Negative Legislation

By Roberto Borgert

Article I Initiative

About the Author:

Roberto is a 2018 graduate of the University of Chicago Law School. He currently clerks for Judge Timothy J. Kelly of the U.S. District Court for the District of Columbia.

The author would like to thank Noel Ottman, Andreas Petasis, and Anagha Sundararajan for their comments and encouragement during this project. He also thanks the Article I Initiative and staff of the Federalist Society for providing the opportunity to think deeply about these issues.

Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, we offer links to other perspectives on the issue. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Mr. Borgert's article won First Place in the Fourth Annual Article I Initiative Writing Contest, conducted by the Federalist Society's Article I Initiative on the topic *Judicial Interpretation and the Erosion of Legislative Power*. Prof. Lillian BeVier, Hon. C. Boyden Gray, and Hon. Chris DeMuth were the esteemed judges for the Writing Contest. They completed a blind review of the submitted essays addressing the contest topic, and they selected this paper as the winner. Please visit articleiinitiative.org to learn more about the Initiative.

Other Views:

• Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, The Atlantic, Nov. 16, 2019, https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/.

• Deborah A. Widiss, *Communication Breakdown: How Courts Do — and Don't — Respond to Statutory Overrides*, Judicature (Spring 2020), https://judicature.duke.edu/articles/how-courts-do-and-dont-respond-to-statutory-overrides/.

• James Durling, *May Congress Abrogate Stare Decisis by Statute?*, 127 Yale L.J. Forum 27 (May 1, 2017), https://www.yalelawjournal.org/pdf/Durling_uhck33r9.pdf.

Modern commentators have spilled much ink on the undemocratic nature of congressional delegations to executive branch agencies. Less discussed is the unchecked role of courts in declaring law through statutory interpretation. Whether federal courts have intentionally appropriated Congress's lawmaking function or reluctantly speak when Congress abdicates its legislative duties is, for purposes of this essay, largely irrelevant. Congressional response to judicial statutory interpretation is inhibited by structural features established by the Constitution and by political self-interest. In an era of polarization and weakening separation of powers, Congress is losing its voice in expounding the meaning of statutes.

To protect its lawmaking function from judicial encroachment, Congress should embrace negative lawmaking: the exercise of its power to say what the law is *not*. Underpinning this proposal is the view that Congress's difficulty in restricting judicial activism in the realm of statutory interpretation is primarily a problem of political economics. Negative lawmaking is a public-choice-informed innovation that can reduce the cost of producing legislation.

This essay proceeds in three parts. Part One describes how each of the three branches of government produces legal goods. It then illustrates how the relative costs of lawmaking and judicial interpretation of statutes give the judiciary an institutional advantage in having the last word on the meaning of a law. Part One concludes by explaining the pressures on Congress to cede to the judiciary that last word. The second part of this essay defines negative lawmaking and explores how it can empower Congress to respond to judicial interpretations. Part Two also speculates about why Congress has not chosen to enact negative legislation in the past and why it nevertheless may choose to do so in the future. The final part of the essay affirms the constitutionality of negative lawmaking and its strengthening effect on the separation of powers between the branches.

I. Costs of Legislation, Regulation, and Judicial Interpretation

Public choice theory contends that our political system functions according to economic incentives.[1] In the Article I realm, constituents demand legislative goods, and legislators, seeking reelection, produce legislation to meet that demand.[2] Interest groups with specific goals likewise prod legislators to take positions, offering political support as a reward. Legislators and

1 Robert D. Tollison, *Public Choice and Legislation*, 74 Va. L. Rev. 339, 341–42 (1988). *See also* Matthew Wansley, *Virtuous Capture*, 67 Admin. L. Rev. 419, 425–32 (2015) (describing legislative public choice theory and critiques of it).

2 Tollison, *supra* note 1, at 344–51. *See also* Elizabeth Garrett & Adrian Vermeule, 50 Duke L.J. 1277, 1287–88 (2001) (observing that legislators are motivated by reelection, desire for respect, promoting vision of public interest, and other ends).

interest groups then wield procedural and political tools to push desired legislation through each house of Congress and across the President's desk for the signature that transforms an enrolled bill into federal law. This Part discusses the political economics of legal goods, that is, laws, regulations, and court decisions. It lays the groundwork for the negative legislation proposal by describing the costs of obtaining different legal goods and explains why Congress is ill-equipped, and even reluctant, to protect the laws it passes from judicial interpretations it views as incorrect.

A. Sources of Legal Goods

The public may seek legal goods from Congress, but there are strong reasons to seek them elsewhere. Under the Presentment Clause[3] and the internal rules of Congress,[4] a legislative proposal must make its way through the committees and floors of each house of Congress and then to the President for approval. Legislative scholars have observed that the path to presidential signature is littered with "vetogates," or points in the legislative process at which political actors can "veto" a bill.[5] Vetogates take the form of a committee chairman's power to place or not place an item on the committee's agenda; a party leader's decision to call or not call for a vote on the floor of either chamber; the Senate filibuster; reconciliation negotiations; or the President's ultimate prerogative to refuse to sign a bill.[6] These constitutional and extra-constitutional hurdles increase the cost of producing legislation.

Aware of the high cost of passing a federal law, interest groups and the public also turn to administrative agencies to obtain legal goods.[7] Rulemaking, while not entirely free from vetogates, is a lower-cost venture, typically requiring sign-off only by the White House and agency officials.[8] Once the relevant officials—who themselves may be connected to interest groups—green-light a proposed regulation, the regulation undergoes the Administrative Procedure Act's[9] relatively undemanding notice-and-comment procedures before publication in the Federal Register.

But the administrative state gives, and it can also take away. Lawmaking by regulation is less durable than lawmaking by statutes. While amending or repealing statutes requires a second journey through Article I's legislative minefield, a regulation issued in one administration can be undone via the same, less onerous process by the next.

The courts are a third source of legal goods.[10] Courts can broaden or narrow the scope of constitutional rights, resolve the meaning of contracts or the nature of a property right, or, most relevant to this essay, interpret statutory language. As long as an interpretive dispute can be packaged as an Article III "case or controversy,"[11] a court is likely to issue a decision on a matter of statutory interpretation.[12] If an interest group, or a cooperating plaintiff, goes to court to advance its view of the meaning of a federal statute, and the initial ruling is contrary to the group's position, the group can seek review by a federal appellate court. And if the appellate court issues another unfavorable decision, the group will encounter its first formal vetogate: the Supreme Court's discretion to grant or deny certiorari.[13] If the Court denies certiorari, the group will have to find a different plaintiff and start all over again to limit or overturn the adverse opinions spawned on the earlier case's journey to the Supreme Court.

