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## *ARTICLES*

# TEXTUALISM AND STATUTORY PRECEDENTS

*Anita S. Krishnakumar*[*]

*This Article seeks to shed light on a little-noticed trend in recent U.S. Supreme Court statutory interpretation cases: the Court's textualist Justices—or at least some subset of them—have proved remarkably willing to abandon stare decisis and to argue in favor of overruling established statutory interpretation precedents. This is especially curious given that statutory precedents are supposed to be sacrosanct. Congress, rather than the Court, is the preferred vehicle for correcting any errors in the judicial construction of a statute, and courts are to overrule such constructions only in rare, compelling circumstances. What, then, accounts for the textualist Justices' unabashed willingness to overrule statutory precedents in recent years? And how can this practice be reconciled with textualism's core aims of promoting clarity and stability in the law?*

*This Article advances a threefold thesis. First, it argues that the textualist Justices view precedents that create a test for implementing a statute (e.g., the "motivating factor" test for Title VII violations) as*

[*] Professor, St. John's University School of Law. J.D., Yale Law School, 1999; A.B., *with distinction*, Stanford University, 1996. I owe deep thanks to Aaron-Andrew Bruhl, Marc DeGirolami, William N. Eskridge, Margaret H. Lemos, Kate Levine, Michael Perino, Rosemary Salomone, Sharmila Sohoni, and Deborah A. Widiss for valuable comments and insights on earlier versions of this Article, and to participants at workshops at Yale and Cardozo Law Schools for sharpening my thinking about this topic. Special thanks also to Dean Michael A. Simons and St. John's Law School for generous research support. Finally, I am indebted to my husband, Ron Tucker, for his patience with this project and to the editors at the *Virginia Law Review* for excellent editorial work. All errors are my own.

*different from ordinary text-parsing statutory interpretation (e.g., "labor" means "manual labor"). More specifically, textualist jurists regard what I call "implementation test" precedents as akin to common-law decision-making, rather than statutory interpretation—and seem to have created a de facto "implementation-test exception" to the heightened stare decisis protection normally afforded statutory precedents. Second, the Article links textualist Justices' proclivity for overruling to an oft-unspoken predicate assumption of textualism—that is, that there is a singular "correct answer" to every question of statutory interpretation. This assumption may make it especially difficult for textualist jurists to accept the idea that an incorrect statutory interpretation should be left in place simply because it was first in time. Last, the Article notes that some textualist jurists see themselves as "revolutionaries," whose function is to overthrow the old, corrupt jurisprudential order, including outmoded precedents reached through the use of illegitimate, atextual interpretive resources.*

*Ultimately, the Article both supports and critiques textualist Justices' approach to statutory precedents. On the one hand, it argues that a relaxed form of stare decisis for implementation test precedents makes sense for many reasons, as long as special deference is given to implementation tests that Congress has expressly endorsed. At the same time, it rejects textualists' attempts to overrule non-implementation test precedents based on simple disagreement with the original interpretation.*

## INTRODUCTION

Statutory stare decisis—sometimes referred to as the "super-strong"[1] presumption that prior judicial interpretations of a statute are correct and should not be overruled except by congressional amendment—has been the subject of significant normative debate among legal scholars. Some have argued that the presumption should be absolute, freezing in place judicial interpretations of statutes until and unless Congress acts,[2] while others have advocated a more relaxed rule that allows for judicial overruling of statutory precedents that have grown outmoded.[3] Several studies—many of them recent—have tackled the related questions of how often Congress overrides judicial interpretations of statutes and how courts implement such overrides.[4]

[1] I borrow this term from William Eskridge. See William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1362 (1988).

[2] See Lawrence C. Marshall, Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 2467, 2467 (1990); Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 177, 182–83 (1989) [hereinafter Marshall, Let Congress Do It]; Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74, 143–45 (2000).

[3] See Eskridge, supra note 1, at 1363–64; William N. Eskridge, Jr., The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases, 88 Mich. L. Rev. 2450, 2452 (1990) [hereinafter Eskridge, Amorous Defendant].

[4] See, e.g., Matthew R. Christiansen & William N. Eskridge, Jr., Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011, 92 Tex. L. Rev. 1317, 1318 (2014); William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 334 (1991); Richard L. Hasen, End of the Dialogue? Political Polarization, the Supreme Court, and Congress, 86 S. Cal. L. Rev. 205, 210 (2013); Virginia A. Hettinger & Christopher Zorn, Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court, 30 Legis. Stud. Q. 5, 6 (2005); Pablo T. Spiller & Emerson H. Tiller, Invitations to Override: Congressional Reversals of Supreme Court Decisions, 16 Int'l Rev. L. & Econ. 503, 504 (1996); Deborah A. Widiss, Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides, 84 Notre Dame L. Rev. 511, 516–17 (2009) [hereinafter Widiss, Shadow Precedents]; Deborah A. Widiss, Undermining Congressional Overrides: The Hydra

Largely absent from the literature, however, has been any discussion of the relationship between statutory interpretation theory and statutory stare decisis.[5] That is, do textualist and purposivist interpretive philosophies differ in their theoretical views toward statutory stare decisis? Are there any noticeable differences in how jurists who associate themselves with different interpretive theories treat or talk about statutory stare decisis? For all the attention that scholars have devoted to methodological differences in statutory interpretation, no one seems to have given much thought to differences in interpretive views about statutory stare decisis. Meanwhile, scholarship in this area is increasingly relevant because several recent U.S. Supreme Court decisions reveal a surprising trend: the Court's textualists—or at least some subset of them—regularly are willing to overturn statutory precedents. Indeed, they are far more willing to do so than are their purposivist counterparts. This trend is noteworthy because it is the opposite of what we would expect; on the whole, textualists tend to prioritize the predictability and stability of legal rules and other "rule of law" values over the flexibility associated with looser, case-by-case decision-making.[6] Purposivists, by contrast, tend to be more willing to tolerate inconsistency and case-by-case adjudication. Yet, during the Roberts Court's first decade, the Court's textualist or textualist-leaning Justices repeatedly have called for overruling a statutory precedent, even when doing so would upset settled expectations.[7] By contrast, the Court's purposivist Justices have called for overruling a statutory precedent only once during the same period.[8]

Problem in Statutory Interpretation, 90 Tex. L. Rev. 859, 865 (2012) [hereinafter Widiss, Undermining Overrides].

[5] But see Stephen M. Rich, A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law, 87 S. Cal. L. Rev. 1197, 1202 (2014) (arguing that textualist interpretive methodology has undermined several employment-law doctrines without expressly overruling them, stare decisis notwithstanding).

[6] See, e.g., Grant Gilmore, The Ages Of American Law 17 (1977) (maintaining that formalism "holds out the promise of stability, certainty, and predictability"); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts xxix (2012) ("[T]extualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 597–98 (1987) (noting that predictability is important in planning and litigation).

[7] See infra Appendix I (listing twelve such cases in ten terms).

[8] See id.

Consider a few examples. In 2015, self-avowed textualist Justices Alito, Thomas, and Roberts voted (in dissent) to overrule a 1964 Patent Act precedent because the Court's original interpretation was based on an economic theory that has since been "debunked."[9] A few terms earlier, Justices Thomas, Alito, and Scalia similarly argued (in a concurrence) that a 1988 securities law precedent should be overruled because it was based on a since-disproved theory of efficient markets.[10] In a handful of other cases, Justice Thomas has issued solo dissents arguing that a statutory precedent should be overruled, stare decisis notwithstanding.[11] While judges and commentators have articulated a few exceptions to statutory stare decisis that the entire Court follows, the textualist Justices' calls to overrule in the above cases have not tended to fit into such exceptions.[12] Only one of the above cases, for example, involved a so-called "common-law statute"—that is, a statute that is considered a delegation of broad authority to courts and therefore exempt from statutory stare decisis.[13]

The puzzle thus emerges: what accounts for textualist Justices' dismissiveness towards statutory precedents in such cases? One obvious

[9] Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2415 (2015) (Alito, J., dissenting).

[10] Halliburton Co. v. Erica P. John Fund, 134 S. Ct. 2398, 2417–27 (2014) (Thomas, J., concurring in the judgement).

[11] See, e.g., Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); Kimbrough v. United States, 552 U.S. 85, 114–16 (2007) (Thomas, J., dissenting). For a nonexhaustive list of Roberts and Rehnquist Court cases in which at least one Justice called for overruling a statutory precedent, see infra Appendix I.

[12] See discussion infra Part I. Previously articulated exceptions include those for (1) procedural flaws—for example, when a precedent was the product of poor briefing or inadequate deliberation by the Court; (2) common-law or constitutionalized statutes; and (3) instances where Congress or private persons relied upon the precedent. See Eskridge, supra note 1, at 1369–84.

[13] The case was *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). Four other cases listed in Appendix I also involved the Sherman Act. For detailed discussion of the common-law-statutes exception to statutory stare decisis, see, for example, Ethan J. Leib & Michael Serota, The Costs of Consensus in Statutory Construction, 120 Yale L.J. Online 47, 53 (2010) ("In the world of what are sometimes known as common law statutes, broad delegation to the judiciary is uncontroversial, and the legislature expects judges to develop the law over time by utilizing a free-form common law method."); Margaret H. Lemos, Interpretive Methodology and Delegations to Courts: Are "Common-Law Statutes" Different?, *in* Intellectual Property and the Common Law 89, 91–93 (Shyamkrishna Balganesh ed., 2013).

answer is ideology—that is, that textualist Justices are less respectful of statutory precedents that produce results that run counter to their ideological preferences. But while ideology certainly seems to play *some* role in *some* of the cases, it does not provide a complete explanation for the Justices' approaches in all the cases that advocate overruling a statutory precedent.[14] And although some of the cases may be explained as simple instances of textualist jurists prioritizing a clear text over a precedent they believe misreads that text, most cannot. In fact, many of the cases in which textualist or textualist-leaning Justices have voted to reject an established statutory precedent have not involved much textual analysis at all.[15] So something other than ideology and fidelity to text must be at work in at least some of the cases.

This Article seeks to bring critical attention to textualist jurists' demonstrated willingness to flout the doctrine of statutory stare decisis—and to use this surprising trend as a lens through which to glean important insights about statutory interpretation theory and textualism in particular. Most statutory interpretation scholarship is top-down. It conceives of theories of statutory interpretation in a highly abstract and idealized fashion, debating the merits of textualism, purposivism, and pragmatism in general terms and using particular cases merely as one-off illustrations or to score debating points.[16] In the statutory stare

[14] See discussion infra notes 115–120 and accompanying text.

[15] See, e.g., Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2415 (2015) (Alito, J., dissenting); *Halliburton*, 134 S. Ct. at 2418 (Thomas, J., concurring in the judgement); Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2045 (2014) (Scalia, J., dissenting) (noting that although he initially joined in the interpretation at issue, time has proved that decision wrong and "[r]ather than insist that Congress clean up a mess that [he] helped make, [he] would overrule [the precedent]"); id. (Thomas, J., dissenting) (arguing that precedent interpretation that extended tribal sovereign immunity to suits arising out of an Indian tribe's commercial activities outside its territory was unsupported by the underlying rationale for tribal immunity, inconsistent with limits on tribal sovereignty, and interfered with state sovereignty and that the passage of time has proved it a bad interpretation); *Leegin*, 551 U.S. at 882; State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) (overruling precedent based on subsequent developments in legal doctrine and evolving economic theories about vertical price restraints); Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 207–08 (1991) (O'Connor & Scalia, JJ., dissenting).

[16] See, e.g., William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479-81 (1987); William N. Eskridge, Jr., Norms, Empiricism, and Canons in Statutory Interpretation, 66 U. Chi. L. Rev. 671 (1999); John F. Manning, What Divides Textualists From Purposivists?, 106 Colum. L. Rev. 70, 70 (2006); Caleb Nelson, What is Textualism?,

decisis context, this conventional, theory-driven approach has caused scholars to miss the fact that textualist and purposivist Justices have starkly different views about several issues that make a great deal of practical difference in how courts interpret statutes. For example, textualists and purposivists diverge in their views about the "stickiness" of precedents that establish tests for implementing a statute, about the role of the U.S. Supreme Court in supervising how such implementation tests fare in the lower courts, and about how judges should treat legislative overrides of the Court's interpretations.[17]

This Article deviates from the conventional top-down approach. Instead, it begins from the bottom-up, examining patterns in cases involving statutory stare decisis to discover what they reveal about statutory interpretation theory. The Article proceeds in three Parts.

Part I catalogues several recent cases in which textualist or textualist-leaning Justices[18] have voted to overrule an established statutory

91 Va. L. Rev. 347 (2005); Vermeule, supra note 2. Thanks to Mila Sohoni for pointing this out.

[17] See discussion infra Parts II.A & II.B.

[18] For purposes of this Article, I count as "textualists" Justices Scalia and Thomas and as "textualist-leaning" Justices Alito, Roberts, and Kennedy. Justices Scalia and Thomas regularly identify themselves as textualists and clearly follow a textualist interpretive methodology—seeking to identify the plain meaning of statutory text, informed by dictionary definitions, language canons, and the whole-act rule while eschewing reliance on legislative history, intent, and purpose. Justices Alito, Roberts, and Kennedy, although less purist in their use of textualist interpretive tools, also emphasize these tools when construing statutes. See Anita S. Krishnakumar, Reconsidering Substantive Canons, 84 U. Chi. L. Rev. 825, 849 (2017); Peter J. Smith, Textualism and Jurisdiction, 108 Colum. L. Rev. 1883, 1887 (2008) ("[I]t appears that several Justices—clearly Justices Scalia and Thomas, and perhaps Chief Justice Roberts and Justices Alito and Kennedy—on the Supreme Court now consider themselves textualists."). This labeling is consistent with how other scholars and commentators have depicted these Justices. See Ernest Gellhorn, Justice Breyer on Statutory Review and Interpretation, 8 Admin. L.J. Am. U. 755, 758 (1995) ("Justices Kennedy and Scalia have led a 'textualist' movement claiming that the 'plain meaning' of the statute should be given effect."); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 125 & n.505 (2001) (calling Justice Kennedy a textualist "fellow traveler[]"); Richard J. Pierce, Jr., Justice Breyer: Intentionalist, Pragmatist, and Empiricist, 8 Admin. L.J. Am. U. 747, 748 n.5 (1995) (listing Justice Kennedy as a textualist); John F. Duffy, In re Nuitjen: Patentable Subject Matter, Textualism and the Supreme Court, Patently-O (Feb. 5, 2007), http://patentlyo.com/patent/2007/02/in_re_nuijten_p.html (observing that Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito "adhere to some form of fairly rigorous textualism in statutory interpretation"). I have not

precedent. Part II advances three theories and lessons about textualism that emerge from close examination of textualist Justices' willingness to depart from statutory stare decisis in those cases. First, textualist Justices are especially willing to overturn statutory precedents that establish a decision-making rule designed to guide the implementation of the statute in future cases, as opposed to precedents that closely parse the meaning of statutory text. For example, they consider a precedent that establishes a burden-shifting test for Title VII lawsuits as less authoritative than a precedent that construes the word "labor" to refer only to "manual" but not "intellectual" labor. The explanation for this appears to be that textualist Justices view precedents that articulate an implementation test as more akin to judge-made common law rules than traditional statutory construction. Accordingly, they consider it the Court's, rather than Congress's, responsibility to correct errors in such tests. Second, Part II argues that textualist Justices, particularly in the post-Scalia era,[19] seem prone to a "correct answer" mindset—and that this jurisprudential commitment to precision and a single correct statutory meaning may make it particularly difficult for textualist Justices to sacrifice accuracy in favor of stability. In addition, and perhaps relatedly, some textualist jurists see themselves as revolutionaries, whose purpose and function is to overthrow the old, corrupt judicial order, including improperly reasoned statutory precedents.

counted Justice Gorsuch as a "textualist" or "textualist-leaning" Justice because as this article goes to press, he has been on the U.S. Supreme Court for only a few months and has participated in only a few cases. While one commentator has labeled Justice Gorsuch a "textualist," see Ramesh Ponnuru, Neil Gorsuch: A Worthy Heir to Scalia, Nat'l Rev. (Jan. 31, 2017), http://www.nationalreview.com/article/444437/neil-gorsuch-antonin-scalias-textualist-originalist-heir), scholars have not yet studied his opinions or approach in statutory cases systematically. Without the benefit of such systematic analysis, it would be premature to characterize him as either "textualist" or "textualist-leaning," and it would be especially premature to opine about his approach to statutory stare decisis.

[19] Justice Scalia is widely considered to have ushered in a radical new form of statutory interpretation in the 1990s—the "New Textualism," which broke from the old, soft plain-meaning rule and traditional textualism in its absolutist rejection of all forms of legislative history and its emphasis on ordinary usage and consistency with the "corpus juris" (the surrounding body of law) as the lodestars of statutory interpretation. See William N. Eskridge, Jr., The New Textualism, 37 U.C.L.A. L. Rev. 621, 623–24 (1990); Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 17 (Amy Gutman ed., 1997).

Part III considers the normative implications of the theories advanced in Part II. It argues that while certain elements of textualists' approach to statutory precedents may properly be retained, others deserve to be jettisoned. When courts create tests for implementing a statute, they are engaging in a gap-filling enterprise similar to that which administrative agencies perform and courts, like agencies, should have the power to update or revise these tests to reflect practical difficulties experienced in administering them. But this principle is subject to an important limit: relaxed stare decisis for statutory precedents is appropriate only in the limited context of precedents that establish an implementation test and does not justify overruling precedents with which later courts simply disagree.

## I. RECENT TEXTUALIST DEPARTURES FROM STATUTORY STARE DECISIS

Before delving into the cases, it is worth providing a little background. Statutory precedents are supposed to enjoy a special status in the law. Whereas common-law precedents are entitled to an ordinary "presumption of correctness" and constitutional precedents receive a relaxed presumption of correctness—because the complexity of amending the Constitution makes judicial correction the only effective avenue for fixing errors in constitutional interpretation—statutory precedents are treated to a "super-strong" presumption of correctness.[20] Indeed, the Court has said that it will overrule statutory precedents only under the most compelling circumstances, and Justice Brandeis famously commented that "in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, *provided correction can be had by legislation*."[21] Numerous judges and commentators have noted that the Court's heightened fidelity to stare decisis in the statutory context "marks an essential difference between

[20] Eskridge, supra note 1, at 1362; see also Burnet v. Coronado Oil & Gas, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting).

