affirmed by the bill, is that copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will afford protection to the copyright owner against the unauthorized reproduction of his work in useful as well as nonuseful articles.").

[51] 347 U.S. 201 (1954).

[52] Id. at 213–14, 217.

[53] 17 U.S.C. §§ 102 note, 113 note (2012). As it happens, the Supreme Court just addressed some of the confusion in this area of law in *Star Athletica, LLC v. Varsity Brands*, 137 S. Ct. 1002 (2017). It has proven remarkably hard to know what part of useful articles (in the case at issue, cheerleading uniforms) is actually copyrightable work and what is excluded as a "useful article." 17 U.S.C. § 101 (2012). Notably, the Sixth Circuit drew on the House Report's discussion of *Mazer* to find the relevant uniforms copyrightable, using the Report's endorsement of "conceptual separability" instead of "physical separability." See Varsity Brands v. Star Athletica, LLC, 799 F.3d 468, 481 n.6, 490 n.12 (6th Cir. 2015) (citing H.R. Rep. No. 94-1476, at 47, 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660, 5668). When the U.S. Supreme Court affirmed the Sixth Circuit in an opinion by Justice Thomas, it did not cite the relevant House Report, but it did explain how Congress endorsed *Mazer* by lifting language from post-*Mazer* regulations by the Copyright Office. *Star Athletica, LLC*, 137 S. Ct. at 1011–12. Justice Breyer's dissent, however, made substantial use of the relevant House Report in seeking to implement Congress's understanding of *Mazer* during the passage of the 1976 act. Id. at 1031–32 (Breyer, J., dissenting).

disability law, financial institutions law, civil procedure, family law, and election law.

*a. New Jersey*

Under the federal Individuals with Disabilities Education Act ("IDEA"),[54] a question unanswered in the statute is which party bears the burden of proof—an individual family or a school district—in disputes over the nature and extent of required special education support. A New Jersey law enacted in 2008 placed the burden of proof on school districts in these IDEA due process hearings.[55] In doing so, the statutory text expressly underwrote a holding by the New Jersey Supreme Court to that effect, *Lascari v. Board of Education*.[56] The state legislature responded to a 2005 U.S. Supreme Court decision, *Schaffer v. Weast*, which held that the IDEA burden was on the party seeking relief (this could be an individual family or a school district) while leaving open the question of whether state legislatures could effectively modify the Court's decision by always placing the burden on the school district.[57] Both the New Jersey statutory text and its accompanying Assembly Committee statement made clear that the 2008 law underwrote the *Lascari* holding.[58]

Another example from New Jersey involves mortgage foreclosure actions. In 2009, the legislature filled a gap in its 1995 Fair Foreclosure Act by underwriting an intervening appellate division decision that had applied a twenty-year statute of limitations to a residential mortgage foreclosure action based on a default due to nonpayment.[59] The new statutory text specifying the twenty-year limitation period for instituting such a foreclosure suit did not refer expressly to the appeals court decision, but both the Assembly Committee Statement and the Senate

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[54] Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified at 20 U.S.C. §§ 1400–82 (2012)).

[55] See N.J. Stat. Ann. § 18A:46-1.1 (West 2013).

[56] 560 A.2d 1180 (N.J. 1989). The New Jersey Supreme Court had held that the school district should bear the burden of proof under federal regulations promulgated pursuant to the IDEA's predecessor statute, the Education for All Handicapped Children Act of 1975. Id. at 1188.

[57] 546 U.S. 49, 62 (2005).

[58] See § 18A:46-1.1; N.J. Assemb. Educ. Comm. Statement, Assemb. 212-4076, 2d Ann. Sess. (2007).

[59] See § 2A:50-56.1 (underwriting the holding in *Security National Partners v. Mahler*, 763 A.2d 804, 808 (N.J. Super. Ct. App. Div. 2000)).

Committee Report were explicit that the amendment underwrote the holding in that case.[60]

*b. California*

In 2003, the California legislature added Section 340.8 to the state Code of Civil Procedure, specifying the time for bringing tort actions based on exposure to hazardous materials or toxic substances.[61] Section 1 of the statute codified the doctrine of delayed discovery for these toxic tort actions.[62] Section 2 of the enacted text stated: "It is the intent of the Legislature to [endorse] the rulings" on the doctrine of delayed discovery set forth in a California appellate court decision, *Clark v. Baxter Healthcare Corp.*,[63] construing two earlier state supreme court cases (also cited in Section 2), and to disapprove a contrary ruling by another appellate court panel.[64] In addition to this explicit text, both the Assembly Committee and Senate Committee bill analyses clearly stated that the legislature intended to underwrite *Clark*.[65]

*c. New York*

In one important example, the New York legislature amended the state's domestic relations law[66] to underwrite an earlier path-breaking decision from the New York Court of Appeals that permitted the adoption of a child by the unmarried adult partner of the child's biological parent, whether the partner was heterosexual or homosexual.[67]

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[60] See N.J. Assemb. Fin. Insts. & Ins. Comm. Statement, Assemb. 213-3269, 1st Ann. Sess. (2008); N.J. S. Commerce Comm. Statement, S. 213-250, 1st Ann. Sess., at 1 (2008).

[61] Ch. 873, S. 331, Act of Oct. 12, 2003, Legis. Couns. Dig. 443–44 (discussing that the bill adds § 340.8, relating to toxic injuries, to the Code of Civil Procedure).

[62] Act of Oct. 12, 2003, ch. 873, 2003 Cal. Stat. 6398–99 (codified at Cal. Civ. Proc. § 340.8). Section 1 provides that such actions shall commence no later than two years from the date of injury or when the plaintiff became aware of the injury, its cause, and "sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another." Id.

[63] 100 Cal. Rptr. 2d 223 (Ct. App. 2000).

[64] Ch. 873, 2003 Cal. Stat. 6399. The statutory text in § 1, quoted supra note 62, tracks the discussion in *Clark*, 100 Cal. Rptr. 2d at 228.

[65] See Cal. Assemb. Comm. on Judiciary, S. 331, 2003–04 Reg. Sess., at 1 (2003); Cal. S. Judiciary Comm., S. 331, 2003–04 Reg. Sess., at 2 (2003).

[66] Act of Sept. 17, 2010, ch. 509, 2010 N.Y. Laws 1364–65 (codified at N.Y. Dom. Rel. § 110 (McKinney 2010)).

[67] See In re Jacob, 660 N.E.2d 397, 405 (N.Y. 1995).

The court expansively construed the earlier text—which provided that "[a]n adult unmarried person or an adult husband and his adult wife *together* may adopt another person"[68]—in light of the statute's purpose to advance the best interest of the child and in acknowledgment of the changing realities of family life.[69] Fifteen years later, the Senate Introducer's Memorandum in support of the bill acknowledged that some lower courts were still narrowly interpreting the word "together" so as to preclude the ability of unmarried couples to adopt a child together.[70] Accordingly, the Memorandum explained that the legislation "codifies the Court of Appeal's [sic] decision in Matter of Jacob and Matter of Dana" while also clarifying the domestic relations law to assure that "unmarried adult couples may jointly adopt a child together where neither is the biological parent of the child."[71]

In a second example from New York, a 2005 New York Court of Appeals decision adjudicated the validity of 163 affidavit ballots in a close State Senate race.[72] The ballots came from registered voters who went to the right polling site but for one reason or another voted in the wrong election district. Finding the ballots valid under then-current statutes, the Court of Appeals found "ministerial error by the board of elections or any of its employees [which] caused such ballot envelope[s] not to be valid on [their] face."[73] By "infer[ring]" "ministerial error" under the statute rather than requiring a showing of such error in some way, the court interpreted the state's election law in a manner that was reasonable though not obvious or necessary.[74] Accordingly, in 2009, the state legislature sought to amend the state's election law to require the counting of ballots when voters appear and cast their ballots at the

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[68] N.Y. Dom. Rel. Law § 110 (McKinney 1999) (emphasis added).

[69] See *Jacob*, 660 N.E.2d at 399–401.

[70] See New York State Senate Introducer's Memorandum in Support, S. 232-1523A (2009).

[71] Id. The issue of neither member of an unmarried couple being the biological parent had not been before the Court of Appeals in 1995. Id.

[72] See Panio v. Sunderland, 824 N.E.2d 488 (N.Y. 2005) (per curiam).

[73] Id. at 490 (citing and quoting N.Y. Elec. Law § 16-106(1) (McKinney 2009) and N.Y. Elec. Law § 9-209(2)(a)(2) (McKinney 2009)).

[74] See id. (noting the minimal likelihood of fraud when a voter appears in person with identification before board personnel, the court concluded it could "reasonably infer" that an affidavit ballot cast at the correct polling place but the wrong election district results from ministerial error by a poll worker who fails to direct the voter to the correct table).

correct polling place but at the wrong election district.[75] Although the text of the statute did not mention the Court of Appeals decision,[76] the memorandum created by the senator who introduced the statute and the Assembly Memorandum in support both made clear that the amendment underwrote the 2005 New York Court of Appeals decision, mentioning it explicitly in sections entitled "Justification."[77] Each memorandum quoted the court's reasoning that "we can reasonably infer that casting an affidavit ballot at the correct polling place but the wrong election district is the result of ministerial error on the part of the poll worker in failing to direct the voter to the correct table."[78] The underwrite thereby locked in a potentially contestable decision that could have been walked back by a different Court of Appeals, with a different political configuration. In doing so, it prevented subsequent judicial tampering with this aspect of the state's election law.

*d. Wisconsin*

Finally, a 2006 Wisconsin statute made numerous substantive changes to the state laws regulating protective placement and protective services for persons with disabilities.[79] The accompanying Legislative Council Act Memo explained that the new statute underwrote several different state court decisions, specifically court cases that mandated a protective placement hearing when a court appoints a guardian for incompetent persons in a nursing home,[80] provided that an interested person may participate in protective placement hearings at the court's discretion,[81] and established requirements and procedures for annual

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[75] Act of July 28, 2009, ch. 248, 2009 N.Y. Laws 939 (codified at N.Y. Elec. § 9-209 (McKinney 2009)).

[76] N.Y. Elec. Law § 9-209(2)(a)(i)(E)(iii) (Consol. Supp. 2017).

[77] See N.Y. Spons. Memo., S. 232-1554 (2009); N.Y. State Assemb. Memo. in Support of Legislation, Assemb. 232-4962 (2009).

[78] See N.Y. Spons. Memo., S. 232-1554 (2009) (quoting *Panio*, 824 N.E.2d at 490); N.Y. State Assemb. Memo. in Support of A. 4962, Assemb. 232-4962 (2009) (same).

[79] Act of Apr. 5, 2006, ch. 55, 2005 Wis. Sess. Laws 999 (codified at scattered sections of Wis. Stat. (2017)).

[80] Wisconsin Legislative Council Act Memo, Assemb. 785, at 6 (2005) (discussing underwrite of *Agnes T. v. Milwaukee County*, 525 N.W.2d 268 (Wis. 1995)).

[81] Id. at 9 (discussing underwrite of *Coston v. Joseph P.*, 586 N.W.2d 52 (Wis. Ct. App. 1998)).

reviews of such protective placements.[82] The text of the statute included notes that referred specifically to these court decisions.[83]

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In summary, we have explored three archetypes of legislative statutory underwrites, using nearly a dozen separate examples derived from a broad range of doctrinal areas in both federal and state law: (1) text of enacted law that cites and endorses a case (usually but not always of the highest court); (2) text of enacted law that endorses judicial constructions (whether of the highest court or of appellate level courts) with clear legislative history identifying approved cases; and (3) clear legislative history in both legislative chambers' committee reports accompanying enacted law signaling an underwrite. There may be underwrites worth considering that take other forms, but for now we limit the core of our analysis to these archetypes. Moreover, as these examples suggest, the phenomenon of legislative underwriting is quite widespread in federal and state codes.[84]

### *C. Added Dimensions*

Before turning to evaluate the costs and benefits of underwriting practices in legislatures, it is worth complicating the picture a bit to highlight that underwrites—even of the archetypal forms we have outlined here—can present themselves in quite different contextual

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[82] Id. at 20 (discussing underwrite of *County of Dunn v. Goldie H.*, 629 N.W.2d 189 (Wis. 2001)).

[83] See ch. 55, 2005 Wis. Sess. Laws at 1002, 1004, 1009.

[84] Underwrites also take place at the local legislative level. A recent example comes from New York City Human Rights Law, Administrative Code of the City of New York § 8-130(c) (2016):

> Cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include Albunio v. City of New York, 16 N.Y.3d 472 (2011), Bennett v. Health Management Systems, Inc., 92 A.D.3d 29 (1st Dep't 2011), and the majority opinion in Williams v. New York City Housing Authority, 61 A.D. 3d 62 (1st Dep't 2009).

This local underwriting has a City Council underwriting lower-level state appellate cases and the New York Court of Appeals. Local underwritings may ultimately be *sui generis* because the city's legislature cannot control the development of state law. On some unique features of the local legal ecosystem, see Ethan J. Leib, Local Judges and Local Government, 18 N.Y.U. J. Legis. & Pub. Pol'y 707, 715–16 (2015).

settings. We do not want to ignore such complications. Rather, we believe that some of these facets of underwriting practices will serve to enrich our evaluative discussion in Parts II and III.

First, notice that some underwrites appear to be part of an ongoing conversation that a legislature and a judicial branch are having over time within one issue area, while others look like "plucking" judicial ideas and integrating them into a possibly distinct statutory structure. To draw from the examples described above, the federal copyright laws and the New York adoption statute seem like the former sort, in which the underwrite is integral to the statute's development over time. By contrast, Congress's borrowing of judicial preemption standards within Dodd-Frank seems more like the latter. Although it is premature to analyze these different efforts by legislatures, it would seem that the former underwrites reflect the sort of exchange that makes statutory interpretation and legislative supremacy coherent. By contrast, it is harder to know what to say about the use of legal tests that are developed under one set of facts and then transplanted into another legal regime without too much elaboration.

A second nuance is contrasting what one might call "stand-alone" underwrites and those which are embedded in or are passed in conjunction with overrides. Both the Civil Rights Act of 1991 and the Copyright Act of 1976 described above are quite clear examples of Congress seeking to calibrate its policy by carefully telling the courts the cases it is rejecting along with those it is approving. Even the much shorter Securities Fraud Enforcement Act of 1988 we described above had Congress both underwriting and overriding at the same time to give instructions about just what kind of misappropriation theory it was endorsing. By contrast, New Jersey's statute of limitations for foreclosure actions is an archetypal "stand-alone" underwrite which only references the case it is endorsing without identifying any related cases it is rejecting.