But if the group prevails at either the Court of Appeals or the Supreme Court, the interest group will have obtained, in most cases, a durable legal good. This is because courts take the view that stare decisis has "special force" in statutory interpretation cases.[14] This view presupposes that Congress can always amend a statute if it does not approve of a judicial interpretation.[15] Absent congressional indication to the contrary, courts will assume the prior interpretation is correct.[16]

B. The (Not So) Active Dialogue Theory

The judiciary's approach to statutory interpretation is grounded in a misapprehension: that if Congress disagrees with a judicial interpretation, it can easily respond by enacting responsive legislation. For reasons described below, the structure of Congress's market for legal goods limits the institution's ability to counter judicial statutory interpretations. Facing a handicapped Congress, the judiciary should have little reason to expect pushback on most matters of statutory interpretation.

The Supreme Court's view of its own interpretive decisions is that they "effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special

3 U.S. Const., art. I, § 7 (requiring bicameralism and presentment to the President).

4 U.S. Const., art. I, § 5 ("Each House may determine the Rules of its Proceedings . . . .").

5 William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 Notre Dame L. Rev. 1441, 1444 (2008).

6 *Id.* at 1444–45.

7 Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L. J. 1337, 1342–44 (2013) (describing agency capture by interest groups).

8 Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 Va. L. Rev. 471, 513–17 (1988) (delegation of law making power to agencies "lowers the cost to interest groups of influencing the political process; it conflicts in the most fundamental way imaginable with the core constitutional function of raising the transaction costs to interest groups of obtaining passage of favored legislation").

9 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

10 Frank B. Cross, *The Judiciary and Public Choice*, 50 Hastings L.J. 355, 360 (1999) ("Courts are simply another venue in which influence may be brought to bear upon government policy.").

11 *See* U.S. Const. art III, § 2 ("The judicial Power shall extend to all Cases . . . [and] Controversies . . . .").

12 Cross, *supra* note 10, at 367–68 (describing how interest groups "[p]urchas[e] judicial precedent"). *But see* Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 Cal. L. Rev. 1401, 1436 (2016) (explaining that courts may use justiciability doctrines to limit certain plaintiffs' access to litigation as a means to effect policy changes through the judiciary).

13 28 U.S.C. § 1254(1).

14 Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

15 *Id.* at 173.

16 Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 322–27 (2005) (discussing rationales for the doctrine).

justification, [the decisions] are balls tossed into Congress's court, for acceptance or not as that branch elects."[17] Scholars describe this communicative model of statutory interpretation as a "courts-Congress interpretive dialogue."[18] Congress first "speaks" by enacting legislation. The judiciary responds by interpreting the legislation and, to paraphrase Justice Elena Kagan, sends the ball back into Congress's court. If Congress does nothing, the courts read that silence as confirmation that their interpretation was correct. The judicial interpretation gains the protection of the super stare decisis rule, and the courts-Congress dialogue moves to a different statutory subject.[19]

This view of statutory interpretation is convenient for the judiciary, but it ignores Article I truths. While it is technically correct that "Congress remains free to alter what [the Court] ha[s] done," political factors within Congress cast doubt on the Court's approach to statutory interpretation.[20]

Justice Antonin Scalia recognized as much in his first term as a Supreme Court Justice. In *Johnson v. Transportation Agency, Santa Clara County, California*,[21] the majority relied on the fact that Congress did not amend Title VII of the Civil Rights Act of 1964[22] in response to the Court's decision in *United Steelworkers of America v. Weber*,[23] and it construed that congressional inaction as affirmation that its interpretation in *Weber* was correct.[24] Justice Scalia noted the majority's reasoning ignored that the provision at issue was "part of a total legislative package containing many *quids pro quo*."[25] The brunt of his argument was that, by focusing on Congress's reaction to the Court's prior interpretation of a single provision, the Court was mistakenly disentangling different components of the overall agreement. Members of Congress, who originally voted for the legislation as a compromise, could not be expected to vote for disfavored components once there was a "judicial opinion, safely on the books," protecting the parts of the law of which they approved.[26] To infer anything from Congress's inaction would require "ignor[ing] rudimentary principles of political science"[27] since congressional inaction could represent either "(1) approval of the status quo, [ ] (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."[28]

There are other reasons Congress's ability and willingness to respond to judicial interpretations are limited. First, the individuals constituting the Article I and Article III branches have different time horizons in their institutional roles—differences that operate to Congress's disadvantage. Article III judges have lifetime tenure.[29] Representatives, in contrast, must run for reelection every two years, and senators every six years.[30] Because of the pace of litigation in federal court, this means that, by the time the Supreme Court or an inferior appellate court interprets a statute, the country will have held elections.[31] The Congress replying to a judicial statutory interpretation will rarely be the same Congress that enacted the statute.

Whether a future Congress's view of a statute illuminates the original meaning of a statute has theoretical implications for statutory interpretation,[32] but, more importantly here, congressional turnover also affects Congress's institutional capacity to respond to a judicial decision. Political agendas, membership, and the balance of power within Congress will likely shift between a statute's enactment and courts' interpretation of that statute. If a court misconstrues a statute's original meaning, the enacting coalition may no longer exist to recognize the court's error and correct it. Remaining members of the enacting coalition may not wish to spend political capital responding to a judicial interpretation that they recognize as wrong, but that is costly to correct. Other members of Congress may prefer the incorrect interpretation and block attempts to amend the law.[33]

Courts also enjoy resource advantages in any interpretive dialogue with Congress. For one, the cost to courts of producing a statutory interpretation is relatively low.[34] Outside of justiciability issues and the granting of certiorari, courts do not face the vetogates that raise the cost of producing legal goods. Second, deciding legal disputes, including interpreting and applying

17 Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 456 (2015).

18 Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 731, 776 (2014); *see also* James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. Rev. 346, 348 (2019).

19 Eskridge, Jr., *supra* note 5, at 1458–59 (describing how this dialogue works in practice).

20 Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (quoting *Patterson*, 491 U.S. at 172–73).

21 480 U.S. 616 (1987).

22 42 U.S.C. § 2000 *et seq*.

23 443 U.S. 193 (1979).

24 *Johnson*, 480 U.S. at 629 n.7.

25 *Id.* at 671 (Scalia, J., dissenting).

