CORRECTING THE SUPREME COURT—WILL IT LISTEN? USING THE MODELS OF JUDICIAL DECISION-MAKING TO PREDICT THE FUTURE OF THE ADA AMENDMENTS ACT

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I. INTRODUCTION

Political science scholars have long debated the question of what drives judicial decisions.[1] They generally agree that judges' individual political preferences play a significant, or even dominant, role in case outcomes.[2] Among political theorists, the debate is not whether ideology influences judicial decisions. Instead, the respective political models of judicial decision-making disagree as to whether any factors, such as the law, public opinion, or legislative intent ever constrain judges' political pursuit.[3] This robust political debate often focuses on the more specific

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1. *See, e.g.*, RICHARD L. PACELLE, JR., BRETT W. CURRY & BRYAN W. MARSHALL, DECISION MAKING BY THE MODERN SUPREME COURT 28–49 (2011) (describing various controverted theories of judicial decision-making).

2. *E.g.*, MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT 1 (2011) ("Much of the [political science] discipline has long embraced the notion that judicial outcomes primarily reflect judicial policy preferences."); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 23 (1998) ("It is generally conceded, at least among social scientists, that members of the Court are by and large policy seekers."); PACELLE, CURRY & MARSHALL, *supra* note 1, at 38 ("Most analysts concede the role that attitudes and values play in individual decision-making.").

3. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 85 (2013) ("There is debate over how responsive judges and Justices are to the desires and concerns of legislative and executive officials."). *Compare e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE ATTITUDINAL MODEL REVISITED 86–97, 320–25 (2002) (discussing how Justices decide cases based on ideology and are unconstrained by law or other branches of government), *with* EPSTEIN

question of whether the preferences of Congress and the President constrain judicial interpretation of federal statutes.[4] The political models offer sophisticated empirical support for their competing positions on this question.[5]

The legal community, however, has been slow to incorporate these theories and evidence into our analysis of pertinent issues.[6] This is not surprising given that the political science consensus clashes with the legal normative preference and the principles taught in law school: that judges decide cases based on objective law, rather than personal political views.[7] This Article seeks to incorporate the insights of political science by using the models of judicial decision-making to predict the impact of the Americans with Disabilities Act Amendments ("ADAAA" or "the Act") on the United States Supreme Court. In doing so, this Article reveals some weaknesses in the models' predictive utility due to their limited study of the effect of federal statutes, such as the ADAAA, that overturn Supreme Court precedent. Using the few studies of overrides that are available, this Article predicts that a conservative Supreme Court will interpret the ADAAA in a restrictive manner contrary to the Act's broad purposes.

In 2008, the ADAAA[8] was passed by a unanimous Congress and signed by President George W. Bush[9] in order to amend the Americans with Disabilities Act ("ADA") of 1990.[10] The ADA prohibits discrimination in employment on the basis of disability.[11] The ADAAA

& KNIGHT, *supra* note 2, at 9–18, 139–57 (discussing how Justices are constrained by a number of forces including institutions of government).

4. EPSTEIN, LANDES & POSNER, *supra* note 3, at 85–86. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 95–139; PACELLE, CURRY & MARSHALL, *supra* note 1, at 42–45, 63–64.

5. *E.g.*, SEGAL & SPAETH, *supra* note 3, at 312–26; PACELLE, CURRY & MARSHALL, *supra* note 1, at 44, 71.

6. EPSTEIN, LANDES & POSNER, *supra* note 3, at 2 (noting that a "small sliver" of the legal community "takes an interest, whether sympathetic or critical, in what social scientists might have to say about judges"); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1441 (2001) (noting reluctance of law professors to abandon the idea that judges decide cases based on nonpolitical analysis of the law).

7. *E.g.*, PACELLE, CURRY & MARSHALL, *supra* note 1, at 29; Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1462, 1464 (2003).

8. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (codified at 42 U.S.C. §§ 12101, 12102, 12111-12114, 12201, 12210).

9. Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187, 239 (2008).

10. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (current version as amended at 42 U.S.C. §§ 12101–12213).

11. 42 U.S.C. § 12112 (2012).

identifies a series of Supreme Court decisions that incorrectly interpreted the ADA's definition of "disabled."[12] Instead of changing that definition, however, the ADAAA includes "instructional amendments" which direct the courts to reject the prior precedent and to interpret the *same* statutory language in a different way.[13] When the Supreme Court interprets the ADAAA, it will therefore face the identical language it previously defined in a narrow manner and an expression of legislative and executive intent for conferring a different meaning to those words. Consequently, if the Court is not concerned with the intent of its co-equal branches, the ADAAA may not succeed. Thus, the various models of judicial decision-making, including their respective predictions of the degree to which the legislative and executive branches actually constrain the Supreme Court, provide a useful basis for predicting the effect of the ADAAA.

Employment discrimination law is a field in which it is particularly important to understand the forces that limit the judiciary, if any. The Supreme Court has repeatedly issued decisions that restrict the reach of federal anti-discrimination laws,[14] including its recent decisions in *Vance v. Ball State*[15] and *University of Texas Southwestern v. Nassar*.[16] In response, Congress has repeatedly amended these laws to override the Court's limiting interpretations;[17] however, the overrides have not been consistently effective at restoring or expanding employee protections.[18] The 2008 ADAAA is one of the most recent overriding efforts in this area of law, and its efficacy has yet to be determined. Thus, the models have the potential to not only explain and predict the impact of ADAAA, but also to provide insight into the Supreme Court's long-standing resistance to congressional and executive intent in employment discrimination law generally.

12. ADAAA § 2(a)(3)–(7); 42 U.S.C. § 12101 (note) (2012).

13. *See infra* Part II.B.2.

14. *See, e.g.*, Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 349, 352–54, 367, 371–74, 376 (2010) (describing how Supreme Court decisions limit the reach of federal anti-discrimination laws).

15. Vance v. Ball State Univ., 113 S. Ct. 2434 (2013) (limiting employer liability for sexual harassment by narrowly defining the category of employees who are supervisors).

16. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 113 S. Ct. 2517 (2013) (holding plaintiffs must prove the more stringent "but for" causation in retaliation cases under Title VII instead of using the more lenient motivating factor standard).

17. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 516, 537 (2009).

18. *Id*. at 536–60 (describing how reliance on pre-override case law, *i.e.* shadow precedents, limits the efficacy of congressional amendments seeking to override conservative court decisions on federal anti-discrimination laws).

Part II of this Article presents the predominant theories of judicial decision-making. Part III explains the details of the ADAAA and discusses the instructional amendments that seek to overturn specific Supreme Court precedent. Part IV analyzes the ADAAA from the perspective of the prevailing models of judicial decision-making, focusing particularly on each model's prediction for the efficacy of the statutory override. Also in Part IV, the Article explores the empirical basis for the models' claims and reveals that many proponents of the political models of judicial decision-making have not fully examined the effect of statutes, such as the ADAAA, which seek to overturn Supreme Court decisions. Part V draws from the few available studies that have particularly examined these overrides. This evidence demonstrates that although overrides are generally effective, Justices are particularly likely to disregard overrides in cases involving statutory protections of minority rights. This Article therefore concludes that, if the Supreme Court is conservative at the time of a decision on disability discrimination, the Court will interpret the ADAAA narrowly, and the ADAAA will fail to achieve its purpose of broadening the protection of disabled employees. Part VI discusses the normative concerns raised by this specific judicial resistance to certain categories of overrides and the practical implications for those who would seek to affect employee rights going forward.