[21] *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting) (emphasis added).

statutory interpretation on the one hand and [common] law and constitutional interpretation on the other."[22]

Scholars have both applauded and criticized this heightened presumption of correctness. Professor Frank Horack, for example, argued that the presumption is a necessary corollary to the separation of powers. He reasoned that once the Court has interpreted a statute, the statute becomes "*amended* to the extent of the Court's decision" so that "[a]fter the decision, whether the Court correctly or incorrectly interpreted the statute, the law consists of the statute *plus* the decision of the Court."[23] If the Court later reverses the position it took in the first case, it is "affirmatively changing an established rule of law under which society has been operating"—something that is "explicitly and unquestionably the exercise of a legislative function."[24]

Professor Lawrence Marshall has advocated going one step further, urging the Court to adopt an *absolute rule* of stare decisis for all its statutory decisions.[25] Marshall reasons that as an elected branch, Congress, rather than the Court, must be an "active participant in the ongoing process of statutory lawmaking" and that the only way to ensure that this will happen is to "let Congress know that it, and only it, is responsible for reviewing the Court's statutory decisions, and that it, and only it, has the power to overrule the Court's interpretations of

[22] Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S 409, 424 n.34 (1986) (quoting Edward H. Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 540 (1948)). See also Frank E. Horack, Jr., Congressional Silence: A Tool of Judicial Supremacy, 25 Tex. L. Rev. 247, 248–49 (1947) (defending the super-strong presumption against overruling statutory precedents); Robert E. Keeton, Venturing to Do Justice: Reforming Private Law 79–80 (1969) (citing Levi's arguments in favor of stricter stare decisis because controversial changes are better enacted by the legislature); Earl Maltz, The Nature of Precedent, 66 N.C. L. Rev. 367, 388–89 (1988) (criticizing the Court's disparate treatment of statutory versus common law or constitutional precedents); C. Paul Rogers III, Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws, 14 Houston L. Rev. 611, 611, 626 (1977) (noting that the "prevailing view" is that stare decisis should be followed more strictly for statutory precedents than for "common law or [other] court-made precedents"); James C. Rehnquist, Note, The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court, 66 B.U. L. Rev. 345, 370 (1986) (defending the presumption in statutory but not constitutional cases).

[23] Horack, supra note 22, at 250–51 (emphasis in original).

[24] Id. at 251.

[25] See Marshall, Let Congress Do It, supra note 2, at 183.

federal statutes."[26] Professor Adrian Vermeule has seconded the call for an absolute rule of statutory stare decisis, based on traditional textualist concerns about administrative efficiency.[27]

By contrast, Professor Bill Eskridge and other pragmatist legal process scholars have urged judges to take a more relaxed approach to statutory stare decisis—one that allows for overruling precedents that have grown outmoded over time.[28] For example, Eskridge argues that the heightened presumption in favor of upholding statutory precedents should give way when changed circumstances render a precedent inconsistent with original legislative expectations or evolving statutory policy, or when practical experience suggests that a precedent is no longer working.[29]

In regularly calling for overruling statutory precedents, the textualist and textualist-leaning Justices on the U.S. Supreme Court have thus taken an approach that—oddly—is more in line with the one advocated by their philosophical adversary, Bill Eskridge, than by their intellectual ally Adrian Vermeule. Again, this is the opposite of what we would expect based on theory alone, as textualism prioritizes predictability and stability in the law.[30]

This Part examines several cases in which textualist or textualist-leaning Justices on the Roberts and Rehnquist Courts voted to overrule a statutory precedent. Section A discusses cases in which textualist Justices advocated rejecting a statutory precedent because the precedent was based on a since-discredited economic theory. Section B examines cases in which textualist Justices refused to apply a precedent interpreting one statute to a closely related statute that was modeled on or contained the exact same language as the statute interpreted in the precedent case. Section C explores cases in which textualist Justices

[26] Id.

[27] See Vermeule, supra note 2, at 143–45 ("The stronger the rule of statutory stare decisis, the less frequently litigants will request an overruling and the less time that must be spent on reconsidering previously decided questions.").

[28] See Amy Coney Barrett, Statutory Stare Decisis in the Courts of Appeals, 73 Geo. Wash. L. Rev. 317, 342–47 (2005); Reed Dickerson, The Interpretation and Application of Statutes 252–55 (1975); Eskridge, supra note 1, at 1363; Eskridge, Amorous Defendant, supra note 3, at 2452.

[29] See Eskridge, supra note 1, at 1364.

[30] See sources cited supra note 6.

advocated overruling a statutory precedent on the grounds that it had proved unworkable.

### *A. Evolving Economic Theory Cases*

Appendix I provides a list of Supreme Court cases decided between 1970 and 2015 in which a majority, dissenting, or concurring opinion advocated overturning a statutory precedent.[31] This list of cases is nonexhaustive, although particular attention was paid to identifying cases decided during the Roberts and Rehnquist Courts (from 1986 to 2015). The Justices who joined in the opinion that advocated overruling and the reason(s) they provided to justify overruling are listed in the last two columns.[32] As the Appendix shows, in several cases, the Court's textualist or textualist-leaning Justices advocated overruling on the ground that the Court's initial interpretation was based on an economic theory that had since been "soundly refuted."[33] Although textualist Justices succeeded in overruling the precedent in only one of these cases, their opinions, when taken together, sound a consistent theme that statutory interpretations based on outdated economic theories should constitute an exception to the rule of statutory stare decisis.

Consider, for example, Justice Alito's dissenting opinion in *Kimble v. Marvel Entertainment*.[34] *Kimble* involved a provision of the Patent Act, which grants certain exclusive rights to a patentee and "his heirs or assigns" and provides that a patent expires twenty years from its

[31] See infra Appendix I.

[32] See id.

[33] Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2415 (2015) (Alito, J., dissenting). See also Halliburton Co. v. Erica P. John Fund, 134 S. Ct. 2398, 2418 (2014) (Thomas, J., concurring in the judgement) (urging the Court to overrule a precedent because "[l]ogic, economic realities, and our subsequent jurisprudence have undermined [its] foundations"); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889 (2007) (justifying Court's decision to overrule precedent making resale price maintenance per se illegal in part on grounds that the "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance"); Continental T.V. v. GTE Sylvania, Inc., 433 U.S. 36, 47–48 (1977) (overruling precedent in part because it had "been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts," and went against "[t]he great weight of scholarly opinion").

[34] *Kimble*, 135 S. Ct. at 2415.

application date.[35] A 1964 precedent, *Brulotte v. Thys Co.*, held that a patent holder cannot charge royalties for the use of his invention after its patent term has expired.[36] Kimble obtained a patent for a Spider-Man-inspired web-slinging toy.[37] Marvel later marketed a similar toy, Kimble sued for patent infringement, and the parties entered a settlement agreement through which Marvel purchased Kimble's patent and agreed to pay Kimble a royalty.[38] Some years later, Marvel stumbled upon the *Brulotte* decision and sought a declaratory judgment establishing that *Brulotte* effectively sunsets the royalty clause in its settlement agreement with Kimble.[39] Kimble countered that *Brulotte* should be overruled because it (1) is based on an economic theory—that post-patent-expiration royalties constitute an anti-competitive tying arrangement—that has since been severely criticized; and (2) creates several anticompetitive effects of its own.[40] Kimble cited numerous law review articles and treatises[41] as well as three Court of Appeals decisions[42] to demonstrate that the *Brulotte* rule is widely considered outdated, misguided, and anticompetitive in effect.

A majority of the Court acknowledged that a "broad scholarly consensus" supported Kimble's criticism of the *Brulotte* rule,[43] but nevertheless upheld the rule based almost entirely on statutory stare decisis.[44] In a dissenting opinion, Justice Alito, joined by Justices

[35] See 35 U.S.C. §§ 154(a)(1), (2) (2012).

[36] 379 U.S. 29, 32 (1964).

[37] See *Kimble*, 135 S. Ct. at 2405.

[38] Id. at 2406.

[39] See id.

[40] See id. at 2412–14.

[41] See Brief for Petitioners at ix-xii, Kimble v. Marvel Entm't, 135 S. Ct. 2401 (2015) (No. 13-720), 2015 WL 428993.

[42] See id. at 15–16 (citing Kimble v. Marvel Enters., Inc., 727 F.3d 856, 857 (9th Cir. 2013) ("*Brulotte* rule is counterintuitive and its rationale is arguably unconvincing"); Zila, Inc. v. Tinnell, 502 F.3d 1014, 1019 & n.4 (9th Cir. 2007) (stating that *Brulotte* is "economically unconvincing" and has been "criticized roundly"); Scheiber v. Dolby Labs., 293 F.3d 1014, 1017 (7th Cir. 2002) (internal quotation marks omitted) (observing that *Brulotte* "incorrectly assumes that a patent license has significance after the patent terminates" and has been "justly[] criticized").

[43] *Kimble*, 135 S. Ct. at 2412.

[44] Id. at 2412–13. The majority also stressed that *Brulotte* did not "hinge" on the economic argument that Kimble criticized. See id. at 2413.

Thomas and Roberts, argued that the Court should have overruled *Brulotte*.[45] The dissenters' chief arguments were that (1) the *Brulotte* rule was a judicial rule, arrived at through application of an economic theory, rather than a strict interpretation of the language of the Patent Act; and (2) the economic theory on which *Brulotte* was based had been "soundly refuted" in the fifty years since *Brulotte* was decided.[46]

A second economic-theory case in which the textualist Justices ignored statutory stare decisis also bears mentioning: *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[47] *Leegin* involved a ninety-five-year-old statutory precedent, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, in which the Court had ruled that it is per se illegal under the Sherman Act for a manufacturer to set a minimum price that distributors must charge for the manufacturer's goods.[48] Unlike in *Kimble*, the textualist and textualist-leaning Justices prevailed in *Leegin*. As in *Kimble*, the textualists' chief reason for abandoning the *Dr. Miles* precedent was a supposedly widespread consensus in the economics literature that resale price maintenance does not necessarily produce anticompetitive effects and can even have procompetitive effects.[49] The majority opinion recited arguments from numerous treatises, books, and articles—going on for three full pages—to support its conclusion that it no longer made sense to follow *Dr. Miles*'s per se rule.[50] It also argued

[45] See id. at 2415 (Alito, J., dissenting). Notably, Justices Thomas and Alito voted to overrule the statutory precedent in all three of the economic theory cases discussed in this Section. See id.; Halliburton Co. v. Erica P. John Fund, 134 S. Ct. 2398, 2417 (2014) (Thomas, J., concurring in the judgement); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 880 (2007). Justices Scalia and Roberts voted to overrule in two of the three cases, and Justice Kennedy voted to do so in one case. See *Kimble*, 135 S. Ct. at 2415 (Roberts); *Halliburton*, 134 S. Ct. at 2417 (Scalia), *Leegin*, 551 U.S. at 880 (Roberts, Scalia, and Kennedy).

[46] *Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting).

[47] 551 U.S. 877 (2007).

[48] 220 U.S. 373, 408 (1911).

[49] See *Leegin*, 551 U.S. at 889–92.

[50] See id. (citing, e.g., Robert Bork, The Antitrust Paradox 288–91 (1978); Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 184–191 (2005); Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 170 (1983); Pauline M. Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J. Law & Econ. 263, 292–93 (1991); Benjamin Klein & Kevin M. Murphy, Vertical Restraints as Contract Enforcement

that the *Dr. Miles* rule was inconsistent with other, more recent Supreme Court decisions.[51] The dissenting Justices, mostly purposivists, disputed the economic-consensus argument, insisting that there was nothing new in the studies the majority invoked, that the economics literature also contained arguments supporting the *Dr. Miles* rule, and that several congressional actions, including the repeal of a related statute, showed legislative approval of the *Dr. Miles* rule.[52]

Importantly, *Leegin* involved the Sherman Act, long considered a "common-law statute" that is supposed to evolve to meet the dynamics of current economic conditions. Common-law statutes are said to be phrased in "sweeping, general" language that is meant to confer a broad delegation of authority to courts to "develop[] legal rules on a case-by-case basis in the common-law tradition."[53] In other words, judges are *supposed to* update the Sherman Act to reflect developments in antitrust law.[54] Some commentators have suggested that securities and intellectual property statutes also should be treated like common law statutes,[55] and the plaintiff (and dissent) in *Kimble* sought to analogize the Patent Act to antitrust statutes.[56]

In one sense, then, the textualist Justices' eagerness to overrule precedents based on misguided economic theories could be chalked up to an exercise of the traditional common-law statutes exception to

Mechanisms, 31 J. Law & Econ. 265, 295 (1988); Frank Mathewson & Ralph Winter, The Law and Economics of Resale Price Maintenance, 13 Rev. Indus. Org. 57, 74–75 (1998)).

[51] See *Leegin*, 551 U.S. at 901–02.

[52] See id. at 908–12, 919 (Breyer, J., dissenting).

[53] Guardians Assoc. v. Civil Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting).

[54] See, e.g., *Leegin*, 511 U.S. at 899–900.

[55] See Shyamkrishna Balganesh, Debunking Blackstonian Copyright, 118 Yale L.J. 1126, 1167 (2009) (calling the Copyright Act a "common law statute"); William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1052 (1989) (calling anti-fraud provisions of securities laws "common law statutes"); Pierre N. Leval, Trademark: Champion of Free Speech, 27 Colum. J.L. & Arts 187, 198–99 (2004) (describing the Lanham Act and the Federal Trademark Dilution Act as "delegating" statutes); Craig Allen Nard, Legal Forms and the Common Law of Patents, 90 B.U.L. Rev. 51, 53 (2010) (calling the Patent Act a "common law enabling statute").

[56] See *Kimble*, 135 S. Ct. at 2418 (Alito, J., dissenting) ("*Brulotte* was an antitrust decision masquerading as a patent case."); Brief for Petitioners, at 11, Kimble v. Marvel Enters., Inc., 135 S.Ct. 2401 (2015) (No. 13-720), 2015 WL 428993.

statutory stare decisis. But such a characterization misses something important: these cases demonstrate a significant, and somewhat controversial, progression from the traditional common-law statutes exception. The exception is supposed to apply when the law in the relevant field—e.g., antitrust, securities, intellectual property—has changed, not when new academic papers are published questioning or criticizing the theory the Court has adopted when giving meaning to broad language in a statutory provision. Yet the textualist Justices seem to be following a tacit rule that statutory precedents that are based on economic theories can and should be updated or overruled if the relevant economic theory—rather than the *law in the relevant field*—later evolves. That is, they seem to be recognizing an "incorrect economic theory" exception to statutory stare decisis. Sections II.A and II.C.1 will expand on this concept, arguing that textualists' willingness to update statutory precedents they believe to be based on outmoded economic theories is connected to two larger jurisprudential principles: (1) a belief that statutory precedents that establish a judicial test for implementing a statutory provision are less binding than those that establish the meaning of statutory text; and (2) a commitment to finding the one "correct" statutory reading.

### *B. Not Quite Stare Decisis: Statutes* In Pari Materia

The Court's textualist Justices also have proved willing to reject statutory stare decisis in cases involving the application of a precedent that construes a closely related statute, even when the two statutes contain identical language and the second statute derived its language *in haec verba* from the statute at issue in the initial case.[57] The *in pari materia* rule directs courts to interpret closely related statutes that contain the same language or deal with the same subject matter similarly.[58] Thus, if an armed robbery statute has been interpreted to

[57] "*In haec verba*" is a Latin phrase that means "in the same words." *In haec verba*, Black's Law Dictionary (6th ed. 1990).

[58] See, e.g., Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) (internal quotation marks omitted) (citations omitted) (explaining that statutes addressing the same subject matter are *in pari materia* and should be construed "as if they were one law."); United States v. Stewart, 311 U.S. 60, 64 (1940) (citations omitted) (same).

mean "X," then similar or identical language in a carjacking statute modeled on that armed robbery statute should be read to mean "X" as well. In other words, a precedent interpreting statute A is to be applied to similar or identical language in statute B as well. The Court's textualist and textualist-leaning Justices have ignored, or have advocated ignoring, this rule as well.

Consider, for example, *Gross v. FBL Financial Services, Inc.*,[59] which construed the Age Discrimination in Employment Act of 1967 ("ADEA").[60] The ADEA makes it unlawful for an employer to take adverse action against an employee "because of such individual's age."[61] In an earlier case, *Price Waterhouse v. Hopkins*,[62] the Court[63] had announced a burden-shifting rule for determining when an employer has taken unlawful adverse action against an employee under identical language in Title VII prohibiting discrimination "because of such individual's . . . sex."[64] Under that test, a plaintiff was required to show by "direct evidence" that sex "was a substantial factor" in the employer's decision. This showing then shifted the burden to the employer to demonstrate that it would have taken the same adverse action even absent reliance on the prohibited criteria.[65]

In *Gross*, the Court, in a majority opinion authored by arch-textualist Justice Thomas and joined by the same Justices who overruled the *Dr. Miles* precedent in *Leegin*, voted to overrule *Price Waterhouse* as applied to the ADEA.[66] The opinion justified this departure from statutory stare decisis on two grounds. First, it noted that after *Price Waterhouse* was decided, Congress amended Title VII to explicitly endorse the "substantial factor" concept, without similarly amending the

[59] 557 U.S. 167, 169–70 (2009).

[60] Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621–34 (2012)).

[61] 29 U.S.C. § 623(a) (2012).

[62] 490 U.S. 228 (1989).

[63] The test was announced in Justice O'Connor's concurring opinion. Because no opinion garnered five votes, O'Connor's opinion was considered controlling by most lower courts. Justice White also concurred, but Justice O'Connor's opinion was believed to present the narrowest holding supporting the outcome. See Widiss, Undermining Overrides, supra note 4, at 884.

[64] 42 U.S.C. §§ 2000e–2(a)(1), (2) (2012).

[65] See *Price Waterhouse*, 490 U.S. at 276–78 (O'Connor, J., concurring in the judgement).

[66] *Gross*, 557 U.S. at 167, 170–74 (2009).

ADEA.[67] Second, it argued that, "Title VII is materially different [from the ADEA] with respect to the relevant burden of persuasion."[68] As commentators have noted, this was a stunning argument, given well-established Supreme Court precedent holding that the substantive provisions of Title VII and the ADEA are to be interpreted identically because the ADEA was derived "*in haec verba*" from Title VII.[69] Indeed, Justice Kennedy's *Price Waterhouse* dissent had assumed that the plurality's mixed-motives framework extended to the ADEA,[70] and all the Courts of Appeals that considered the issue before *Gross* had unanimously applied *Price Waterhouse* to ADEA claims.[71] Even respondent's brief acknowledged the unorthodoxy of treating Title VII and the ADEA differently, asking the Court to "overrule *Price Waterhouse* with respect to its application to the ADEA."[72] Justice Thomas's *Gross* opinion also noted that *Price Waterhouse*'s burden-shifting framework was difficult for lower courts to apply and stated that it would be unwise to extend that framework to ADEA claims.[73]

[67] See id. at 173–74.

[68] Id. at 173.

[69] See, e.g., Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)). See generally Northcross v. Bd. of Ed. of Memphis , 412 U.S. 427, 428, (1973) (per curiam) (interpreting the Emergency School Aid Act in light of the Civil Rights Act as the relevant provisions shared similar language and a "common raison d'être"). See also Widiss, Undermining Overrides, supra note 4, at 890–92 ("The majority opinion relegates to a footnote the starting premise . . . that the substantive provisions of Title VII and the ADEA are generally interpreted identically.").

[70] See *Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting).

[71] See Febres v. Challenger Caribbean Corp., 214 F.3d 57, 60 (1st Cir. 2000); Ostrowski v. Atlantic Mut. Ins., 968 F.2d 171, 173 (2d Cir. 1992); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1093, 1095 (3d Cir. 1995); EEOC v. Warfield–Rohr Casket Co., 364 F.3d 160, 164 (4th Cir. 2004); Rachid v. Jack In The Box, 376 F.3d 305, 309–12 (5th Cir. 2004); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 570-71 (6th Cir. 2003); Visser v. Packer Eng. Assocs., 924 F.2d 655, 658 (7th Cir. 1991) (en banc); Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 780 (8th Cir. 1995); Gonzagowski v. Widnall, 115 F.3d 744, 749 (10th Cir. 1997); Lewis v. YMCA, 208 F.3d 1303, 1303–04 (11th Cir. 2000) (per curiam).