26 *Id.*

27 *Id*. at 672.

28 *Id.*

29 U.S. Const. art. III, § 1.

30 U.S. Const. art. I, §§ 2, 3.

31 *See* United States Courts, *Judicial Business*, Table B-4A, U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2019 (2019) (median time in civil and criminal cases from filing in lower court to last opinion or final order in appeals court across the D.C. and regional circuits was 29.6 months).

32 *See, e.g.*, Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex. L. Rev. 1125, 1138–39 (2019) ("[I]t is not obvious that the Court should rely on what *today's* legislators think about the meaning of a law enacted by a *previous* Congress.").

33 *Johnson*, 480 U.S. at 671 (Scalia, J., dissenting). *See also* Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 881 (D.C. Cir. 1992) (en banc) (Randolph, J., concurring) (observing that "a later Congress might [ ] actually prefer a court's misinterpretation [of a statute]").

34 The cost of resolving interpretation cases falls mostly on the public who pay to maintain the judicial system. *See* Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 Harv. J. Legis. 123, 127 (1992).

statutes, is what courts do all day, every day. Congress, on the other hand, has an agenda consisting of far more than determining the correct meaning of any given statute.[35] And even if Congress were inclined to keep tabs on statutory interpretation decisions, courts produce so many decisions that Congress would have to devote a substantial part of its sessions to analyzing, debating, and responding to judicial decisions. Because courts have comparatively more resources and time to devote to statutory interpretation,[36] it should come as no surprise that courts often have the last word in the interbranch conversation

For all these reasons, courts' interpretive canons often misread congressional cues.[37] The canons of congressional acquiescence and reenactment make little sense once congressional dynamics are understood.[38] The canon of congressional acquiescence instructs that a court may take congressional inaction as evidence that Congress approves of a prior judicial interpretation.[39] But as Justice Scalia noted, legislative inaction can occur for many reasons other than acquiescence:[40] A hostile committee chair can block an otherwise popular proposal, a backchannel threat of presidential veto can torpedo a bill before it is drafted, or a bill can fail because not enough members were in the Capitol during a vote.[41]

The canon of congressional reenactment suffers from similar flaws. The reenactment rule presumes that Congress is "aware of an administrative or judicial interpretation of a statute and [ ] adopts that interpretation when it re-enacts a statute without change."[42] As in the context of acquiescence, the fact that Congress reenacts a statute without addressing a judicial interpretation says little about whether Congress approves of the interpretation. It equally could be the case that Congress did not respond to a decision because it was not aware of the decision,[43] or that a legislative bargain had been struck and tinkering with a proposed bill would undo the deal.

Professors Abbe Gluck and Lisa Schultz Bressman have demonstrated that congressional staff are unaware of certain interpretive canons[44] and do not draft legislation with known canons in mind.[45] This reality increases the likelihood that courts will understand Congress to say X when Congress really means Y.

Justice Scalia's observations in *Johnson*, while astute, have not changed the Court's approach to statutory stare decisis. The Court has indeed been humbler in deploying the canon of congressional acquiescence that supported the majority's holding in *Johnson*.[46] But it continues to rely on the super stare decisis rule,[47] and it arguably even expanded it to non-statutory cases where Congress "exercises primary authority" and could override the Court's decision.[48] In continuing to apply statutory stare decisis and other interpretive canons, the Court maintains the formalist view that Congress and the courts dialogue through effortless channels of clear communication.

C. Statutory Interpretation as Blame-Shifting

Congress may be content with this state of affairs. In the realm of administrative law, a commonplace theory proposes that politics incentivizes Congress to delegate authority to agencies rather than enact legislation.[49] In doing so, Congress delegates to agencies the authority to address issues that are controversial or that require taking unpopular or politically costly action. Once an agency has lawmaking power, members of Congress can claim credit for creating a new pro-social program but blame the agency when conflicts inevitably arise between implementation of that program and the interests of regulated groups.[50] In other words, Congress can pass the buck to the executive branch.

35 Victoria Nourse, *Underwrites, Overrides and Recovered Precedents*, 104 Va. L. Rev. Online 89, 94 (2018) (Congressional "members focus on how to solve national crises, not on how to draft a legal decision, particularly a legal decision no voter has ever heard of.")

36 *See* Garrett & Vermeule, *supra* note 2, at 1301 (noting that a member of Congress who analyzes constitutional questions "loses time for fundraising, casework, media appearances, and obtaining particularized spending projects in her district"). The same goes for legislators analyzing statutory interpretation questions.

37 *See generally* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013) (describing results of a survey of congressional staffers about their knowledge or use of interpretive canons in drafting legislation).

38 William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 95–108 (1988) (arguing there is little informative value from legislative inaction).

39 *Id.* at 71–72.

40 *Id.*; *see also Johnson*, 480 U.S. at 672 (Scalia, J., dissenting).

41 Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. Cal. L. Rev 205, 212–13 (2013).

42 Lorillard v. Pons, 434 U.S. 575, 580 (1978).

43 Barrett, *supra* note 16, at 331–33 (collecting evidence that "Congress is generally unaware of circuit-level statutory interpretations").

44 *See* Gluck & Bressman, *supra* note 37, at 949 (drafters are unaware of rule of lenity and clear statement rules).

45 *Id.* at 930 ("[T]he canons most commonly employed by courts, including the rule against superfluities, the whole act rule, and the use of dictionaries, appear to be used the least often by our drafters.").

46 *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 749–50 (2006) (reciting "oft-expressed skepticism toward reading the tea leaves of congressional inaction").

47 *See Kimble*, 576 U.S. at 456–57, 462, 464–65 (citing lack of congressional response to Supreme Court decision as justification to maintain precedent).

48 *See* Michigan v. Bay Mills Indian Community, 572 U.S. 782, 799 (2014) (applying doctrine to tribal sovereign immunity precedent); *see also id.* at 828 n.6 (Thomas, J., dissenting) (rejecting expansion of doctrine to "preserve a common-law decision of this Court").

49 David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731, 740–41 (1999).

50 *Id.*; *but see* Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & Pol. 239, 240–51 (2012) (proposing alternative account of delegation and blame-shifting).