II. MODELS OF JUDICIAL DECISION-MAKING

The political models of judicial decision-making attempt to explain judicial motivations in a wide range of cases.[19] According to Jeffrey Segal and Harold Spaeth, a model is a "simplified representation of reality" that focuses on certain "crucial factors," and this simplification "provide[s] a useful handle for understanding the real world that reliance on more exhaustive and descriptive approaches does not."[20] The model approach therefore contrasts with a case-study approach that typically delves deeply into a particular decision or line of decisions.[21] Although the models are based on complicated statistical analyses, by providing insight into the forces that drive judicial decisions, they also provide insight into practical concerns:

19. SEGAL & SPAETH, *supra* note 3, at 45 (citing Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87 (1996)).

20. *Id.*

21. *Id*. at 44.

> The better that judges are understood, the more effective lawyers will be both in litigating cases, and, as important, in predicting the outcome of cases, thus enabling litigation to be avoided or cases settled at an early stage. . . . A realistic understanding of judges should also improve legal education and enable the design of realistic proposals . . . for judicial reform.[22]

Four of the main models of judicial decision-making are set forth below. Although some models have included an analysis of judicial decision-making in lower federal courts,[23] the models have generally focused on explaining and predicting Supreme Court decisions.[24]

A. LEGAL MODEL

The legal model, or legal formalism model, is the one model that in its "naïve" form[25] claims that political preferences do not play a role in judicial decisions[26] and that judges decide cases based on the law.[27] This is commonly taught in law school and has been described (perhaps unflatteringly) as "irresistible" to the legal academy.[28] According to legal formalism, judges search out the "correct" answer by referring to precedents, statutes, or other authority, and then apply that authority in a neutral manner to the case at hand.[29] The legal model is often presented as the normative ideal; in the context of the Supreme Court, the legal model suggests that because the Justices are unelected and have life tenure, they should not decide cases based on political preference and risk undermining the democratic basis of the American governmental system.[30]

22. EPSTEIN, LANDES & POSNER, *supra* note 3, at 6.

23. *E.g.*, Cross, *Decisionmaking*, *supra* note 7 (examining the determinants of decisions of the U.S. Circuit Courts of Appeals).

24. EPSTEIN, LANDES & POSNER, *supra* note 3, at 6 (noting that the "social-scientific literature about judges . . . is heavily focused on the U.S. Supreme Court"). Each of the major attitudinal, strategic, and integrated works discussed in this Article defines their theories as concerning a Supreme Court decision. *See* SEGAL & SPAETH, *supra* note 3, at 86; EPSTEIN & KNIGHT, *supra* note 2, at 10–11; BAILEY & MALTZMAN, *supra* note 2, at 14–16; PACELLE, CURRY & MARSHALL, *supra* note 1, at 3.

25. Cross & Nelson, *supra* note 6, at 1439.

26. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 6; Cross & Nelson, *supra* note 6, at 1439–40.

27. EPSTEIN, LANDES & POSNER, *supra* note 3, at 2; PACELLE, CURRY & MARSHALL, *supra* note 1, at 29–32; Cross & Nelson, *supra* note 6, at 1439–41.

28. Cross & Nelson, *supra* note 6, at 1439, 1441.

29. *Id.* at 1439. *See also* SEGAL & SPAETH, *supra* note 3, at 48.

30. *E.g.*, PACELLE, CURRY & MARSHALL, *supra* note 1, at 29; Cross, *Decisionmaking*, *supra* note 7, at 1464.

Political science scholars have repeatedly and extensively criticized the legal model for its lack of empirical support.[31] However, modern versions of the legal model have emerged and address this critique, at least in part. For example, some legalists contend that even if ideological motives play a role in judicial decisions, judges may nonetheless value the law and seek to follow it for various normative or practical reasons.[32] Moreover, the role of the law has been defended as part of an integrated theory of judicial decision-making that acknowledges the policy and strategic motivations of justices, but asserts that legal doctrines also play a role in their decisions.[33] Overall, the naïve legal model, in which law is the determining factor in judicial decisions, is not generally endorsed by modern political scholars,[34] who now prefer other models which assert that judges decide cases based, at least in part, on their political preferences.[35]