[72] Brief for Respondent at 26–40, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (No. 08-441), 2009 WL 507026.

[73] *Gross*, 557 U.S. at 179. In 1991, after *Price Waterhouse* and well before *Gross* was decided, Congress enacted the 1991 Civil Rights Act, a major statute that sought to override several highly unpopular Supreme Court Title VII decisions, including *Price Waterhouse*. The 1991 CRA replaced *Price Waterhouse*'s burden-shifting test with an outright ban on

In a similar vein was *CBOCS West, Inc. v. Humphries*, which involved Section 1981 of the Civil Rights Act of 1866.[74] Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."[75] The statutory question in *CBOCS* was whether Section 1981 encompasses a claim that an employer has retaliated against an employee for complaining that the employer violated another person's Section 1981 rights. In an earlier case, *Sullivan v. Little Hunting Park*, the Court had construed a related provision of the Civil Rights Act, Section 1982, to encompass a claim by a white landowner who alleged retaliation by a homeowners' association after the landowner protested the association's discrimination against the landowner's black tenant.[76] Later cases made clear that *Sullivan* stands for the proposition that Section 1982 encompasses retaliation claims.[77]

The language of Section 1982 is identical to the language of Section 1981, except that Section 1982 guarantees the right "to inherit, purchase, lease, sell, hold, and convey real and personal property," rather than the right to "make and enforce contracts."[78] As with Title VII and the ADEA, the Court has long construed Sections 1981 and 1982 similarly, in recognition of these "sister statutes' common language, origin, and purposes."[79]

using sex or any other prohibited criteria as a "motivating factor" in an employment decision, as well as limited the effect of an employer's showing that it would have made the same decision. The 1991 congressional override is discussed further in Section III.A. What is important to note here is that the *Gross* majority opinion did not directly address the 1991 CRA—except to point out that Congress amended only Title VII to allow "mixed motive claims"—and did not similarly amend the ADEA. Id. at 174.

[74] 553 U.S. 442, 445 (2008).

[75] 42 U.S.C. § 1981(a) (2012).

[76] 396 U.S. 229, 234–35 (1969).

[77] See, e.g., Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 176 (2005) ("[I]n Sullivan we interpreted a general prohibition on racial discrimination [in § 1982] to cover retaliation against those who advocate the rights of groups protected by that prohibition.").

[78] See 42 U.S.C. §§ 1982, 1981(a) (2012).

[79] See *CBOCS*, 553 U.S. at 448. Specifically, the Court noted that both § 1981 and § 1982 trace their origins to the Civil Rights Act of 1866, Pub. L. No. 39-26, § 1, 14 Stat. 27; that both provisions "represent[] an immediately post-Civil War legislative effort to guarantee the then newly freed slaves the same legal rights that other citizens enjoy"; and that both

In 1989, twenty years after *Sullivan*, the Court in *Patterson v. McLean Credit Union*[80] significantly limited the scope of Section 1981, finding that the phrase "to make and enforce contracts" does not apply to "conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions."[81] Because victims of an employer's retaliation often will have opposed discriminatory conduct that took place *after the formation of the employment contract*, *Patterson*'s holding seemed in practice to foreclose retaliation claims. However, in 1991, Congress enacted the Civil Rights Act of 1991 ("CRA"), which overruled *Patterson*.[82]

The Court thus faced the question whether Congress's overruling of *Patterson* reinstated the pre-*Patterson* consensus rule that *Sullivan*'s retaliation holding applied to Section 1981 as well as Section 1982. A majority of the Court ruled that the 1991 CRA amendments did have this effect, and that:

> *Sullivan*, as interpreted and relied upon by *Jackson*, as well as the long line of related cases where we construe Sections 1981 and 1982 similarly, lead us to conclude that the view that Section 1981 encompasses retaliation claims is indeed well embedded in the law. That being so, considerations of stare decisis strongly support our adherence to that view.[83]

Justices Thomas and Scalia dissented, arguing that "the Court's holding has no basis in the text of Section 1981."[84] The dissent did not attack the original *Sullivan* decision, but maintained that later cases

provisions use "broad language" providing that all citizens or persons within the United States shall enjoy the same rights enjoyed by white citizens. See id. at 448 (citing Gen. Bldg. Contractors Ass'n. v. Pa., 458 U.S. 375, 383–84, 388 (1982); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439–40, (1973); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78, (1968)) (noting "shared historical roots" and "strong purposive connection between the two provisions").

[80] 491 U.S. 164 (1989).

[81] Id. at 171, 177.

[82] Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (codified at 42 U.S.C. § 1981).

[83] *CBOCS*, 553 U.S. at 451.

[84] Id. at 457–58 (Thomas, J., dissenting).

holding that Section 1982 encompasses retaliation claims misread *Sullivan* and ignored the statutory text.[85] The most striking thing about Justice Thomas's dissent, however, was its bald insistence that even if *Sullivan* had "squarely and unambiguously held that Section 1982 provides an implied cause of action for retaliation," the Court should not extend *Sullivan*'s erroneous interpretation of Section 1982 to Section 1981:[86]

> [E]rroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep. Otherwise, stare decisis, designed to be a principle of stability and repose, would become a vehicle of change whereby an error in one area metastasizes into others, thereby distorting the law.[87]

In other words, in *CBOCS*, as in *Gross*, Justices Thomas and Scalia argued that statutory precedents should not apply to related provisions in other statutes when the Court believes that the precedent interpretation is erroneous or has had undesirable consequences.[88] The normative desirability of such an approach is discussed *infra* Part III.B. Here, I simply note that this argument illustrates Justice Thomas's strong emphasis on adopting the "correct reading" of the statute and his unwillingness to put stare decisis ahead of accuracy. Justice Thomas's lack of tolerance for "incorrect" statutory constructions is further on display in several solo dissents in which he alone voted to overrule.[89] The cases range in subject area and statute type but demonstrate a shared resistance to following statutory stare decisis for its own sake.

The borrowed-statute precedent cases discussed in this Section are, of course, different from the "evolving economic theory" cases in that they

[85] Id. at 464–69. (Thomas, J., dissenting).

[86] Id. at 468–70. (Thomas, J., dissenting).

[87] Id. at 469–70. (Thomas, J., dissenting).

[88] In a similar vein is *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2526–31 (2015) (Thomas, J., dissenting) (arguing that erroneous precedents interpreting Title VII and ADEA should not be applied in interpreting the Fair Housing Act).

[89] See, e.g., Gonzalez v. United States, 553 U.S. 242, 260–61 (2008) (Thomas, J., dissenting); Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); Kimbrough v. United States, 552 U.S. 85, 114–16 (2007) (Thomas, J., dissenting).

involve the application of a statutory precedent to a different statute than the one at issue in the initial case. However, given the longstanding judicial practice of applying precedents involving Title VII and the ADEA and Section 1981 and 1982 interchangeably, these cases raise the same puzzle as the economic-theory cases discussed in the previous Section: why are the textualist and textualist-leaning Justices willing to abandon statutory stare decisis for certain statutes in certain cases?

### *C. "Unworkable" Precedents*

Modern textualists also have argued—usually unsuccessfully—that a statute should be overruled because it has proved "unworkable" or "confusing" to implement. "Unworkability" is a long-standing, traditional ground for abandoning a precedent, statutory or otherwise,[90] and it has been invoked by jurists of all jurisprudential philosophies.[91] But the Court's textualist Justices seem particularly fond of this form of argument—and more regularly advocate overruling *statutory* precedents based on it than do their purposivist counterparts.

Consider, for example, three recent cases: *Altria Group, Inc. v. Good*,[92] *Holder v. Hall*,[93] and *Gross v. FBL Financial Services, Inc.*[94] *Altria* raised the question whether state law claims for fraudulent misrepresentation against cigarette manufacturers were preempted by the Public Health Cigarette Smoking Act of 1969.[95] A majority of the Court concluded that such claims were not preempted, relying heavily on a prior precedent, *Cipollone v. Liggett Group*.[96] Justice Thomas

[90] See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) ("Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law" as when there is "inherent confusion created by an unworkable decision").

[91] See, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988); Moragne v. States Marine Lines, 398 U.S. 375, 378 (1970); Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965).

[92] 555 U.S. 70 (2008).

[93] 512 U.S. 874 (1994).

[94] 557 U.S. 167 (2009).

[95] Pub. L. No. 91-222, § 5(b), 84 Stat. 87, 88 (codified at 15 U.S.C. § 1334(b) (2012)).

[96] *Altria*, 555 U.S. at 73, 82. *Cipollone* directed implementing courts to examine each state law claim individually and ask whether the claim was predicated "on a duty 'based on smoking and health.'" 505 U.S. 504, 528–29 (1992) (quoting § 1334(b)).

dissented, joined by Justices Scalia, Roberts, and Alito.[97] His opinion criticized the *Cipollone* predicate-duty test as unduly complicated and confusing and called for overruling it, observing that "lower courts have consistently expressed *frustration at the difficulty in applying* the *Cipollone* plurality's test."[98] The dissent argued that "[t]he Court should not retain an interpretive test that has proved incapable of implementation" and that "*[s]tare decisis* considerations carry little weight when an erroneous governing decision[n] has created an unworkable legal regime."[99] Finally, the dissent noted that *Cipollone* was a plurality decision and argued that it therefore was not binding.[100]

Recall also that the majority opinion in *Gross v. FBL Financial Services, Inc.* invoked unworkability arguments, albeit as a secondary justification for refusing to apply *Price Waterhouse*'s burden-shifting test to the ADEA.[101] After explaining that Title VII and the ADEA were different in material respects, the opinion added that "it has become evident in the years since [*Price Waterhouse*] was decided that its burden-shifting framework is *difficult to apply*" and "courts have found it *particularly difficult* to craft an instruction to explain its burden-shifting framework."[102] Given the difficulties experienced in applying *Price Waterhouse*'s framework, the majority insisted, it made no sense to extend that framework to the ADEA.[103] By contrast, Justice Stevens' purposivist dissenting opinion insisted that *Price Waterhouse* directly governed construction of the ADEA and lamented "[the majority's] utter disregard of our precedent and Congress'[s] intent.[104] The dissent

[97] *Altria*, 555 U.S. at 91.

[98] Id. at 92, 97 (Thomas, J., dissenting) (emphasis added) (citing lower court opinions).

[99] Id. at 97–98 (third alteration in original) (internal quotation marks omitted) (quoting FEC v. Wis. Right to Life, 551 U.S. 449, 501 (2007) (Scalia, J., concurring).

[100] Id. at 96.

[101] 557 U.S. 167, 179 (2009).

[102] Id. at 173, 179 (emphasis added).

[103] Id. at 179.

[104] Id. at 182–83 (Stevens, J., dissenting) ("That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply 'with equal force in the context of age discrimination, for the substantive provisions of the ADEA "were derived *in haec verba* from Title VII."'" (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).

dismissed the majority's workability concerns by noting that Congress expressly endorsed the "motivating-factor" framework in its 1991 amendments to Title VII and argued that this legislative endorsement should trump any workability objections.[105]

Justice Thomas's concurrence in *Holder v. Hall*, joined by Justice Scalia, echoed the reasoning of the majority opinion in *Gross*. There, the Court held that Section 2 of the Voting Rights Act ("VRA") does not allow challenges to the size of a government body because there is no objective "ideal" governing body size against which the challenged governing body can be measured.[106] Justice Thomas wrote separately to advocate that the Court go much further and engage in "a systematic reassessment of [its] interpretation of § 2."[107] Specifically, he argued that the Court's decision in *Thornburg v. Gingles*,[108] which interpreted Section 2 to reach claims of vote "dilution," should be overruled.[109] In his view, "the gloss" *Gingles* placed on the statute "is at odds with the terms of the statute and has proved utterly unworkable in practice."[110] Justice Thomas's opinion also complained that *Gingles* was "based on a flawed method of statutory construction," characterized the *Gingles* implementation test as "a disastrous misadventure in judicial policymaking," and argued that "by construing the Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of political theory."[111]

The cases discussed in this Part range in subject matter—from antidiscrimination law to patent law, antitrust law, criminal sentencing, and preemption. Despite the differences in subject matter, however, similar themes about precedents that are "not really statutory interpretation"[112] or that are too erroneous to deserve adherence resound

[105] Id. at 185–87 ("Because Congress has codified a mixed-motives framework for Title VII cases—the vast majority of antidiscrimination lawsuits—the Court's concerns about that framework are of no moment.").

[106] Holder v. Hall, 512 U.S. 874, 885 (1994).

[107] Id. at 892 (Thomas, J., concurring in the judgement).

[108] 478 U.S. 30, 46 (1986).

[109] *Holder*, 512 U.S. at 945 (Thomas, J., concurring in the judgment).

[110] Id. at 892.

[111] Id. at 892–93, 945.

[112] Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2415 (2015) (Alito, J., dissenting).

in the textualist-authored opinions that advocate rejecting a statutory precedent.

Finally, it is worth noting that while this Article focuses on the U.S. Supreme Court, committed textualist jurists on other courts also have shown a marked proclivity for overruling statutory precedents.[113] The

[113] A prominent example is the Michigan Supreme Court, which gained a textualist majority from 1998 to 1999, when Michigan Governor John Engler appointed four new Justices—each an avowed textualist—to the court. See Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and The New Modified Textualism, 119 Yale L.J. 1750, 1803–04 (2010). Justice Stephen Markman, for example, had worked in the Reagan Administration's Office of Legal Policy and was credited with helping to put in place a "new generation of textualist judges." Id. at 1804; see also Cornell W. Clayton, The Politics of Justice: The Attorney General and the Making of Legal Policy 151 (1992) (describing Markman's influence in the Office of Legal Policy); T.R. Goldman, The Flower of the Reagan Revolution (John Roberts, Jr.), Free Republic (Aug. 4, 2005), http://www.freerepublic.com/focus/f-news/1457017/posts (same). Likewise, Justice Maura Corrigan had argued in speeches and law review articles that courts should adopt textualism in order to achieve "a disciplined interpretive approach." Maura D. Corrigan, Textualism in Action: Judicial Restraint on the Michigan Supreme Court, 8 Tex. Rev. L. & Pol. 261, 263–64 (2004). These textualist appointees quickly overruled numerous statutory precedents; indeed, in the newly constituted court's first five years, its textualist majority overruled more statutory precedents than the court had done during any previous period in the state's history. See Gluck, supra, at 1804 & n.195 (citing Corrigan, supra, at 264); Nelson P. Miller, "Judicial Politics": Restoring the Michigan Supreme Court, Mich. B.J., Jan. 2006, at 38; Robert A. Sedler, The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings, 55 Wayne L. Rev. 1911, 1929–30 & n.81 (2009); Clifford W. Taylor, A Government of Laws, and Not of Men, 22 T.M. Cooley L. Rev. 199, 208 (2005)); Todd C. Berg, Marilyn Kelly Named New Michigan Supreme Court Chief Justice, Mich. Law. Wkly., Jan. 12, 2009 (noting that the court overruled sixty-one precedents between 2000 and 2005, compared with eighteen in the prior five-year period). {Master: Spacing in this FN}

For examples of such cases, see Haynie v. State, 664 N.W.2d 129, 132, 135 (Mich. 2003) (overruling Koester v. City of Novi, 580 N.W.2d 835 (Mich. 1998)); Gladych v. New Family Homes, 664 N.W.2d 705, 706 (Mich. 2003) (overruling Buscaino v. Rhodes, 189 N.W.2d 202 (Mich. 1971)); Rednour v. Hastings Mutual Ins. Co., 661 N.W.2d 562, 564–65, 567 (Mich. 2003) (overruling Nickerson v. Citizens Mut. Ins., 224 N.W.2d 896 (Mich. 1975)); Pohutski v. City of Allen Park, 641 N.W.2d 219, 224 (Mich. 2002) (overruling Hadfield v. Oakland Co. Drain Comm'r, 422 N.W.2d 205 (Mich. 1988)); Sington v. Chrysler Corp., 648 N.W.2d 624, 627 (Mich. 2002) (overruling Haske v. Transp. Leasing, 566 N.W.2d 896 (Mich. 1997)); Brown v. Genesee Cty. Bd. of Comm'rs, 628 N.W.2d 471, 474 & n.4 (Mich. 2001) (overruling Green v. Dep't of Corrections, 192 N.W.2d 491 (Mich. 1971)); Nawrocki v. Macomb Cty. Rd. Comm'n, 615 N.W.2d 702, 709, 718 (Mich. 2000) (overruling Pick v. Szymczak, 548 N.W.2d 603 (Mich. 1996)); Robinson v. City of Detroit, 613 N.W.2d 307, 311 (Mich. 2000) (overruling Fiser v. Ann Arbor, 339 N.W.2d 413 (Mich. 1983); Rogers v. Detroit, 579 N.W.2d 840 (Mich. 1998)). But see People v. Hawkins, 668 N.W.2d 602, 618, 622 (Mich. 2003) (Cavanagh, J., dissenting) (chastising court for disregarding "the strong

little that we know about state experiences with statutory stare decisis lends support to this Article's central claim that the disregard for statutory stare decisis displayed by textualist Justices on the U.S. Supreme Court is no accident but, rather, a natural corollary to the textualist jurisprudential approach—or, perhaps, to jurisprudential tendencies that make an individual judge likely to associate herself with a textualist interpretive philosophy.[114]

## II. SOME THEORIES AND LESSONS

It may be tempting, in reviewing the above cases, to conclude that textualist Justices' willingness to abandon statutory stare decisis can be explained simply by judicial ideology. After all, the Roberts Court's textualist and textualist-leaning Justices also are its most conservative Justices, while its purposivist Justices tend to be more liberal.[115] Further, several of the cases in which textualist Justices have voted to overrule a precedent or refused to apply it to a closely related statute have involved antidiscrimination statutes that initially were interpreted in an expansive manner—that is, in keeping with liberal policy preferences. Likewise, the textualist opinions in the evolving economic theory cases tend to support overruling precedents that restrict certain business arrangements or make it easier for shareholders to sue corporations—and thus are consistent with laissez-faire, corporation-friendly, conservative policy preferences. So we could interpret textualist Justices' economic dynamism, stinginess with precedents based on related statutes, and heightened readiness to overturn precedents that have proved unworkable as merely an effort by the Courts' conservatives to negate precedents adopted by more liberal predecessor Courts. Conversely, we could read purposivist Justices' insistence on following statutory stare decisis in those same cases as a corresponding attempt by the Court's liberal jurists to protect liberal precedents.

presumption that a high court's construction of a statute should be given a heightened stare decisis effect").

[114] See infra note 182.

[115] But cf. Margaret H. Lemos, The Politics of Statutory Interpretation, 89 Notre Dame L. Rev. 849, 854 (2013) (book review) (acknowledging this but arguing that there is nothing inherently conservative about textualism).

There is likely some truth to this account. But while ideological considerations certainly may have played *some* role in the Justices' votes in *some* of the cases, they provide an imperfect explanation for a number of others. The Patent Act case, *Kimble*, for example, does not seem to have a clear liberal-versus-conservative dividing line—indeed, all the Justices seemed to agree that the *Brulotte* rule was a bad one as a matter of policy—and an odd assortment of the liberal Justices plus Justices Scalia and Kennedy voted to uphold the rule.[116] Further, ideology does not seem sufficient to explain Justice Thomas's lone dissents advocating overruling statutory precedents in cases such as *Kimbrough* and *Preston*, where all the other Justices, conservative and liberal alike, voted to follow the precedent.[117] Moreover, very few of the Court's opinions advocating overruling a statutory precedent garnered *all five* (or even four) of the conservative Justices' votes.[118] Thus, while this Article does not mean to discount the role that ideology may have played in some of the cases discussed in Part I, it argues that there is more than *just* ideology at work in these cases.