Congress also passes the buck to the courts.[51] Congress does so by enacting vague legislation[52] or by not updating older laws.[53] By letting courts take up hard questions of statutory interpretation, Congress avoids difficult votes and can avoid fault for delivering unsatisfactory legislative outcomes.[54] For example, a coalition may pass a law that is vague enough to sweep in policies preferred by different members of the coalition and then leave it to the courts to determine which policies the legislation actually enacts.[55] These maneuvers result in courts deciding major questions because Congress failed to definitively answer them legislatively.[56]

II. Negative Legislation

To increase Congress's ability and willingness to counter judicial interpretations, legislators should begin proposing "negative legislation." Negative legislation negates the effect of a court's statutory interpretation. Unlike typical congressional "override" legislation, which renders a judicial decision obsolete by enacting new statutory language, negative legislation rejects a statutory interpretation but does not propose a correct meaning.

That difference should increase the likelihood Congress will respond to a judicial statutory interpretation it opposes. As anyone who has worked with a team knows, it is easier to assemble a coalition against an idea than a coalition affirmatively endorsing an idea. By allowing Congress to negate a judicial interpretation without proposing new language for detractors to veto, the costs of legislation should go down. Enacting negative legislation will, at the margins, make it easier for Congress to negate an errant interpretation when the requisite majorities of Congress dislike the interpretation but cannot agree on how to correct the judiciary.

A. The Basics

Negative legislation functions by nullifying the precedential value of a particular judicial statutory interpretation and precluding future courts from adopting the same interpretation. Where typical legislation amending a statute may discuss a court case to give context to the law and explain the effect of new statutory language, negative legislation bluntly disapproves a judicial interpretation. A negative law could, for example, state only: "The United States Court of Appeals for the Third Circuit's interpretation of 1 U.S.C. § 1 as interpreted in *Bus v. Gus*, 123 F.4th 567 (3d Cir. 2053) is incorrect." Rejecting an interpretation is the goal of negative legislation. Once the legislation accomplishes that goal, its work is done.

Negative legislation assumes that there exists a range of reasonable interpretations for many statutes, if not all statutes. As Dean John Manning notes, modern statutory interpretation theory acknowledges that "one can believe both that there is a right or best answer to a legal question and that reasonable people may disagree about what that answer is."[57] The *Chevron*[58] doctrine is a tool courts developed to accommodate that principle in the realm of administrative law, allowing courts to defer to an agency interpretation of an ambiguous statute that falls within "the bounds of reasonable interpretation."[59]

Other contexts also reflect this truth. For example, the meaning of a statute's text took center stage in *Bostock v. Clayton County*.[60] The majority and two dissenting opinions, all proclaiming a textualist approach to interpretation, interpreted Title VII of the Civil Rights Act of 1964 and reached different conclusions about the statute's meaning.[61] Given that most statutes can bear a range of potential interpretations, negative legislation simply instructs courts that they misinterpreted a statute and sends the judiciary back to the drawing board to consider other possible interpretations.

That may seem simplistic, but it is a commonplace method of communication in legal and other contexts. A variation on Francis Lieber's classic "soupmeat" allegory illustrates the ordinariness of communicating by simply saying "no."[62] Lieber envisions that "a housekeeper says to a domestic: 'fetch some soupmeat,' accompanying the act with giving some money to the latter."[63] In this instance, suppose the housekeeper adds "from the butcher on Drury Lane." There are three butchers on Drury Lane. The domestic goes to one butcher, purchases the meat and returns

51 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, 376–77 (2010) (describing how and why Congress delegates lawmaking authority to courts).

52 *Id.* at 370–72.

53 Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. in Am. Pol. Dev. 35, 37 (1993) (politicians divert difficult issues to the judiciary). *See also* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 434 (2008) (providing examples of "policy-driven [ ] statutory interpretation").

54 Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 Int'l Rev. L. & Econ. 349, 364–65 (1993) (theorizing that delegating legislative power to courts accomplishes "the largest risk shift, that is, the largest responsibility shift").

55 Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 595–97 (2002) (congressional staffers use ambiguity to resolve political disputes and "hope that the courts will give [their side] the victory); *see also* Hasen, *supra* note 41, at 221 (Congress deliberately passed ambiguous legislation in response to *Georgia v. Ashcroft* to "avoid a deep partisan divide about the workings of the Act."); *cf.* Bressman & Gluck, *supra* note 18, at 774 (significant number of congressional staffer survey respondents expressed preference that "courts not interpret their statutes at all").

56 Graber, *supra* note 53, at 44.

57 John F. Manning, *Clear Statement Rules and The Constitution*, 110 Colum. L. Rev. 399, 424 (2010).

58 Chevron, U.S.A., Inc. v. N.R.D.C., 467 U.S. 837 (1984).

59 City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 296 (2013).

60 140 S. Ct. 1731 (2020).

61 *See id.* at 1737 (majority opinion) (Gorsuch, J.); *id.* at 1754–84 (Alito, J., dissenting); *id.* at 1822–37 (Kavanaugh, J., dissenting).

62 Francis Lieber, Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics 18 (William G. Hammond ed., 3d ed. 1880), republished in 16 Cardozo L. Rev. 1883, 1904 (1995).

63 *Id.*

to the housekeeper. The housekeeper rejects the meat, saying, "No, not *that* butcher. Go and get different soupmeat." Now left with two choices, the domestic picks one, purchases meat, and returns to the housekeeper. This time the housekeeper is satisfied.

This surely is not the most efficient method of communication in many circumstances. And in the hypothetical, it is perfectly plausible that the domestic may have had to go shopping a third time to satisfy the housekeeper. To ease the domestic's burden, the housekeeper could have specified "the butcher in the green store" or revealed other information to guide the domestic. But perhaps the housekeeper did not have time to write out further instructions or did not remember which butcher sold the best soupmeat. In that case, assuming there was no urgency in receiving the soupmeat and the household could absorb the cost of buying or repurposing the first soupmeat, trial and error was not an irrational choice.

Here, Congress is the housekeeper; the judiciary, the domestic. Congress can give affirmative direction to the judiciary in interpreting statutes, or it can say, "Try again." Where a majority disapproves of an interpretation, and the costs of error and delay in reaching the correct interpretation by this indirect route are less than the cost and delay of assembling a coalition to enact new statutory language, negative legislation can play a role in checking the judiciary.

B. Negative Legislation Is a Fourth Species of Override Legislation

Congress occasionally responds to judicial decisions, but it has either never or very rarely passed negative legislation.[64] There are, however, many examples of other kinds of override legislation.[65] Override legislation is what it sounds like: a law that overrides a judicial decision interpreting a statute. Negative legislation acts similarly to traditional override legislation, but it differs in two ways.