B. JUDGES AS POLICY SEEKERS

For several decades, analysis of judicial decision-making centered around two theories: the "attitudinal model" and the "strategic model."[36]

31. SEGAL & SPAETH, *supra* note 3, at 66–85; PACELLE, CURRY & MARSHALL, *supra* note 1, at 32–34; Cross, *Decisionmaking*, *supra* note 7, at 1467; Cross & Nelson, *supra* note 6, at 1443. The legal model is said to ignore well-developed empirical evidence that judges act according to their political preferences, described in more detail below. *See generally* SEGAL & SPAETH, *supra* note 3 (detailing empirical support for the attitudinal model).

32. BAILEY & MALTZMAN, *supra* note 2, at 7; Cross & Nelson, *supra* note 6, at 1441–43. *See also* JEB BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM AND CONTEMPORARY COURT-CONGRESS RELATIONS 60 (2004) (describing the recent "post-positivism theory" that law is an internal constraint on the courts, a sense of obligation).

33. *See, e.g.*, BAILEY & MALTZMAN, *supra* note 2, at 15; PACELLE, CURRY & MARSHALL, *supra* note 1, at 52.

34. BARNES, *supra* note 32, at 59; Cross & Nelson, *supra* note 6, at 1443.

35. BAILEY & MALTZMAN, *supra* note 2, at 1 ("Much of the [political science] discipline has long embraced the notion that judicial outcomes primarily reflect judicial policy preferences . . . ."); EPSTEIN & KNIGHT, *supra* note 2, at 23 ("It is generally conceded, at least among social scientists, that members of the Court are by and large policy seekers."); PACELLE, CURRY & MARSHALL, *supra* note 1, at 38 ("Most analysts concede the role that attitudes and values play in individual-level decision making."); Luke M. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, 45 GA. L. REV. 211, 213 (2010) ("Within political science the field of 'judicial politic' has tended to assume that judges use their office to maximize the implantation of a broad platform of individual policy preferences."). Each model described *infra* acknowledges that policy preferences are at least one factor in judicial decision-making. Other models acknowledge the role of individual politics as well. *See, e.g.*, EPSTEIN, LANDES & POSNER, *supra* note 3, at 5, 8–11 (embracing a model of having a judge as a participant in a labor market, "motivated and constrained, as other workers are, by costs and benefits both pecuniary and nonpecuniary," and concluding that, particularly in the Supreme Court, ideological factors play a role).

36. Milligan, *supra* note 35, at 214–15.

The attitudinal model asserts that judges act solely on their policy preferences.[37] The strategic model[38] asserts that judges act on their policy preferences, but in so doing they are constrained by other forces or institutions to some degree.[39] These dominant theories frame the discourse about judicial decision-making[40] and have been used to analyze a wide range of issues.[41]

1. The Attitudinal Model

The attitudinal model asserts that a conservative judge or Justice votes the way he or she does because he or she is conservative, and a liberal judge because he or she is liberal.[42] "In the attitudinal model, the legal views Justices express in their opinions are simply smoke screens to cover their pursuit of policy."[43] According to the attitudinal model, Justices decide cases based on their policy preferences[44] and are not influenced in

37. SEGAL & SPAETH, *supra* note 3, at 86 ("The attitudinal model represents a melding together of key concepts from legal realism, political science, psychology, and economics. This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the Justices. Simply put, Rehnquist votes [sic] the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal."); PACELLE, CURRY & MARSHALL, *supra* note 1, at 34–36; EPSTEIN, LANDES & POSNER, *supra* note 3, at 69.

38. The strategic model is sometimes called a separation of powers model. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 13.

39. EPSTEIN & KNIGHT, *supra* note 2, at 9–13; PACELLE, CURRY & MARSHALL, *supra* note 1, at 39–45. *See also* BAILEY & MALTZMAN, *supra* note 2, at 13 ("In [the strategic] view, Justices may still primarily be interested in policy but may find that they cannot ignore the desires of the other branches of government if they want to achieve their policy goals."); Cross & Nelson, *supra* note 6, at 1446 ("[J]udges in [the strategic] model recognize that they are constrained in their powers by the operation of outsiders, which may include the Congress . . . .").