Indeed, two themes emerge from the cases examined in Part I and listed in Appendix I. First, most of the cases involve statutory constructions that established a decision-making rule or test for implementing a statutory provision, rather than a simple holding that a statutory word or phrase means "Y."[119] Second, many of the cases involve textualist arguments that a precedent should be overruled because it simply "got the meaning of the statute wrong" or was based

[116] See Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2412–13 (2015).

[117] See Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); Kimbrough v. United States, 552 U.S. 85, 114–16 (2007) (Thomas, J., dissenting).

[118] See infra Appendix I (reporting only three such cases, out of thirty-one). These cases were *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (five votes), *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008) (four votes), and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (five votes).

[119] See, e.g., *Kimble*, 135 S. Ct. at 2407–08, 2412; Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516–18 (2015); Halliburton v. Erica P. John Fund, 134 S. Ct. 2398, 2405-07 (2014); *Gross*, 557 U.S. at 171–73; John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–35 (2008); *Altria*, 555 U.S. at 80–82; *Preston*, 552 U.S. at 352–53; *Leegin*, 551 U.S. at 881–82, 887; Kimbrough, 552 U.S. at 90–91; State Oil Co. v. Khan, 522 U.S. 3, 7, 12 (1997); Holder v. Hall, 512 U.S. 874, 878, 880 (1994).

on an economic theory that has since been "debunked."[120] This Part argues that these two observations reflect important, and thus far under-appreciated, corollaries to textualists' jurisprudential philosophy.

Section A explains that textualism's focus on the statutory text and hostility towards judicial policymaking seems to translate into a view that statutory decisions which establish a test for implementing a statute are somehow less authoritative than decisions that hold that the text of "X" provision means "Y." Section B examines how this "implementation test" insight might explain textualist Justices' dismissive treatment of congressional overrides in a number of cases that have surprised scholars. Section C suggests two additional explanations for textualists' willingness to overrule statutory precedents: (1) textualism's interpretive methodology lends itself to a "correct answer" mindset that makes it difficult for textualist jurists to accept a statutory construction they believe "gets it wrong"; and (2) at least some textualists view themselves as judicial revolutionaries, seeking to reshape how courts interpret statutes, and thus are willing to break a few eggs (i.e., overrule a few cases) along the way.

### *A. "Implementation Tests" Are Different*

A prominent theme, or argument, that runs through several of the cases discussed in Part I is that the precedent the textualist Justices would overrule is "not really statutory interpretation" at all but, rather, some form of judicial policymaking. Typically, the precedents at issue involve a judicial test or rule for implementing a statutory provision as opposed to a simple holding that "X" word or phrase means "Y." That is, such cases establish that "ABC" test or rule is to be used to decide

[120] See, e.g., *Kimble*, 135 S. Ct. at 2415–17 (Alito, J., dissenting) (economic theory); *Halliburton*, 134 S. Ct. at 2418 (Thomas, J., concurring in the judgment) (economic theory); *Gross*, 557 U.S. at 173–75 (text); *Altria*, 555 U.S. at 92, 95–96, 106–07 (Thomas, J., dissenting) (text); CBOCS West, Inc. v. Humphries, 553 U.S. 442, 457–58, 464 (2008) (Thomas, J., dissenting)(text); Gonzalez v. United States, 553 U.S. 242, 260–61 (2008) (Thomas, J., dissenting) (text); *Preston*, 552 U.S. at 363 (Thomas, J., dissenting) (text); *Leegin*, 551 U.S. at 899–900 (economic theory); *Kimbrough*, 552 U.S. at 114–16 (Thomas, J., dissenting) (text); Clark v. Martinez, 543 U.S. 371, 402–03 (2005) (Thomas, J., dissenting) (text); *Holder*, 512 U.S. at 892, 945 (Thomas, J., concurring in the judgment) (text); Johnson v. Transp. Agency, 480 U.S. 616, 670–73 (1987) (Scalia, J., dissenting) (text).

whether a particular action falls within "X" statutory provision—as opposed to that "X statutory provision means Y." Some of the "not really statutory interpretation" cases involve a test or interpretation that is only loosely connected to a statutory anchor, such as the test for determining when a practice constitutes a "restraint of trade" in the economic-theory cases. Implementation tests are also prevalent in cases involving antidiscrimination statutes, such as Title VII (e.g., burdens of proof), and procedural statutes, such as those establishing limitations periods or jurisdictional rules.[121]

The distinction between text-parsing statutory interpretation and implementation tests is one that the Justices themselves have hinted at in some cases—although any discussion they have offered has been brief and undeveloped. In *Kimble*, for example, the textualist dissenting opinion urged the Court to overrule *Brulotte* on the ground that the rule established in *Brulotte* was "not based on anything that can plausibly be regarded as an interpretation of the terms of the Patent Act," that it was "a bald act of policymaking" and "was not really statutory interpretation at all."[122] Similarly, in another economic theory case, *Halliburton*, the Court reconsidered a precedent that dictated how investors must prove the reliance element of the implied Rule 10b-5 cause of action—a test that governed implementation of a regulation.[123] The precedent case, *Basic Inc. v. Levinson*, created an evidentiary presumption that the price of stock traded in an efficient market reflects all public, material information.[124] Justice Thomas's concurring opinion, which advocated overruling *Basic*, argued that "*Basic*, of course, has nothing to do with statutory interpretation. . . . [It] concerned a judge-made evidentiary presumption for a judge-made element of the implied 10b-5 private cause of action, itself 'a judicial construct that Congress did not enact in the text of the relevant statutes.'"[125] Recall that in *Holder v. Hall*, Justice Thomas's concurring opinion likewise characterized the precedent case's "totality of the circumstances" test for implementing Section 2 of

[121] See infra Appendix I.

[122] *Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting).

[123] 134 S. Ct. at 2405.

[124] Basic Inc. v. Levinson, 485 U.S. 224, 245, 249–50 (1988).

[125] *Halliburton*, 134 S. Ct. 2398 at 2425 (2014) (quoting Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008)).

the Voting Rights Act as a "disastrous misadventure in judicial policymaking."[126]

At first blush, such comments may sound like an excuse or a flimsy attempt to justify a seemingly heretical departure from statutory stare decisis. But on closer consideration, these grumblings about judicial policymaking reflect a significant and unappreciated difference between textualist and purposivist jurisprudential views about statutory constructions that involve implementation tests—as opposed to constructions that directly parse statutory language. That is, when the precedent interpretation adopts a judge-made implementation test, textualists view that interpretation as more like common-law decision-making than traditional statutory interpretation.[127]

Further, because an interpretation that adopts an implementation test is not saying, "Here is what Congress enacted into law," but only, "Here is how courts should apply what Congress enacted into law," and because the test is *judicially* created, textualist Justices view the interpretation (and test) as open to revision by subsequent Courts who believe the test to be misguided, contrary to statutory text, unworkable, costly to implement, or out of step with subsequent legal developments. In other words, if any of the reasons cited as justifying the overruling of a common-law precedent is present with respect to an implementation-test precedent, textualist Justices are likely to consider that reason sufficient to justify overruling the implementation test.

One reason textualists give for making such a distinction between implementation-test and text-parsing precedents is that the separation-

[126] Holder v. Hall, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment). See also discussion infra Part II.C (analyzing the textualists' "correct answer" mindset and their self-image as jurisprudential revolutionaries).

[127] The textualist opinions in the non-antitrust economic-theory cases go out of their way to argue that the statutes at issue in those cases are like common-law statutes—because securities laws largely have been developed by courts, see *Halliburton*, 134 S. Ct. at 2425–26 (Thomas, J., concurring in the judgment), or because the precedent case was essentially an antitrust case "masquerading" as a patent case, see *Kimble*, 135 S. Ct. at 2418 (Alito, J., dissenting). This Article argues that the fact that the precedents at issue involved implementation tests rather than ordinary text-parsing statutory interpretation at least contributed to textualist Justices' view of the original precedents as common-law equivalents—and that the implementation-test exception helps explain textualist Justices' willingness to overturn precedents in other cases that do not involve statutes that even arguably could be considered "common-law statutes."

of-powers concerns that justify statutory stare decisis are not present—or at least are significantly diminished—with implementation tests. That is, Congress is not necessarily the institution best suited to update or correct errors in a judicially created test designed to help lower courts implement a statutory provision. Congress does not, for instance, monitor how well an implementation test is working in the lower courts or pay attention to lower-court criticism of such tests.[128] The Supreme Court, by contrast, in its role as overseer of the judicial system, might more organically be in touch with lower court experiences employing an implementation test established by one of its earlier cases.[129]

Some of the textualist-authored opinions in the cases discussed in Part I and listed in Appendix I have explicitly acknowledged the different institutional dynamics at work when a statutory interpretation adopts an implementation test versus a text-parsing construction. In *Kimble*, for example, Justice Alito's dissenting opinion insisted that

> we do not give super-duper protection to decisions that do not actually interpret a statute. When a precedent is *based on a judge-made rule* and is not grounded in anything that Congress has enacted, we cannot "properly place on the shoulders of Congress" the entire burden of correcting "the Court's own error."[130]

Similarly, Justice Thomas's concurring opinion in *Halliburton* argued that,

> [i]n statutory cases, it is perhaps plausible that Congress watches over its enactments and will step in to fix our mistakes, so we may leave to Congress the judgment whether the interpretive question is better left "'settled'" or "'settled right.'" But *this rationale is untenable when it comes to judge-made law* like "implied" private causes of action, which we retain a duty to superintend. . . . *[W]hen we err in areas of*

[128] See Barrett, supra note 28, at 342–47 (arguing that Congress has little incentive to monitor court of appeals decisions).

[129] Indeed, even apart from the Court's official role as head of the judicial system, its members are likely to have formal and informal interactions with lower-court judges, which might give rise to inter-court chatter about cases and precedents.

[130] *Kimble*, 135 S. Ct. at 2418 (Alito, J., dissenting) (emphasis added) (quoting Girouard v. United States, 328 U.S. 61, 69–70 (1946)).

> *judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around*.[131]

In other words, when the judiciary fashions a test to help courts apply the text of a statute, rather than merely identifies the "correct meaning" of statutory text, textualists view any problems with that test as within the judiciary's prerogative, as well as its responsibility, to correct. Perhaps the reason for this, suggested by Justice Thomas's discussion in *Halliburton*, is that mistakes in judicial interpretation of the statute's text can or should signal to Congress that that text needs correction or clarification; whereas mistakes in a judicially crafted test for implementing a statute are more difficult for Congress to correct. Indeed, in order to correct an implementation test, Congress would have to amend or alter the terms of a judicial holding, rather than the text of a statute—or at least would have to mention the judicially created test in the text of the corrective amendment. Congress has at times done precisely this—the Civil Rights Act of 1991 is a prime example[132]—but such legislative corrections of judicially crafted tests are awkward and often themselves meet with judicial resistance in subsequent application.[133]

Purposivist Justices, by contrast, do not seem to view statutory precedents that create implementation tests as less binding than precedents that adopt a straightforward holding that a statutory word or phrase means "X." Or, at least, purposivist Justices regularly seem to vote to uphold such implementation tests, citing statutory stare decisis. What accounts for this difference? One possible explanation is that purposivists treat implementation tests differently than do textualists because purposivists are, on the whole, more comfortable with tests and factors than are textualists. In this sense, the implementation-test divide may be a close cousin of the rules–standards divide that tends to break along textualist–purposivist lines.[134]

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[131] *Halliburton*, 134 S. Ct. at 2425–26 (Thomas, J., concurring in the judgment) (emphasis added) (citations omitted) (quoting Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424 (1986)).

[132] See Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071.

[133] See infra Section II.B.

[134] Briefly, the rules-versus-standards debate acknowledges that judges have a choice, when articulating legal policies, between establishing clear, bright-line rules—e.g., "No one

As scholars have observed, textualists have shown a heightened preference for rules over standards, whereas purposivists and intentionalists have proved more comfortable with standards (though not necessarily to prefer them over rules).[135] Thus, for example, textualists are less willing than jurists who subscribe to other interpretive approaches to recognize case-by-case exceptions to a statutory rule on the ground that the rule is over- or under-inclusive.[136] Moreover, textualists "enthusiastically deploy canons of construction, with special emphasis on the more rule-like of the canons."[137] Accordingly, it is possible that textualists are more willing to overrule precedents that involve implementation tests at least in part because such tests essentially establish "standards"—giving courts guidelines for how to apply a statute and leaving significant room for judicial discretion—rather than fixed rules. Purposivists, on the other hand, may be more comfortable with tests that allow for judicial discretion on a case-by-case basis. Indeed, they may view judicial discretion in the application of a statute as a *good* thing—on the theory that it enables courts to ensure that the statute is implemented consistently with Congress's purpose in individual cases.

On a second, deeper level, the difference between purposivists' and textualists' attitudes towards implementation test precedents may reflect an under-appreciated difference between the two interpretive theories' visions of the proper role of the Court in statutory interpretation. Specifically, textualists seem to view the Court as more of a monitor, or supervisor, of the lower courts and the legal system as a whole than do purposivists. Purposivists, by contrast, seem to view the Court as more

may drive over sixty-five miles per hour"—versus establishing flexible standards—e.g., "No one may drive at an excessive speed." Whereas rules are absolute and straightforward, standards are somewhat open-ended and require further judicial evaluation at the implementation stage. Whereas rules are predictable, clear, and categorical, standards require case-by-case analysis. For general discussions of the distinction between rules and standards, see Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 258 (1974); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 559–60 (1992); Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 58–59 (1992).

[135] See, e.g., Nelson, supra note 16, at 372–403.

[136] See id. at 381–83.

[137] John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419, 422 (2005).

of a faithful agent of Congress than do textualists. Or perhaps it is more accurate to say that both textualists and purposivists view the Court as *both* a monitor *and* a faithful agent, but that textualists place greater emphasis on the monitor role, while purposivists place greater weight on the faithful agent role.

I have elsewhere observed that the Roberts Court's conservative Justices—who also tend to be its most textualist and textualist-leaning Justices—seem more focused on ensuring that a particular statutory construction works well within the legal system than do their liberal, often purposivist, counterparts.[138] For example, when these Justices pay attention to the practical consequences that a particular interpretation is likely to produce, they tend to emphasize administrability concerns—e.g., whether the interpretation will waste judicial resources, prove impossible to administer, or result in unclear or unpredictable rules.[139] In the context of statutory stare decisis, I believe this translates into a greater willingness on the part of these Justices to overrule a statutory precedent that is giving lower courts difficulty. Indeed, a number of the textualist opinions that advocate overruling statutory precedents have cited the problems that lower courts have had implementing the precedent, sometimes quoting directly from lower court opinions criticizing the precedent.[140]

[138] See Anita S. Krishnakumar, Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis, 62 Hastings L.J. 221, 225 (2010).

[139] Id. at 226, 244–45.

[140] See, e.g., Gross v. FBL Fin. Servs., 557 U.S. 167, 179 (2009) (citing Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1179 (2d Cir. 1992)) (referring to "the murky water of shifting burdens in discrimination cases"); Altria Grp., Inc. v. Good, 555 U.S. 70, 97 (2008) (Thomas, J., dissenting) (citing Good v. Altria Grp., Inc., 436 F. Supp. 2d 132, 142 (D. Me. 2006)) ("'[C]ourts remain divided about what the [*Cippollone*] decision means and how to apply it' and . . . '*Cipollone*'s distinctions, though clear in theory, defy clear application.'"); Visser v. Packer Eng'g Assocs., 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, J., dissenting) (citing judicial difficulty in formulating burden-shifting instructions and juror difficulty in applying such instructions). See also Holder v. Hall, 512 U.S. 874, 892 (1994) (Thomas, J., concurring in the judgment) (stating that precedent has forced lower courts to grapple with inherently political questions); Hilton v. S. C. Pub. Rys. Comm'n, 502 U.S. 197, 212 (1991) ("It will be difficult, if not impossible, for lower courts to know" how to the implement test at issue). See also discussion infra Section II.C (exploring textualists' "correct answer" mindset).

This lower-court-monitor function may also explain something puzzling about the evolving economic-theory cases. In many of these cases, textualist Justices advocated replacing a clear, easy-to-administer test or interpretation with one that is more complicated for courts to administer. In *Kimble*, for example, they would have replaced *Brulotte*'s straightforward rule ("No royalties after the patent expires") with antitrust law's open-ended rule of reason (an "elaborate inquiry" that requires courts to conduct "a full-fledged" economic analysis of a royalty clause's likely effect on competition).[141] This is curious because, as I have shown elsewhere, the textualist Justices have in numerous other cases rejected statutory constructions that would be messy to implement, citing the practical difficulties and confusion that such constructions would produce for lower courts.[142]

But textualists' emphasis on the Court as monitor or supervisor of the lower courts readily explains this seeming anomaly: the Court's willingness to adopt the messier test in such cases may stem, in part, from the fact that lower courts have found the clear, simple test difficult to administer, or have criticized it for some other reason. *Kimble* is again a good example. Although the *Brulotte* precedent adopted a simple, easy-to-administer rule—whereas the dissenters' preferred "rule of reason" test was more complicated—lower courts charged with administering the *Brulotte* rule had severely criticized it.[143] Thus, the dissenting Justices may have viewed their monitoring role as best fulfilled by jettisoning a precedent that lower courts had denounced—

[141] See Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2408–09, 2411 (2015) (citing Brief for Petitioner at 45). Indeed, the majority opinion pointed this out and stressed the simplicity of the *Brulotte* rule in comparison to the "rule of reason" advocated by the dissenters. See id. at 2411. See also, e.g., Halliburton Co. v. Erica P. John Fund, 134 S. Ct. 2398, 2418–19 (2014) (Thomas, J., concurring in the judgment) (advocating replacing a simple rule that presumed reliance on defendant's misrepresentations with a messy, fact-specific judicial inquiry into whether particular plaintiffs in fact relied on defendant's misstatements); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 882 (2007) (replacing *Dr. Miles*'s per se rule against vertical price restraints with them the "rule of reason" test).

[142] See Anita S. Krishnakumar, The Anti-Messiness Principle in Statutory Interpretation, 87 Notre Dame L. Rev. 1465, 1507–12 (2012). See also William N. Eskridge, Jr. et al., Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy 1210 & n.178 (5th ed. 2014) (citing this principle).

[143] See Zila, Inc. v. Tinnell, 502 F.3d 1014, 1019–20 & n.4 (9th Cir. 2007); Scheiber v. Dolby Labs., Inc., 293 F.3d 1014, 1017–18 (7th Cir. 2002).

even though that precedent established a test that was seemingly simple on its face.

Purposivist Justices, by contrast, may be more willing to stick with old implementation-test precedents than are their textualist counterparts, even in the face of lower-court criticism, because they view the act of creating an implementation test as a judicial effort to effectuate Congress's goals in enacting the statute. That is, because purposivists are not focused exclusively on the text of the statute, they may not view the judicial adoption of an implementation test that is one step removed from the text as a "bald act of judicial policymaking."[144] Rather, they may view such tests as part and parcel of the judicial process of ensuring that Congress's purpose is fulfilled when a statute is applied to concrete legal disputes.