First, where override legislation gives courts new statutory language to interpret, negative legislation disclaims a past interpretation as incorrect and prevents courts from applying the same interpretation in future cases analyzing the statute. Second, negative legislation explicitly identifies the judicial interpretation it negates. Override legislation typically mentions a court case, if at all, only in legislative history or in a findings or purpose section, but not in the operative language amending the statute at issue.

There are different flavors of override legislation. One group of scholars delineates three categories of overrides: updates, clarifications, and restorations. First, overrides can "update" the law because a statute and its judicial interpretations may no longer be good fits for modern problems and amendments are necessary.[66] Overrides can also "clarify" the law by setting a clear rule where the Supreme Court has not. This may occur when the Supreme Court summarily affirms a lower court interpretation without announcing a national rule, or where the Supreme Court fails to agree on a statute's meaning—for example, where there is no controlling majority opinion.[67] Finally, overrides can "restore" the law in reaction to what Congress and the President consider to be a "bad interpretation by the Supreme Court."[68] Negative legislation is most similar to restorative overrides and can be thought of as a subset of the restorative override category or as a fourth species of override legislation.

Whether Congress is updating, clarifying, or restoring a law following a judicial interpretation, Congress rarely mentions the relevant judicial decision in the language of the legislation, instead opting to amend statutes directly.[69] When Congress chooses to identify the court case it seeks to override, it usually names the decision in a legislative finding or purpose section that the Office of the Law Revision Counsel often does not place in the U.S. Code.[70] Congress's discussion of an overridden case can range from criticizing the effect of a court decision[71] to opining that a decision interpreted a provision too narrowly or broadly.[72] Unlike traditional override legislation, negative legislation requires naming the negated decision in the text of the substantive language.

64 Matthew Christiansen and Professor William Eskridge, Jr., identified 286 overrides of 275 Supreme Court statutory interpretation decisions. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317, 1329, 1515 (2014). In researching for this essay, I examined all of the overriding legislation they identified and did not find a single example of negative legislation. Nevertheless, other scholars have found that Congress sometimes "underwrites" or specifically approves of interpretive decisions, which is functionally the inverse of negative legislation. *See* Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 Va. L. Rev. 1487, 1495 (describing different forms of underwriting, including "within the substantive law itself").

65 Christiansen & Eskridge, Jr., *supra* note 64, at 1515.

66 *Id*. at 1370.

67 *Id.* at 1373–74.

68 *Id.* at 1374–75.

69 Deborah A. Widiss, *Identifying Congressional Overrides Should Not Be This Hard*, 92 Tex. L. Rev. See Also 145, 164–65 (2014).

70 *Id.* at 164 n.102 (providing examples of override legislation identifying court cases they sought to reject in precatory findings and purposes sections). Professor Kevin Stack observes that purpose sections are often placed in the notes to the Code, rather than the Code itself. *See* Kevin M. Stack, *The Enacted Purposes Canon*, 105 Iowa L. Rev. 283, 329–30 (2019). Placement in the U.S. Code is not legally significant, but Professor Stack argues that American legal culture "frequently treats the Code as a shorthand for the corpus of all federal legislation" and thus ignores legislative purpose statutes. *Id.* One benefit of negative legislation is that it avoids the problems associated with not naming cases in the substantive language of an override statute. *See* Widiss, *supra* note 69, at 165 (noting practical benefits of statements "in statutory language that [a law] is intending to override a prior judicial decision); Stack, *supra*, at 331 (arguing that Code-based legal analysis overlooks properly enacted legislative purpose sections).

71 *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(1), 123 Stat. 5 (2009) ("The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.").

72 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3553 (2008) ("[T]he Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress.").

C. Negative Legislation in Practice

The discussion thus far has been theoretical. A couple of examples now follow to show how Congress can use negative legislation to respond to real cases.

In *Trump v. Hawaii*,[73] the Supreme Court construed Section 212(f)[74] of the Immigration and Nationality Act[75] (INA) to give the President authority to bar certain classes of foreign nationals from entering the United States. The Court held that the statute granted "the President broad discretion to suspend the entry of aliens into the United States" and upheld the challenged action.[76] The appellees offered alternative statutory constructions limiting the power of the President under Section 212(f).[77] They lost.

To understand how Congress can use negative legislation to respond to the decision, assume that the Court's interpretation of the INA is near the upper bound of potential interpretations regarding how much discretion the statute gives to the President. Further, suppose that a majority of Congress believes the Court should have interpreted Section 212(f) as granting less discretion to the President. If the majority wishes to pass override legislation but is split on how much discretion the President should have, the majority will not be able to respond to the judicial decision. On the other hand, if the majority is willing to merely negate *Trump v. Hawaii*, its chances of passing legislation increase.[78]

This example demonstrates how negative legislation can facilitate congressional response where the scope or range of a statute is in dispute. Those cases tend to operate on a continuum of potential meanings, asking "how much?" or "to what extent?" Negative legislation can also facilitate congressional action where statutes present categorical questions. Rather than ask how much of a thing a statute addresses, categorical cases ask with which things a statute concerns itself.

For example, circuits are split as to which factors sentencing courts can consider when determining whether to reduce a sentence under the First Step Act.[79] Some circuits think courts must or may consider post-sentencing developments such as intervening changes in law or a defendant's rehabilitation.[80] Others disagree.[81] These questions do not have a continuum of potential answers; either a court can consider a factor, or it cannot. Negative legislation is perhaps more useful to legislators in responding to categorical cases than continuum cases because the range of interpretations is likely to be slimmer, and the potential meanings after reinterpretation may be known in advance.[82]

To draw on the First Step Act example, suppose a statute could allow a court to consider one of the following in deciding whether to reduce a sentence: (1) rehabilitation but not intervening changes in law, (2) intervening changes in law but not rehabilitation, (3) both rehabilitation and intervening changes in law, or (4) neither. An interpreting court finds that the statute authorizes consideration of (1) rehabilitation but not intervening changes in law.

The court's interpretation has the support of forty percent of Congress. The rest of Congress disagrees with the court's interpretation but is divided as to whether a court can consider both factors or neither. No member thinks a court can consider intervening changes in law but not rehabilitation. With a majority to negate the opinion, Congress enacts negative legislation and the President signs it. The legislation precludes the next court encountering the statute from interpreting it to authorize consideration of rehabilitation but not intervening changes in law. The court's remaining options are to consider (2) intervening changes in law but not rehabilitation, (3) both, or (4) neither.[83]

D. Negative Legislation Fills a Legislative Gap

Negative legislation allows Congress to legislate if a majority does not like a court's interpretation but cannot agree how to fix it. It is not a complicated idea, and since there is some use for the mechanism, there should be some history of Congress employing the device. But there is scant evidence Congress has ever used it. This section considers why that might be and predicts that the same political conditions that have caused a decline in override legislation also make negative legislation more attractive.