40. For example, some recent works take portions of the attitudinal and strategic models—as well as the legal model—to develop a combined, multifactor theory. *See infra* Part II.C.

41. *See, e.g.*, Milligan, *supra* note 35 (analyzing the role of "congressional end-runs" as a form of strategic constraint on the Supreme Court); Derigan Silver, *Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts*, 15 COMM. L. & POL'Y 129, 139–41 (2010) (using the strategic and attitudinal models of judicial decision-making to analyze federal decisions concerning national security and prior restraints).

42. SEGAL & SPAETH, *supra* note 3, at 86; PACELLE, CURRY & MARSHALL, *supra* note 1, at 34–36; EPSTEIN, LANDES & POSNER, *supra* note 3 at 69.

43. BAILEY & MALTZMAN, *supra* note 2, at 5.

44. Justices' political preferences are measured by an analysis of their vote in civil liberties cases and newspaper editorials that characterized the Justices prior to confirmation. *See* SEGAL & SPAETH, *supra* note 3, at 321. The other models described herein use various complex, highly sophisticated methods for ascertaining ideology. *See, e.g.*, BAILEY & MALTZMAN, *supra* note 2, at 27–31. For details on how the various models design empirical tests, see *id*. at 156–74; PACELLE, CURRY & MARSHALL, *supra* note 1, at 54–56; SEGAL & SPAETH, *supra* note 3, at 316–26; Mario Bergara, Barak Richman &

that process by external forces.[45] The attitudinalists note that Supreme Court Justices are uniquely poised to vote according to their political views because of their autonomy (including over their case load), lack of political accountability, and the fact that they have no higher office for which to strive.[46] The attitudinal model is supported by various empirical studies that analyze large data sets of Supreme Court decisions and find a strong correlation between political ideology and judicial decision-making.[47] Proponents of this model see no evidence that the positions of Congress or the President (or other non-policy factors) play any role in the outcomes.[48] The attitudinal model remains highly influential and is a reference point against which other models are defined.[49]

2. The Strategic Model

The strategic model embraces the notion that judges and Justices follow their political preferences in making decisions.[50] However, it further asserts these preferences are limited to some degree by other forces and institutions.[51] According to the strategic model, Justices will generally seek to effectuate policy goals, but they will also modify their decisions to account for the constraints of the co-equal branches of government, court rules, their colleagues' viewpoints, and even public opinion.[52] Although the strategic model agrees with the attitudinal model's premise that judges are policy seekers, the strategic model has been described as a major critique of

Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 20 LEGIS. STUD. Q. 247, 251–60 (2003).

45. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 4–6.

46. SEGAL & SPAETH, *supra* note 3, at 92.

47. *Id.* at 312–26. *See also* EPSTEIN, LANDES & POSNER, *supra* note 3, at 77–85 (detailing a number of studies supporting the attitudinal model).

48. *E.g.*, SEGAL & SPAETH, *supra* note 3, at 321–23.

49. *See, e.g.*, BAILEY & MALTZMAN, *supra* note 2, at 4 ("Segal and Spaeth's book *The Supreme Court and the Attitudinal Model* has become required reading for students of the Court. The model is so influential that empirically oriented political scientists have an almost pathological skepticism that law matters.") (quotations and citations omitted).

50. EPSTEIN & KNIGHT, *supra* note 2, at 10; PACELLE, CURRY & MARSHALL, *supra* note 1, at 39.

51. EPSTEIN & KNIGHT, *supra* note 2, at 10, 13 ("[J]ustices may be primarily seekers of legal policy, but they are not unconstrained actors who make decisions based only on their own ideological attitudes. Rather, Justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act. . . . Justices must also consider the preferences of other political actors, including Congress."). *See also* BAILEY & MALTZMAN, *supra* note 2, at 97–101 (describing the strategic model); PACELLE, CURRY & MARSHALL, *supra* note 1, at 39–45 (same).