One might think of "stand-alone" underwrites as akin to surgical strikes by the legislature—helping judges to see just what they get right and enabling the meaning of the underwrite to be clear as day for courts in future cases. Especially in domains where the underwrite is integral to a statute's development over time, a stand-alone underwrite would seem to be a very useful intervention by the legislature. But notice that if the stand-alone underwrite is of the "plucking" form instead, it might be especially difficult to ascertain its full meaning without additional

context. Transposition from one setting (a preemption standard in one legal regime as applied to another, for example) might not be as easy for courts to apply in future cases without substantially more elaboration. In such instances, having a litany of underwrites and overrides together could be useful for interpreters in the future to understand legislative meaning. Indeed, even outside the plucking environment, overrides and underwrites together may usefully give courts more information about legislative intent. These elaborations can be helpful in calibrating policy, in knowing whether an underwrite should be construed broadly, and in ascertaining how portable an underwrite should be outside its narrow domain.[85]

* * *

After this descriptive primer on an underappreciated phenomenon that occurs in legislatures with some frequency, we turn to a more normative evaluation of whether it is ultimately a productive venture for legislatures to be in the business of underwriting. Below we offer a rough cost-benefit analysis.

## II. WHY UNDERWRITE?

In this Part, we are explicit about the disadvantages (Section II.A) and advantages (Section II.B) of underwrites in our legal systems. We begin with the possible costs, in part because they appear more obvious and also because they are more in line with the received wisdom that elevating the status of underwrites would seem a departure from the standard picture of institutional exchange between courts and legislatures. After concluding that underwriting is probably, on balance, a productive enterprise, we present some thoughts (in Section II.C) about certain as-applied aspects of underwrites that shed additional light on our evaluative arguments.

As should be evident by this point, we approach the role of underwrites from a "legal process" perspective. What this means is that we are inclined to view an underwrite as a reinforcing instruction from the legislature to its agents.[86] While the special force of a two-branch

[85] We address these issues more directly in Section II.C.

[86] Legislative reinforcement may take the form of applauding a court for correctly construing what the legislature meant all along or of enacting a new text that endorses a court's approach to the prior statute.

pronouncement may at times be sufficient to establish a kind of super-precedent,[87] we have concerns that enshrining such a status could dilute the ordinary significance of stare decisis.[88] Further, notwithstanding our legal process predilections, we are sensitive to potential risks that can be associated with the practice as legislators, judges, or lawyers may strategically initiate or interpret underwrites to further their own self-interested outcomes. We also recognize that statutes may have different political economies that can affect the congressional appetite for underwriting. For instance, a statute that generates relatively little judicial attention, or that is rarely considered for possible updating by a legislature, is not likely to generate much mobilized opposition against those looking for an underwrite, rendering its passage much less meaningful than an underwrite that is carefully added to limit the ambit of an override or an underwrite that is supported from a salient coalition of interest groups openly debating the future direction of complex policy.

These factors are all relevant for the assessment of costs and benefits, to which we now turn.

### *A. Costs*

It is a truism that "no legislation is cost-free,"[89] and there are specific costs associated with clarifying statutory language through overrides and underwrites.[90] It is worth being clear about certain distinctive costs associated with underwriting so that we can draw some normative conclusions about the value of the practice in the final analysis.

One obvious and potentially significant issue involves opportunity costs. When we first commenced this project, we had a general sense of the possibility for underwriting, and we thought abstractly about whether it would be a beneficial addition to the theory and practice of statutory interpretation. We had assumed it would be a relatively rare phenomenon and that we would have to look hard to find examples. We

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[87] Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring) (stating that presidential authority is at its maximum "[w]hen the President acts pursuant to an express or implied authorization of Congress").

[88] See infra Sections II.B, III.A.

[89] Edward O. Correia, A Legislative Conception of Legislative Supremacy, 42 Case W. Res. L. Rev. 1129, 1163 (1992).

[90] See Brudney, supra note 9, at 20–40.

made this assumption because, superficially, it seems like an impractical way for a legislature to spend its time. The opportunity cost for spending time on underwrites might be forgoing work solving new social problems. This is especially true when the status quo "pre-underwrite" presumptively accords with legislative preferences (even if the relevant precedent is not yet "supercharged"). One might feel that legislators ought to spend their time addressing current policy issues, conducting oversight of executive branch activities, or responding to pressing requests from their constituents. Once a court decides that a law means something, the legislative underwrite for emphasis or confirmation can seem like wasted energy.

Those opportunity costs, however, do not seem to dissuade legislatures from engaging in underwriting after all, as we reported in Part I. Our examples at the state level are often stand-alone bills that, in expressing support for one or more court decisions, anchor that precedent while sweeping aside any confusion or tension that may have arisen from other intervening judicial rulings. Our examples at the federal level tend to include instances when the legislature is already passing a law on a related subject in which the underwrite is part of that larger statute, at times combined with disapproval of other contrary court decisions. To be sure, some quantum of time that the legislature takes up drafting underwrites might plausibly be repurposed to explore an intricacy or implication of the new law or amendment. And given the number of high court decisions that might be candidates for legislative approval (not to mention the multiplier effect from lower court rulings), the frequency of underwrites we have identified suggests that legislative resources can be diverted from addressing entirely separate novel problems that deserve policymakers' attention.

But while we recognize and credit the reality of such opportunity costs, we are not persuaded that underwriting is displacing our legislatures' ability to solve the nation's core challenges. Statutes that underwrite court rulings, like statutes that reauthorize ongoing programs or that appropriate funds to existing agencies, are part of the legislative maintenance functions that coexist with laws responding ab initio to newly prioritized policy challenges. As a conserving element alongside more innovative efforts, underwrites can be understood as contributing to the warp and woof of lawmaking stability. Moreover, underwrites as we define them are tied to textual enactments. We have already excluded from our conception of underwriting any legislative history "in the

air"—untethered to enacted legislation—as an irrelevant expenditure of legislative resources.

A distinct opportunity cost is the possibility that underwrites, especially of lower court decisions, will derogate from the functions of the highest court because legislatures will usurp the high court's jurisdictional terrain in resolving lower court conflicts. We have several responses to this concern—and we focus on the federal system here to make our point, though *mutatis mutandis* the same points could be made at the state level. In pragmatic terms, the Supreme Court currently resolves only a fraction of all circuit court conflicts.[91] As the Court's docket has shrunk by more than half since the mid-1980s,[92] there is no reason to anticipate that Congress addressing more lower court conflicts will inflict meaningful damage on the Court's domain. Further, at a doctrinal level there may well be circuit conflicts in areas of law where private parties invest a high level of reliance—think of securities law, bankruptcy law, or intellectual property law. Waiting for a fully mature and percolated circuit conflict on such matters may cause more damage to reliance interests than if Congress steps in and picks a winner, with a suitably clear explanation. Finally, the institutional tradeoff of allowing the most democratically accountable branch to preempt the Supreme Court in resolving certain nascent or evolving disagreements over statutory meaning may actually enhance legitimacy within our legal system, as we explain in Section II.B below. Rather than violating conceptions of role fidelity by "stealing cases," a legislature that asserts more control over judicial interpretations of its statutory product may be seen as remaining invested in its democratic responsibility to author and explicate a polity's laws.

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[91] See generally Evan Bernick, The Circuit Splits Are Out There—And the Court Should Resolve Them, 16 Engage 36 (2015) (exploring unaddressed circuit splits); Ruth Bader Ginsburg, Remembering Justice White, 74 U. Colo. L. Rev. 1283, 1285 (2003) (acknowledging that the Court might not always take up circuit splits unless they are deep or have percolated for enough time).

[92] See generally David R. Stras, The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation, 27 Const. Comment. 151 (2010) (analyzing potential causes for the Court's shrinking docket); Margaret Meriwether Cordray & Richard Cordray, The Supreme Court's Plenary Docket, 58 Wash. & Lee L. Rev. 737 (2001) (same); Arthur D. Hellman, The Shrunken Docket of the Rehnquist Court, 1996 Sup. Ct. Rev. 403 (same). Perusing basic Court statistics reveals that the shrunken docket pattern has continued until the present day. See Statistics, Harv. L. Rev., https://harvardlawreview.org/category/statistics/ [https://perma.cc/QA85-R2RN] (last visited Aug. 27, 2017).

An additional challenge created by the presence of underwrites—or at least by increased efforts to promote underwriting as a legislative modality—is the enhanced prospect of policy-related conflict. If each legislative session featured constant revisiting of old laws and their interpretation in the courts, this could make matters feel less settled for officials, administrators, judges, and citizens. A likely result might well be increased conflict in society as a whole, the very opposite of what the underwrite aspires to accomplish. High-profile attention to underwrites may be especially conflict producing in today's polarized and gridlocked legislative settings,[93] incentivizing manipulative behavior on both sides of the aisle. Regular and conspicuous revisiting of important legislation may also have downstream effects, making almost any effort to harmonize judicial and legislative visions of a text's meaning subject to partisan challenge. In an ironic twist, more attention to the very possibility for explicit underwriting could lead to less underwriting.

We appreciate that heightened attention to underwriting as a legislative function may contribute to its becoming more politicized. The fact that underwrites signal agreement with the judiciary and consensus between the branches could serve to make legislators less vigilant or cautious about what precisely they are endorsing as an interbranch consensus. In addition, well under half of all legislators are trained as lawyers,[94] and fewer still have experience with court decisions as litigators. If underwrites garner more legislative attention, this may

[93] See generally Richard H. Pildes, Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America, 99 Calif. L. Rev. 273 (2011) (exploring the causes of severe polarization in modern politics). It is worth noting that gridlock is a function not only of polarization, but also of divided government. See Sarah A. Binder, Stalemate: Causes and Consequences of Legislative Gridlock 4–10 (2003); Sarah A. Binder, The Dynamics of Legislative Gridlock, 1947–96, 93 Am. Pol. Sci. Rev. 519, 527 (1999). We have entered a period of united government in Washington, which may alleviate gridlock in the federal legislative process, even though we remain highly polarized as a nation. And it may be that we see lots of state-level underwriting even in periods of polarization because there is less gridlock within state legislatures.

[94] The number of lawyers in the state legislatures is about fourteen percent, and the number of lawyers in Congress is below forty percent, down from about eighty percent in the mid-nineteenth century. See Karl Kurtz, Who We Elect: The Demographics of State Legislatures, Nat'l Conf. St. Legislatures (Dec. 1, 2015), http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx [https://perma.cc/B3W3-V9DL]; Debra Cassens Weiss, Lawyers No Longer Dominate Congress; Is Commercialization of Profession to Blame?, A.B.A. J. (Jan. 20, 2016, 8:06 AM), http://www.abajournal.com/news/article/lawyers_no_longer_dominate_congress_is_commercialization_of_profession_to_b [https://perma.cc/76K5-KC8L].

inadvertently contribute to policy-related confusion given legislators' often rudimentary understandings of the judicial holdings and reasoning they are asked to approve. Legislatures also may not fully understand or anticipate the implications of what they are doing when they are underwriting. Cases do not come briefed with a clear guide as to what is holding and what is dicta, and the art of citing and quoting from cases to signal agreement can sometimes sow confusion for legal audiences.[95]

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[95] An interesting example here may come from the 1982 amendments to the Voting Rights Act of 1965. In a famous modification of the voting rights regime in 1982, Congress simultaneously overrode *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which had purported to require plaintiffs in voting rights claims to show that a practice or procedure was enacted or maintained at least in part for an invidious purpose, and underwrote *White v. Regester*, 412 U.S. 755 (1973), which had allowed plaintiffs to make out their claims through a showing of discriminatory results. See, e.g., S. Rep. No. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179 ("S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [that] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*." (footnote omitted)); id. at 67, *reprinted in* 1982 U.S.C.C.A.N. 177, 246 ("New Subsection 2(b) delineates the legal analysis which the Congress intends courts to apply under the 'results test.' Specifically the subsection codifies the test for discriminatory result laid down by the Supreme Court in *White v. Regester*, and the language is taken directly from that decision. 412 U.S. 755 at 766, 769."); accord H. Rep. No. 97-227, at 2, 28–30, 43, 71–72 (1981) (self-consciously rejecting *Bolden* and endorsing *White*). But during the underwrite, Congress, while quoting the *White* standard, changed a word from *White* in the text of the statute without careful explanation. The Court decision gives minorities the right "to elect *legislators* of their choice," *White*, 412 U.S. at 766 (emphasis added), while the statute gives minorities the right "to elect *representatives* of their choice," 42 U.S.C. § 1973(b) (2012) (emphasis added). This "imperfect" underwrite gave rise to a subsequent case about whether the statute covers only legislators or also judges. See Chisom v. Roemer, 501 U.S. 380 (1991) (holding, by a 6-3 vote and over vigorous dissent from Justice Scalia, that § 2 of the Voting Rights Act applies to judicial elections). Irrespective of what the Court ultimately did with the signal from Congress about its endorsement of *White* (and recognizing that both *White* and *Bolden* involved constitutional dimensions), this example serves to highlight a real cost of underwriting practices that seem explicit and carefully considered but can also be confusing for downstream interpreters.

All that said, it is important to understand the core benefit of the underwriting-overriding hybrid here that might serve to counterbalance the costs of imperfect articulation. The Court after the 1982 amendments was given an absolutely clear signal that *Bolden* contained the wrong kind of analysis for developing statutory voting rights and that *White*'s discriminatory results approach was the generally preferable one going forward. Although Congress drew from constitutional law in doing its underwriting work and failed to anticipate every question about the applicability of the 1982 amendments that was to come, it was unmistakable in

At the same time, legislators are advised by attorneys at numerous levels—on their committees, in their personal offices, and through the chamber's legislative counsel. These legal staffers are responsible for providing members with guidance on relevant judicial developments. Lawyered participation on both sides of the aisle should reduce the prospects for stealth underwrites or related political manipulations. Moreover, even with heightened attention to underwrites, strategic insertions of endorsement of judicial decisions should be less likely to occur than furtive efforts to inject overrides, given that the endorsed judicial decisions at issue will presumptively remain applicable under stare decisis. We do not wish to minimize the possibilities for unanticipated confusion or strategic mischief. But in the end, this is essentially a plea that underwriting be done well and carefully rather than haphazardly and/or on the sly.

Of course, the legislative process is already quite politicized and susceptible to manipulation. It is not obvious that underwrites, premised on law and policy agreement between two branches of government, will add substantially to that witches' brew. As is true with renewal of appropriations measures and reauthorizations, laws building on the status quo may be less politicized than new policymaking proposals, although they may nonetheless give rise to partisan disagreements as a function of the legislature's composition and climate.

Further, the politicization that is part of court-legislative exchange is hardly limited to the legislature. As Justice Stevens's dissent in *West Virginia University Hospitals v. Casey* suggests,[96] Supreme Court efforts at statutory interpretation may at times be inconsistent with the faithful servant norm linked to legislative supremacy. The saga of the Civil Rights Act of 1991 (overriding many Supreme Court decisions, almost

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which direction the legislature wanted the courts to go in their statutory interpretation work. Even those skeptical of the substance of the underwriting conceded that the basic thrust of the underwrite was hard to deny. See S. Rep. No. 97-417, at 104 n.24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 277 n.24 (Additional Views of Sen. Orrin G. Hatch of Utah) ("The Committee Report could not be more explicit in its adoption of the standard of the Supreme Court in *White v. Regester*.").

Because *White* was not a Voting Rights Act case and arose under the Constitution rather than statutory law, this example is not squarely within our "statutory underwriting" category. Still, it usefully demonstrates a cost we flag in the text that could easily arise in a purer statutory underwriting environment.