Negative legislation has many advantages for members of Congress, though perhaps not for the public. First, by disapproving a judicially imposed meaning rather than proposing new statutory language, Congress necessarily adds a layer of complexity that will inhibit the public's ability to monitor congressional action. Monitoring negative legislation will therefore likely be difficult for the general public and will raise the cost of countering proposed negative legislation.[84] Understanding the effect of negative legislation requires understanding the role of courts in our system of governance, the implications of a statutory interpretation, and the range of interpretations the relevant statute can bear. That complexity will favor resourced interest groups best able

73 138 S. Ct. 2392 (2018).

74 8 U.S.C. § 1182(f).

75 8 U.S.C. § 1101 *et seq*.

76 *Trump*, 138 S. Ct. at 2408.

77 *Id.* at 2410–15.

78 Legislators who believe the Court should have interpreted the statute to give the President even more discretion may even join the negating coalition.

79 Pub. L. No. 115-391, 132 Stat. 5194 (2018).

80 *See, e.g.*, United States v. Easter, 975 F.3d 318, 327 (3d Cir. 2020); United States v. Chambers, 956 F.3d 667, 675 (4th Cir. 2020).

81 *See, e.g.*, United States v. Kelley, 962 F.3d 470, 476 (9th Cir. 2020).

82 On the other hand, ex-ante knowledge of potential outcomes could make a vote for negative legislation more politically costly. There may be only one alternative interpretation a court could reach after negation. If the effects of the alternative interpretation are clear, the political consequences of the vote may be the same as a vote for override legislation.

83 This scenario leaves open the possibility of interpreting the statute to allow consideration of intervening changes in law but not rehabilitation, an interpretation no member of Congress thinks is correct. *See infra* note 92 and accompanying text.

84 John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 William & Mary L. Rev. 365, 379 (1999) (explaining how the general public remains "rationally ignorant" of legislative activity because of the cost of monitoring the activity and remote chance of affecting its outcome).

to monitor the importance of any proposed negative legislation and to identify instances in which negative legislation can achieve their goals.[85] It will also favor legislators who wish to avoid public scrutiny for undoing a statutory interpretation.

Second, and relatedly, Congress can use negative legislation to negate district and appellate court interpretations. Negating decisions from those courts should be the bread and butter of interest group and congressional coalitions engaging in negative lawmaking because doing so will negate the future impact of an adverse decision and remove the need for further litigation.[86] These decisions attract less media attention, which is likely a consequence of the cost of monitoring all judicial proceedings across the federal judiciary. Perhaps reflecting these visibility issues, Congress has been much less likely to respond to appellate court decisions than to Supreme Court decisions.[87]

Because of their low visibility among the public and Congress, inferior court decisions are ripe for negation.[88] Their lower visibility means it is less likely the voting coalition will be blamed if the negation leads to an unpopular outcome. And if the negation results in a popular outcome, the voting coalition can be sure to let its constituents know of its success. Negating lower court decisions will probably raise their visibility in the long run, but it is doubtful that they will ever achieve the same political saliency as Supreme Court decisions.

Finally, negative legislation is a good bargaining chip for pulling together a legislative coalition. Because the effect of negative legislation on the meaning of a statute is not determined until a court reinterprets the statute, members of a voting coalition should not fear commensurate political repercussions for including negative legislation as part of a deal.[89] It is hard to be blamed for something when the effect of undoing an interpretation is not concrete and will not be determined until a court reinterprets a statute, which could take months or even years. Further, if a court later interprets a statute and a member's constituents do not approve of that interpretation, the member can always shift blame to the courts.[90]

Because negative legislation allows Congress to pass the buck and is the type of legislation interest groups are well positioned to pursue, it should already be a mainstay in the congressional toolbox. But it is not. It could be that members of Congress are not interested in negating interpretations, though that seems unlikely. If interest groups are willing to litigate court cases to the Supreme Court to avoid bad precedent or create new favorable precedent, they should also have an interest in pushing Congress to undercut unfavorable precedent.[91]

One possible explanation for the dearth of negative legislation is that, where a coalition exists that can enact negative legislation, the coalition is also sufficiently numerous to pass affirmative statutory language effectuating its goals. Members of Congress take a risk by negating one interpretation since the judge or panel who next reinterprets the statute may produce a "worse" outcome.[92] That risk may deter coalitions from pursuing negative legislation altogether. If a legislator has scarce political capital, it is rational to spend that capital on securing legislative benefits rather than simply negating an interpretation and sending it back to a judiciary that may not adopt the legislator's preferred alternative. It is better to get the sure thing. Another potential answer is that internal institutional rules or norms may discourage negative legislation. Members and their staff may think negative legislation is not "real" legislation worth congressional consideration.[93] In any event, the lack of negative legislation deserves additional study.

Even if negative legislation is not commonplace today, it may start falling into congressional favor. Congress's production of restorative congressional overrides has decreased since the 1990s.[94] Some scholars propose that the decline is related to increased polarization, Congress's shift in subject-matter focus away from judicially constructed super-statutes, or political ideology.[95] Whatever the reason, the decline in overrides suggests an opening for negative legislation.

First, where consensus has broken down, coalitions that previously were able to craft new statutory language to override a court decision might need to turn to negative legislation. If

85 *See, e.g.*, Nourse & Schachter, *supra* note 55, at 610–13 (lobbyists are regularly involved in congressional bill drafting).

86 Cross, *supra* note 10, at 368 (describing settlement and selective litigation strategies by interest groups).

87 Barrett, *supra* note 16, at 331–32 (collecting research examining congressional responses to appellate court decisions).

88 William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 320 n.122 (1988) ("[I]nterest groups tend to be most influential when (1) they are trying to block rather than enact legislation, (2) the issues have low public and media visibility and are being addressed in forums friendly to the groups, and (3) they can count on support from public sentiment, other relevant groups, and/or key political figures.") (citing K. Schlozman & J. Tierney, Organized Interests and American Democracy 317 (1986)).

89 *But see supra* note 82. In cases with a limited range of statutory meaning, negation may have predictable consequences and greater political saliency.