52. EPSTEIN & KNIGHT, *supra* note 2, at 10; Milligan, *supra* note 35, at 224–25.

the attitudinal model because it posits some external check on a Justice's pursuit of a political agenda.[53] Like the attitudinalists, proponents of the strategic model also support their position by pointing to empirical studies based on statistical analyses of a large number of Supreme Court decisions.[54]

C. INTEGRATED MODELS

More recently, an integrated model of judicial decision-making has emerged and has moved the discussion away from the dominant attitudinal/strategic divide.[55] This "nuanced" approach combines the attitudinal, strategic, and legal theories, and acknowledges the role of policy preferences in judicial decisions while also finding empirical support for strategic and legal constraints on the Justices' pursuit of their personal political goals.[56] This newer model contributes a useful theoretical construct that takes the best of multiple approaches. Moreover, it offers new evidence to respond to the longstanding critiques that the strategic and legal models lacked sufficient empirical support for their claims.[57]

53. Milligan, *supra* note 35, at 224 ("Perhaps the leading critique [of the attitudinal model] comes from adherents to the strategic model."). *See also* EPSTEIN, LANDES & POSNER, *supra* note 3, at 85 (describing the strategic theorists' response to the attitudinal claim that Justices are not constrained by the co-equal branches); PACELLE, CURRY & MARSHALL, *supra* note 1, at 39 (contrasting the attitudinal and strategic approaches).

54. Frank B. Cross, *Symposium: Perspectives on Judicial Independence: Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L. J. 195, 209–10 (2003) (summarizing studies supporting the strategic model). *See also* PACELLE, CURRY & MARSHALL, *supra* note 1, at 44 (describing the empirical research of strategic modelists which finds "evidence in support of strategic behavior and finds that the Supreme Court and its Justices are often constrained by congressional preferences in statutory cases"); EPSTEIN, LANDES & POSNER, *supra* note 3, at 86 (describing studies supporting strategic influences). *But see* SEGAL & SPAETH, *supra* note 3, at 346–49 (summarizing other empirical studies that undermine the strategic model); BAILEY & MALTZMAN, *supra* note 2, at 101 (noting conflicting results in empirical studies of strategic influences).

55. BAILEY & MALTZMAN, *supra* note 2; PACELLE, CURRY & MARSHALL, *supra* note 1. *See also* Cross & Nelson, *supra* note 6, at 1491–93 (concluding that legal, attitudinal and strategic factors all play a role in judicial decisions).

56. BAILEY & MALTZMAN, *supra* note 2, at 15–16 ("Our evidence suggests a nuanced portrait of the Supreme Court and the choices Justices make, a portrait of policy-motivated but legally and institutionally constrained Justices."); PACELLE, CURRY & MARSHALL, *supra* note 1, at 53 ("We theorize that the Court's decisions are a function of the ideological predilections of the Justices, tempered perhaps by the positions of the President and Congress and structured by the facts of the particular case on the plenary docket and the existing legal principles, precedents, and tests in the particular issue area.").

57. BAILEY & MALTZMAN, *supra* note 2, at 65–79, 101–20 (noting the lack of effective empirical support for legal influences as well as the lack of consensus in empirical strategic studies and presenting their methods to address those challenges); PACELLE, CURRY & MARSHALL, *supra* note 1, at 32–34, 45–

1. "Law Matters"[58]—Resurrecting the Role of the Law in Theories of Judicial Decision-Making