[96] See 499 U.S. 83, 113–14 (1991) (Stevens, J., dissenting) (quoted in relevant part supra note 4).

all decided between 1986 and 1991)[97] and the Older Workers Benefit Protection Act of 1990 (overriding the Court for the second time with respect to the meaning of the same statutory term)[98] indicate that judicial mischief can exacerbate the prospects for policy-related conflicts on an interinstitutional level, thereby detracting from the communicative and stabilizing role of lawmaking. That this occurs more than occasionally with respect to overrides[99] suggests it will probably take place if underwrites receive heightened attention. Still, judicial undermining of the faithful agent norm may be more likely to occur when the legislature is rejecting a court's interpretation than when it is embracing one.

There are also related doctrinal consequences to consider—some of which we take up in more detail in Part III. The core doctrinal risk is

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[97] See Christiansen & Eskridge, supra note 5, at 1492–93 (listing twelve Supreme Court decisions, nine of which were decided between 1986 and 1991, that were overridden by the 1991 Civil Rights Act).

[98] Brudney, supra note 9, at 11–20 (describing a multistage process, whereby Congress in 1978 overrode a 1977 Court decision construing certain language in the Age Discrimination in Employment Act, the Court in a 1989 decision reiterated portions of its earlier decision on grounds that Congress had rejected its holding but not all of its reasoning, and Congress in 1990 then overrode the Court's 1989 decision as well; and explicating how the 1990 congressional phase of this judicially inspired interbranch exchange carried sizable opportunity costs for Congress).

[99] See generally Widiss, Shadow Precedents, supra note 5, at 531–34, 551–56 (describing the ways in which courts limit the scope or application of overrides); Widiss, Hydra Problem, supra note 5, at 881–900 (describing how the Supreme Court in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), construed an override of its earlier Title VII decision as a quasi-underwrite of that decision for other similarly worded but not subsequently amended texts).

Apart from the judicial undermining identified in *Gross*, it seems possible that overrides may be inadvertently undermined in part by Congress. For example, in the 1991 Civil Rights Act, Congress overrode the Court's refusal, earlier that same year, to endorse expert-witness fee reimbursement in a civil rights lawsuit, pursuant to the 1976 Civil Rights Attorney's Fees Awards Act. See 42 U.S.C. § 2000e-5(k) (2012); *Casey*, 499 U.S. at 88, 97; H.R. Rep. No. 102-40, pt. 1, at 78–79 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 616–17. In doing so, Congress may have unintentionally given legs to a different portion of *Casey*, which had suggested that a 1987 Court decision (*Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)) set forth a general rule of limitation on expert-witness fee-shifting. See 499 U.S. at 86; H.R. Rep. No. 102-40, pt. 1, at 78–79, *reprinted in* 1991 U.S.C.C.A.N. 549, 616–17. This implied ratification may survive even though aspects of the legislative history to the 1991 Civil Rights Act signal that *Crawford Fitting* itself was deemed suspect as a general rule. See, e.g., H.R. Rep. No. 102-40, pt. 2, at 30, 53 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 723, 738–39; 137 Cong. Rec. 30668 (Nov. 7, 1991) (statement of House Floor Manager Rep. Ford). We are grateful to Professor Peter Strauss for bringing this example to our attention.

that, although we may hope that making plain the possibility of explicit underwriting will help put other implications from legislative silence in their proper place in the panoply of reasoning from "post-enactment legislative signals,"[100] there is still a danger that courts will end up using *more* silence and inaction to derive meanings: in particular, *the inaction of failing to underwrite*. This would be a cost to the enterprise of statutory interpretation because the absence of an agreement to underwrite should not be freighted with any special meaning. To be sure, we are hopeful that the canons of acquiescence would be better understood and applied as more underwriting comes to light. Yet there is clearly some possibility that underwrites would look so attractive for implicature within statutory interpretation that enthusiastic courts might go too far and start reasoning from the absence of an underwrite. Courts might even discount stare decisis, thinking they have implied license to revisit statutory precedents where legislatures have not expressed explicit approval. Much as an underwrite can seem like it is capable of "super-charging" precedent, there is a worry that the lack of an underwrite can undermine stare decisis more generally. That would be a serious cost, and one that risks exacerbation as underwriting becomes more salient and more common.

Finally, on a less pragmatic yet still important level, there is a risk to overplaying the concept of legislative supremacy.[101] Although the idea of interbranch dialogue seems inspired by "The Legal Process" made famous by Professors Henry Hart and Albert Sacks,[102] an unduly rigid conception of legislative supremacy trades on a very nonlegal process vision that "the law" comes from just one kind of speaker. This mode of thinking is more tied to a civil law approach, not the common law perspective prevalent in the United States, where lawyers are used to

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[100] See William N. Eskridge, Jr., Post-Enactment Legislative Signals, 57 Law & Contemp. Probs. 75, 76 (1994).

[101] See generally William N. Eskridge, Jr., Spinning Legislative Supremacy, 78 Geo. L.J. 319 (1989) (defending dynamic interpretation and interbranch dialogue notwithstanding legislative supremacy); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281 (1989) (evaluating the implications of legislative supremacy in nonconstitutional areas of public policymaking).

[102] See, e.g., Hart & Sacks, supra note 14, at 774–92 ("Problem No. 27. Interstitial Correction of Decisional Doctrines of General Application"); id. at 810–44 ("Problem No. 29. Revision of Judicial Interpretation of an Existing Statute"). In our forthcoming paper on interbranch dialogue, we draw out the legal process etiology more explicitly. See Brudney & Leib, supra note 2, at Part III.

judicial development of policy over time.[103] Beyond this potential lack of familiarity to our common law tradition, an undue assertion of legislative supremacy risks derogating from the dialogue itself. If one institution is always master and one always subordinate, this can have a negative effect on the productivity of the dialogue.[104]

Admittedly, these kinds of costs associated with "too much" underwriting are speculative, and judges are used to being supreme in other conversations, notably exchanges about constitutional law. Nonetheless, it can be an unusual sort of supremacy in which a legislature endorses the authority of another branch, using the other branch's words and grammar. In that regard, Senator Orrin Hatch once usefully reminded Congress that when it speaks by embracing case law, it may actually be derogating from its own authority rather than reasserting it if it is not careful to specify exactly what it hopes to accomplish in its underwriting.[105] Such concerns should not be wholly discounted, and any recommendation for making salient and more common the practice of underwriting should be calibrated with this cost, among others, in view.

### *B. Benefits*

Although one might think that legislatures have better uses for their time than identifying judicial decisions of which they approve, we have

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[103] For more on how the United States is really a hybrid common law-civil law jurisdiction, see generally Thomas H. Lee, Civil Law's Influence on American Constitutionalism, N.Y.U. L. (unpublished manuscript), http://www.law.nyu.edu/sites/default/files/upload_documents/Lee%20Civil%20Law%20Tradition%20NYU%20Final%20Draft.pdf [https://perma.cc/9YA4-5Z6A] (last visited Sept. 3, 2017).

[104] On the need for co-equal participants to make the interbranch dialogue work well, see generally Jeremy Waldron, Some Models of Dialogue Between Judges and Legislators, 23 Sup. Ct. L. Rev. (2d) 7 (2004).

[105] See S. Rep. No. 97-417, at 104 n.24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 277 n.24 (Additional Views of Sen. Orrin G. Hatch of Utah) ("[T]he Committee has chosen to adopt language with a history—language that has already been suffused with some meaning by the Court—rather than venture with language that was capable of standing on its own and being interpreted *de novo*. To the extent that they have explicitly anchored this language to *White* [*v. Regester*, 412 U.S. 755 (1973)]—and that point is far clearer in the Committee debates on this issue than even in the Committee Report—courts are obliged to recognize this and to appreciate that Congress (for better or worse) chose to incorporate the case law of *White*—all of its case law—in rendering meaning to the new statutory language. Given the Committee's decision to define the new test in terms of *White*, the Committee Report ironically is reduced substantially in importance.").

identified several clusters of reasons supporting the practice of regular underwriting. Indeed, taken together, these benefits might recommend even more underwriting in the right contexts.

The first cluster involves the abiding value of interbranch communication. Given that so much of the practice of statutory interpretation relies on the possibility of legislative-judicial dialogue, it would seem useful for there to be better communication between the branches, leading ultimately to more rational policy development over time.[106] As legislatures take the opportunity to focus on how their enacted laws are being implemented, they can help to refine interpretive efforts in the courts. Through a process of revisiting and honing legislative work product, courts can more responsibly approximate democratic preferences even as they continue to receive input from officials whose jobs are to study the consequences of various regulatory legal regimes. Thus, not only can our laws better track policy choices being made by representatives elected to set policy, but also those laws can benefit from ongoing deliberation by judges and legislators outside the narrow litigation context.

There are at least two cash-outs that can flow from this sharpening of interbranch communication. One is the added value of underwritten lower court decisions as direction to other courts. Because, as we have suggested, very few statutory conflicts reach the Supreme Court or a state's highest court,[107] underwriting a lower court decision when the legislature concludes a court "got it right" is a way for a legislature to minimize the development, or prevent the continuation, of lower court conflicts. By foreclosing contrary lower court understandings, an underwrite communicates clearly to the judicial branch on a matter squarely within the legislative bailiwick. At the federal level, this preclusion of further lower court conflicts may be especially valued in subject areas like securities and copyright, where uncertainty can be unusually costly to both regulated entities and regulators.

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[106] See Christiansen & Eskridge, supra note 5, at 1414 ("[O]ften overrides clarified confusing rules and standards created by the Supreme Court and replaced the Court's holdings with clearer legal regimes."). The authors' favorite example is the override of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), in which Congress provided an "artful" and "efficient" solution that would have been unlikely to come from the agency if the Court had permitted the FDA to assert its jurisdiction over tobacco. See Christiansen & Eskridge, supra note 5, at 1454.

[107] See sources cited supra notes 91–92.

Another cash-out is to resolve issues arising from agency nonacquiescence, the practice of executive branch officials refusing to extend law made by regional court of appeals panels. This problem arises on the federal stage because Congress assigns agencies to implement national policy through the uniform administration of its authorizing statutes, but agencies may sometimes decline to adopt regional courts of appeals decisions as properly implementing that national policy or direction.[108] Some scholars have criticized nonacquiescence as upsetting the balance between agencies and courts by depriving courts of the power to enforce congressional limitations on agency conduct until the Supreme Court enters the fray, which can often take a very long time.[109] Both the agency and the lower courts act in the belief that they are respecting and reflecting Congress's will and purposes. Underwrites offer a means of escaping this interbranch conundrum by restoring legislative supremacy as expressed through appropriately precise and elaborated text and legislative history.[110] *Mutatis mutandis*, intrastate dynamics can mirror these institutional complexities.

A second cluster of benefits leverages legal stability: underwriting can facilitate continued reliance on precedent by courts, agencies, and actors in civil society. This can be important so that courts do not backpedal, agencies continue to receive useful information about how the statutes they implement should be applied and developed, and private actors feel comfortable making investments in their operations with more confidence that today's interpretation of statutes will be close to tomorrow's. Admittedly, court-driven common law ultimately is more pliable and may pose a bigger business risk in this respect, given that the likelihood of a legislature passing comprehensive legislation reversing course is generally small. Nonetheless, more regular underwriting can

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[108] See Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 692–718 (1989) (reporting that the Social Security Administration and the National Labor Relations Board are regular practitioners of nonacquiescence).

[109] See Matthew Diller & Nancy Morawetz, Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz, 99 Yale L.J. 801, 803 (1990).

[110] This ancillary benefit also reflects that, while we have chosen not to address legislative underwrites of agency interpretations, underwrites of judicial interpretations can have a meaningful if indirect effect on agency choices and priorities.

serve to mitigate the costs associated with the legal uncertainty wrought by statutory law.

Consider in this regard our New York election law example above.[111] There was a real risk of backpedaling from a plausible, but not required, reading of the election code in just those cases where a modified decision could swing a close election. In foreclosing possibilities for future partisan meddling in election results by a motivated judiciary, the New York legislature provided a sensible underwrite to the Court of Appeals decision that stabilized the law in an area where stability is central to democratic functioning.

A third cluster involves the development of a more nuanced interpretive hierarchy. Once the practice of underwriting is exposed and utilized as a more regular feature of the legislative process, the continued use of tea-leaf reading from legislative inaction and legislative acquiescence should become less prevalent. Reasoning about what a legislature wants by looking at what it doesn't do, what decisions it doesn't override, and what steps it doesn't take to fix the development of the law is both common in the courts and regularly criticized by commentators.[112] But as courts become increasingly aware of how legislatures signify their approval in more affirmative ways through underwrites, judges might be increasingly motivated to discount the sounds of silence as dispositive or even highly probative signals. Put differently, the more underwriting looks like a real option for legislatures, the less courts will have to rely on fictions to approximate intent over time. This is not to conclude that the "silence" and "acquiescence" canons of statutory interpretation should play no role in the enterprise (and that argument doesn't follow from anything we say here); only that underwriting helps make plainer a hierarchy of forms of legislative endorsement. As we suggested above, there is a possible cost that silence may become even more salient in negative terms. Still, with careful emphasis that the lack of an underwrite is not a signal of anything doctrinally, we feel cautiously optimistic that bringing underwriting practices to light is more likely to reset an interpretive hierarchy than it is to further confuse it.

A fourth benefit we can associate with more visible underwriting might be more meaningful *overriding*. With an increase in the frequency

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[111] See supra text accompanying notes 72–78.

[112] See sources cited supra note 9. We take up this theme directly in Part III.

of these exchanges, legislatures are more likely to see it as their business to guide interpretation of their statutes and make more frequent investments in their upkeep. This development should engender greater legislative attention and care in providing useful interventions through both underwriting and overriding. Overriding is "the primary means through which [legislatures] signal[] disagreement with judicial interpretations of statutes."[113] And as interbranch interaction becomes regularized and perhaps even routinized, courts will be less often stuck guessing just what an override means. Thus, underwriting signals along with overrides can help delineate the scope of the overrides, enabling courts to identify more precisely their reach and their contours. With concern about the way "shadow precedent"—precedent that reasonably should have been overturned by an override—continues to be followed by courts even after overrides,[114] increased attention to explicit underwrites in the text of statutes and in their suitably reliable legislative histories will help instruct courts on how to hear what legislatures exert energy to say. This makes even more sense once courts come to appreciate the "diversity of interests represented and the level of public participation in th[e] process" of overriding.[115]

Finally, and perhaps most abstractly, there is likely a legitimacy enhancement within our legal system when interpretive decisions are revisited by legislators, who get to reassert their ownership over the meaning of the policies that control our democracy. In part, it may conduce to sociological legitimacy for citizens to be able to look up the laws that control them without having to parse too many opinions of judges throughout the judicial hierarchy, a "rule of law" benefit. In addition, more normative legitimacy accrues to a democracy when statutory law develops not merely through the common law process but also through the regular interventions of elected legislators, who are primarily responsible for the development of this statutory law. In whatever sense the common law can be vindicated as consistent with the ideals of deliberative democracy,[116] expanding positive elaboration of

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[113] Widiss, Hydra Problem, supra note 5, at 860.

[114] See generally Widiss, Shadow Precedents, supra note 5 (describing and critiquing the phenomenon of "shadow precedents").