Moreover, once the Court has put forth an interpretation that does its best to give effect to Congress's purpose—whether that interpretation takes the form of an implementation test or a text-parsing statutory construction—purposivists view it as the exclusive province of the principal, Congress, to decide whether that interpretation accords with the statute's purpose and to correct the interpretation if necessary. As the majority opinion in *Kimble* argued,

> [W]e apply statutory stare decisis even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.[145]

Because judicial fulfillment of statutory purpose is purposivists' lodestar—rather than judicial cracking of a linguistic code—purposivists do not view implementation test precedents as different in kind, or less deserving of deference, than ordinary statutory interpretation precedents. Moreover, they do not seem to view their primary role in superintending such tests to be to ensure that lower courts are able to administer them.

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[144] *Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting).

[145] Id. at 2409 (citations omitted).

Rather, they seem to view their role to be to ensure that any implementation test they adopt continues to effectuate Congress's purpose as times change—and they accordingly view Congress, rather than the courts, as the appropriate arbiter of such tests' effectiveness.

Indeed, because purposivism as an interpretive methodology is more focused on legislative intent and is comfortable making inferences about such intent based on legislative behavior, it makes sense that purposivists are far more willing than their textualist colleagues to take their cues from Congress when it comes to overturning a precedent. Purposivists also seem more willing to assume that Congress pays attention to judicially crafted implementation tests and to infer congressional approval of an implementation test from legislative inaction following the adoption of such a test.[146] In the purposivist jurist's eyes, the judicial invalidation of an implementation test that Congress has left in place—thereby signaling its implicit approval, much as traditional principals signal ratification of their agents' actions through silence—may seem like the act of a faithless legislative agent.

Appendix I lists thirty-one Supreme Court cases in which at least one member of the Court advocated overruling a statutory precedent. Of these thirty-one cases, only nine contained *explicit* arguments that the precedent at issue constituted judicial policymaking or was not "real statutory interpretation" and therefore was not entitled to the super-strong presumption of correctness afforded by statutory stare decisis.[147] But over half of the cases in the Appendix (seventeen of thirty-one, or 54.8%) involved implementation test precedents.[148] Because the cases

[146] See, e.g., *Leegin*, 551 U.S. at 908 (Breyer, J., dissenting) (noting that Congress has repeatedly refused to overturn the *Dr. Miles*'s per se rule).

[147] See *Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2528–29 (2015) (Thomas, J. dissenting) (arguing that the disparate impact test was created by an agency, not Congress, and that it defies the statute's text); Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2425–27 (2014) (Thomas, J., concurring in the judgment); Altria Grp., Inc. v. Good, 555 U.S. 70, 106–07 (2008) (Thomas, J., dissenting); Kimbrough v. United States, 552 U.S. 85, 114–16 (2007) (Thomas, J., dissenting); *Leegin*, 551 U.S. at 899–900, 905 (2007); Holder v. Hall, 512 U.S. 874, 892–93 (1994) (Thomas, J., concurring in the judgment); Johnson v. Transp. Agency, 480 U.S. 616, 675–76 (1987) (Scalia, J., dissenting); City of Okla. City v. Tuttle, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting); infra Appendix I.

[148] See *Kimble*, 135 S. Ct. at 2408–09 ("unreasonable restraint of trade" test); *Tex. Dep't of Hous.*, 135 S. Ct. at 2516–18 (disparate-impact test); *Halliburton*, 134 S. Ct. at 2409

listed in the Appendix are based on word searches and are not exhaustive, I do not want to overstate the significance of these percentages.[149] But these crude numbers suggest that when the members of the Court are willing to overturn a statutory precedent, they are often dealing with a precedent they may view as less binding because it imposes a decision-making rule for implementing a statute rather than directly construes the statute's text.

### *B. Implementation Tests, Legislative Overrides, and "Shadow Precedents"*

The implementation-test distinction illuminated in Section A has important implications not just for the Court's treatment of its own statutory precedents—but for its treatment of the related category of statutory precedents that *Congress chooses to override* by amendment or new law. This Section discusses the phenomenon of "shadow precedents"—that is, statutory precedents that Congress has overridden

("reliance on material misrepresentation" test); *Kimbrough*, 552 U.S. at 112–14 (Scalia, J., concurring) ("reasonableness" of criminal sentences); Gross v. FBL Fin. Servs., 557 U.S. 167, 176–77 (2009) (burden of proof rule for demonstrating discrimination "because of" age); *Altria*, 555 U.S. at 76–77 (test for determining whether state law is preempted); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–34 (2008) (test for whether statute of limitations is jurisdictional); *Leegin*, 551 U.S. at 885–86 ("unreasonable restraint of trade" test); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("unreasonable restraint of trade" test); *Holder*, 512 U.S. at 880, 880 n.1 ("totality of the circumstances" test under the Voting Rights Act); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275–77 (1988) (test for appealability of a district court order denying motion to stay or dismiss); *Johnson*, 480 U.S. at 631–33 (test for determining whether an employer engaged in "sex" discrimination); *Tuttle*, 471 U.S. at 810 (standard for imposing liability on cities under § 1983); Miller v. Fenton, 474 U.S. 104, 113–15 (1985) (test for distinguishing questions of fact from questions of law); Cont'l T.V. v. GTE Sylvania Inc., 433 U.S. 36, 49–50 (1977) ("unreasonable restraint of trade" test); Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers AFL-CIO v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 137–38 (1976) (test for "unfair labor practice" under NLRA); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393 (1970) (test for determining whether there is a cause of action for wrongful death); infra Appendix I.

[149] Most of the cases in the Appendix were identified through a search of the Westlaw database using the parameters "'stare decisis' /s overrule!" I reviewed the search results and eliminated cases that failed to advocate overruling a statutory precedent (e.g., cases that discussed overruling a constitutional precedent). I also supplemented this word search with cases I independently knew to contain arguments in favor of overruling a statutory precedent.

but that lower courts and even the Supreme Court itself nevertheless continue to follow.[150] It posits that part of the reason for textualists' reluctance to give full effect to congressional overrides in such cases may be that the overridden precedent established an implementation test, which the Court views as its responsibility—rather than Congress's—to update.

As noted earlier, one of the central justifications for heightened deference to statutory precedents is that when a judicial construction of a statute is incorrect, Congress has the power to correct it. Several academic studies have sought to measure empirically how often Congress actually steps in to override the Supreme Court's statutory interpretation decisions.[151] Some of these studies attempt to identify factors that correlate with congressional enactment of an override, such as statutory subject matter or the interpretive tools (e.g., plain meaning) the Court used to construe the statute.[152] Two recent qualitative studies have examined how courts respond when Congress in fact overrides a statutory interpretation precedent. Relying on observations in the employment-law field, these studies show that courts sometimes give surprisingly limited reach to congressional override statutes—often continuing to apply overridden precedents to new situations that at least arguably should be covered by the override.[153]

The implementation-test distinction identified in Section A suggests a new explanation for the "shadow precedent" phenomenon. Insofar as the

[150] I borrow this term from Deborah Widiss. See Widiss, Shadow Precedents, supra note 4.

[151] See sources cited supra note 4. See also Lori Hausegger & Lawrence Baum, Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation, *in* Great Theatre: The American Congress in the 1990s, at 224, 233-40 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998) (using empirical methods to determine when Congress will be more likely to overrule a decision by the Court); James Buatti & Richard L. Hasen, Conscious Congressional Overriding of the Supreme Court, Gridlock, and Partisan Politics, 93 Texas L. Rev. See Also 263 (2015) (measuring the number of "conscious" congressional overrides); Matthew R. Christiansen, William N. Eskridge Jr. & Sam N. Thypin-Bermeo, The Conscious Congress: How Not to Define Overrides, 93 Tex. L. Rev. See Also 289 (2015) (critiquing whether "conscious" overrides is a helpful metric in assessing Congress-Court relations).

[152] See Christiansen & Eskridge, supra note 4, at 1387–1413; Eskridge, supra note 4, at 343–49.

[153] See Widiss, Shadow Precedents, supra note 4; Widiss, Undermining Overrides, supra note 4.

Court's textualist and textualist-leaning Justices view implementation test precedents as the equivalent of common-law rulemaking, rather than traditional statutory interpretation, they may believe that revisions to such tests should be the exclusive province of the judiciary, rather than Congress. Indeed, they may regard legislative tinkering with such tests as an illegitimate usurpation of judicial authority. Accordingly, these Justices may be inclined to give a narrow reading to congressional overrides of judicially crafted tests. That is, textualist Justices may take the view that when the Court adopts a judge-made test for implementing a statute, the Court should be willing to change the test if it proves wrong or unworkable—much as the Court does with constitutional and common-law decisions. However, when an implementation test is changed *by Congress*, through an override, these same Justices may take the view that the Court should read that change narrowly and give meaning only to the precise change Congress enacts. In other words, textualists may view congressional overrides of judicially crafted implementation tests somewhat like courts in an earlier era viewed statutes in derogation of the common law—as pesky legislative intrusions to be given limited effect.[154]

Indeed, in some cases it almost seems as if the Court's textualists have created a *de facto* clear-statement rule for congressional overrides of implementation test precedents.[155] That is, they appear to have adopted an unspoken rule that the original shadow precedent continues to apply in all situations other than those that are clearly covered by the override. Thus, if Congress wishes for the override to apply broadly, it must either explicitly declare that the override is meant to completely repeal the precedent, or it must amend every related statute that might be construed in light of the precedent to make clear that the precedent no

[154] See, e.g., Daniel A. Farber & Philip P. Frickey, In the Shadow of the Legislature: The Common Law in the Age of the New Public Law, 89 Mich. L. Rev. 875, 875 (1991) ("A century ago, statutes were considered intrusions into the pristine order of the common law"); Thomas C. Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1, 33–35 (1983).

[155] The clear statement rule is a presumption, or canon, of statutory interpretation that requires exceptional clarity in the text of a statute before the statute may be construed to overcome an important background norm (e.g., federalism). For a comprehensive overview of clear statement rules, see William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593 (1992).

longer applies to that statute. By contrast, these same Justices have been quite generous in their willingness to adopt sweeping *judicial overrulings* of implementation-test precedents. In other words, the Justices seem to have adopted a common-law-like stare decisis rule for the judicial review of implementation test precedents, but a clear-statement-like rule for the judicial review of *congressional overrides* of implementation-test precedents. Paradoxically, and notwithstanding textualism's oft-asserted claim to promoting judicial deference to congressional choices,[156] the upshot is that textualists are regularly unwilling to give full effect to congressional overrides.

Consider an example involving the Civil Rights Act of 1991 ("CRA"), which overrode several earlier Supreme Court decisions interpreting Title VII. One of the overridden cases was *Lorance v. AT&T Technologies*,[157] which involved a challenge to a seniority system brought by a group of female employees. The seniority system had been in place for several years, but a new round of layoffs based on the system had occurred shortly before the plaintiffs filed their charge with the EEOC.[158] Title VII provides that in order to preserve eligibility to file an employment-discrimination claim, an employee must file a charge with the EEOC within 180 days "after the alleged unlawful employment practice occurred."[159] The question presented was when Title VII's statute of limitations began to run and whether plaintiffs filed their charge in a timely manner.[160] A divided Court ruled that the statute of limitations for challenging a seniority system begins to run when the seniority system is first adopted, not when it is applied to disadvantage a member of a protected class and that plaintiffs, accordingly, had not filed their charge in a timely manner.[161] This was a classic example of

[156] See, e.g., Manning, supra note 16, at 103 ("By giving priority to semantic context (when clear), textualism offers a more defensible account of legislative supremacy . . . ."); Manning, supra note 18, at 18 ("The root of the textualist position is . . . in straightforward faithful agent theory.").

[157] 490 U.S. 900, 901–03 (1989).

[158] See id. at 902.

[159] Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1079 (codified at 42 U.S.C. § 2000e-5(e)).

[160] *Lorance*, 490 U.S. at 903.

[161] Id. at 911–13.

"implementation test" statutory interpretation, in that it established a rule for administering the statute of limitations.

The CRA overrode *Lorance* by amending the general rule regarding time limits to add that, with respect to seniority systems, "an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or *when a person aggrieved is injured by the application of the seniority system* . . . ."[162] Despite this override, courts, including the Supreme Court, have continued to apply *Lorance* as a "shadow precedent."[163] Most notoriously, in *Ledbetter v. Goodyear Tire & Rubber*, the Court's textualist and textualist-leaning Justices invoked *Lorance* to give an exceedingly stingy reading to the 1991 CRA.[164] *Ledbetter* involved a claim of pay discrimination, rather than a challenge to a seniority system, but its facts otherwise paralleled *Lorance*'s. Lilly Ledbetter claimed that she had received poor employment evaluations because of her sex and that the evaluations resulted in a rate of pay that was substantially lower than the pay of men at the company with similar experience and qualifications.[165] The Supreme Court, in a 5–4 decision that cited *Lorance* extensively, ruled that Ledbetter's charge had not been timely filed because most of the performance evaluations and pay decisions about which she complained had been made several years earlier, outside the 180-day charging period specified by Title VII.[166] The majority opinion referenced the 1991 CRA override only in a footnote, observing that "[a]fter *Lorance*, Congress amended Title VII to cover the specific situation involved in that case."[167] It characterized the override as applying "only" to seniority systems and argued that the basic reasoning underlying the *Lorance* decision had not been called into question.[168]

[162] Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1079 (codified at 42 U.S.C. § 2000e-5(e)) (emphasis added).

[163] See Widiss, Shadow Precedents, supra note 4.

[164] 550 U.S. 618, 620 (2007).

[165] See id. at 621–22.

[166] Id. at 623–29.

[167] Id. at 627 n.2.

[168] Id. A similar example involves the Pregnancy Discrimination Act of 1978 ("PDA"), which overrode the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). See Widiss, Shadow Precedents, supra note 4, at 552–53. *Gilbert* addressed

Justice Ginsburg and the other purposivist Justices dissented, arguing that the override "superseded" the decision in *Lorance* and made it "no longer effective."[169] The dissent insisted that the override demonstrated Congress's view that *Lorance* was "glaringly at odds with the purposes of Title VII" and cited legislative history that showed that Congress intended the override to eliminate reliance on both the reasoning and the holding of *Lorance*.[170] Congress quickly overrode the Court's decision with the Lilly Ledbetter Fair Pay Act of 2009.[171]

whether a disability policy that provided benefits to employees for all short-term disabilities except pregnancy discriminated on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964. Id. at 551. A majority of the Court reasoned that the plan did not discriminate on the "basis" of "sex" because "sex" was not the explicit distinguishing factor. *Gilbert*, 429 U.S. at 135. Rather, there were two groups of potential recipients of disability benefits, "pregnant women and nonpregnant persons," and although the "first group is exclusively female, the second includes members of both sexes." Id. (quoting Geduldig v. Aiello, 417 U.S. 484, 496–97 n.20 (1974)). Because there was no class of disabilities for which men were covered and women were not, the Court found there was no sex discrimination. Id. at 139.

Congress quickly overrode *Gilbert* with the PDA. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)). The PDA added a definition of "sex" as used in Title VII, providing that: "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." § 1, 92 Stat. at 2076. The legislative history of the PDA made clear that Congress intended for the override to "return" the law to what many believed it had meant prior to the decision in *Gilbert*. See H.R. Rep. No. 95-948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750 ("It is the committee's view that the dissenting Justices correctly interpreted the Act."); Widiss, Shadow Precedents, supra note 4, at 552. Yet in *In re Union Pacific Railroad Employment Practices Litigation*, the Eighth Circuit, in an opinion authored by a textualist-leaning judge, rejected plaintiffs' claim that denial of insurance coverage for contraceptives violates Title VII. 479 F.3d 936, 942–43 (8th Cir. 2007). The court construed the language of the PDA narrowly, holding that contraceptives are not "related" to pregnancy for purposes of analysis under the PDA. Id. at 942. It then performed a "separate" sex discrimination analysis and held that there was no sex discrimination on the grounds that Union Pacific's plan denied coverage for both men and women and deemed the fact that prescription coverage currently was available only for women irrelevant—the reasoning from *Gilbert* that Congress rejected in the PDA. See id. at 943–45 & n.5.

[169] *Ledbetter*, 550 U.S. at 652 (Ginsburg, J., dissenting).

[170] See id. at 652–53 (alteration in original) (quoting Sponsors' Interpretative Memorandum, 137 Cong. Rec. 29046, 29047 (1991)) ("This legislation should be interpreted as disapproving the extension of [*Lorance*] to contexts outside of seniority systems.").

[171] Pub. L. No. 111–2, 123 Stat. 5 (Jan. 29, 2009) (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

Thus far, the literature on shadow precedents has treated continued judicial reliance on overridden cases as a problematic but understandable result of judicial confusion about the extent to which Congress intends for an override to cancel out a prior precedent.[172] Accordingly, proposals for reform have tended to suggest new, default interpretive rules designed to give broad reach to legislative overrides.[173] But the implementation-test exception identified in Part II.A suggests another, more deliberate, explanation for the shadow precedent phenomenon. Perhaps courts are not merely confused about the extent to which an override has repudiated a prior precedent; perhaps they are intentionally seeking to limit the effect of a legislative override of a judicially crafted test because they believe that the judiciary, rather than Congress, is best situated to make changes to such tests. In the case of *Ledbetter* and *Lorance*, for example, perhaps the textualist Justices viewed *Lorance*'s implementation rule—that a discriminatory practice must be challenged when it occurs rather than when its effects are felt—as a common-law-like rule that courts should update based on their lived experiences with the rule. Although they recognized that the legislature formally has the power to override the rule, they may have viewed the override skeptically, as an intrusion by the legislative branch into a function—implementation—that belongs to the judiciary. Accordingly, they may have felt bound to give effect to the override *only to the extent that it clearly repudiated the precedent*. Put differently, the Justices in the *Ledbetter* majority may have viewed questions about when a statute of limitations should begin to run as "judicial administration" questions that courts are better equipped than legislatures to answer and may, accordingly, have viewed Congress's override as a legislative intrusion whose reach they were justified in limiting.[174]

[172] See, e.g., Widiss, Shadow Precedents, supra note 4, at 514–15; Widiss, Undermining Overrides, supra note 4, at 860–61, 933.

[173] See Widiss, Shadow Precedents, supra note 4, at 566–75 (proposing a "rebuttable presumption" that congressional overrides signal a need for "fresh" statutory analysis); Widiss, Undermining Overrides, supra note 4, at 933–41 (emphasis omitted) (suggesting that the Court provide "fresh" statutory analysis "consistent with the meaning Congress signaled it ascribes to the relevant language").

[174] For instance, textualists may have believed the *Lorance* rule was necessary to keep judicial dockets manageable—or at least that the judiciary, rather than the legislature, is best-situated to make such determinations.

