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Practical Tips for Interpreting Statutory Overrides

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PRACTICAL TIPS FOR INTERPRETING STATUTORY OVERRIDES

BY DEBORAH A. WIDISS

UNDER OUR TRIPARTITE SYSTEM OF GOVERNMENT, the legislative branch is responsible for enacting statutes, and courts are simply charged with interpreting them. However, when laws are ambiguous or unclear, the judicial role often involves "making" law, in the sense that the courts fill in the gaps about what the law will mean. That said, if Congress disagrees with a court's interpretation, it can enact an override—an amendment to the existing statute or a new statute that supersedes the prior judicial interpretation. The same process can occur at the state or local level.

Thus, overrides are a key mechanism for ensuring legitimacy supremacy and enforcing the separation of powers built into our Constitution. However, overrides can only play this role if they actually *override*—that is, they must change how lawyers and courts understand the law. In a series of academic articles, I've shown that overridden precedents—what I have called "shadow precedents"—often continue to hold sway.[1] This short essay briefly explains some of the challenges that can arise in interpreting overrides and provides tips for lawyers and judges to address them. I pull examples from employment discrimination law because that is my own area of expertise; additionally, as discussed below, overrides explain a new divergence in causation standards between federal and Texas employment discrimination law. However, these questions arise in all areas of statutory law, and the suggestions for identifying and implementing overrides outlined below could be applied in any area of statutory practice.

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I. Identifying Overrides

The first step in properly implementing an override is simply knowing that it has been enacted. This is harder than it sounds. There is no single comprehensive list of overrides. The best resource is probably a major study by Professor Bill Eskridge and Matt Christiansen, published in 2014, that sought to identify all overrides enacted between 1967 and 2011 that superseded prior *Supreme Court* decisions.[2] This study makes several important contributions, but for practicing lawyers and judges, the most helpful part may be the appendix that lists all of the overrides and identifies the specific cases they superseded.[3] It is important to recognize, however, that earlier studies have suggested that Congress supersedes circuit and lower court decisions frequently as well, and these overrides are not included in the study. Nor does the study include any overrides enacted by state or local legislatures.

Importantly, lawyers cannot assume that Westlaw or Lexis will reliably flag precedents that have been superseded by statute.[4] The coding protocols employed by both companies generally rely on *judicial* signals regarding when subsequent developments affect the validity of a prior precedent. In contexts governed by common law, or when it is a court decision that overrules a prior court decision, this works well, since a lower court cannot supersede a higher court's decision. But it does not work well when it is *Congress*, rather than a court, that supersedes a precedent. In most instances, Lexis and Westlaw wait until a court indicates in a decision that a statutory amendment affects the viability of a prior precedent before flagging the case in any way. Moreover, if it is a Supreme Court decision that has been superseded, Westlaw will only "yellow" flag the prior decision, rather than red flag it, unless the Supreme Court itself indicates that its prior decision was superseded by Congressional action.

In a recent article, I looked at how quickly Westlaw flagged the overrides identified by the Christiansen & Eskridge study, and I found that on average, it took almost *four years* (!) before an overridden case was flagged by *any lower court*.[5] There are important variations here, however. Restorative overrides—in which Congress repudiates the prior decision as contrary to Congress's original intent—are typically flagged quite quickly (the median lag time was only about four months). This is probably because the statutory language itself often castigates the prior decision and because the "fight" between Congress and the Supreme Court often generates a lot of press attention. Such restorative overrides, however, are rather rare.

RETURN TO TABLE OF CONTENTS

The vast majority of overrides identified in the Christiansen & Eskridge study update or clarify statutory law without suggesting that the prior decision was necessarily "wrong." Indeed, the Supreme Court often specifically asks Congress to enact such overrides to address ambiguities or anomalies in existing law. Such overrides generally receive less press attention, and it typically takes several years before the prior precedents are flagged as superseded in Westlaw.

Accordingly, best practice for lawyers and judges in statutory cases should be to review carefully the *statutory language* that governs a dispute before reflexively following court precedents interpreting the statute. If the court precedents *predate amendments to the statutory language*, the precedent and the new statutory language needs to be analyzed to determine whether and to what extent the amendments supersede the pre-existing interpretation. In conducting this research, it may be helpful to consult the full public law that enacted the amendment, rather than simply the codified code section at issue, because the session law may include findings and purpose clauses that demonstrate the legislature's intent to supersede a prior precedent. Additionally, relevant context may be found in guidance or regulations issued by agencies, secondary sources, and legislative history such as committee reports on the bill.

II. Applying Overrides

Once a lawyer identifies that a statutory amendment relates to a pre-existing precedent, the lawyer—and ultimately the court—has to determine the extent to which the override supersedes the prior precedent. There are several reasons why courts might continue properly to cite to an overridden precedent. First, most overrides are prospective rather than retrospective. Accordingly, facts that arose prior to the enactment of an override are generally decided under *pre*-override law, even if the decision comes after the override. Second, an override may not override *all* aspects of the prior decision and a court must determine when to follow the new statutory language and when to follow the prior precedent. The first part of this section demonstrates that courts sometimes simply make mistakes; they follow aspects of an overridden precedent—or lower court decisions that rely on an overridden precedent—that are unquestionably superseded. The second part of this section discusses some of the more complicated interpretive questions that can arise where it is unclear which should control.