[115] Christiansen & Eskridge, supra note 5, at 1414; see also id. at 1419 (noting that the legitimacy of overrides "rests upon the *open*, *deliberative*, and *pluralist* process by which statutes are supposed to be enacted").

[116] See Matthew Steilen, The Democratic Common Law, 2011 J. Juris. 437, 471–84.

statutory law to include legislatures as well as courts also seems to conduce to higher aspirations of democratic access and deliberation.

### *C. Underwriting "As Applied"*

Apart from understanding and assessing costs and benefits associated with underwrites, there are certain "as applied" aspects of the practice that may further illuminate the weight of these contesting arguments. Although our ultimate conclusion is that underwrites are entitled to respect by courts under most conditions, there are particular vulnerabilities that can threaten to limit the legal efficacy of these clear expressions of legislative approval. Below, we identify six caveats that might cut against a simplistic view regarding the application of legislative supremacy in the statutory domain.

#### *1. Underwriting Trial Court Decisions*

When a legislature seeks to underwrite a trial-court level decision, there is a question about whether such a decision could have sufficient generality or authority to bind all courts on a going-forward basis. Justice Scalia gives expression to some of this concern in his concurring opinion in *Blanchard v. Bergeron*: "Congress is elected to enact statutes rather than point to cases, and its Members have better uses for their time than poring over District Court opinions."[117] Although we do not agree with Justice Scalia that a legislature is somehow wasting its time studying cases to see if its statutes are being applied correctly, we can understand the concern with extensive legislative studies of trial-level cases in particular.

In *Blanchard*, Justice Scalia finds especially disconcerting the "role reversal"[118] required by the underwrite in that case: the Supreme Court was seemingly put in the position of parsing trial-level court cases for guidance. From one perspective, it might seem unexceptional for a legislature to find a few cases that represent its thinking, incorporate them by reference, and expect future judges to follow this legislative thinking to its logical conclusion. Yet from another, the "role reversal" issue flagged by Justice Scalia does seem to challenge the internal hierarchy of the judiciary such that it may be prudent for legislatures to

[117] 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment).

[118] Id. at 97.

focus their underwrites primarily on higher court opinions (supreme courts and appellate courts) if they hope to be effective.

Such a focus also would parry the concern that members of legislatures are not necessarily lawyers and are therefore less able to understand trial-court opinions. Further, in contrast to federal and state supreme court decisions, which are fewer in number and tend to receive media coverage, decisions by lower-level courts, especially at the trial-court level, are unlikely to be noticed by committee leaders, much less by members outside the committees. This gives rise to the risk that approval of a lower court decision reflects an exchange between committee staff and an interested private group or agency official, rather than broader awareness and appreciation from legislators.[119]

We do not advocate limiting underwrites to decisions by a federal or state supreme court. Moreover, when a statute is written in open-ended, common law–type language, as was true for the Civil Rights Attorney's Fees Awards Act of 1976,[120] for example, the widespread acceptance by lower courts of a certain approach may be an especially apt candidate for legislative underwrite. Nonetheless, we note that lower-court decisions—especially from trial courts—are more likely to have the parties' lawyers as their relevant audiences, whereas appellate and supreme court decisions are more likely to be authored with broader audiences in mind.[121] And the latter are decisions that a legislature could more easily become aware of and understand, rendering the underwrite comprehensible to future statutory interpreters.

### *2. Underwrites Using Legislative History*

Justice Scalia's problems with the underwrite in *Blanchard* were not limited to Congress's pointing to district court opinions, of course; he was also irritated that Congress did its underwriting in the Civil Rights Attorney's Fees Awards Act of 1976[122] in legislative history, with a view toward further judicial interpretations.[123] As he wrote:

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[119] See Brudney, supra note 9, at 83–84.

[120] 42 U.S.C. § 1988(b) (2012) (providing that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs").

[121] See Lawrence Baum, Judges and Their Audiences: A Perspective on Judicial Behavior 170 (2006); Richard A. Posner, How Judges Think 146 (2008).

[122] Pub. L. No. 94-559, 90 Stat. 2641.

[123] *Blanchard*, 489 U.S. at 98–99.

> What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.
>
> I decline to participate in this process. It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, *in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.*[124]

Although we will not revisit here the perennial legislative history debates,[125] we do not share Justice Scalia's blanket skepticism about the value of a legislature's explanation of its purpose or intent in reliable documents produced as an integral part of the legislative process—or about courts' reliance on such documents in their own interpretation.[126] Still, in the proposed underwrite at issue in *Blanchard*, Justice Scalia highlights that the district court opinions were cited by only one chamber rather than both[127]—and the committee reports failed to

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[124] Id. at 99 (emphasis added).

[125] Compare, e.g., Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371, 375–79 (arguing against undue reliance on legislative history in light of democratic theory and other practical concerns), with Abner J. Mikva, A Reply to Judge Starr's Observations, 1987 Duke L.J. 380, 382–85 (maintaining that "the use of legislative history is compelled by the inherent ambiguities of statutes"); Kavanaugh, supra note 20, at 2149–50 (suggesting that some judges may have a perverse incentive to find textual ambiguities as an excuse to rely on favorable legislative history), with Robert A. Katzmann, Judging Statutes 9–10 (2014) (positing that judicial respect for legislative history makes courts more likely to interpret laws in a manner consistent with legislative purposes and increases the prospects that Congress will perceive federal courts as productive partners in the lawmaking enterprise).

[126] See Brudney, supra note 9, at 70–86 (discussing modalities of reliable legislative history); see also Peter L. Strauss, The Courts and the Congress: Should Judges Disdain Political History?, 98 Colum. L. Rev. 242 (1998) (arguing that using political history in understanding statutes is required by constitutional structure).

[127] *Blanchard*, 489 U.S. at 98. The House Committee Report does discuss the Fifth Circuit decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (which the district courts cited in the Senate Report had construed), and it makes clear that the judicial remedy of attorney's fees must be "full and complete" in order for victims of civil right violations to have effective access to court. See H.R. Rep. No. 94-1558, at 1, 8 (1976).

describe the significance and import of the cases they were citing,[128] leaving the Court to do the complicated work of "separating holding from dictum."[129]

For an underwrite based on legislative history to deserve its rightful place, we would generally agree that both cameral entities (where relevant) should evidence their intent to underwrite; they also need to explain themselves well enough that the judiciary is not left at sea with little more than a string cite. Otherwise, there is the ironic risk of an increase in judicial discretion (and perhaps judicial mischief) within a practice that is supposed to be limiting judicial discretion through important signals from the principal of all statutory product.[130]

### *3. Underwrites in Uncodified Portions of Enacted Laws*

Another possible mode of attack against the kind of underwrite we illustrate in Part I is that the specific provisions that execute the underwrite often appear in preliminary material in statutes, such as findings or purpose sections. No one doubts these provisions are enacted law, so even formalists would have to treat them as having met the recognized requirements of lawmaking (in contrast to the formalist view of legislative history). Yet, the Supreme Court at one point indicated that these portions of enacted law—which do not always make their way easily into the United States Code—may "not constitute an exertion of the *will* of Congress which is legislation, but a recital of considerations which in the *opinion* of that body existed and justified the expression of its will in the [relevant] act."[131]

That said, the sections passed into law in our examples of underwrites above are clearly substantive legislation, not mere "opinions." And the placement of the underwrite in a findings or purpose section is not mere interpretive guidance with courts as the only audience, but is a substantive piece of legislative will that should be treated as such. It is

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[128] *Blanchard*, 489 U.S. at 98–99.

[129] Id. at 97.

[130] When overrides are ambiguous or imprecise, they too can have this perverse effect. See generally Widiss, Hydra Problem, supra note 5, at 861 (highlighting that the interpretation of overrides can serve to increase judicial discretion when the override's function is largely to "check . . . judicial lawmaking").

[131] Carter v. Carter Coal Co., 298 U.S. 238, 290 (1936) (discussing the Bituminous Coal Conservation Act of 1935, 49 Stat. 991, § 1 (codified at 15 U.S.C. §§ 801–02 (Supp. II 1936))).

useful to remember that when the Court issued its skeptical remark about congressional recitals, it was most likely protecting its prerogatives in the domain of constitutional law (where judicial rather than legislative supremacy is the default norm). The statute at issue in that case was declared to be an unconstitutional exercise of Congress's powers, so Congress's own opinion about the statute's constitutionality could not be taken by the Court to be dispositive.[132]

Accordingly, we do not think there is any conceptual difficulty with placing statutory underwrites within prefatory material in statutory drafting. Still, legislatures may want to be clear that, in findings or purposes sections that include underwrites, they are expressing their will about the meaning of a newly enacted provision rather than their opinion about its constitutionality. This may also make it more likely that those responsible for translating public laws into the U.S. Code will situate the underwrite in an accessible form for courts to see, cite, and respect. No matter how the session laws ultimately get inserted into relevant published codes, when a legislature embraces a statutory decision (rather than a constitutional decision), the courts should never forget it is a statute they are expounding, subject to the fundamental principle of legislative supremacy.

### *4. Intended Audiences and Underwriting*

Different statutes are directed to different audiences, and underwriting practices must remain sensitive to these differences. Many statutes aim to control subjects' primary conduct, while some statutes seek to guide courts or other governmental actors.[133] As a general matter, to the extent legislatures aim to be as clear as possible to citizens and residents about how to conform their conduct to law—using underwrites and other available means of clarification about a law's meaning—it seems reasonable to expect that courts should heed a legislature's guidance. Yet there are classes of laws—rules of procedure and evidence strike us

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[132] The case was decided right before the Court finally bought into the New Deal and its expansive understanding of Congress's authority under the Commerce Clause. In the statute at issue in *Carter*, Congress had used its findings to emphasize that regulating the coal industry was in the "national public interest"—and that it "directly affect[s] . . . interstate commerce." 49 Stat. 991–92, § 1 (codified at 15 U.S.C. §§ 801–02 (Supp. II 1936)).

[133] See, e.g., H.L.A. Hart, The Concept of Law 27–49 (2d ed. 1994); Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984).

as the most obvious—where an underwrite might have less purchase because judges may plausibly believe that they have a better understanding of how the rules of the courtroom do and should operate on a day-to-day basis. In this regard, it is unsurprising that enactment procedures for the Federal Rules feature intimate court involvement, and there is ample debate among scholars about whether the Federal Rules ought to have a *sui generis* interpretive regime.[134] Precisely because there is reason to doubt legislative supremacy here, underwriting of judicial decisions about internal workings of the court system might have less force. A court's sense of its supervisory control over the rules of engagement within its chambers could justify discounting, if not ignoring, what the court takes to be interstitial meddling with its affairs.

*5. Underwrites Based on Constitutional Avoidance*

There is at least one other form of underwrite that could challenge the obviousness of legislative supremacy. Imagine a statutory decision by a high court that is inflected with constitutional concerns. The court reads a fair housing statute prohibiting religious discrimination in the "sale or rental of a dwelling" as not extending to rental arrangements among roommates within an apartment. The decision construes "dwelling" to cover an apartment as a whole—rather than shared living arrangements within its subparts—not primarily because the court is confident that this is what the legislature meant or intended, but rather to avoid interfering with intimate or private relationships, such as a decision by Muslim, Jewish, or Christian roommates to live with others of their own religious faith.[135] If the legislature then underwrites that decision to exclude from its coverage all single-unit roommate arrangements, one might think a court should give respect to the statutory ratification the next time the issue arises.

But if the predicate constitutional law evolves, it may be less than obvious that the underwrite is legally effective. Thus, to continue with our hypothetical, assume the same higher court in a subsequent case

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[134] See, e.g., Lumen N. Mulligan & Glen Staszewski, Civil Rules Interpretive Theory, 101 Minn. L. Rev. 2167 (2017); Lumen N. Mulligan & Glen Staszewski, Institutional Competence and Civil Rules Interpretation, 101 Cornell L. Rev. Online 64 (2016); Elizabeth G. Porter, Pragmatism Rules, 101 Cornell L. Rev. 123 (2015).

[135] See, e.g., Fair Hous. Council v. Roomate.com, LLC, 666 F.3d 1216, 1220–22 (9th Cir. 2012).

becomes concerned about possibly unconstitutional forms of exclusion of newcomers (based on religion or national origin) by roommates in impersonal rental arrangements, where inhabitants stay short periods and there are five or six roommate changes per year.[136] The court might then decide to modify the statutory meaning of "dwelling" to cover these more commercialized roommate settings. In short, there are domains of statutory interpretation that may be shaped or driven by constitutional law. In such contexts, legislative supremacy can sometimes reasonably take a back seat to the judicial supremacy common within constitutional law. Although this is not the place to explore whether judicial supremacy is the right posture for all constitutional law, we simply note that underwrites that veer close to areas of constitutional law are more likely to see resistance from within the judiciary.

### *6. Underwrites and Ripple Effects*

With all of these caveats, what then of the unexceptional view that, when a legislature agrees that the judicial branch got an interpretive decision correct, the courts ought to stay the course and respect their own precedent rather than backpedal from it? It is hard to argue with this proposition. Even if the legislature is only explicitly and clearly endorsing an appellate court decision before the issue reaches the highest court, the legislature is king in the world of statutory law, and it needs to be respected throughout the judicial hierarchy, however awkward it may be for a highest court to feel bound by an intermediate appellate court that has been underwritten by the courts' real boss, the legislature.

Still, as with legislative overrides, there is likely to be what Professor Deborah Widiss has called the "hydra problem": when a legislature says something specific about developing case law in one statute, it may "permit the rapid growth of new 'heads' in numerous other statutes."[137]

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[136] See Elizabeth A. Harris, A Pocket of Manhattan Where No One Stays for Long, N.Y. Times (Feb. 25, 2013), http://www.nytimes.com/2013/02/26/nyregion/in-new-york-financial-district-is-a-pocket-of-transience.html?ref=nyregion&_r=0 (reporting on New York City financial district apartments with high level of roommate turnover among childless young professionals).

[137] Widiss, Hydra Problem, supra note 5, at 863. Professor Widiss's "hydra" model does not exactly translate to the underwrite context because the original "severing of a head" makes more sense as a metaphor for an override. Id. Still, because an underwrite stunts growth in one area, we can use the hydra model to highlight similar potential dynamics that could occur in the underwrite domain.

For instance, imagine a scenario in which a legislature underwrites a high court decision to embrace a "disparate impact" claim of discrimination under a core civil rights statute, which did not make absolutely clear that such claims are legally viable. Then imagine that the high court is presented with a disparate impact claim of discrimination under a different, though related, antidiscrimination statute with slightly different wording from the core civil rights statute.[138] The "hydra problem" here would be an assumption that, because the legislature took the time to underwrite the disparate impact theory for the core statute, it is reasonable to draw a negative inference regarding the disparate impact claim's viability in the other statute. We would agree with Widiss that this kind of reasoning is neither required by logic nor is it respectful of the way legislatures work.[139]

Accordingly, it is important for underwrites to be respected for all they mean for the statutes to which they pertain but not to be the basis for negative inferences about statutory law elsewhere. We would not necessarily go where Widiss does in the override context: she proposes "a rebuttable presumption that enactment of an override calls for the (re)interpretation of . . . analogous provisions in related statutes."[140] At the same time, we share her concerns when it comes to the dangers of negative inferences associated with underwrites.