Of course, the *Ledbetter* decision also seems to have been motivated, in part, by ideological concerns: the Justices who gave the 1991 CRA a narrow reading were also the Court's most conservative Justices, ideologically indisposed to favor Title VII claims. This Article does not intend to suggest that ideology is not at work in such cases; rather, it aims to show that there may be jurisprudential reasons, in addition to ideology, that help explain the Justices' "shadow" reliance on precedents such as *Lorance*.[175]

Specifically, the Court, or its textualist-leaning Justices, may be holding congressional revisions to judicially created implementation tests to a clear-statement standard that they do not apply to judicial revisions of the Court's own common-law-style tests for implementing a statute. In other words, the textualist Justices may view it as part of the Court's role to reconsider its own implementation tests based on practical experiences with the test, but they may view it as suspect—and an occasion for a limiting judicial check-and-balance—when the impetus for changes to an implementation test comes from Congress, as a corrective of a judicial decision. Moreover, these Justices may believe that a different standard of review should apply when they are reviewing the new statutory text of a congressional override (a clear-statement rule) than when they are revisiting a judicial interpretation of a statute (common-law standard of review).

Purposivist jurists, by contrast, generally have been willing to give broad effect to congressional overrides of statutory precedents that adopt implementation tests—as Justice Ginsburg's *Ledbetter* dissent illustrates. One reason for this may be that, as noted earlier,[176] purposivists are more focused on legislative intent than are their textualist colleagues—and thus are more willing to take their cues from Congress when evaluating the scope and meaning of an override. For example, purposivist jurists are, as a matter of methodological preference, far more willing to give effect to materials in the legislative record that demonstrate congressional intent for an override to apply broadly or indicate that Congress thought the Court's original

[175] See supra notes 115–120 and accompanying text for more on why ideology does not fully explain textualist Justices' willingness to abandon statutory stare decisis.

[176] See discussion supra Part II.

interpretation erroneous and meant for the override to completely repudiate the precedent. These are all facets of the "faithful agent" versus "monitoring" role that divides purposivists and textualists: purposivists view it as their role to fulfill Congress's design, which entails giving full effect to Congress's overrides of the Court's own statutory interpretations, while textualists view it as the Court's role to monitor rules of the Court's own making, including common-law-like tests for implementing statutes. Moreover, textualists seem to view Congress as a poor judge of the effectiveness of judicially crafted implementation tests, and Congress's power to interfere with such tests as limited only to direct changes Congress makes to the text of the relevant statutes.

### *C. Textualism's Psychology*

In addition to the implementation-test distinction, two other factors appear to contribute to textualist Justices' readiness to overrule statutory precedents. First, textualist Justices appear prone to a "correct answer" mindset, such that their jurisprudential commitment to precision and belief in a single correct statutory meaning may make it especially difficult for them to follow a precedent they view as inaccurate. Second, at least some of the textualist Justices seem to see themselves as jurisprudential revolutionaries, whose function is to overthrow the old, corrupt, judicial order—including statutory precedents arrived at through the use of improper interpretive tools such as legislative history. This Section explores each of these factors in turn.

#### *1. A "Correct Answer" Mindset*

At its core, textualism is a method of statutory interpretation that aims to identify the plain meaning of a statute's text—that is, the simple, basic, obvious meaning.[177] It is founded on a belief that most statutes have an easily identifiable meaning,[178] and there is some evidence that

[177] See, e.g., Webster's New World Dictionary 570 (David B. Guralnik ed., 2d Concise ed. 1982) (listing third meaning for the word "plain" as "clearly understood; evident; obvious" and sixth meaning as "not complicated; simple").

[178] See, e.g., Jonathan T. Molot, The Rise and Fall of Textualism, 106 Colum. L. Rev. 1, 39 & n.169 (2006) (citing Antonin Scalia, Judicial Deference to Administrative

textualist judges tend to find a plain meaning more often than do other jurists.[179] Textualist judges, particularly in the post-Scalia era, tend to presume that there is a correct, definitive answer to every (or nearly every) interpretive question and to treat the task of statutory interpretation like a puzzle.[180] If the correct answer cannot be found through a plain reading of the text, then the dictionary, Latin maxims, other sections of the statute, and even the Court's interpretations of *other statutes* using similar language should be consulted to decipher the statute's meaning. Such bounded interpretive aids are trusted to lead the Court to the correct construction. As Justice Scalia and co-author Professor Bryan Garner put it in a book designed to serve as a textualist primer on statutory interpretation, "[M]ost interpretive questions have a right answer. Variability in interpretation is a distemper."[181]

This Article suggests that textualism's relentless focus on identifying the "correct" statutory meaning may have an under-appreciated side effect for its proponents. That is, textualists' "correct meaning" emphasis may make it especially difficult for them to follow a precedent that they believe gets the answer to the interpretive puzzle wrong. In other words, something about the textualist approach—what we can

Interpretations of Law, 1989 Duke L.J. 511, 521) ("Some interpreters have great confidence in the determinacy of law and tend to view their initial reading of a text as the single, correct reading.").

[179] See, e.g., Bradford C. Mank, Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism, 53 Wash. & Lee L. Rev. 1231, 1266, 1275 & n.235 (1996) (explaining that textualists rarely believe they must defer to agency interpretations because they usually find clear meaning in the text); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 521 (acknowledging that he "finds *more* often . . . that the meaning of a statute is apparent from its text and from its relationship with other laws."). See also Krishnakumar, supra note 18, at 849 (demonstrating that most textualist Justices invoked plain meaning at higher rates than non-textualist Justices during the Roberts Court's first 6.5 terms).

[180] See Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351, 354, 372 (1994) (describing how textualists' puzzle-solving approach often results in answers); Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 Colum. L. Rev. 749, 779 (1995) (comparing the textualist interpretive process to solving a puzzle); see also Mank, supra note 179, at 1257 (noting textualists' conviction and certainty about their method).

[181] Scalia & Garner, supra note 6, at 6.

perhaps call the "correct answer" mindset—may make it particularly painful for textualist Justices to accept an incorrect statutory construction simply because it was first in time.[182] As a result, the famous tenet that "in most matters it is more important that the applicable rule of law be settled than that it be settled right"[183] may prove challenging for textualists to adhere to in practice.

In arguing that textualists are prone to a "correct answer" mindset, I do not mean to suggest that purposivist and pragmatist jurists do not also seek the "best" or "correct" reading of a statute. Identifying the "best" statutory construction is a goal shared by every interpretive approach. But different interpretive theories define "best answer" in different ways. Whereas textualists tend to argue that there is one correct way to read a statute, purposivists and pragmatists tend to acknowledge that there is often more than one fair way to construe a statute and that their preferred construction is "best" *in light of Congress's purpose* or *in light of the practical consequences it will produce*. Jurists who subscribe to purposivist or pragmatic interpretive theories do not argue that the construction they advance is the only plausible one, that there is only one valid way to read the statute, or that other readings are illegitimate. Textualist jurists, by contrast, regularly make such claims—for example, arguing that the statute's text is "dispositive";[184] calling opposing constructions of the statute "sheer applesauce";[185] and using dictionary definitions to insist that the term at issue cannot mean what an opposing

[182] It is also, of course, possible that an individual judge's predisposition to a "correct answer" mindset may be what attracts the judge to textualism as an interpretive approach. It is hard to say which comes first, textualism or a "correct answer" mindset. In hypothesizing about the reasons that underlie textualist jurists' relaxed approach to statutory stare decisis, I do not mean to imply that textualism causes any particular kind of thinking, rather than the other way around. This Article's intent is merely to note a correlation between textualism and a "correct answer" mindset. Thanks to Professor Maggie Lemos for pressing me to clarify this.

[183] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (emphasis added).

[184] See, e.g., CBOCS West, Inc. v. Humphries, 553 U.S. 442, 464 (2008) (Thomas, J., dissenting); Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co., 534 U.S. 327, 340 (2002).

[185] Zuni Pub. Sch. District No. 89 v. Dep't of Educ., 550 U.S. 81, 113 (2007) (Scalia, J., dissenting). See also King v. Burwell, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting) ("[p]ure applesauce").

opinion construes it to mean.[186] This textualist disdain for interpretations that do not square with dictionary definitions—or that are identified through the use of "improper" interpretive aids, such as purpose or legislative history—may in turn make it more difficult for textualists to accept statutory precedents that they believe "get it wrong," even in the name of stability and continuity.[187]

A significant literature has recognized the impact of textualists' "correct answer" mindset in the context of judicial review of agency statutory interpretations—arguing that textualist judges are more likely to refuse to defer to agency interpretations. Specifically, scholars have argued that textualism is more likely than other interpretive approaches to lead judges to find that a statute has a "plain meaning" and, accordingly, to deny deference to an administrative agency's contrary construction of the statute.[188] As Professor Thomas Merrill has argued, "Textualism . . . tends to make statutory interpretation *an exercise in ingenuity*—an attitude that may be less conducive to deference to the decisions of other institutions than the dry archival approach associated with intentionalism."[189]

A similar effect appears to be at work with textualism and statutory stare decisis—except that in this context textualists often deny deference to the interpretations made by predecessor courts, rather than administrative agencies. Recall, for example, that in *CBOCS West, Inc.*

[186] See, e.g., Rapanos v. United States, 547 U.S. 715, 731–33 (2006) (alteration in original) (citations omitted) (reasoning that the term "waters of the United States" cannot include dry channels through which water occasionally flows because the dictionary defines "water" as "streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "flowing or moving masses"); MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 225 (1994) (citations omitted) (holding that a statute authorizing an agency "to modify" rates does not confer power to make fundamental changes because "[v]irtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion").

[187] See, e.g., Johnson v. Transp. Agency, 480 U.S. 616, 670–73 (1987) (Scalia, J., dissenting) (calling majority's defense of precedent based on congressional inaction a "canard").

[188] See Michael Herz, Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation, 16 Harv. Envtl. L. Rev. 175, 198–99 (1992) ("Confidence in statutory meaning is likely to keep a textualist judge in *Chevron*'s nondeferential step one."); Merrill, supra note 180, at 357–58 (discussing the impact of textualism on *Chevron* deference); Pierce, supra note 180, at 752 (discussing the Court's extreme use of textualism to the exclusion of other factors).

[189] Merrill, supra note 180, at 354 (emphasis added).

*v. Humphries*, discussed in Part I.B, Justice Thomas, joined by Justice Scalia, insisted that the precedent at issue did not interpret Section 1982 to support a retaliation claim, but that even if it did, *the precedent should be rejected because it incorrectly construed the statute's text*.[190] Similarly, Justice Thomas's dissent in *Preston v. Ferrer*, listed in Appendix I, argued that the precedent at issue in that case should be overruled because it was simply wrong, both as a matter of text and context, to hold that the Federal Arbitration Act ("FAA") applies to state courts.[191] This type of "*the precedent is just plain wrong!*" argument features prominently in a number of other cases listed in Appendix I.[192]

The "correct answer" mindset also may play a role in textualists' eagerness to overrule precedents based on discredited economic theories. That is, textualists' call to overrule in such cases may not be so much about updating the statute to reflect modern understandings—a distinctly purposivist or pragmatic goal that seems oddly incongruous with textualism—as much as about the scholarly consensus that *the economic theory supporting the precedent is flawed*. That is, textualists' "correct answer" mindset may translate into a powerful urge to correct interpretations based on a now-refuted economic theory, so that an entire line of legal doctrine does not continue to rest on a false foundation. Whereas jurists who subscribe to other interpretive theories may be willing to wait for Congress to update the law when new economic understandings or data prove an original judicial interpretation wrong, textualists may find it more offensive to leave a clearly recognized error

[190] 553 U.S. 442, 464–70 (2008) (Thomas, J., dissenting).

[191] 552 U.S. 346, 363 (2008) (Thomas, J., dissenting) (citing prior cases that analyzed contemporary case law and other provisions of the FAA).

[192] See Altria Grp., v. Good, 555 U.S. 70, 92, 95–96, 106–07 (2008) (Thomas, J., dissenting) (criticizing the "plurality's atextual approach" because "the text speaks for itself"); Gonzalez v. United States, 553 U.S. 242, 260–61 (2008) (Thomas, J., dissenting) (citations omitted) (asserting that the precedent engaged in an "amazing display of interpretive gymnastics" and was "a patently 'revisionist construction of the Act'"); Clark v. Martinez, 543 U.S. 371, 402–03 (2005) (Thomas, J., dissenting) (arguing that the precedent interpretation is "untenable" and "[t]he mere fact that Congress can overturn our cases by statute is no excuse for failing to overrule a statutory precedent of ours that is clearly wrong"); Holder v. Hall, 512 U.S. 874, 892, 945 (1994) (Thomas, J., concurring in the judgment) (calling precedent "at odds with the terms of the statute" and "based on a flawed method of statutory construction"); *Johnson*, 480 U.S. at 670–73 (Scalia, J., dissenting) ("*Weber* rewrote the statute it purported to construe."); infra Appendix I.

on the books—and in a position to distort future interpretations. In a sense, then, scholarly consensus may substitute for clear statutory text in these cases and textualists may be unwilling to accept a precedent that contradicts such consensus in much the same way that they have difficulty with precedents that contradict the statute's text. As Justice Thomas put it in his concurring opinion in *Halliburton*, "Principles of stare decisis do not compel us to save *Basic*'s muddled logic and armchair economics."[193]

As Appendix I and the case examples in Part I demonstrate, the Court's two most committed textualists, Justices Thomas and Scalia, appear to be most fond of this type of "*the precedent is just plain wrong!*" argument. Justice Thomas in particular seems to have difficulty reconciling the "correct answer" mindset with the doctrine of statutory stare decisis. He has regularly authored opinions that advocate overruling precedents because they are "*just plain wrong!*"[194]—and this argument has featured prominently in the cases in which he alone has voted to overturn.[195] This is in part because Justice Thomas is a bit of a revolutionary with respect to judicial methodology, as discussed further in the next Section.[196] Justice Scalia, too, advocated overturning precedents on the ground that they were erroneous—although less often and less consistently than Justice Thomas.[197] Notably, Justice Scalia

[193] Halliburton Co. v. Erica P. John Fund, 134 S. Ct. 2398, 2425 (2014) (Thomas, J., concurring in the judgment).

[194] See supra note 192. In fact, Justice Thomas criticized a precedent's textual analysis in eleven of the thirteen precedent-challenging opinions in Appendix I that he authored.

[195] See *Gonzalez*, 553 U.S. at 260–61 (Thomas, J., dissenting); *Preston*, 552 U.S. at 363 (Thomas, J., dissenting); Kimbrough v. United States, 552 U.S. 85, 114–15 (2007) (Thomas, J., dissenting).

[196] See infra Part II.C.2. Justice Thomas is also unusually willing to overrule constitutional precedents if the original opinion was not based on an originalist methodology. See Jeffrey Rosen, Originalism, Precedent, and Judicial Restraint, 34 Harv. J.L. & Pub. Pol'y 129, 130 (2011) ("According to Justice Scalia, Justice Thomas would overrule any precedent that is inconsistent with the Constitution's original meaning."). But this view is at least consistent with the rule that constitutional precedents are entitled to a relaxed form of stare decisis—a result of the difficulty legislators face in amending the Constitution, which has made the Court the de facto actor capable of correcting mistakes of constitutional interpretation. By contrast, Justice Thomas's readiness to overrule statutory precedents based on inaccuracy cuts against the longstanding statutory stare decisis rule.

[197] Justice Scalia joined four of the opinions Justice Thomas authored that made a "*the precedent is just plain wrong!*" argument and joined two of three opinions advocating

sometimes voted to follow statutory stare decisis despite his strong belief that the precedent was wrongly decided—including in cases in which he had dissented from the opinion that established the precedent.[198] Justice Scalia thus seemed to strike more of a balance between "getting it right" and adhering to statutory stare decisis than does Justice Thomas.[199] The other textualist or textualist-leaning Justices, by contrast, only rarely joined an opinion citing the erroneousness of a prior Court's statutory analysis as a justification for overturning a statutory precedent.[200]

*2. Textualism as Revolution*

Textualist jurists' readiness to overturn statutory precedents may also be explained, in part, by the fact that the most committed among them

overruling based on an evolving economic theory. See Gross v. FBL Fin. Servs., 557 U.S. 167, 178–79 (2009) (arguing that the Court's precedent is plainly wrong); CBOCS West, Inc. v. Humphries, 553 U.S. 442, 469–70 (2008) (Thomas, J., dissenting) (same); *Altria*, 555 U.S. at 106 (Thomas, J., dissenting) (same); *Holder*, 512 U.S. at 945 (Thomas, J., concurring in the judgment) (same); *Halliburton*, 134 S. Ct. at 2417–27 (Thomas, J., concurring in the judgment) (espousing an evolving economic theory); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889–92 (2007) (same). Scalia also authored one opinion himself arguing that a precedent should be overturned because it was simply incorrect. See *Johnson*, 480 U.S. at 672–73 (Scalia, J., dissenting).

[198] See, e.g., *Preston*, 552 U.S. at 353. Scalia joined the majority opinion despite previously expressing disagreement with the same construction in an earlier case, *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284–97 (1995) (Scalia, J., dissenting); *Kimbrough*, 552 U.S. at 114–16. Scalia also joined the majority opinion here to uphold *Booker* despite the fact that he originally dissented in that case.

[199] Indeed, Justice Scalia wrote about the importance of stare decisis in preserving stability and argued that it usually should apply even when a prior decision misinterprets the statute's text. See Scalia & Garner, supra note 6, at 272, 331 (acknowledging that it is not appropriate "to overrule all cases previously ignoring or distorting the statute" because "stare decisis suffices to preserve them.").

[200] See *Altria*, 555 U.S. at 92, 95–96, 106–07 (Thomas, J., dissenting) (Justices Roberts, Scalia, Alito joining); Clark v. Martinez, 543 U.S. 371, 402–03 (2005) (Thomas, J., dissenting) (Justice Rehnquist joining). See also infra Appendix I (listing additional cases critiquing the Court's previous statutory analysis). These other textualist-leaning Justices were more willing to vote to overturn statutory precedents based on evolving economic theories than they were to overrule based on perceived errors in the original opinion's statutory analysis. See *Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting); *Halliburton*, 134 S. Ct. at 2417–27 (2014) (Thomas, Scalia & Alito, JJ., concurring in the judgment); *Leegin*, 551 U.S. at 887–88 (Kennedy, Roberts, Scalia, Thomas, & Alito, JJ., majority opinion).

see themselves as revolutionaries seeking to reinvent the judiciary's approach to interpreting statutes.[201] Many served as legal advisors to Republican presidents prior to joining the bench: some played key roles in selecting and vetting judicial nominees who could be counted on to follow specific jurisprudential approaches, including textualism.[202] As judges themselves, they now are on a mission to reshape the way that courts construe both the Constitution and statutes—championing an originalist approach to constitutional interpretation and a textualist approach to statutory interpretation.

Given their revolutionary mission, these jurists are perfectly willing to overrule past precedents that, in their view, were decided using interpretive methods they consider illegitimate and that they took office intending to overthrow. In other words, rejecting old precedents does not bother these textualist revolutionaries because it is part and parcel of their agenda to depose the old jurisprudential regime.

While some state courts appear to be comprised of a solid bloc of jurists who fit this "revolutionary" bill, the Justices on the U.S. Supreme Court fall along a spectrum in their commitment to a textualist revolution. At one end of the spectrum is Justice Thomas who regularly calls for overruling statutory (and constitutional) precedents.[203] Justice Scalia is next, followed by Justice Alito, Justice Roberts, and then Justice Kennedy—as Appendix I illustrates.[204]

[201] Thanks to Bill Eskridge for this insight.