A. Clearly Superseded

Sometimes, courts continue to cite overridden precedents for propositions that are no longer good law. In a working paper, I illustrate this by looking at the implementation of the ADA Amendments Act of 2008 (ADAAA).[6] This was a bipartisan bill that was passed by landslide majorities in the House and the Senate and was signed by President George W. Bush. The ADAAA superseded prior Supreme Court cases that had interpreted the definition of "disability" in the Americans with Disabilities Act quite narrowly. Congress was quite clear that it thought that the Court had misinterpreted the original law. The ADAAA includes statutory findings that state the earlier cases "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protections for many individuals whom Congress intended to protect," and statutory "purpose" clauses that explicitly "reject" several distinct aspects of these earlier cases.[7]

The ADAAA has had a significant effect. Citations to the overridden decisions have fallen dramatically, and in many instances courts are correctly applying the new law. But there are also numerous decisions that improperly continue to follow the overridden precedents. For example, the ADAAA expressly superseded the Supreme Court's interpretation of what a plaintiff needs to prove to succeed on a claim that she was discriminated against because she was "regarded as" having a disability.[8] Some courts, however, continue to apply the old standard, often citing to the ADAAA for other propositions but asserting (incorrectly) that the Supreme Court's holding on this point remains good law.[9]

The ADAAA also removed the "roots"—i.e., Supreme Court precedents—that underlie a significant body of circuit and district court precedent, and courts should reconsider reliance on the cases that grew from those decisions. Courts, however, sometimes continue to rely on pre-ADAAA circuit precedent that applied the (now) superseded decisions to determine whether particular health conditions can be a qualifying disability, without reconsidering how the ADAAA should change this analysis.[10]

My findings regarding errors in implementing the ADAAA are particularly troubling because the ADAAA was quite explicit in repudiating the prior precedents, and it received extensive coverage in the popular and legal press. The prevalence of mistakes in this context suggests that there are probably much bigger problems implementing overrides that are less well known. This is also suggested by a different study that I am currently completing, which shows that number of citations to cases superseded by non-restorative overrides barely changes after the override. Put simply, such overrides often seem to fail to actually *override*.[11]

The solution here is easy. Once lawyers and courts realize that an override may have bearing on the resolution of a case,

they simply need to read carefully the new statutory language and determine how it relates to prior precedents, including not only the Supreme Court precedents directly superseded, but also circuit or district court decisions that had relied on those prior precedents.

B. Arguably Superseded

Harder questions emerge when it is debatable whether the relevant aspect of a prior precedent is superseded by the amendment. I have looked at this in two different contexts. First, it may be unclear whether an override supersedes the *reasoning underlying a decision* as well as the specific holding of a decision. For example, in 1978, Congress superseded an (in)famous Supreme Court decision that had held that pregnancy was not a form of sex discrimination. In recent years, however, courts have disagreed about whether the overridden decision should control cases concerning breastfeeding or prescription contraception.[12]

Second, courts have struggled to determine whether an override of a judicial interpretation of one statute affects interpretations of similar language in *other statutes.*[13] In the employment discrimination context, this has been illustrated by a series of decisions regarding what causation standard should govern claims. In 1991, Congress overrode a decision interpreting Title VII, which prohibits discrimination on the basis of race, sex, religion, color, and national origin, by amending the statute to state explicitly that a plaintiff can win a law suit if she shows that any of these grounds was a "motivating factor" in an adverse employment action.[14] Congress, however, did not amend any of the other employment discrimination statutes modeled on Title VII, or Title VII's separate retaliation provisions. The Supreme Court has recently taken the position Congress's "failure" to separately amend these provisions should be interpreted as a preference for a more stringent causation standard—"but for" causation—to govern these other contexts.[15]

The Supreme Court's decisions in this area explain a new divergence between Texas and federal laws regarding employment discrimination. Shortly after the 1991 amendments to Title VII, the Texas Commission on Human Rights Act was likewise amended to include a "motivating factor" standard.[16] The TCHRA prohibits discrimination on all of the grounds addressed in Title VII, and also, in the same sentence, age and disability. This was not particularly significant until the Supreme Court held that federal claims on the basis of *age* are governed by a but-for causation standard, and many courts have followed this decision to hold that a but-for standard governs federal disability claims as well.[17] Thus, claims on the basis of age or disability under the TCHRA should now be analyzed *separately from* analogous federal claims, because the plaintiff's burden on causation is lower.[18] It may be appropriate to interpret Texas retaliation claims separately as well, because the TCHRA retaliation provisions does not include the "because of" language that was significant in the Supreme Court's decision regarding the federal causation standard for retaliation claims.[19]

More generally, the U.S. Supreme Court has given mixed signals regarding how to resolve these kinds of ambiguities when interpreting overrides. It has sometimes suggested the prior precedent remains controlling, except where unquestionably superseded by statutory language directly on point.[20] But it has also sometimes suggested that an override functionally erased a prior precedent entirely and restored prior understandings of the issue, even if they were *not* addressed in the text of the override itself.[21] In my academic writing, I have criticized the former approach and advocated for interpretive conventions that give more weight to the effect of an override. But for lawyers representing clients, these conflicting instructions can be helpful, in that one can take whichever position on the effect on an override is advantageous to one's client.