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[138] This is a simplification of a story one could tell about the Civil Rights Act of 1964, *Griggs v. Duke Power Co.*, and litigation under the Fair Housing Act of 1968. See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2525 (2015) (holding that disparate impact claims are viable under the Fair Housing Act). The case does not actually invoke the "hydra problem" in the way we suggest in the text, but it could have. In the real case, the Court found that Congress "ratified" the disparate impact theory (that was utilized in courts of appeals cases) through 1988 amendments to the Fair Housing Act. See id. at 2521, 2525. The proposed ratification would not have amounted to an underwrite in our terms; rather, it was asserted under a theory of implied endorsement through legislative silence. See id. at 2520 ("'If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.' A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 322 (2012); see also *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 244, n.11 . . . (2009) ('When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction of the statute'); *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 336 . . . (1934) (explaining, where the courts of appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, '[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government')." (alterations in original)).

[139] See Widiss, Hydra Problem, supra note 5, at 863–64.

[140] Id. at 864–65.

It is hard to say as a matter of pure theory whether a legislature's *negating* versus *endorsing* a court decision—overrides or underwrites—would generally be intended to have the more substantial ripple effect outside the core area of a focused legislative intervention. One could argue that an endorsement is more likely portable outside the core into the periphery because the political capital needed to enact a ratification might reside in a more consensual group, whereas the political economy that animates a typical override might require cobbling together a potentially more fragile coalition. Under such a view, the underwrite should be "contagious," as it were, in statutory interpretation, whereas the override should be narrowly construed.

On the other hand, one might suggest that an underwrite is cheap talk because it looks like a form of passing the buck and putting a decision on a different branch, whereas the override is throwing down the gauntlet and taking democratic responsibility for results. Under that view, the underwrite is the thing that should be narrowly interpreted and the override—precisely because it is hard to accomplish—should be expansively construed as an achievement of democratic capital.

We think there is no clear answer as to which of these views is right in the general case. Different areas of law may have different dynamics that would need to be considered. For example, overrides in criminal law[141] and underwrites in tax[142] seem especially easy for legislatures to accomplish. The political economy of particular areas of law probably needs to figure into the question of just how broadly any particular underwrite deserves to spread from its core to its periphery.

We cannot perform that level of analysis here. Beyond the general claim that underwrites should be respected at least narrowly and that *negative inferences* about other laws seem generally inappropriate, whether an underwrite should spread to cognate areas of law is a judgment call, requiring more fine-grained discussion about the socio-legal and political dynamics within any legislative subfield. Given these realities, we suggest that courts pay close attention to deliberative expressions of legislative purpose or intent contained within or accompanying such underwrites. They should take additional notice if a

[141] See Christiansen & Eskridge, supra note 5, at 1361 (finding that overrides occur most frequently when the government loses criminal law cases).

[142] See Staudt et al., supra note 10, at 1352–55 (finding many underwrites in the tax area because there is regular oversight by relevant congressional committees about what is going on in the courts).

cluster of underwrites and overrides in the same enactment can help clarify the reach and ambit of portability.

## III. INTEGRATING UNDERWRITES

Having concluded thus far that the practice of underwriting is more common than previously understood and having suggested that (when done carefully) the practice should be viewed as a net benefit to our democracy, as well as our enterprise of statutory interpretation, this Part describes how to integrate underwrites with certain longstanding and influential interpretive doctrines. We suggest how underwrites comport with general approaches to stare decisis in statutory cases (Section III.A) and how to think about underwrites' relationship to the doctrines of acquiescence common within statutory interpretation cases (Section III.B). We then consider some particular circumstances where more—or less—underwriting might be valuable (Section III.C), and we conclude by identifying certain institutional mechanisms that might help to routinize and spotlight underwrites (Section III.D).

### *A. Interplay with Stare Decisis*

We cautioned earlier about courts assuming they could discount stare decisis and revisit their past precedents when legislatures do not underwrite previous court decisions. We do not intend to enter into the scholarly debates about theoretical or practical justifications for respecting precedent.[143] Instead, we accept that such respect is valuable as a general matter, while also identifying certain exceptional situations where courts may be more justified in departing from the precedent-based meaning of statutes. Those exceptional situations, in turn, shed light on when underwrites may be especially useful or appropriate.

Our interest here is in *statutory* stare decisis, consistent with our initial focus on underwrites of statutory judicial decisions. Unlike constitutional precedent, which is exceedingly difficult to modify through the constitutional amendment process, statutory precedent allows legislatures a reasonable opportunity to override or modify it.[144]

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[143] See, e.g., Daniel A. Farber, The Rule of Law and the Law of Precedents, 90 Minn. L. Rev. 1173 (2006); Maltz, supra note 9; Jeremy Waldron, Stare Decisis and the Rule of Law: A Layered Approach, 111 Mich. L. Rev. 1 (2012).

[144] See Amy Coney Barrett, Statutory Stare Decisis in the Courts of Appeals, 73 Geo. Wash. L. Rev. 317, 322–27 (2005).

Given that legislatures are primarily responsible for developing policy through statutory law, parties advocating that a court abandon statutory precedent when a legislature has not done so bear an especially heavy burden.[145] Legal scholars continue to debate the extent to which a legislature's "reasonable opportunity" to alter judicial precedent should carry close to conclusive weight or is overemphasized in this stare decisis context.[146] For our purposes, we can accept as a starting point that on the federal stage Congress has exercised its reasonable opportunity with some frequency in response to Supreme Court statutory decisions.[147] Accordingly, stare decisis regarding Supreme Court precedent is presumptively quite robust.[148]

There are at least three major justifications for why stare decisis in this setting should carry substantial interpretive weight.[149] One involves rule of law values. Respect for precedent reflects a commitment that "bedrock principles are founded in the law rather than in the proclivities of individuals."[150] This commitment implicates related concepts of judicial stability and neutrality. Subsequent judges must accord proper

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[145] See id. at 317. Because judges make all common law, they have more leeway to change their own precedent. On the variability of the force of stare decisis among statutory, constitutional, and common law cases, see, for example, *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–10 (1932) (Brandeis, J., dissenting); Brian C. Kalt, Three Levels of *Stare Decisis*: Distinguishing Common-Law, Constitutional, and Statutory Cases, 8 Tex. Rev. L. & Pol. 277, 277–78 (2004); Edward H. Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 540 (1948).

[146] Compare Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 177, 183 (1989) (arguing for conclusive weight), with Hillel Y. Levin, A Reliance Approach to Precedent, 47 Ga. L. Rev 1035, 1052 (2013) (arguing that Congress cannot easily fix judicial errors in the modern context).

[147] See generally Henschen, supra note 5, at 441–42 (citing examples from 1950s and 1960s); Eskridge, supra note 5, at 424–55 (citing examples from 1970s and 1980s); Christiansen & Eskridge, supra note 5, at 1480–96 (citing examples from 1990s and 2000s).

[148] It appears that conscious overrides in the federal context have declined somewhat since the early 1990s at least in part due to partisan polarization and gridlock in Congress. See Buatti & Hasen, supra note 5, at 265–66; Hasen, supra note 5, at 209. Still, as observed above in note 93, we may be entering into a less gridlocked period at the federal level.

[149] For relatively recent discussion and analysis of these justifications, see Barrett, supra note 144; Farber, supra note 143, at 1176–84; Randy J. Kozel, Precedent and Reliance, 62 Emory L.J. 1459 (2013); Levin, supra note 146; Waldron, supra note 143.

[150] Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

effect to their predecessors' decisions[151] and—notwithstanding their possibly different ideological proclivities—must be willing to live with the standards set forth under these precedents.[152]

A second justification involves values associated with reliance. Legislatures may rely on judicial precedents when building on an existing statutory scheme[153] or when developing new statutes in analogous areas. Government agencies rely on existing precedent when formulating or modifying rules and guidance that implement a statute. The fabric of statutory law is thickened in these ways, and private parties—both individuals and regulated entities—consistently rely on the settled quality of judicial precedents to order their behavior. As explained by Justice Scalia, a central objective of stare decisis is "protecting the expectations of individuals and institutions that have acted in reliance on existing rules."[154]

A third justification for stare decisis is more pragmatic, involving institutional cost savings for the judiciary. As eloquently phrased by then-Judge Benjamin Cardozo, "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[155] By routinely and regularly adhering to precedent, judges conserve their time and intellectual capital for new interpretive challenges.[156] This substantial gain in judicial efficiency is especially meaningful in the statutory setting, where complex legislative schemes

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[151] See Waldron, supra note 143, at 22–26, 31. See generally Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2409 (2015) (describing stare decisis as a doctrine that requires adherence to precedent even if it "means sticking to some wrong decisions").

[152] See Farber, supra note 143, at 1179.

[153] This reliance element is one reason for the canon that repeals by implication are not favored. See Morton v. Mancari, 417 U.S. 535, 549 (1974); see also Smith v. Robinson, 468 U.S. 992, 1026 (1984) (Brennan, J., dissenting) (defending the canon "not only to avoid misconstruction of the law effecting the putative repeal, but also to preserve the intent of later Congresses that have already enacted laws that are dependent on the continued applicability of the law whose implicit repeal is in question").

[154] Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment), overruled in part by Ring v. Arizona, 536 U.S. 584, 589 (2002).

[155] Benjamin N. Cardozo, The Nature of the Judicial Process 149 (1921).

[156] See Kozel, supra note 149, at 1467; Jonathan R. Macey, The Internal and External Costs and Benefits of Stare Decisis, 65 Chi.-Kent. L. Rev. 93, 102 (1989). In addition, stare decisis "reduces incentives for challenging settled precedents, saving parties [as well as] courts the expense of endless relitigation." *Kimble*, 135 S. Ct. at 2409.

enacted in stages or layers often require courts to build on their own prior holdings and reasoning.

Yet, although respect for precedent creates a strong presumption of doctrinal stability in statutory settings, that presumption is not irrebuttable. Scholars have long recognized that stare decisis at the Supreme Court level is less powerful in some circumstances than in others.[157] The Court itself has observed that precedent may be worthy of overruling if it is conceptually undermined by intervening changes in legislative action or judicial conduct, inconsistent with our sense of justice or with the social welfare, overly confusing, or a positive detriment to coherence in the law.[158] These are broadly defined categories inviting a certain amount of judicial discretion, but they make clear that stare decisis has limits based on subsequent changes in the law, conflict with important issues of national policy, or a severe lack of workable application.[159]

In addition, the Court has been less respectful of stare decisis when construing "common law statutes" such as the Sherman Act. As Justice Kagan recently explained, "Congress . . . intended that law's reference to 'restraint of trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.'"[160] Accordingly, the Court has "felt relatively free to revise [its] legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences."[161] One further ground for limiting the weight of doctrinal precedent involves decisions that have not been heavily relied on by the government or private actors. Such decisions may be of relatively recent vintage[162] or are perhaps interpretations of a single statutory provision that is unconnected to a

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[157] See generally Hart & Sacks, supra note 14, at 1357 (describing situations where the presumption may be overcome); Levin, supra note 146, at 1068–72, 1090–97 (identifying categories of cases where stare decisis should be less powerful, discussing ways to weaken the precedential value of "evil precedent," and describing how judges can assess the relative strength of reliance interests that underlie support for precedent).

[158] See Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989).

[159] See id. (identifying five Supreme Court decisions between 1963 and 1973 that relied on one or more of these grounds to overrule or modify a Supreme Court statutory precedent).

[160] *Kimble*, 135 S. Ct. at 2412 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (1988)).

[161] Id. at 2412–13.

[162] See, e.g., Boys Mkts. v. Retail Clerks Union, Local 770, 398 U.S. 235, 240–42 (1970).

larger legislative scheme or that affects relatively few members of society.

Apart from these doctrinally based limitations articulated with respect to Supreme Court precedent, there are institutional reasons why stare decisis may well carry less weight in other court settings. Congress is generally aware of Supreme Court cases: they are few in number and almost invariably attract media attention. Legislators thus have a reasonable opportunity and incentive to override decisions with which they strongly disagree. By contrast, the federal courts of appeals decide tens of thousands of cases each year, the vast majority of which draw little or no media coverage.[163] Congress can hardly be deemed to respect these decisions as precedents when it lacks the time or resources to know about more than a tiny fraction of them, much less to review them for consistency with its own enacted laws.

Then too, Congress understands that appeals court interpretations can be modified or reversed upon review by the Supreme Court and thus may not be the ultimate judicial pronouncement on matters of statutory meaning. As Professor Amy Coney Barrett observed, "The Supreme Court can hope to elicit a congressional response because it has the last word. The courts of appeals lack the ability to elicit a congressional response because they do not."[164] Finally, while Supreme Court decisions establish legal rules and precedents for the country as a whole, circuit courts have a far more limited purchase on congressional actors. Decisions establishing precedent in the Second Circuit or the Ninth Circuit are unlikely to interest senators or representatives from the South or Midwest. Accordingly, the chances are extremely slim that members of Congress will feel obligated or even encouraged to support override legislation for such appeals court decisions.[165]

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[163] See, e.g., U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding During the 12-Month Period Ending June 30, 2016, U.S. Cts., http://www.uscourts.gov/sites/default/files/data_tables/stfj_b1_630.2016.pdf [https://perma.cc/4B2R-6AXA] (last visited Sept. 26, 2017); U.S. Court of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding During the 12-Month Period Ending December 31, 2016, U.S. Cts., http://www.uscourts.gov/sites/default/files/data_tables/stfj_b1_1231.2016.pdf [https://perma.cc/9KK6-7AEC] (last visited Sept. 26, 2017).

[164] Barrett, supra note 144, at 343.

[165] See id. at 344; see also Aaron-Andrew P. Bruhl, Following Lower-Court Precedent, 81 U. Chi. L. Rev. 851, 877–78 (2014) (discussing risks of inferring congressional respect for lower court precedent). There are exceptional settings in which circuit opinions reflect a

A second institutional setting where stare decisis may be less powerful involves elected state court judges. In contrast to Supreme Court Justices, judges elected to state supreme courts must face the voting public on a periodic basis.[166] This alone engenders a heightened political awareness and a consequent sensitivity to contemporary electoral preferences or intensities that may subtly influence consideration of past precedents.[167] In addition, state court judges tend to be attuned to how state legislatures function, inasmuch as they move between the branches professionally in ways that their modern federal counterparts do not.[168] This level of familiarity and understanding means that elected state judges "are [well] positioned to use current legislative preferences as interpretive inputs,"[169] thereby softening the impact of

specialized area of expertise. Accordingly, Congress may be more likely to respond if it disagrees with the results. See Barrett, supra note 144, at 345 n.151 (discussing the Second Circuit on securities cases and the Federal Circuit on patent cases).