[202] See Stephen J. Markman, On Interpretation and Non-Interpretation, 3 Benchmark 219, 219 (1987); Current Members, Supreme Court of the United States, https://www.supremecourt.gov/about/biographies.aspx (last visited Oct. 23, 2017); Biography of Former Associate Justice Antonin Scalia, https://www.supremecourt.gov /about/biographyScalia.aspx (last visited Oct. 23, 2017) [hereinafter Biography of Scalia]; Goldman, supra note 113 (describing Michigan Supreme Court Justice Markman's role in the "Reagan Revolution") and accompanying text; infra note 210.

[203] As Appendix I shows, Justice Thomas joined thirteen of seventeen Roberts Court opinions advocating overruling a statutory precedent (and authored ten of them). If we include Rehnquist Court opinions, he joined seventeen of twenty-four opinions calling for overruling a statutory precedent between 1992–2015 and authored thirteen of them. See infra Appendix I.

[204] Justice Scalia joined sixteen of twenty-nine opinions in cases calling for overruling a statutory precedent during the years he served on the Court (1986–2015) and authored five of them. Justice Alito joined eight of seventeen opinions calling for overruling a statutory precedent during his tenure (2006–2015) and authored three of them. Justice Roberts joined five of eighteen opinions calling for overruling a statutory precedent during his tenure

It should not come as a surprise that Scalia and Thomas are the Justices most committed to a textualist interpretive methodology. Justice Scalia served in the Office of Legal Counsel under President Ford[205] and had a long history in politics and in his scholarly and judicial writings of seeking to revolutionize how courts interpret statutes.[206] Justice Thomas's calls for revolution have largely been confined to his judicial opinions but he has been equally, if more quietly, as committed as Justice Scalia to the textualist interpretive approach. Justice Alito's inclusion in this group of willing "overrulers" is more unexpected and likely has more to do with the implementation-test exception discussed in Section A than with a revolutionary textualist zeal.[207] Chief Justice Roberts, perhaps because of his role as Chief Justice, has shown himself to be much more concerned with institutional preservation than with revolution or with textualism. Indeed, as scholars have chronicled, he has shied away from bold moves that might appear politically or ideologically motivated—voting to uphold the Affordable Care Act and employing an incremental, almost "stealth" path to overrule *Miranda*,

(2005–2015) and authored none of them. Justice Kennedy joined six of twenty-six opinions that called for overruling a statutory precedent during his tenure (1988–2015) and authored two of them. See id.

[205] See Biography of Scalia, supra note 202.

[206] See, e.g., Scalia & Garner, supra note 6, at xxix, 6; Scalia, supra note 19, at 3, 17; Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 108–22 (2007) (Scalia, J., dissenting); Blanchard v. Bergeron, 489 U.S. 87, 97–100 (1989) (Scalia, J., concurring in part and concurring in the judgement).

[207] While Justice Alito is certainly a textualist, he differs from Justices Thomas and Scalia in that he is not committed to rejecting legislative history as an interpretive aid—on the contrary, he has proved willing to consult the statute's legislative history in several cases. See, e.g., B & B Hardware v. Hargis Indus., 135 S. Ct. 1293, 1310 (2015); Kellogg Brown & Root Servs. v. United States ex rel. Carter, 135 S. Ct. 1970, 1973, 1977–78 (2015); Descamps v. United States, 133 S. Ct. 2276, 2302 (2013) (Alito, J., dissenting); Taniguchi v. Kan. Pac. Saipan, 566 U.S. 560, 569–70 n.4 (2012); Brown v. Plata, 563 U.S. 493, 577 & nn.9–10 (2011) (Alito, J., dissenting); Global-Tech Appliances v. SEB, 563 U.S. 754, 761 (2011); Milner v. Dep't of Navy, 562 U.S. 562, 565–67, 581–82 (2011) (Alito, J., concurring); Pepper v. United States, 562 U.S. 476, 515–17 (2011) (Alito, J., concurring in part, concurring in the judgment, dissenting in part); Bloate v. United States, 559 U.S. 196, 222–23 (2010) (Alito, J., dissenting); Carr v. United States, 560 U.S. 438, 470–72 (2010) (Alito, J., dissenting); Jones v. Harris Assocs., 559 U.S. 335, 339, 343 n.3 (2010); Corley v. United States, 556 U.S. 303, 329 (2009) (Alito, J., dissenting); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 583–85 (2008); Zedner v. United States, 547 U.S. 489, 501–02 (2006).

the Voting Rights Act, and other precedents.[208] And Justice Kennedy, often referred to as the "swing" vote on the Roberts Court,[209] is easily the least revolutionary of all the Justices in his ideological and methodological commitment to textualism—as well as in his career before joining the bench.[210]

A 2015 case, *Perez v. Mortgage Bankers Association*,[211] nicely illustrates the Justices' varying positions on the "revolutionariness" scale. *Perez* involved a D.C. Circuit decision that imposed a new requirement on administrative agencies: forcing them to engage in notice and comment before substantially changing an existing interpretation of their own regulations.[212] All of the Justices agreed that the D.C. Circuit's new rule was inconsistent with the Administrative

[208] See, e.g., King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting) (arguing that taxpayers purchasing insurance on an Exchange established by the Secretary of Health and Human Services are not entitled to tax credits under the Affordable Care Act because the federal exchange has not been set up "by the State"); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (holding that the Affordable Care Act's individual mandate is constitutional under Congress's taxation power); Berghuis v. Thompkins, 560 U.S. 370, 381–89 (2010) (requiring a suspect who has been informed he has a right to remain silent to make an unambiguous statement invoking the right in order to take advantage of it); Florida v. Powell, 559 U.S. 50, 59–64 (2010) (noting that while an individual has the right to consult with a lawyer and to have a lawyer present during interrogation, the latter right at least need not be explicitly conveyed to the individual); Maryland v. Shatzer, 559 U.S. 98, 103–16 (2010) (holding that releasing an individual back to the general prison population constitutes a break in custody that ends the presumption of involuntariness in waiving *Miranda* rights); Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 207–11 (2009) (permitting all political subdivisions of states to seek bailout from the preclearance requirements of the Voting Rights Act). See also Barry Friedman, The Wages of Stealth Overruling (With Particular Attention to *Miranda v. Arizona*), 99 Geo. L.J. 1, 3 (2010) (describing how the Roberts Court "overrul[ed] *sub silentio* what [it] would not overturn explicitly").

[209] See, e.g., Sheryl Gay Stolberg, Justice's Tolerance Toward Gays Is Seen in Sacramento Roots, N.Y. Times, June 22, 2015, at A10.

[210] Whereas Chief Justice Roberts and Justices Thomas and Alito, like Justice Scalia, all served in high-level positions during the Reagan, Bush, or Ford administrations, often providing legal advice about the meaning of the Constitution or federal statutes, Justice Kennedy spent most of his pre-judicial career in private practice and academia. See Biographies of Current Justices of the Supreme Court, supra note 202; Biography of Scalia, supra note 202.

[211] 135 S. Ct. 1199 (2015).

[212] Id. at 1206.

Procedure Act ("APA") and voted to reverse.[213] Justices Thomas and Scalia would have gone further, however, to overrule a well-established precedent, *Auer v. Robbins*, which held that courts must defer to administrative agencies' interpretations of their own regulations.[214] Justice Scalia's concurring opinion in *Perez* argued both that *Auer* was incompatible with the APA's text and that it created a practical conundrum—too much deference to agency interpretations of agency regulations—that prompted the D.C. Circuit's misguided rule.[215]

Justice Alito, on the other hand, was not willing to reach down and overrule *Auer*—yet—and so authored a concurring opinion that expressed sympathy for Justices Scalia's and Thomas's views and signaled his willingness to reconsider *Auer* in a future case.[216] Justices Roberts and Kennedy joined the majority opinion with no mention of overruling *Auer*.

As *Perez* illustrates, Justices Thomas and Scalia see themselves as leaders in a quest to rid the legal system of textually incorrect, outmoded, and practically problematic statutory interpretations. They were willing, therefore, to strike down a precedent that was not even squarely before the Court. Justice Alito is more cautious. Though he seemed inclined to agree with Justices Thomas and Scalia on the merits of overruling *Auer*, he was willing to wait for a more opportune moment. Justices Roberts and Kennedy are far more "precedentially correct" in their approaches, staying silent because there was no need to discuss the merits of *Auer* in this case.

Ultimately, the "correct answer" mindset and a commitment to revolutionize statutory interpretation probably apply most, or have the most explanatory value, for Justices Thomas's and Scalia's treatment of statutory precedents. The implementation-test exception, by contrast, cuts across all the textualist and textualist-leaning Justices and seems to be a factor in a majority of the cases in which these Justices advocate overruling a statutory precedent. Indeed, it is worth reiterating that over half the cases listed in Appendix I (seventeen of thirty-one (54.8%))

[213] Id.
[214] 519 U.S. 452, 461 (1997).
[215] *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment).
[216] Id. at 1210–11 (Alito, J., concurring in part and concurring in the judgment).

involved implementation-test precedents.[217] Of the remaining fourteen cases, seven contained an argument that the precedent in question conflicted with the statute's plain text; all but one of these was authored by Justice Thomas or Justice Scalia.[218]

## III. IMPLICATIONS & RECOMMENDATIONS

Having demonstrated that textualists are more willing to overrule statutory precedents on the grounds that implementation tests are not real statutory interpretation or because the "correct answer" mindset makes them loathe to perpetuate a mistake, it is worth examining whether they have a point. This Part turns from the theoretical to the normative, evaluating the desirability of textualist Justices' relaxed approach to statutory stare decisis. It argues that if we view judicially created tests for implementing statutes as analogues to agency statutory implementation, then it makes sense to allow judicial updating of such tests. This is especially true where an implementation test precedent has proved unworkable in practice and the alternative is to wait for Congress to notice the problem and muster the political will to fix it.

At the same time, however, this Article takes issue with the "correct answer" mindset justification, arguing that statutory precedents should not be overruled simply because a later Court believes an earlier Court "got the interpretation wrong." It also criticizes textualist Justices' readiness to abandon statutory stare decisis for closely related statutes that have a long history of being interpreted similarly and disapproves of textualists' stingy construction of congressional overrides and continued reliance on "shadow precedents"—which amounts to a rigid adherence to statutory stare decisis in the face of legislative action disapproving the

[217] See supra note 148 and accompanying text.

[218] See *CBOCS West, Inc.*, 553 U.S. at 469 & n.5 (2008) (Thomas, J., dissenting); Gonzalez v. United States, 553 U.S. 242, 260–61 (2008) (Thomas, J., dissenting); *Preston*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); Clark v. Martinez, 543 U.S. 371, 401–02 (2005) (Thomas, J., dissenting); BedRoc Ltd. v. United States, 541 U.S. 176, 187–89 (2004) (Thomas, J., concurring in the judgment); Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment); Johnson v. Transp. Agency, 480 U.S. 616, 675–76 (1987) (Scalia, J., dissenting); infra Appendix I. Overall, more than three-fourths (twenty-four of thirty-one (77.4%)) of the cases listed in Appendix I involved either an implementation test or an argument that the precedent in question conflicted with the statute's plain text.

precedent. Section A makes the case that judicial interpretations of statutes that establish implementation tests have a great deal in common with agencies' implementing regulations and should similarly be susceptible to updating and correction if they should prove problematic. Section B advocates that courts apply the ordinary form of stare decisis used for common-law precedents to implementation test precedents, but with a congressional-approval caveat. The section also examines how several of the cases described in Part I would fare under such an approach.

### *A. The Agency Analogue*

In one sense, when courts interpret statutes—and particularly when they create tests for implementing a statute—they are engaging in a gap-filling enterprise similar to that which administrative agencies perform when they promulgate rules, issue orders, or adopt policies designed to execute Congress's statutory directives.[219] As Professor Margaret Lemos has highlighted, many federal statutes openly delegate decision-making authority to federal courts through the deliberate use of vague or open-ended statutory language.[220] Among the statutes Lemos highlights as examples are a number that were at issue in the cases discussed in Part I.[221] In the context of administrative agencies, it is well established that regulations, orders, and policies adopted pursuant to legislatively delegated authority are not set in stone and that agencies are free to later update their interpretations and implementation rules to reflect new factual or legal developments, practical realities, or their own evolving policy judgments.[222] This analogue suggests that statutory stare decisis

[219] See, e.g., Margaret H. Lemos, The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363, 370–72 (2010).

[220] Id. at 370–71.

[221] Id. (discussing the Sherman Act, Title VII, the Securities Act of 1934, the Individuals with Disabilities Education Act, the Copyright Act, and the Labor Management Relations Act).

[222] See FCC v. Fox Television Stations, 556 U.S. 502, 514–15 (2009). See also Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 863–64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

similarly should be relaxed for judicial interpretations that amount to gap-filling exercises—that is, for interpretations that involve significant judicial policymaking rather than merely "say what the law is." The classic case would include judicial interpretations that create implementation tests.

There is an obvious counter to this analogue—namely, that unlike administrative agencies, courts are not *policymaking* institutions. Rather, courts are supposed to be neutral arbiters of the law. If we treat their statutory interpretations the way we treat agency interpretations—allowing them to change implementation tests based on societal developments like evolving economic theories or on their own judgment that a previously announced rule is producing undesirable consequences—courts will begin to look a lot like policymakers. That, in turn, could cause legitimacy problems for the Court and is the kind of judicial discretion-broadening practice that textualists themselves ordinarily object to.

Having set forth this counter to the agency–court analogue, I want to resist it—at least to a certain extent. There are several reasons to question the courts-are-not-policymakers argument in this context. First, there is some merit to the textualist-leaning Justices' argument that when the Court crafts an implementation test, the initial judicial interpretation itself amounts to an act of policymaking. That is, the Court is not merely deciding what "X" statutory term or phrase means; instead, it is crafting a rubric for applying the statute in the future—much as common-law courts craft standards or multi-factor inquiries for evaluating common-law claims in future cases. Given this, it is something of a facade to insulate judicially created implementation tests from later revision, based on the argument that courts should not engage in judicial policymaking. Rather, as textualists and their sympathizers have suggested, perhaps we should be honest about calling an act of policymaking an act of policymaking and should permit judicial correction of judicially created policies if and when those policies prove unworkable.

Further, legitimacy concerns should be diminished when the Court overturns an implementation test versus when it overturns a more straightforward "X term means Y" interpretation. As I have observed elsewhere, it should be easier, and involve less embarrassing back-pedaling, for the Supreme Court to overturn its own rules for

implementing a statute than for it to overturn its previous conclusions about what a statutory phrase or word means.[223] That is, it should be more acceptable, politically and institutionally, for the Court to declare that, "*The test we created for implementing this statute is proving unworkable for lower courts to apply, so it is time that we step in and fix it*," than it is for the Court to state, "*We changed our mind. The statute does not really mean what we previously said it means*."[224]

Second, rethinking statutory stare decisis for implementation test precedents does not have to be an all-or-nothing endeavor. There may be a middle ground between treating implementation test precedents like agency interpretations and entrenching them against all change. While it is true that courts serve a different institutional function than do administrative agencies, it also is true that when the Supreme Court updates an implementation test to address lower-court confusion or other test-administration problems, the Court may be viewed as engaging in a permissible form of policymaking—that is, supervising or acting as an administrator of the judicial system. Indeed, in such cases, the Supreme Court, like administrative agencies who have close connections and feedback loops with the industries they regulate,[225] is more likely to be in touch with how lower courts are faring under an implementation test than are members of Congress. This is in part because the Supreme Court is more connected to lower courts through professional interactions, publications highlighting trends in judicial decisions, and contacts with litigants and attorneys than is Congress. It is also because, as the ultimate supervisor of the judicial system, the Supreme Court is in a better position to receive complaints about an implementation test from other members of the legal profession than is Congress. Although attorneys might lobby Congress seeking changes in the law, it is difficult to imagine lower court judges complaining to Congress about an implementation test they find difficult to administer. By contrast, lower court judges do write articles criticizing Supreme Court precedents and pen lengthy criticisms of such precedents in their own judicial

[223] Krishnakumar, supra note 142, at 1491–92.

[224] See generally id. at 1492.

[225] See, e.g., Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61, 70 (2006) (detailing ways members of Congress informally supervise and provide feedback to agencies).

opinions—and litigants seeking to convince the Court to abandon an implementation test have significant incentives and opportunities to bring such criticisms to the Court's attention.

In addition, it seems more appropriate, institutionally, for the Court rather than Congress to correct an implementation test that is not working. Even if Congress is made aware that lower courts have criticized a precedent or have had trouble implementing it, *Congress is simply less likely to reverse the precedent than is the Court*. As political scientists and legal scholars have long recognized, the legislative process is filled with numerous "negative legislative checkpoints" or "veto gates"—e.g., committee jurisdiction, filibusters, bicameralism, conference committees, presentment—that prevent the majority of legislative proposals from becoming law.[226] Moreover, the legislative agenda is crowded, and Congress may be more committed to addressing other agenda items even if it is made aware of lower court dissatisfaction with a Supreme Court implementation test. Indeed, depending on the political saliency of the implementation test precedent, Congress may have very little motivation to override the test—because the issue is not important enough to its members or to interest groups who have clout with its members or, conversely, because the issue is too controversial and its members cannot agree on how to fix the test. Relatedly, Congress may be less motivated to spend its limited time and resources enacting administrative fixes to judicial tests than it is to address other kinds of publicly visible issues. Indeed, it may view the supervision of implementation tests as a mere housekeeping matter, low on its list of priorities.

### *B. Ordinary Stare Decisis for Implementation Tests*

Given the above, it may make sense for courts to apply a relaxed form of stare decisis to statutory interpretation precedents that involve an implementation test—and to correct such tests judicially when they turn out to be problematic. This Article argues that courts should apply to implementation test precedents the ordinary form of stare decisis that

[226] See, e.g., McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 Geo. L.J. 705, 7219–22 (1992); Maxwell L. Stearns, The Public Choice Case Against the Item Veto, 49 Wash. & Lee L. Rev. 385, 398, 408 (1992).

they currently apply to common law precedents—that is, an ordinary presumption of correctness.

Here is how this could work: the U.S. Supreme Court already has articulated a list of "prudential and pragmatic" factors that justify overruling a non-statutory judicial precedent. The Court articulated these factors in a case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[227] that involved a constitutional rather than a common-law precedent, but the factors nevertheless provide a useful guide for gauging when it is appropriate to overrule an ordinary precedent. The factors the Court has articulated permit judicial overruling when

(1) The precedent "has proven to be intolerable simply in defying practical workability;"

(2) The precedent has not created reliance interests "that would lend a special hardship to the consequences of overruling;"

(3) "[R]elated principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; or

(4) "[F]acts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[228]

Given the centrality of the legislature in statutory interpretation and the "faithful agent" nature of the relationship between the Court and Congress in statutory cases,[229] I would add to this list of factors the countervailing consideration of whether Congress has expressly approved the implementation test at issue. That is, if Congress has affirmed a Court-adopted implementation test in the course of amending the statute—including by favorably mentioning the test in the legislative

[227] 505 U.S. 833, 854 (1992).

[228] Id. at 854–55; see also Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989) (delineating similar criteria); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)) (same).