90 Graber, *supra* note 53, at 44.

91 *See, e.g.*, Ann Southworth, *Elements of the Support Structure for Campaign Finance Litigation in the Roberts Court*, 43 Law & Soc. Inquiry 319, 324–29 (2018) (highlighting different interest groups participating in or funding campaign finance litigation at the Supreme Court).

92 For example, in the sentencing statute example above, the reinterpreting court could interpret the statute to allow consideration of intervening changes in law and not rehabilitation—an interpretation no member of Congress thought was correct. The possibility of such an outcome may deter legislators who prefer the status quo over the risk of an interpretation no one wants.

93 Bressman & Gluck, *supra* note 18, at 794 (congressional survey respondents felt that "legislation had to 'look' a certain way").

94 *Compare* 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, 306 (2015) (finding decline began in 1998) *with* James Buatti & Richard L. Hasen, *Conscious Congressional Overriding of the Supreme Court, Gridlock, and Partisan Politics*, 93 Tex. L. Rev. See Also 263, 264 (2015) (finding decline began after 1991). The discrepancy stems from scholarly disagreement over which legislation qualifies as override legislation.

95 Victoria F. Nourse, *Overrides: The Super-Study*, 92 Tex. L. Rev. See Also 205, 206 n.11 (2014).

parties can agree that a decision is incorrect but cannot agree on how to remedy the issue, sending it back to the courts is a next-best option.[96] Second, if growing ideological distance is driving a decline in overrides, odd bedfellows may emerge to challenge judicial interpretations that fix the meaning of a statute beyond each side's preferred range of interpretations.[97] Ideological opposites may wish to join forces to dislodge a centrist interpretation for a chance at their preferred outcomes.

Finally, if *Chevron* deference takes on a smaller role in administrative statutory interpretation,[98] courts, not agencies, will be the final interpreters of statutes addressing a wide range of social and economic matters. Whereas *Brand X*[99] incentivizes interest groups to lobby the executive branch to negate judicial interpretations of ambiguous statutes,[100] *Chevron*'s decline will direct that political activity back to Congress. These pressures may encourage Congress to wield its negation power more aggressively.

III. Negative Legislation and the Constitution

Negative legislation is no good if it is unconstitutional. The most obvious constitutional objection is that negative legislation imposes an impermissible rule of decision by telling a court how to interpret a statute. The Constitution forbids Congress from directing courts to reach a particular result in a particular case by prescribing a "rule of decision."[101] The test for identifying an impermissible rule of decision is that "Congress violates Article III when it compels findings or results under old law. But Congress does not violate Article III when it changes the law."[102]

The rule of decision argument against negative legislation is that, by stating that the judiciary incorrectly interpreted a statute, the legislature infringes on the judicial function to say what the law is in a specific case. This view has some intuitive force. Certainly, if Congress directed a court to interpret the operative statute in a hypothetical *Smith v. Jones* case such that *Smith* won or ordered that a judgment be declared "null and void,"[103] that legislation could be an inappropriate rule of decision.[104] But negative legislation as proposed here does neither of those things.

Negative legislation restricts how a court can interpret a statute, but it does so in an ordinary way. Imagine a law affecting birds. If a court interprets the law as applying to penguins, and Congress responds by amending the statute's definition section to exclude penguins from the definition of "bird," Congress is instructing the judiciary how to interpret "bird." That is, Congress mandates that courts interpret "bird" as excluding penguins. Similarly, negative legislation restricts the potential meanings a statute can bear by instructing courts not to interpret a statute in the same way another court interpreted that statute.

The Supreme Court takes a functional approach when examining the proper form of legislation. In *Robertson v. Seattle Audubon Society*,[105] the Court considered a rule-of-decision challenge to an environmental statute that cited two still-pending cases and that affected the outcome of those cases. The Court brushed aside the challenge. It stated that, to the extent the statute "affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases."[106] The new statute amended the underlying law by "deem[ing] compliance with new requirements to 'meet' the old requirements," thus altering the meaning of the original requirements.[107] It was immaterial whether Congress amended the original statute directly or enacted a separate statute citing caselaw to modify the original statute.[108] Either enactment "produced an identical task for a court"—the application of new law to existing facts.[109]

Negative legislation requires the court reinterpreting a statute to apply new law to existing facts. Negative legislation is new law. It can be either prospective or, within constitutional bounds, retroactive.[110] And, like most legislation, it is generally applicable.[111] The main difference is its method of transmitting legal content. A court interpreting negative legislation will have to read the negated opinion, identify the relevant interpretation, and construe the underlying statute to avoid the negated meaning.[112]

This is not meaningfully different from what a court must do in interpreting new statutory text. In altering the range of

96 *See* Nourse & Schacter, *supra* note 55, at 595–96 (recounting congressional staffer consensus that ambiguity created space for political agreement where each side "hope[s] that the courts will give [them] victory").

97 Bruce Yandle, et al., *Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation*, 2008 Univ. Ill. L. Rev. 1225, 1228–30 (2008) (describing how groups with vast ideological differences can form consequentialist coalitions).

98 *See generally* Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 Admin. L. Rev. 725 (2007) (demonstrating how doctrinal changes have likely "hastened *Chevron*'s demise").

99 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

100 *See infra* notes 121–23 and accompanying text.

101 Bank Markazi v. Peterson, 136 S. Ct. 1310, 1322–23 (2016).

102 Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (plurality opinion).

103 Evans v. State, 872 A.2d 539, 549–50 (Del. 2005) (drawing on the original understanding of judicial power to find statute nullifying a court judgment unconstitutional under the Delaware Constitution).

104 *Bank Markazi*, 136 S. Ct. at 1323 n.17, 1326.

105 503 U.S. 429 (1992).

106 *Id.* at 440.

107 *Id.* at 439–40.

108 *Id.* at 440.

109 *Id.*

110 Landgraf v. USI Film Prods., 511 U.S. 244, 265–80 (1994) (discussing presumption against retroactivity and applicability of intervening change in law doctrines).

111 *Bank Markazi*, 136 S. Ct. at 1327–28 (general applicability is not a necessary quality of legislation).