[166] Judges are elected by the voters in twenty-two of the fifty state supreme courts, fifteen via nonpartisan elections and seven via partisan election. See Methods of Judicial Selection, Am. Judicature Soc'y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= [https://perma.cc/N25K-YJVV] (last visited Sept. 26, 2017); see also Allen Lanstra, Jr., Does Judicial Selection Method Affect Volatility?: A Comparative Study of Precedent Adherence in Elected State Supreme Courts and Appointed State Supreme Courts, 31 Sw. U. L. Rev. 35, 40–44 (2001) (identifying twenty-one states where voters elected supreme court judges as of 2000). The percentage of all state trial and appellate judges who stand for election of some type is even higher—more than eighty percent. See Shirley S. Abrahamson, Speech: The Ballot and the Bench, 76 N.Y.U. L. Rev. 973, 976 (2001). Counting the "merit" systems (in which a judge is first seated through appointment but is retained through election), forty states have elective judiciaries. See generally Jed Handelsman Shugerman, The People's Courts: Pursuing Judicial Independence in America 296 n.22, 366 nn.1–4 (2012) (describing what percentage of the states use elections to select their supreme courts and what form these elections take).

[167] See Aaron-Andrew P. Bruhl & Ethan J. Leib, Elected Judges and Statutory Interpretation, 79 U. Chi. L. Rev. 1215, 1254, 1257 (2012).

[168] See Hans A. Linde, Observations of a State Court Judge, *in* Judges and Legislators: Toward Institutional Comity 117, 118 (Robert A. Katzmann ed., 1988) ("[B]y dint of prior political experience as legislators or prosecutors, [many state judges] are quite familiar with the legislative branch and feel comfortable interacting with it."). By contrast, only one Supreme Court Justice appointed since the 1950s (Justice O'Connor in 1981) held prior elected legislative or executive office. See Lee Epstein, Jack Knight & Andrew D. Martin, The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court, 91 Calif. L. Rev. 903, 930–32 (2003). None of the Justices appointed since 2003 (Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, and Gorsuch) have held such elected offices. See Robert Alleman & Jason Mazzone, The Case for Returning Politicians to the Supreme Court, 61 Hastings L.J. 1353, 1354–56, 1391 (2010).

[169] Bruhl & Leib, supra note 167, at 1254.

statutory stare decisis. Further, state capitals are relatively small and concentrated environments when compared to Washington, D.C. In these more intimate surroundings, state judges and legislators interact more often and understand one another better, which further encourages judges to acculturate to currently enacted legislative modifications or revisions.

Presumably for these reasons, elected judges—especially but not exclusively those chosen via partisan ballot—have been found to be less willing to adhere to precedent than their appointed counterparts.[170] Moreover, there is evidence that elected judges write more opinions and get cited less often, suggesting a lighter force of stare decisis.[171] Additionally, state court judges elected to their positions make more campaign contributions than their appointed counterparts; they also are more likely to have attended lower-ranked in-state law schools than their appointed colleagues from other states.[172] Perhaps not surprisingly, some scholars have concluded that these elected judges "are more like politicians and less like professionals."[173]

What does all this mean for integrating the practice of underwrites with our varied commitments to stare decisis? Our taxonomy of settings in which stare decisis is less robust invites consideration of the same settings as attractive candidates for legislative underwrites. Thus, for instance, Congress might decide that underwriting a particular Supreme Court decision is valuable in an area where subsequent changes in the law have sowed confusion or uncertainty, limiting the impact of precedent. Our earlier discussion of the ratification of *Griggs v. Duke Power Co.* qualifies under this heading:[174] Congress in the Civil Rights Act of 1991 decided to incorporate the disparate impact standard set

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[170] See Stefanie A. Lindquist, Stare Decisis as Reciprocity Norm, *in* What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake 173, 178, 184–85 (Charles Gardner Geyh ed., 2011) (finding that from 1975 to 2004 partisan-elected state supreme courts were far more likely to overturn existing precedent than courts selected by other methods; non-partisan-elected courts were next most likely to overturn precedent, while appointed state supreme courts were considerably less likely to do so than either group of elected courts).

[171] See Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary, 26 J.L. Econ. & Org. 290, 326–27 (2010).

[172] Id. at 327.

[173] Id.

[174] See supra text accompanying notes 36–38.

forth in *Griggs* after the subsequent *Wards Cove Packing Co. v. Atonio* decision had cast serious doubt on the operation of that standard.[175] Additionally, underwrites may be attractive with respect to decisions where there has been minimal reliance but strong legislative support. The underwrite of *Barnett Bank of Marion County N.A. v. Nelson* in the Gramm-Leach-Bliley Act of 1999 might qualify here.[176] Substantial reliance on the 1996 precedent was unlikely in such a short period, but Congress strongly believed that the decision was correct and important enough to ratify in text.

It may be less obvious to infer that underwrites make sense for decisions deemed essentially unworkable in coherence terms. Yet Congress may decide that underwriting a particular decision serves to prioritize that precedent with the aim of clearing away judicial or agency flotsam and jetsam pointing in a different direction.[177] When Congress decides to lock in such a precedent before it is abandoned by the courts, this constitutes an instance of legislative supremacy appropriately asserted.[178]

A solid case can also be made to support underwrites in settings where stare decisis is weaker for institutional reasons. With respect to the courts of appeals, Congress might be especially tempted to underwrite decisions in areas of special circuit expertise, such as securities statute interpretations from the Second Circuit.[179] This arguably is what took place in Congress's underwrite of the misappropriation doctrine in the Insider Trading and Securities Fraud Enforcement Act of 1988.[180] Even for the vast majority of appeals court decisions presumptively unknown to Congress, one or more may be brought to its attention and become underwrite subjects—perhaps to

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[175] See supra notes 34–38 and accompanying text.

[176] See supra text accompanying notes 31–32.

[177] This kind of underwrite may be accompanied by explicit disapproval of contrary judicial authority. See generally supra note 35 and accompanying text (discussing overrides in the 1991 Civil Rights Act that accompanied the underwrite of *Griggs*).

[178] On the other hand, underwriting an antitrust precedent risks stifling the very common law–type development that Congress contemplated and encouraged in the first instance when it chose to legislate an economic standard ("restraint of trade") that hinged on evolving understandings of economics. We consider that counterpoint below. See infra text accompanying notes 226–27.

[179] See supra note 165.

[180] See supra text accompanying note 39.

preempt the Supreme Court from addressing a circuit conflict or simply to approve a decision in an area of law that has captured Congress's interest.

Finally, state court decisions may be especially attractive candidates for underwrites given the softer influence of stare decisis and the close political and professional relations between courts and legislatures at the state level. We set forth six examples from four states in Section I.B, but we are confident that scores of additional instances occur regularly in state legislatures across the country. At times, a legislature simply underwrites what it deems one eminently sensible judicial gloss on its incomplete or ambiguous statutory text.[181] On other occasions, a legislature aggregates and writes into law the distilled holdings from several decisions addressing the same point of statutory meaning.[182] And occasionally, a state legislature follows an even more extended judicial trail, approving a state court decision that has expanded the state law beyond a U.S. Supreme Court precedent.[183]

It might seem tempting to conclude that we are framing a linear theory of complementarity for underwrites: in areas where stare decisis is weaker, legislative endorsements are *especially* justified or *uniquely* appropriate. We think, however, that such a description would be at once under- and over-inclusive in that the relationship between stare decisis and underwrites cannot be so neatly contained.

For one thing, underwrites may well reflect legislative preferences for reasons unrelated to the strength of stare decisis. A legislature might wish to embed a relative consensus among lower courts that have specified the meaning of certain open-ended text. This wish may simply reflect an emergent or widespread policy agreement among legislators, irrespective of the number of lower courts that have spoken or the possible denial of review by the highest court. Alternatively, a legislature may underwrite from more strategic interbranch motives when seeking to lock in a high court result that is congenial to a majority

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[181] See, e.g., supra notes 66–71 and accompanying text (discussing 2010 New York domestic relations law statute); supra notes 72–78 and accompanying text (discussing 2009 New York election law statute); supra notes 59–60 and accompanying text (discussing 2009 New Jersey mortgage foreclosure statute).

[182] See, e.g., supra notes 79–83 and accompanying text (discussing 2006 Wisconsin disabilities law revision).

[183] See, e.g., supra notes 54–58 and accompanying text (discussing 2008 New Jersey law on burdens of proof).

of both houses. Legislative approval may be a hedge against shifting perspectives in an ideologically changing high court or against an effort by the implementing agency in a new administration to revisit the judicial result.[184] These examples suggest that underwrites could be seen as giving rise to "supercharged" precedents in certain circumstances: the legislature's endorsement precludes deviation by institutional actors (here, lower courts or the highest court) that otherwise might feel less constrained.

Other instances that arguably fit into such a "supercharging" model include underwrites that foreclose the possibility of agency nonacquiescence or that preclude further development of circuit court conflicts.[185] At the same time, the likelihood that underwrites make more sense where stare decisis is weakest suggests that this may be more of a *levelling-up* mechanism than a supercharge. And the risk of labeling certain forms of underwriting as "supercharged" is a tendency to weaken the standard voltage associated with stare decisis in general, which would be unfortunate.

Moreover, failure to underwrite in an area where stare decisis has relatively less weight ought not give rise to an inference that precedent is to be ignored or discounted. Despite Justice Kagan's instruction about common law statutes in *Kimble v. Marvel Entertainment, LLC*,[186] Congress's reluctance to underwrite decisions construing common law statutes like the antitrust laws or the Civil War–era civil rights laws has hardly resulted in an abandonment of respect for precedent in these fields.[187] More generally, such respect is especially important for precedent outside the Supreme Court. The same factors that contribute

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[184] In *King v. Burwell*, 135 S. Ct. 2480, 2488–89, 2496 (2015), the Supreme Court ratified an agency interpretation as "correct" (not simply "reasonable" or "permissible"), thereby precluding any effort by implementing agencies to revisit the result in the future. Just as a legislative underwrite precludes judicial revisiting or updating of its own precedent, the Supreme Court in *King* precluded agency updating of its own interpretation by invoking a "major questions" exception to the *Chevron* deference approach. Id. at 2488–89.

[185] See supra Section II.B (discussing these two issues).

[186] 135 S. Ct. 2401, 2412–13 (2015); see supra text accompanying notes 160–61.

[187] See, e.g., Smith v. Wade, 461 U.S. 30, 34 (1983) (invoking precedent to determine the nature of damages recoverable for tort liability under 42 U.S.C. § 1983); City of Newport v. Fact Concerts, 453 U.S. 247, 257–59 (1981) (relying on precedent to decide whether municipalities are immune from punitive damages in a § 1983 lawsuit); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688–96 (1978) (invoking precedent to apply the Rule of Reason under § 1 of the Sherman Act).

to the reduced influence of stare decisis with respect to court of appeals decisions strongly militate against according meaning to the absence of underwrites for these decisions. Congress lacks the time and resources to become aware of them, they are not the final judicial word on a statutory matter, and they have limited geographic scope.[188]

In sum, the rule of law, reliance, and judicial efficiency values that support statutory stare decisis remain strong. And these values, which are relevant even in settings where stare decisis has less influence, counsel against drawing negative inferences from failure to engage in legislative underwrites. At the same time, the doctrinal and institutional settings in which stare decisis appropriately carries less weight offer distinct possibilities for legislatures to underwrite on a more self-conscious and perhaps more frequent basis.

### *B. Interplay with the Varied Sounds of Legislative Silence*

Courts will need to consider how both the possibility for and ongoing practice of legislative underwriting should influence their approaches to the trio of interpretive doctrines parading under the banner of "legislative acquiescence." Federal courts and state courts[189] often reason that legislatures agree with their rulings—and thus, that these rulings should be kept in place or even extended—when legislatures (1) stay silent after a publicized court opinion,[190] (2) reenact statutory provisions without changing them,[191] or (3) reject proposals for changes from the status quo established in the courts.[192] The modality of reasoning from legislative silence holds that legislatures probably

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[188] See supra notes 163–65 and accompanying text.

[189] For some state examples of the reenactment rule specifically, see *Madrigal v. Indus. Comm'n*, 210 P.2d 967, 971 (Ariz. 1949); *Devillers v. Auto Club Ins. Ass'n*, 702 N.W.2d 539, 568 (Mich. 2005) (Cavanagh, J., dissenting); *Rambo v. Lawson*, 799 S.W.2d 62, 65 (Mo. 1990) (Robertson, J., concurring in the result). There are occasional legislative endorsements of the reenactment rule as well. See, e.g., N.M. Stat. Ann. § 12-2A-20(B)(7) (West 2014) ("[T]he following aids to construction may be considered in ascertaining the meaning of the text: . . . a reenactment of a statute or readoption of a rule that does not change the pertinent language after a court or agency construed the statute or rule.").

[190] See generally 2B Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 49:9 (7th ed. 2012) (discussing legislative inaction after a court decision as evidence that the legislature agrees with that decision).

[191] See generally id. § 49:8 (discussing reenactment of a statute with a previous judicial gloss as evidence of the interpretation's correctness).

[192] See Eskridge, supra note 9, at 69.

acquiesce to decisions by courts that they are aware of but choose not to override.[193] The reenactment rule holds that when a legislature, presumptively aware of a judicial interpretation of a statutory provision, reenacts that statute without changing the provision, it will be deemed to have endorsed the court decision.[194] And courts may read a rejected proposal in legislative history (whether by vote of the full membership or of an important committee) to be a choice against a particular interpretation embodied in that proposal.[195]

Because pure silence and rejected proposals do not result in enacted law, they are of lesser significance in the pantheon of the tools of statutory interpretation.[196] Indeed, scholars who have considered the range of acquiescence doctrines have tended to see the reenactment rule as standing apart from mere legislative silence or inaction,[197] which Justice Scalia has called a "canard."[198] Justice Scalia's impatience with silence and rejected proposals stemmed from his view that too many inferences can be drawn from inaction or "the failure to enact 'overruling' legislation, including (1) approval of the status quo; (2) inability to agree upon how to alter the status quo; (3) unawareness

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[193] See, e.g., Peter Tiersma, The Language of Silence, 48 Rutgers L. Rev. 1, 89 (1995).

[194] See e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 804 n.4 (1998); Pierce v. Underwood, 487 U.S. 552, 567 (1988) (declining to apply the reenactment rule due to unsettled judicial interpretation but acknowledging that reenactment of a statute with consistent judicial interpretation "generally includes the settled judicial interpretation"); Lorillard v. Pons, 434 U.S. 575, 580 (1978).

[195] See e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 579–80 (2006); Doe v. Chao, 540 U.S. 614, 622–23 (2004); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975).

[196] See Cleveland v. United States, 329 U.S. 14, 22 (1946) (Rutledge, J., concurring) ("There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated and in the clarity and certainty of the expression of its will." (footnote omitted)).

[197] See, e.g., William N. Eskridge, Jr., Reneging on History? Playing the Court/Congress/President Civil Rights Game, 79 Calif. L. Rev. 613, 670–71 (1991) (finding that "[t]he reenactment rule is somewhat less questionable" than reasoning from legislative silence); Marshall, supra note 146, at 184 n.42 ("The reenactment rule is itself quite controversial and is subject to some, but not all, of the criticisms that have been directed at the silent-acquiescence argument."); Tiersma, supra note 193, at 90 ("Because the legislature has reenacted the statute, it is more likely to be aware of the courts' interpretation, and there is no doubt that the legislature has had sufficient opportunity to nullify an incorrect interpretation.").