[229] See, e.g., Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature. . . . The judicial task is to discern and apply a judgment made by others, most notably the legislature."); Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 Va. L. Rev. 1295, 1313 (1990) ("Traditional democratic theory suggests that the court interpreting a statute must act as the faithful agent of the legislature's intent.").

record accompanying the amendment—then that legislative affirmation should preclude judicial overruling of the test.[230] In statutory interpretation, unlike in common-law rulemaking and constitutional interpretation, Congress is sovereign and therefore should be given priority over courts in establishing statutory meaning. Thus, even if a particular implementation test has proved to be problematic, confusing, or unworkable in practice, it should be upheld if expressly approved by Congress. If Congress (the principal) says a particular interpretation of a statute is good, then the Court (the agent) must accept that.

It is one thing, of course, to note all of this theoretically, but what would application of this ordinary form of stare decisis, supplemented by a congressional-approval caveat, look like in practice? The next section considers how this proposed rule would have played out in the cases discussed in Part I.

*1. Evolving Economic Theory Cases*. On the one hand, none of the implementation tests involved in the economic-theory cases in Part I were unworkable or difficult to administer. Indeed, the precedent tests were *easier* to implement than the tests the textualist Justices sought to replace them with.[231] Reliance interests, to the extent they existed, also favored upholding the precedent implementation tests.[232] The crucial consideration in both *Kimble v. Marvel Entertainment* and *Leegin Creative Leather Products v. PSKS, Inc*. thus was the fourth *Casey* factor (facts have changed) and, to some extent, the third (related principles of law have changed). Indeed, in all of the evolving-economic-theory cases listed in Appendix I, the textualist-leaning Justices' push to overrule was based on an argument that the economic theory (i.e., the facts) underlying the interpretation at issue had changed so significantly as to rob the precedent of significant application or

[230] Recent scholarship has noted the prevalence of this type of "legislative underwrite," through which Congress expressly endorses the Court's interpretation of a statute. See Ethan J. Leib & James J. Brudney, Legislative Underwrites, 103 Va. L. Rev. 101 (2017).

[231] See Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 924 (2007) (Breyer, J., dissenting) (making this point); Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2408–09 (2015) (citing Brief for Petitioner) (same); supra notes 141–143 and accompanying text.

[232] See *Leegin*, 551 U.S. at 925 (cataloguing "considerable reliance upon the *per se* rule").

justification.[233] In *Kimble*, there seemed to be little disagreement between the Justices on this point; all of the Justices seemed to concede that the rule established in *Brulotte v. Thys Co*[234] was outmoded.[235] Under the ordinary form of stare decisis applicable to common-law precedents, then, the *Brulotte* rule might have been an acceptable candidate for overruling.

In *Leegin*, by contrast, the question whether the economic theory had changed significantly was fiercely debated. While the textualist and textualist-leaning Justices argued that new studies by economists had disproved the theories on which the precedent interpretations were based, the purposivist-leaning Justices insisted that the discrediting economic studies were not new, but merely repeated critiques that had been raised and rejected when the precedents were decided.[236] The Justices who voted to overrule in *Leegin* also argued that subsequent legal developments—including rulings by the Supreme Court in related cases—had eroded the rule adopted in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[237] (*Casey*'s third factor).[238] The purposivist Justices who voted to affirm *Dr. Miles* disagreed with this characterization.[239] They also hinted at congressional approval, noting that Congress had considered and rejected the economic arguments raised by the overrulers in legislative hearings.[240] (The purposivist Justices did not, however, point to any evidence of express congressional approval of the *Dr. Miles* precedent). Given this contention over the extent to which the relevant

[233] See *Kimble*, 135 S. Ct. at 2415–16 (Alito, J., dissenting); Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2420–21 (2014) (Thomas, J., concurring in the judgment); *Leegin*, 551 U.S. at 889–92; State Oil v. Khan, 522 U.S. 3, 15–19 (1997).

[234] See supra note 36 and accompanying text.

[235] See *Kimble*, 135 S. Ct. at 2412 (noting a "broad scholarly consensus" supports Kimble's position).

[236] See *Leegin*, 551 U.S. at 920–23 (2007) (Breyer, J., dissenting). A similar debate between the textualist and purposivist Justices took place in another economic theory case. See *Halliburton*, 134 S. Ct. at 2410.

[237] See supra note 48 and accompanying text.

[238] See *Leegin*, 551 U.S. at 887. Cf. *Halliburton*, 134 S. Ct. at 2418, 2423 (Thomas, J., concurring in the judgment) (similarly arguing that subsequent legal developments lend support of overruling precedent).

[239] See *Leegin*, 551 U.S. at 920–21 (Breyer, J., dissenting).

[240] See id. at 908 (Breyer, J., dissenting).

factual and legal circumstances changed, *Leegin* likely would have been a close case even under a relaxed form of stare decisis.

*2. Statutes* In Pari Materia. A rule applying ordinary stare decisis for implementation test precedents would not, as a general matter, support textualist Justices' relaxed approach to precedents for related statutes that are *in pari materia* with the statute at issue in the precedent case. That is, the traditional rule would not allow members of a later Court to refuse to apply an implementation-test precedent to a closely related statute simply because the members of the later Court believe the initial construction of the first statute to be incorrect. In my view, this rule makes sense because when two statutes have a history of being interpreted in the same manner—such that constructions given to one also govern the other—allowing the Court to reject an implementation test applicable to one statute when construing the other results in overwhelming confusion about which related precedents apply to both statutes and which do not. In the Title VII and ADEA context, for example, the law now stands in a perplexing in-between position: Title VII precedents *sometimes* apply to ADEA interpretation questions, but other times do not.[241] Moreover, this kind of related-statutes exception is really just a way of allowing a later Court to erode a statutory precedent with which it disagrees—by limiting its application. In this sense, the related-statute exception is merely another version of the "*just plain wrong!*" argument.

On the other hand, if an implementation test precedent that ordinarily would apply to a related statute has proved unworkable, then the Court would not be bound to apply that precedent to the related statute. Thus, in *CBOCS West Inc. v. Humphries*, the dissenting opinion's argument that the retaliation claim recognized for Section 1982 should not be applied to Section 1981 would not have succeeded, because there was no indication that the rules established in *Sullivan v. Little Hunting Park* or *Jackson v. Birmingham Bd. of Educ.* were unworkable to administer or

[241] This confusion is not entirely the fault of *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009). Earlier cases had muddled the waters before *Gross*—holding, for example, that procedural questions about the ADEA should be governed by Fair Labor Standards Act ("FLSA") precedents rather than Title VII precedents because the ADEA's remedial provisions were modeled on the FLSA. See Lorillard v. Pons, 434 U.S. 575, 580–85 (1978). But *Gross* has added significantly to the confusion and lack of predictability.

that subsequent legal or factual developments had rendered those precedents obsolete. *Gross v. FBL Financial Services* would be a closer case under the proposed ordinary stare decisis rule because the majority opinion did argue that the "motivating factor" test had proved unworkable in the lower courts.[242] However, this argument was countered by the fact that Congress expressly endorsed the "motivating factor" framework in its 1991 amendments to Title VII.[243] Under the congressional-approval caveat advocated in this Article, that express legislative endorsement would trump any workability objections to the Court's implementation test.

*3. Unworkable Implementation Tests.* As suggested by *Casey* factor four, implementation tests that the Court believes to be unworkable should be ideal candidates for overruling. In order to guard against abuse of this factor, courts should ensure that there is sufficient evidence of lower court confusion or other difficulty administering an implementation test before overruling it. Of the cases discussed in Part I.C, *Altria Group v. Good* seems to be the strongest candidate for overruling. This is because there does seem to have been objective evidence of lower-court confusion and difficulty implementing the predicate-duty test established in *Cipollone v. Liggett Group*, and there does not appear to have been any evidence that Congress endorsed that test.[244] By contrast, as discussed above, ordinary stare decisis likely would not have supported the Court's refusal in *Gross* to apply *Price Waterhouse v. Hopkins*'s burden-shifting implementation test to the ADEA—since Congress had expressly approved that test in the 1991 CRA.[245] Last, it also seems unlikely that *Holder v. Hall* would have presented a good opportunity for overruling, even under ordinary stare decisis. There does not seem to have been any objective evidence that the vote-dilution test adopted in *Thornburg v. Gingles* and criticized by Justice Thomas in *Holder* had proved unworkable in practice. Rather,

[242] *Gross*, 557 U.S. at 178-79.

[243] See id. at 185–87 (Stevens, J., dissenting) ("Because Congress has codified a mixed-motives framework for Title VII cases—the vast majority of antidiscrimination lawsuits—the Court's concerns about that framework are of no moment.").

[244] See Altria Grp. v. Good, 555 U.S. 70, 97 (2008) (Thomas, J., dissenting) (citing confusion in lower federal court cases).

[245] See *Gross*, 557 U.S. at 185–87 (Stevens, J., dissenting).

Justice Thomas's objection to the *Gingles* test seems to have been based on a view that it invited too much judicial policymaking—an objection based on his jurisprudential philosophy, rather than concrete evidence regarding lower courts' experiences implementing the test.[246]

*4. Inaccurate Precedents.* Notably, an administrability-based exception to statutory stare decisis would not allow for overruling based on the Court's conviction that a previous interpretation was "*just plain wrong*!" This is because a "*just plain wrong*!" standard is open-ended and allows judges to overturn precedents based on simple disagreement with the original interpretation—something that is frowned upon even under ordinary stare decisis. Indeed, a "*just plain wrong*!" standard would effectively leave *every* precedent open to revision and, in the process, upend the very concept of statutory stare decisis. As scholars have noted:

> [I]f a court under a purported regime of stare decisis is free to disregard any previous decisions it believes wrong, then the standard for disregarding is the same when stare decisis applies as when it does not, and the alleged stare decisis norm turns out to be doing no work.[247]

In other words, stare decisis comes into effect *only* when the Court believes a previous case was incorrectly decided—if the precedent were correct on the merits, the Court would uphold it for that reason, without regard to stare decisis.[248]

5. *Overrides.* Finally, a rule applying the ordinary form of stare decisis to statutory precedents that create implementation tests would not support textualist Justices' narrow approach to congressional overrides in certain recent cases. When Congress does pay attention to

[246] Holder, 512 U.S. at 892–93 (Thomas, J., concurring in the judgment).

[247] Frederick Schauer, Has Precedent Ever Really Mattered in the Supreme Court?, 24 Ga. St. U.L. Rev. 381, 389–90 (2007).

[248] See, e.g., Richard H. Fallon, Jr., Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 570 (2001); Jill E. Fisch, The Implications of Transition Theory for Stare Decisis, 13 J. Contemp. Legal Issues 93, 97 (2003) (noting that stare decisis does no work where the later court agrees on the merits); Randy J. Kozel, Stare Decisis as Judicial Doctrine, 67 Wash. & Lee L. Rev. 411, 417 (2010) ("…[T]he Court needs to talk about *stare decisis* only where it suspects or concludes that a precedent is wrong.").

an implementation test and goes to the trouble of overriding the Court's formulation, the Court should yield and give full effect to the override. This is a corollary to the congressional-approval caveat described above; Congress is the master in matters of statutory interpretation, so when it expressly addresses the validity of a statutory precedent, its will should be given effect. Moreover, the agency analogue discussed earlier suggests that when Congress expressly *disapproves* of the Court's adoption of a particular implementation test, the Court, like administrative agencies, should follow Congress's expressed preference rather than seek to curtail it. Of course, the Court is not an administrative agency; it has a distinct and unique role to play in monitoring lower courts and the judicial system as well as a checks-and-balances function that agencies do not possess. But these roles and functions do not justify holding Congress to what is effectively a clear-statement standard, the way the Court has done in the cases discussed in Section II.B.

Further, while it makes sense for the Court, given its monitor role, to update an implementation test when it becomes aware of workability problems that Congress is not aware of, it does not make sense for the Court to stubbornly adhere to its own initial interpretation when Congress *has* paid attention to an implementation test and has repudiated it. In other words, the Court's views about the merits of its own test may trump when Congress has not spoken, but they should not trump when Congress *has* spoken. Notably, in override cases like *Ledbetter v. Goodyear Tire & Rubber*, the Court seems deliberately to be limiting the reach of a congressional override—which seems problematic both from a faithful-agency *and* from a separation-of-powers perspective. After all, how is Congress supposed to provide a legislative check if the Court reads Congress's corrections narrowly, privileging the prior judicial interpretation whenever possible?

## CONCLUSION

This Article has sought to illuminate an important and little-noticed trend in statutory interpretation jurisprudence—textualist Justices' willingness to abandon statutory stare decisis in certain cases—and to glean important insights and lessons about textualism and statutory interpretation theory from that trend. In particular, it has demonstrated that textualists and their cohorts seem to view statutory precedents that

create an implementation test as different, and less worthy of deference by subsequent courts, than precedents that engage in ordinary "*X* term means *Y*" analysis. Further, it has argued that textualists' attitude towards implementation tests highlights under-appreciated differences between textualists and purposivists, such as the greater weight that textualists give to the Supreme Court's monitoring function over lower courts. This Article also has suggested that the implementation-test caveat may help explain textualist Justices' reluctance to give full effect to some congressional overrides. Normatively, it has agreed with the textualist Justices that statutory stare decisis should be relaxed for precedents that establish implementation tests, with the caveat that the Court should not overrule an implementation test if Congress has expressly approved that test through statements in the legislative record, in an amendment, or subsequent law. At the same time, it has criticized some textualist Justices' willingness to overrule statutory precedents with which they simply disagree—and has defended statutory stare decisis in such cases.

**Appendix I**
**Statutory Stare Decisis Cases**
**Rehnquist-Roberts Courts**
(Non-Exhaustive List)

| **Case Name** | **Opinion Advocating Overruling** | **Author** | **Reason for Overruling** |
|---|---|---|---|
| Kimble v. Marvel Entm't, 135 S. Ct. 2401 (2015) (Patent Act) | Dissent | Alito (Thomas, Roberts) | Evolving Economic Theory, **Judicial Policymaking** (involves implementation test) |
| Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015) (Administrative Procedure Act) | Concurrence | Alito | Willingness to consider overruling in future case |
| | Concurrence | Scalia | **Text** |
| | Concurrence | Thomas | **Text** |
| Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (Fair Housing Act) | Dissent | Thomas | **Text**, Related Statute (involves implementation test) |
| | Dissent | Alito (Roberts, Scalia, Thomas) | **Text**, Related Statute (involves implementation test) |

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|---|---|---|---|
| Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) (Securities Act) | Concurrence | Thomas (Scalia, Alito) | Evolving Economic Theory, **Judicial Policymaking** (involves implementation test) |
| Mich. v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014) (Indian Gaming Reg. Act) | Dissent | Thomas (Scalia, Ginsburg, Alito) | **Judicial Policymaking**, Subsequent legal developments |
| Gross v. FBL Fin. Servs., 557 U.S. 167 (2009) (Age Discrimination in Employment Act) | Majority | Thomas (Roberts, Scalia, Kennedy, Alito) | **Text**, Related Statute, Unworkable (involves implementation test) |
| Altria Grp. v. Good, 555 U.S. 70 (2008) (Tobacco Statute) | Dissent | Thomas (Roberts, Scalia, Alito) | Unworkable, **Text**, **Judicial Policymaking** (involves implementation test) |
| CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (Section 1981) | Dissent | Thomas (Scalia) | **Text**, Related Statute |
| Gonzalez v. United States, 553 U.S. 242 (2008) (Federal Magistrate Act) | Dissent | Thomas | **Text**, Unworkable, Inconsistent w/ Previous Cases |

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| John R. Sand & Gravel v. United States, 552 U.S. 130 (2008) (Tucker Act) | Dissent | Ginsburg | Subsequent Legal Development, Unworkable (involves implementation test) |
| Preston v. Ferrer, 552 U.S. 346 (2008) (Federal Arbitration Act) | Dissent | Thomas | **Text** |
| Kimbrough v. United States, 552 U.S. 85 (2007) (Sentencing Statute) | Dissent | Thomas | **Text**, **Judicial Policymaking** (involves implementation test) |
| Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007) (Sherman Act) | Majority | Kennedy (Roberts, Scalia, Alito, Thomas) | Evolving Economic Theory + Common Law Statute, Subsequent Legal Developments, **Judicial Policymaking** (involves implementation test) |
| Clark v. Martinez, 543 U.S. 371 (2005) (Immigration Law) | Dissent | Thomas (Rehnquist) | **Text**, Issue Almost Constitutional |
| BedRoc Ltd. v. United States, 541 U.S. 176 (2004) (Pittman Underground Water Act) | Concurrence | Thomas (Breyer) | **Text**, Related Statute |
| Hohn v. United | Majority | Stevens | **Text**, Subsequent |

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|---|---|---|---|
| States,<br>524 U.S. 236 (1995)<br>(Criminal Statute) | | (Ginsburg, Breyer) | Legal Developments |
| Holder v. Hall, 512 U.S. 874 (1994)<br>(Voting Rights Act) | Concurrence | Thomas (Scalia) | **Text**, **Judicial Policymaking**, Unworkable (involves implementation test) |
| Hilton v. S.C. Pub. Rys,<br>502 U.S. 197 (1991)<br>(Federal Employers Liability Act) | Dissent | O'Connor (Scalia) | Messy, Unworkable |
| Irwin v. Dep't of Veterans Affairs,<br>498 U.S. 89 (1990)<br>(Title VII) | Majority | Rehnquist (Scalia, Blackmun, O'Connor, Kennedy) | Unpredictable, Ad-Hoc |
| Gulfstream Aerospace Corp. v. Mayacamas,<br>485 U.S. 271 (1988)<br>(Jurisdictional Statute) | Majority | Marshall (Unan.) | Outmoded, Unworkable (involves implementation test) |
| Johnson v. Transp. Agency Santa Clara Cty.,<br>480 U.S. 616 (1987)<br>(Title VII) | Dissent | Scalia (Rehnquist) | **Text**, **Judicial Policymaking**, Precedent was the Anomaly, No Reliance, Subsequent Cases (involves |

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|---|---|---|---|
| | | | implementation test) |
| Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S 409 (1986) (Sherman Act) | Dissent | Marshall | Subsequent Legal Developments |
| City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (Section 1983) | Dissent | Stevens | **Judicial Policymaking** (calls it dicta/judicial legislating) (involves implementation test) |
| Miller v. Fenton, 474 U.S. 104 (1985) (Habeas Corpus Statute) | Dissent | Rehnquist | Federal v. State Cases (distinguishing) (involves implementation test) |
| Monell v. Dep't of Soc. Servs. Of New York, 436 U.S. 658 (1978) (Section 1983) | Majority | Brennan (Powell, Stevens, Marshall, Stewart, White, Blackmun) | Precedent Itself Departed from Other Caselaw |
| Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (Sherman Act) | Majority | Powell (Burger, Stewart, Blackmun, Stevens) | Economic Theory (involves implementation test) |
| Lodge 76, Int'l Assoc. of Machinists and Aerospace Workers v. | Majority | Brennan (Burger, Blackmun, | Subsequent Legal Developments (involves |

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| Wisc. Emp't Relations Comm'n, 427 U.S. 132 (1976) (National Labor Relations Act) | | Powell, Marshall, White) | implementation test) |
| Flood v. Kuhn, 407 U.S. 258 (1972) (Sherman Act) | Dissent | Douglas (Brennan) | Subsequent Legal Developments, Equities |
| | Dissent | Marshall (Brennan) | |
| Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (Death on the High Seas Act, Jones Act) | Majority | Harlan (Unan.) | Unworkable (involves implementation test) |