112 Courts may resist negative legislation by distinguishing between their holding, judgment, and interpretive reasoning to protect favored interpretations. But courts engage in similar behavior when confronting statutory amendments. It is not obvious that negative legislation provides greater latitude to courts than override legislation in limiting the effect of amending law. *See* Deborah A. Widiss, *Shadow Precedents and the*

possible meanings, negative legislation does not revert the law to a time before the negated judicial decision so as to overturn the court's final judgment.[113] It substantively alters the meaning of a statute by responding to a judicial decision and reducing the future scope of potential statutory meaning. In doing so, it realizes what Abraham Lincoln described in his First Inaugural Address as the possibility to "overrule[a decision]" such that it "never become a precedent for other cases."[114] Negative legislation transforms the statute's meaning, thus creating new law.

Far from being unconstitutional, negative legislation strengthens the Constitution's structural separation of powers by equalizing the playing field between the courts, the executive, and the legislature. The power to negate the action of another branch of government is already a cornerstone of our system of checks and balances. Negative legislation is consistent with those negation powers and provides Congress a tool with which to respond more effectively to judicial lawmaking through statutory interpretation.

Courts deploy negation powers over Congress, the President, and the states. Most obviously, courts have the power to strike down unconstitutional laws.[115] But the courts also negate laws through other mechanisms. Federal preemption doctrine, for example, allows courts to enforce federalism by negating the effects of state laws that conflict with federal law.[116] And courts routinely negate executive actions, either by vacating a promulgated rule or administrative order or by remanding back to the agency to fix a procedural defect, or both.[117]

The President also has the power of negation. The clearest illustration is the veto power.[118] A President's veto sends an enrolled bill back to Congress, negating the effect of the original votes. Only if Congress can muster a majority vote strong enough to overcome the presidential veto—a veto of a veto—will the vetoed enrolled bill become law. The pardon power is another negation power. A pardon negates the effect of a court's conviction of a criminal defendant.[119] Further, as negative legislation precludes future courts from adopting a negated interpretation, a pardon prevents a future President from prosecuting an offender for a pardoned offense.[120]

Finally, the Supreme Court handed the President a third negating power in *Brand X*.[121] There, the Court held that an agency interpretation of an ambiguous statute can supplant a prior judicial construction of the same statute.[122] The rule "directs courts to give effect to the will of the Executive by depriving judges of the ability to follow their own precedent."[123] While this power goes a bit beyond pure negation in that it also requires the agency to propose a new interpretation, it shares key qualities with negative legislation.

Congress already has the power to negate the actions of the executive branch by virtue of the Congressional Review Act (CRA).[124] The CRA provides a fast-track legislative procedure for both houses of Congress to express disapproval of an administrative rule within sixty days of the rule's publication in the Federal Register. The CRA supplies standard language for a joint resolution indicating that "Congress disapproves the rule."[125] The resolution of disapproval, once passed in both chambers, acts as normal legislation and goes to the President's desk for signature or veto. If the resolution becomes law, the CRA prohibits the executive branch from promulgating any rule that is "substantially the same" without new legislative authorization.[126]

Separation of Powers: Statutory Interpretation of Congressional Overrides, 84 Notre Dame L. Rev. 511, 527–28, 531–34 (illustrating how courts absorb override legislation into statutory interpretation).

113 See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995) (judiciary has the "last word . . . with regard to a particular case or controversy").

114 4 R. Basler, The Collected Works of Abraham Lincoln 268 (1953) (First Inaugural Address 1861).

115 *See* Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 S. Ct. Econ. Rev. 115, 121–132 (2004) ("Judicial Power" as understood at the founding includes the power to negate unconstitutional legislation.); Marbury v. Madison, 1 Cranch 137, 177–80 (1803).

116 Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019) (describing preemption doctrine); Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 886 (2000) (federal statute and regulations preempted state tort law).

117 Merrick B. Garland, *Deregulation & Judicial Review*, 98 Harv. L. Rev. 505, 569–70 (1985) (describing administrative law remedies); *see also* Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 Seton Hall L. Rev. 108 (2001).

118 U.S. Const., Art. I, § 7 ("If he approve he shall sign it, but if not he shall return it.").

119 Nixon v. U.S., 506 U.S. 224, 232 (1993) ("The granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is an executive action that mitigates or sets aside *punishment* for a crime.") (quotation omitted) (emphasis in original); Knote v. U.S., 95 U.S. 149, 153–54 (1877).

120 *In re Aiken Cty.*, 725 F.3d 255, 263 n.6 (D.C. Cir. 2013) (Kavanaugh, J.). *See also Ex parte Grossman*, 267 U.S. 87, 120 (1925) ("The executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.").

121 545 U.S. 967.

122 *Id.* at 982–83.

123 Baldwin v. United States, 140 S. Ct. 690, 694 (2020) (Thomas, J., dissenting from denial of certiorari). By increasing the power of the executive branch, *Brand X* also incentivizes interest groups to focus their lobbying efforts toward agencies rather than Congress since they can undo a judicial interpretation of ambiguous statutes without incurring the costs of new legislation. *See also* Macey, *supra* note 8, at 513–17.

124 Pub. L. 104-121, 110 Stat. 871 (1996). Professor Ganesh Sitaraman has proposed a CRA for Supreme Court statutory interpretation decisions. *See* Ganesh Sitaraman, *How to Rein in an All-Too-Powerful Supreme Court*, The Atlantic (Nov. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/. His proposal would create a fast-track procedure similar to the CRA that would avoid several legislative vetogates. Unlike the CRA, his CRA-for-the-Court would not be a negation tool. It would instead allow a joint committee to rewrite the interpreted statute. *See* Ganesh Sitaraman (@GaneshSitaraman), Twitter (Oct. 6, 2020, 9:44 AM), https://twitter.com/GaneshSitaraman/status/1313475155713314816 ("committee would rewrite statute"). If Professor Sitaraman's proposal is ever adopted, Congress could use it to fast-track negative legislation.

125 5 U.S.C. § 802(a).

126 5 U.S.C. § 801(b)(2).

Similar to negative legislation directed toward judicial exposition of statutory meaning, the CRA negates an executive branch action and prevents the executive branch from taking the same action in the future.

The power to negate is not foreign to our system of checks and balances. Rather, it is a feature of the system. Congress has the power to negate judicial statutory interpretations; it need only use the power. The other branches certainly do.

IV. Conclusion

This essay proposes a modest legislative innovation to place Congress on more equal footing with the judiciary in matters of statutory interpretation. Negative legislation is no panacea to judicial overreach or interpretive error, but it is a mechanism through which elected representatives can push back on errant judicial decisions. At the margins, negative legislation will curb judicial overreach and demonstrate that Congress has a voice in pronouncing what the law is, and what it is not.