[198] Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

of the status quo; (4) indifference to the status quo; and (5) political cowardice."[199] Others have offered similar criticisms.[200]

We need not take a general position here on the wisdom or weight of these critiques, but we believe that the reenactment rule is probably a better estimator of legislative intent than its completely silent cousins. To the extent the cluster of acquiescence canons are rules of evidence to approximate legislative intent, the reenactment rule, based on a completed legislative product, is clearer evidence than the others.[201] This is not to say the reenactment rule is without its critics,[202] but at least it is legislative *action* rather than *inaction*, which draws it closer to the kinds of active underwriting we explore in this Article.

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[199] Tiersma, supra note 193, at 91. Professors Hart and Sacks have a list twelve-deep. See Hart & Sacks, supra note 14, at 1359. It would be useful to have some empirical data shedding light on Congress's own views about acquiescence doctrines. However, the most recent and comprehensive study of congressional knowledge and attitudes regarding interpretive factors such as dictionaries, canons, and legislative history, by Professors Gluck and Bressman, does not address legislative silence. See Gluck & Bressman, supra note 2.

[200] See, e.g., Reed Dickerson, The Interpretation and Application of Statutes 181 (1975); Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 537–47 (1983); John C. Grabow, Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities," 64 B.U. L. Rev. 737, 752–55 (1985); Tiersma, supra note 193, at 92–93. See generally Helvering v. Hallock, 309 U.S. 106, 119–21 (1940) ("To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.").

[201] See Tiersma, supra note 193, at 95–96 ("The inference is therefore stronger if Congress has reenacted the statute without change, or has rejected a proposed amendment that would undermine the court's interpretation. Yet because these are merely inferences, and because competing inferences are also possible, congressional silence communicates nothing, but is at best an indicator of possible legislative intent."); see also Scalia & Garner, supra note 138, at 256–60 (more or less endorsing a form of the "reenactment canon" after dismissing acquiescence inferences from inaction).

[202] See, e.g., Robert C. Brown, Regulations, Reenactment, and the Revenue Acts, 54 Harv. L. Rev. 377, 383 (1941); A.H. Feller, Addendum to the Regulations Problem, 54 Harv. L. Rev. 1311, 1317–18 (1941); Erwin N. Griswold, A Summary of The Regulations Problem, 54 Harv. L. Rev 398, 400 (1941); Filiberto Agusti, Note, The Effect of Prior Judicial and Administrative Constructions on Codification of Pre-Existing Federal Statutes: The Case of the Federal Securities Code, 15 Harv. J. on Legis. 367, 368–69 (1978). To be fair, many critiques focus on the reenactment rule's effect on administrative interpretations and regulations rather than on judicial interpretation in particular. See Randolph E. Paul, Use and Abuse of Tax Regulations in Statutory Construction, 49 Yale L.J. 660, 665 (1940) ("No person, therefore, could honestly claim that the doctrine of approval by reenactment has any solid factual foundation.").

To be sure, the reenactment rule can be used to assume that silence—a form of inaction—during the reenactment process connotes a *sub silentio* approval for all judicial interpretations of the statute that precede its reenactment.[203] But this is not the form of the rule that is most persuasive. Rather, the rule works best—and is most consistently applied—when the legislature is self-consciously acting in a way that can reasonably be understood as an endorsement of a preexisting judicial gloss on a particular statutory provision that is being reenacted.[204]

Notice that the more self-conscious an endorsement through reenactment is, the closer that endorsement approaches an underwrite. But it is important to get clear on the range of reenactments that could approach an underwrite yet still come shy of it. For example, imagine that a legislature is planning to amend a policy approach substantially but wants to leave some basic features of that preexisting policy intact. Rather than enacting only a series of amendments and trying to figure out where in the modified statute the revisions belong, it might be more efficient for a legislature to rewrite the whole statute so it holds together with more coherence. Although the legislature might not be explicit about this in the text of the statute or the relevant committee reports, it might be an obvious assumption of the drafters that the parts that remain intact from a prior law are meant to be continuous with the legal decisions made up to the point of the revision.

This example would not qualify as a true underwrite in our terms because the conditions for the gold standard of underwriting—elaborated text or simple text accompanied by elaborated agreement in the relevant committee reports—are not met. But the portions of the statute that have been effectively reenacted can sometimes fairly be taken as acquiescence. This is especially true when discussion in the legislative history tends to imply support for background decisional law without mentioning names of cases.

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[203] See Paul, supra note 202, at 666 n.32 ("[T]he reenactment rule . . . is based not so much upon active acquiescence as upon the assumption that the ruling would have come to the affirmative attention of [the legislature] if it had involved any violent departure from the spirit of the act." (emphasis omitted)).

[204] See Kenneth Culp Davis, Administrative Rules—Interpretive, Legislative, and Retroactive, 57 Yale L.J. 919, 941 (1948) ("Whenever [legislative] awareness of the administrative [or judicial] interpretation does not appear and seems unlikely, the basis for the reenactment rule vanishes."); Eskridge, supra note 197, at 671 ("[T]he reenactment rule should not apply if there is no sound reason to believe that [the legislature] was aware of the Court's decision.").

It is obviously not always the case that a reenactment can routinely be taken to imply agreement with background decisional law. Often, legislatures betray no knowledge or understanding of the complicated gloss that judges have placed upon statutory language. And legislatures surely reenact lots of statutory provisions incidentally to modifications, amendments, and updates without any study of or assumptions about the case law in place at the time of reenactment. Ultimately, it takes a sophisticated interpreter to know the difference. But it is not just a canard to find reenactment to be probative of intent in some set of cases.

This example helps reveal a possible gap in Professors Hart and Sacks's understanding about the reenactment rule, a point made helpfully clear now that the potential for underwriting is squarely on the table. Hart and Sacks tended to resist what they saw as a "rigid" reenactment rule; they preferred to replace it with something akin to a clear statement rule, recommending a finding of acquiescence only when a legislature explicitly seeks to "freeze" the law in place.[205] Although they didn't articulate it, an underwriting is probably the clear statement they were looking for.

We agree that underwrites are the *best* evidence of legislative intent among acquiescence signals. But it is not hard to see that legislatures sometimes will operate with assumptions of correctness of decisional law when they undertake efforts to reform aspects of legal regimes. The reenactment rule can pick up on just those instances when the legislature is implicitly carrying forward judicial decisions into reenacted statutes. The "rigidity" Hart and Sacks impute to the reenactment rule may stem from not fully appreciating that it is only a rule of evidence rather than a dispositive decisional rule.

Hart and Sacks also seem to have exaggerated the likely effect of an acquiescence found to follow from reenactment, which may be part of why they wanted an explicit underwrite to do the work of proving that the legislature agrees with a court decision. Specifically, Hart and Sacks imagined that the doctrinal effect of reenactment was to "freeze the statute in exactly the way it has been applied" and for the statute's body of law "to lose its capacity for continued growth."[206] But it strikes us that

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[205] See Hart & Sacks, supra note 14, at 1366–68; see also T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 37 n.79 (1988) (discussing the Hart and Sacks approach to reenactment).

[206] Hart & Sacks, supra note 14, at 1368.

this is overreading a reenactment—and indeed would overread an underwrite, as well. An acquiescence or endorsement should not reasonably be construed as a "freeze" or as a prohibition on "continued growth." Rather, a reliably expressed underwrite or acquiescence-by-reenactment is primarily a clear instruction not to backslide. It also might permit the approved decision to be utilized in further development of judicial common law decision making, at least in the immediate area and sometimes even in cognate areas, as we discussed in Subsection II.C.6.[207] Although we concluded there that negative inferences from the failure to underwrite should not be legally relevant, nothing requires an underwrite to "freeze" law, nor must an underwrite be so constrained. When a legislature gives a court a "Hear!, Hear!," it very well may be signaling that the underwritten decision can be further developed in traditional common law form and may even be portable to related statutes.[208] Once this is clarified, someone generally sympathetic to Hart and Sacks might both acknowledge the usefulness of underwrites *and* admit that reenactments can be a useful signal to the judiciary not to backslide in an area of decisional law interpreting a statute that has been changed in several respects.

In summary, as judges think about integrating underwrite practices into statutory interpretation, they should be able to see more clearly the distinction between legislatures' active engagement with judicial decisions of the past and the distinctly less probative passive incorporation that inaction can occasionally signal. Judges also should be able to distinguish more readily between an outright endorsement through underwrites and the lesser support for acquiescence supplied by reenactments. But in both of these latter cases, the upshot is not that the state of law "freezes." Indeed, endorsement through underwrites might very well support further growth, reinforcing reliance by establishing that no backsliding is warranted while also giving a boost to the principles and reasoning in the endorsed cases. On this basis, the underwritten decisions can be further implemented in the newly enacted law and whatever relevant related laws make sense.

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[207] See supra text accompanying notes 137–42.

[208] As we argued in Subsection II.C.6, although we did not embrace Professor Widiss's view that overrides should be presumptively portable to related statutes, we explained that the inquiry into whether an underwrite should be "contagious" is very context-specific.

### *C. Wherefore More Underwrites?*

We hope to have convinced legislators, judges, and scholars that they should be paying more attention to underwrite practices and that underwrites are, on balance, healthy for the enterprise of statutory interpretation. We next briefly address several special contexts. Some would probably benefit from more underwriting, while others would not.

Consider *King v. Burwell*,[209] a famous case from the Supreme Court's 2015 docket. Plaintiffs there sought to invalidate a Department of Treasury regulation that awarded tax credits under the Affordable Care Act[210] to participants in health exchanges that were established by the federal government.[211] The authorizing legislation that Treasury was purporting to interpret, however, required that the credits be awarded to participants in "an Exchange established by the State,"[212] where "the State" as conventionally understood probably did not include the federal government.[213] Challengers were ultimately unsuccessful in overturning the Treasury regulation, but not because the Court granted deference to the executive agency.[214] Rather, the Court decided that "the context and structure of the [Affordable Care] Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase" to "allow[] tax credits for insurance purchased on any Exchange created under the Act," including federal exchanges.[215] Leaving aside the political hurdles, should a responsible Congress underwrite this decision by amending the Internal Revenue Code to read "an Exchange established by the State or federal government" or "an Exchange established by this Act" consistent with the holding in *King*?

This query raises the question of whether underwrites might be particularly useful in cases of drafting error. Although *King* was not

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[209] 135 S. Ct. 2480 (2015).

[210] Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119.

[211] Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (codified at 26 C.F.R. pts. 1 & 602) (citing 45 C.F.R. § 155.20).

[212] I.R.C. § 36B(c)(2)(A)(i) (2012).

[213] See *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting) (invoking a definition in the Affordable Care Act that "'State' means 'each of the 50 States and the District of Columbia'" (quoting 42 U.S.C. § 18024(d) (2012))).

[214] See, e.g., Steve R. Johnson, The Rise and Fall of *Chevron* in Tax: From the Early Days to *King* and Beyond, 2015 Pepp. L. Rev. 19, 26.

[215] *King*, 135 S. Ct. at 2495–96.

generally treated as a formal "scrivener's error" case,[216] it might be viewed as an instance of "staffer's error"[217] or even simply a case where the legislative intent was not properly transcribed into the plain language of the statute. It is reasonable to ask whether underwrites might be especially helpful in sticky cases where courts struggle between applying the plain meaning of a statute that seems counterintuitive with a potentially perverse result, and attempting to approximate common sense about what the legislature most probably intended.

Our view is that the cleanup work for drafting errors does not seem like a very pressing category for more legislative underwriting. Such cases, especially ones that reach the highest court in high-profile litigation, are likely to survive on account of the force of stare decisis. Moreover, these cases—involving stark tension between seemingly plain text and putative intent—are the most likely candidates for *overriding* if the highest court gets it "wrong."[218]

Admittedly, legislatures might consider underwriting at an earlier stage of the litigation, when the intermediate courts of appeals have spoken on the issue of a drafting error. If legislators observe that different jurisdictions are expending a lot of resources on resolving a drafting problem, a legislative intervention to underwrite or fix the statute before more judicial resources are consumed on the error seems productive. This may, in fact, be the best explanation for what happened with the Class Action Fairness Act of 2005[219]: the statute had included a provision that seemingly accidentally created a *waiting period* to file a

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[216] See generally Ryan D. Doerfler, The Scrivener's Error, 110 Nw. U. L. Rev. 811 (2016) (arguing that the Affordable Care Act contained a scrivener's error).

[217] See Jesse M. Cross, Statutory Text in the Era of the CEO Legislator: Lessons on Congressional Managing 45 (Aug. 12, 2015) (unpublished manuscript) http://ssrn.com/abstract=2642991.

[218] See Eskridge, supra note 5, at 347–48 (concluding that Congress is more likely to override "'plain meaning' decisions" than any others; nearly half the overrides from 1967 to 1990 address plain meaning or canons reasoning, whereas overrides of decisions based on legislative purpose are rare); see also Daniel J. Bussel, Textualism's Failures: A Study of Overruled Bankruptcy Decisions, 53 Vand. L. Rev. 887, 903–10 (2000) (finding that textualist decisions construing the federal Bankruptcy Code are more likely to be overridden than other bankruptcy decisions between 1978 and 1998).

[219] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2012)).

certain kind of appeal rather than a *time limit*.[220] The relevant legislative history discussed this provision as a seven-day deadline,[221] but the plain meaning of the statute clearly created a seven-day waiting period. Intermediate courts of appeals opted to favor legislative intent over plain meaning, although not without spirited debate.[222] Congress then intervened to fix the statute before the Supreme Court addressed the brewing controversy.[223] Had the Supreme Court taken up the matter more quickly, Congress probably would not have needed to act. But because the lower courts were expending time and energy on the problem, it made sense for Congress to fix the error. While it did not technically underwrite one of the lower courts by pointing to its reasoning, Congress could have efficiently done so, as it was self-consciously fixing its own prior scrivener's error. Even here, though, the argument for *an underwrite* rather than simply *fixing* the error is not terribly strong.

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[220] 28 U.S.C. § 1453(c)(1) (2006) (authorizing discretionary appeals of district court decisions about removal "if application is made to the court of appeals not less than 7 days after entry of the order").

[221] See S. Rep. No. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46 ("New subsection 1453(c) provides discretionary appellate review of remand orders under this legislation but also imposes time limits. Specifically, parties must file a notice of appeal within seven days after entry of a remand order.").