III. Conclusion

Overrides are fundamental to ensuring that the legislative branch can play its expected role as the ultimate authority on statutory law. Overrides, however, are not self-implementing. As described above, courts sometimes continue to rely on overridden precedents where they have clearly been superseded. There are also contexts where it is ambiguous whether the override or the prior precedent should control, leading to widespread confusion and considerable litigation to sort out the ambiguities. In the hard cases, courts are trapped in a difficult situation because they receive mixed signals as to how to resolve these interpretative complexities. I have suggested that this could be addressed by clearer drafting by Congress and reconsidering the interpretative methodologies applied to overrides. But the solution for the easier cases is far more basic. Lawyers and courts simply need to begin their analysis in statutory cases by reading the *statutory language itself* and carefully evaluating whether judicial precedents that *predate the current version* of that statute need to be reconsidered.

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[1] *See generally* Deborah A. Widiss, *Identifying Congressional Overrides Should Not Be This Hard*, 92 TEX. L. REV. SEE ALSO 145 (2014); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012);

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

[2] *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014); *see also* James Buatti & Richard L. Hasen, *Response: Conscious Congressional Overriding of the Supreme Court, Gridlock, and Partisan Politics*, ___ TEX. L. REV. SEE ALSO _ (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530114 (study of "conscious" overrides since 1991).

[3] *See* Christiansen & Eskridge, *supra* note 2, at 1480-1514.

[4] The research summarized in this section is from Widiss, *Identifying Congressional Overrides Should Not Be This Hard*, *supra* note 1, at 155-62.

[5] *See id.* at 158.

[6] *See* Deborah A. Widiss, *Still Kickin' After All These Years:* Sutton *and* Toyota *As Shadow Precedents* (draft on file with author).

[7] Pub. L. 110-325, §2(a) & (b).

[8] *Id.* at §2(a)(3), § 4(a) (codified at 42 U.S.C. § 12102(3)).

[9] *See, e.g.*, Koessel v. Sublette County Sheriff's Dep't, 717 F.3d 736, 742 (10th Cir. 2013); Wingfield v. Escallate, LLC, 5:12-CV-2620, 2014 U.S. Dist. LEXIS 139885, *15-16 (N.D. Ohio Sept. 29, 2014) (both mistakenly relying on prior 'regarded as' standard).

[10] *See, e.g.*, Morris v. Town of Islip, 2014 U.S. Dist. LEXIS 133168, 2014 WL 4700227 (EDNY 2014) (relying on pre-ADAAA case law regarding lifting restrictions); Wanamaker v. Westport Bd. of Educ., 899 F. Supp.2d 193, 211-12 (D. Ct. 2012) (relying on pre-ADAAA case law regarding pregnancy complications); *but see, e.g.*, Feldman v. Law Enforcement Assocs. Corp., 779 F. Supp. 2d 472, 483 n.3 (E.D.N.C. 2011) (pre-ADAAA cases may "carry little, if any, precedential weight with respect to the issue of [disability]").

[11] *See* Brian Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent* (draft on file with author).

[12] *See* Widiss, *Shadow Precedents*, *supra* note 1, at 551-56 (discussing issue and collecting cases).

[13] *See generally* Widiss, *Undermining Congressional Overrides*, *supra* note 1 (discussing issue and collecting cases).

[14] 42 U.S.C. § 2000e-2(m).

[15] Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013); Gross v. FBL Financial Servs., 557 U.S. 167 (2009).

[16] Tex. Labor Code § 21.125 (enacted by Acts 1995, 74th Leg., ch. 76 (S.B. 959), § 9.05(a)).

[17] *Gross*, 557 U.S. at 177; *see, e.g.*, *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) (discussing issue and following *Gross* in ADA case).

[18] Federal district courts have recognized that TCHRA claims for age discrimination are governed by a motivating factor standard that now differs from that applied under federal law. *See, e.g.*, Bleiweiss v. Panduit Sales Corp., CV H-13-0080, 2015 U.S. Dist. LEXIS, at *14 (S.D. Tex. Jan. 13, 2015); Julian v. City of Houston, No. 4:12–CV–2973, 2014 U.S. Dist. LEXIS 104935, at *10 (S.D. Tex. July 31, 2014). However, they do not seem to be doing the kind of separate analysis that may well be warranted. *Cf.* Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 480 (Tx. 2001) (failure to use motivating factor standard was reversible error).

[19] Tex. Labor Code § 21.055.

[20] *See, e.g.*, Ledbetter v. Goodyear Tire, 550 U.S. 618, 627 n.2 (2007), *superseded by* Lilly Ledbetter Fair Pay Act, Pub. L. 111-2 (2009).

[21] *See, e.g.*, CBOCS West Inc. v. Humphries, 553 U.S. 442, 454 (2008).