[222] Six circuits treated the text as a deadline rather than a waiting period, bypassing its plain language. See Miedema v. Maytag Corp., 450 F.3d 1322, 1326 (11th Cir. 2006); Morgan v. Gay, 466 F.3d 276, 277 (3d Cir. 2006); Patterson v. Dean Morris, L.L.P., 444 F.3d 365, 368 n.1 (5th Cir. 2006); Natale v. Gen. Motors Corp., No. 06-8011, 2006 WL 1458585, at *1 (7th Cir. May 8, 2006); Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., 435 F.3d 1140, 1146 (9th Cir. 2006); Pritchett v. Office Depot, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005). This corrective position, however, sparked some judicial controversy. See Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., 448 F.3d 1092, 1093 (9th Cir. 2006) (order denying rehearing en banc); id. at 1094, 1095 (Bybee, J., dissenting, joined by five other judges) ("The Republic will certainly survive this modest, but dramatic emendation of the *United States Code*; I am not so sanguine that in the long term it can stand this kind of abuse of our judicial power."); id. at 1099–100 ("'[R]escuing' Congress from what the panel assumes was a mistake forces both the legislative and judicial branches to deviate from their respective constitutional roles."); Spivey v. Vertrue, Inc., 528 F.3d 982, 983–85 (7th Cir. 2008) (Easterbrook, J.) (applying the plain language as written). For more on the debate, see generally Adam N. Steinman, "Less" Is "More"? Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle, 92 Iowa L. Rev. 1183 (2007) (proposing that courts could resolve this controversy by simply recognizing that the Federal Rules of Appellate Procedure provide a thirty-day deadline to file an appeal).

[223] See Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6(2), 123 Stat. 1607, 1608.

There are also potential risks associated with underwrites in drafting error cases where a court, like the Supreme Court in *King*, has arguably misconstrued plain meaning. If a legislature attempts to underwrite and is unsuccessful—for reasons related to time pressures, substantive disagreement, or politics—it is possible that the mere effort to underwrite will weaken the effect of stare decisis. While such risks are always present regarding inferences from rejected proposals,[224] the stakes are higher in a drafting error context, where reliance values are especially weighty. These are controversies in which it is usually better that statutory meaning be settled because the text reads counterintuitively, and private parties need to rely on the relevant precedent. Indeed, in *King*, part of the reason the Court chose not to use traditional agency-deference doctrine to sustain the Treasury regulation, but rather invoked its own interpretation of the statute, could have been

[224] There may even be risks from failure to offer underwrite proposals, as evidenced by the disagreement between the majority and dissent in *Bob Jones University v. United States*, 461 U.S. 574 (1983). The majority, in an opinion by Chief Justice Burger, upheld as correct a 1970 IRS interpretation of the charitable tax exemption provision of the Internal Revenue Code, see I.R.C. § 501(c)(3) (1982), which had denied tax-exempt status to private schools that practiced racial discrimination. *Bob Jones*, 461 U.S. at 595. The Chief Justice concluded that Congress had essentially underwritten this 1970 agency ruling, based on the text and legislative history of its 1976 revision of the Revenue Code. The 1976 text, see I.R.C. § 501(i), denied tax-exempt status to social clubs whose charters or policy statements discriminated on the basis of race. The accompanying House and Senate Committee Reports referred to the Court's earlier summary affirmance of a lower court decision embracing the 1970 IRS position on § 501(c)(3) as having established that "discrimination on account of race is inconsistent with an *educational institution's* tax exempt status." *Bob Jones*, 461 U.S. at 601 (emphasis added by Court) (quoting S. Rep. No. 94-1318, at 7–8 & n.5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6051, 6057–58 & n.5; H.R. Rep. No. 94-1353, at 8 & n.5 (1976)). In dissent, Justice Rehnquist drew a contrary inference from the 1976 legislation: Congress in § 501(i) showed that "when it wants to add a requirement prohibiting racial discrimination to one of the tax-benefit provisions, it is fully aware of how to do it," yet Congress did no such thing for § 501(c)(3). Id. at 621 (Rehnquist, J., dissenting).

The disagreement in *Bob Jones*—involving an agency's initial interpretation of text, adopted by a lower court and then endorsed without opinion by the Supreme Court, with congressional approval expressed through legislative history—takes us some distance from our prototypical underwriting settings. That said, and given that Congress in 1976 was extending the IRS-approved position against racial discrimination to a new field of private action (written discriminatory policies in noneducational social settings), we are skeptical about Justice Rehnquist's effort to infer meaning from Congress's failure to propose a § 501(c)(3) textual underwrite when it had done so in deliberative terms through both House and Senate reports. Had Congress attempted unsuccessfully to underwrite § 501(c)(3) in text when enacting § 501(i), the lack of success would present a closer question, requiring deeper consideration of the legislative context.

to disable backsliding in this important area of societal reliance. Had the Court chosen to sustain the regulation through deference, a future administration would be free to read the statute another way.[225] Although we have made a point to emphasize that negative inference from failures to underwrite should have no legal significance, we obviously cannot wholly control what courts and lawyers will do with this analytical category of legislative action now that we have helped make it clear that underwrites occur with some frequency.

Another area that does not call out for more underwrites might involve so-called "common law statutes," where legislatures put into place very broadly worded laws that they expect courts to develop themselves over time.[226] Examples in the states may be the local versions of the Uniform Commercial Code. In federal law we might count the antitrust statutes, where it makes sense to have relatively weak stare decisis as a general matter so that courts can adapt the application of the law to modern economic and competitive conditions without routine updates from the legislature.[227] Although we suggested above in Section III.A that areas of weak stare decisis *for institutional reasons* could be strong candidates for more routine underwrites, in the realm of "common law statutes" there is weak stare decisis *by legislative design.* Accordingly, legislatures should generally allow the common law to develop freely with only episodic interventions.

What legislative areas, then, might invite more frequent underwrites?[228] In criminal law, notice to potential defendants is of special concern, helping to structure the rules of statutory interpretation in this field.[229] Adding more precise signals of approval in our criminal

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[225] The law of interpretive deference to administrative agencies permits agencies to change their views within a permissible range of interpretations of a statute. See Chevron, U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 863 (1984). A later case, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), makes clear that lower court decisions about the meaning of an ambiguous statute generally do not bind the agency over time.

[226] For discussion, see Ethan J. Leib & Michael Serota, The Costs of Consensus in Statutory Construction, 120 Yale L.J. Online 47, 53–54 (2010).

[227] See supra notes 160–61 and accompanying text.

[228] In Section III.A, we suggested a few areas where encouraging underwriting would be salutary because stare decisis is weaker for institutional reasons: appeals court decisions in areas of special circuit expertise and state court decisions.

[229] See, e.g., Leib & Serota, supra note 226, at 54–55 (discussing the rule of lenity and the special concern of notice within the statutory interpretation regime as applied to criminal law).

law codes seems to comport with such particularized notice considerations, especially when recognizing that Supreme Court interpretations of inconclusive criminal law text often yields overrides rather than underwrites.[230] Given that the criminal law is an area of substantial interbranch disagreement, more frequent underwriting could help relieve uncertainty and tension in this area.

Finally, to return to the theme of the previous Section on the reenactment rule, there are good reasons to think that more frequent underwrites would be valuable in legislative domains where reenactment is common. As we discussed earlier, the implications from reenactment probably give us only modest information about acquiescence.[231] Accordingly, more explicit underwrites could be useful in the ongoing development of law. Tax laws and appropriations laws that tend to be the source of routine reenactment by legislatures seem especially useful areas to be clear about acquiescence, so that courts are not regularly trying to read tea leaves through legislative silence. Put differently, in legislative domains that are regularly revisited, usually reflecting a working bipartisan coalition to update and clarify the law, underwrites would seem most productive. This instinct is supported by a study of the tax area, where underwrites seem rather common.[232] By contrast, when legislatures take to reforming a statutory scheme only episodically, a reenactment after legislative study can be more plausibly taken as a reasonably reliable signal for courts to stay the course and hence underwrites seem less necessary.

### *D. Bringing Underwrites to Light*

There are better and worse options for making underwrites more systematically visible, keeping in mind some of the benefits and costs we described above. Consider first a new standing conference committee in a legislature, composed of elected members of the lower and upper houses, modeled on the International Law Commission ("ILC"), an

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[230] See Christiansen & Eskridge, supra note 5, at 1361 ("[A]ltogether criminal law, criminal procedure, and habeas corpus rules account for almost 13% of the total overrides, making the combined category among the largest producers of overrides.").

[231] See supra Section III.B.

[232] See generally Staudt et al., supra note 10, at 1342 (describing Congress's tendency to codify case outcomes). But see Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987) (arguing that given Congress's appetite for routine updates and overrides of civil rights statutes, legislative silence is probative).

elected body of the General Assembly of the United Nations.[233] The ILC is involved in codification processes for international law, reading international adjudicatory bodies' decisions and—ALI Restatement-like—putting customary common law into a codified form on an annual basis. The rest of the General Assembly has an opportunity to adopt ILC reports and codifications, and these efforts can have continuing legal force in future litigations. Although the dynamic is quite different on the international law stage, of course, it would be worth considering building an ILC-like body within a governing legislature. Such a body would be tasked with overseeing statutory decisions made within the courts, reporting back to the full membership annually, seeking to underwrite in a more regular fashion case law that gets it right in order to reinforce clarity and encourage reliance. At the very least, such a body could usefully publicize the underwrites that the legislature has already promulgated as part of its regular work product, thereby increasing the chances that courts will pay attention prospectively. This process could also help LexisNexis and Westlaw flag certain cases green, just as they try to red-flag cases that have been overruled by judicial authority—and as they try to do (mostly imperfectly) when a case is overridden by statute.[234]

One could also build off of Chief Judge Robert Katzmann's innovative "statutory housekeeping" project.[235] The project was piloted in the D.C. Circuit in 1992 and was designed as a federal "transmission belt,"[236] directing statutory interpretation decisions about poorly drafted

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[233] See generally Fernando Lusa Bordin, Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law, 63 Int'l & Comp. L.Q. 535 (2014) (discussing the work and impact of the ILC). Thanks to Professor Julian Arato for the lead.

[234] See generally Brian J. Broughman & Deborah A. Widiss, After the Override: An Empirical Analysis of Shadow Precedent, 46 J. Legal Stud. 1, 2 (2017) (highlighting that LexisNexis and Westlaw do a good job of red-flagging cases that are overruled by cases but a less good job of red-flagging cases overridden by statute).

[235] See Robert A. Katzmann & Russell R. Wheeler, A Mechanism for "Statutory Housekeeping": Appellate Courts Working with Congress, 9 J. App. Prac. & Process 131, 133 (2007); Jeff Simard, Note, Stimulating Dialogue Between the Courts and Congress: Sprucing Up the "Statutory Housekeeping" Project, 99 Minn. L. Rev. 1195, 1199–204 (2015).

[236] Robert A. Katzmann & Stephanie M. Herseth, An Experiment in Statutory Communication Between Courts and Congress: A Progress Report, 85 Geo. L.J. 2189, 2193 (1997). Judge Katzmann began the project while with the Brookings Institution in Washington, D.C., prior to his appointment to the Second Circuit. Id. at 2189.

statutes to various offices in the legislature. The aim was for these offices to receive and review copies of decisions of the U.S. Court of Appeals, identifying federal statutes that had drafting errors, gaps, and ambiguities with the hope of reengaging judicial-legislative dialogue.[237] The courts do not offer policy recommendations; they only "speak" through their public opinions, although the submission itself is an effort to affect the legislative agenda.[238] The project still exists after twenty-five years, and many more circuits now participate. But the procedures are fairly low salience and have not led to substantial revisions of statutes by Congress to fix the mistakes the courts are flagging.[239] Still, the Office of Legislative Counsel views the project as a success because, as the entity most responsible for drafting, it is appreciative of the opportunity to learn from prior drafting errors observed by the courts.[240]

One shortcoming of the "statutory housekeeping" project is that the transmission belt goes only one way. That is, little comes back from the legislators to keep the "dialogue" open. It is perfectly reasonable to imagine that legislatures often do not respond to the inputs they get because they are satisfied with the judicial resolution. More express underwriting through an organized transmission belt, however, would be a helpful means of letting courts know they are doing an acceptable job. Rather than inducing such satisfaction from mere silence, Legislative Counsel could be tasked with a more substantial effort to ensure that the opinions submitted actually get addressed through self-conscious underwriting.[241] This project could also be reinforced and expanded to the Supreme Court and the states (it now is only a transmission belt from the Courts of Appeals in the federal system) through statute rather than voluntary participation to increase publicity, transparency, and use.[242]

A third option would be to promote some form of "judicial impact statements" in the legislative process to encourage clearer and more

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[237] Simard, supra note 235, at 1200–01.

[238] Id. at 1195.

[239] Id. at 1205–09, 1214–17.

[240] See id. at 1216.

[241] Jeff Simard proposes something like this "second transmission system." Id. at 1225.

[242] Simard also proposes moving from the "project" to a statutory system, though he does not consider that the Supreme Court might also utilize this mechanism to get underwritings. Id. at 1226–27.

frequent underwritings.[243] A possible template for this kind of exercise is "Constitutional Authority Statements." House rules in the U.S. Congress currently require that all bills must be accompanied by a Constitutional Authority Statement.[244] Although the details of this process have been subject to critical analysis,[245] one might adapt some version of the rule to ensure that lawmakers' work product self-consciously interacts with statutory decisions made in the courts. Admittedly, federal courts have not been especially receptive to Congress's assertions about its own constitutional authority. That said, there is a more deeply rooted tradition of courts listening to legislatures about the meaning of statutory work product in contradistinction to legislative opining on the reach of its own constitutional powers. The judicial impact statement could be enacted as law, or it could be included in both chambers' committee reports, effectuating clear underwrites.

An alternative template for the "judicial impact statement" might be for an office like the Congressional Research Service ("CRS") to develop a list of cases that it expects to be underwritten (or overridden) by a particular bill. CRS tends to be the office in Congress that systematically tracks developments in the judiciary, and it could be tasked with presenting to legislators clear judicial effects any given bill might have. It could also keep itself apprised of statutory decisions that might benefit from underwriting on a more regular and independent basis, reporting back to the legislature.[246] These efforts by CRS would pay dividends to the legal research community too, which, along with courts, often struggles simply to find overrides and underwrites, let alone to understand their implications throughout the corpus juris.

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[243] We are grateful to Jesse Cross for laying out for us in some depth what this could look like.

[244] House Rule XII, 7(c)(1) (114th Cong.) ("A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.").

[245] See Russ Feingold, The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and a Proposed Rule for the Senate, 67 Vand. L. Rev. 837, 841–45 (2014); Hanah Metchis Volokh, Constitutional Authority Statements in Congress, 65 Fla. L. Rev. 173, 182–83 (2013).

[246] On CRS, see Christiansen & Eskridge, supra note 5, at 1445–47.

## CONCLUSION

Irrespective of whether it is sound to search for mechanisms that might further proliferate or entrench the practice of underwriting, we believe the practice itself is far more common than has been previously recognized. We also are persuaded that it is a practice worth making more salient, so that it may become appropriately integrated within the field of statutory interpretation.

In order for this to happen, lawyers, legislators, judges, and scholars should pay closer attention to the reality that legislative-judicial interactions are not inevitably or perhaps even usually oppositional. Such exchange can take forms that are essentially supportive or mutually reinforcing, although these forms need to be better understood. Further, paying careful attention to the doctrinal consequences of legislative underwrites casts new light on several foundational canons of statutory interpretation.

We also recognize that consideration of underwrites tends to call for an intensely contextualized approach in large part because of variable incentives and disincentives for underwriting. Like overrides, stare decisis, and legislative acquiescence, the theory and practice of legislative underwrites is rich with nuance and will repay further analytic examination. We look forward to future studies of this interesting and important phenomenon.

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