The proponents of the integrated model acknowledge the legal model's prior lack of empirical support[59] and offer a new foundation for those influences.[60] For example, Michael Bailey and Forrest Maltzman designed a study that tested for the influence of three legal values: *stare decisis*, judicial restraint (i.e., deference to the elected branches), and strict construction (of the First Amendment's free speech clause).[61] They found that even when ideological voting occurs, these legal values still influence the Supreme Court's decisions.[62] Richard Pacelle, Brett Curry, and Bryan Marshall similarly found evidence of legal influences by testing for the role of precedent in Supreme Court outcomes.[63] Their study offers differing degrees of influence depending on whether a case is constitutional or non-constitutional and whether it concerns salient issues.[64] Overall, they found that, in addition to attitudinal and strategic influences, legal values are also a statistically significant influence on the outcome of certain Supreme Court decisions.[65] This was particularly shown in cases concerning non-constitutional civil rights and civil liberties cases,[66] such as those involving federal anti-discrimination laws.[67]

47, 51–62 (describing critiques of prior legal and strategic model empirical studies and presenting the research design of their approach designed to address these critiques).

58. BAILEY & MALTZMAN, *supra* note 2, at 121.

59. *Id.* at 65; PACELLE, CURRY & MARSHALL, *supra* note 1, at 32–34.

60. BAILEY & MALTZMAN, *supra* note 2, at 121–39; PACELLE, CURRY & MARSHALL, *supra* note 1, at 51–62. Bailey, Matlzman, Pacelle, Curry, and Marshall are not the only recent authors to assert that law does in fact play a role in judicial decisions. *See, e.g.*, BAILEY & MALTZMAN, *supra* note 2, at 6–7 (describing current support for legal theory and citing, among others, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010) and RICHARD POSNER, HOW JUDGES THINK (2008)).

61. BAILEY & MALTZMAN, *supra* note 2, at 8–13. A broader measurement of the influence of strict construction was not possible in their study, and Bailey and Maltzman selected the First Amendment due to the Court's strong commitment in that area. *Id*. at 13.

62. *Id.* at 78 ("In contrast to the attitudinal model, we find strong evidence that legal principles are influential for the decisions made by most Justices.").

63. PACELLE, CURRY & MARSHALL, *supra* note 1, at 51–62.

64. *Id.* at 203–05.

65. *Id.* at 70 ("The attitudinal variable is significant in each subset of cases, but the legal variables are, too. Precedent, on point precedent, and issue evolution are all statistically significant . . . though their relative impacts vary by type of case.").

66. *Id.* at 135 (noting that in unconstitutional civil rights and civil liberties cases "the impact of precedent, controlling for other factors, exerts a stronger impact than the attitudinal variable").

67. At least the Civil Rights Act of 1964 includes Title VII, the anti-employment discrimination provision of that law. *Id.* at 119.

2. Bolstering the Evidence in Support of Strategic Influences

As mentioned above, the proponents of the integrated model offer empirical support for the role of strategic influences in Supreme Court decisions, and they also suggest that their evidence addresses various criticisms of the empirical studies underlying prior defenses of the strategic theory.[68] For example, Bailey and Maltzman found evidence that, in addition to policy motivations and legal constraints, "many Justices are constrained by the President and Congress on statutory cases . . . [and these] Justices moderate their revealed preferences during periods when the Court's median preferences are more likely to be overturned by the elected branches."[69] The methodologies used by Bailey and Maltzman were designed to address inconsistent empirical evidence concerning strategic influences on judges,[70] and they obtained particularly persuasive evidence that the elected branches do affect judicial decisions.[71] Using a different analytical methodology, Pacelle, Curry, and Marshall similarly find strong empirical evidence of strategic influences on the Supreme Court.[72] Their study concluded that in non-constitutional civil rights and civil liberties cases, strategic elements, the Court's collective policy preferences, and legal values play a role in the Justices' decisions.[73]

D. USING THE MODELS

This Article does not seek to prove or disprove any particular model. Instead, it discusses which model offers the best basis for understanding and predicting the fate of the ADAAA. This is useful both for

68. BAILEY & MALTZMAN, *supra* note 2, at 101–20 (describing the lack of consensus in empirical strategic studies, the challenges for empirical studies in this area, and presenting their methods to address those challenges); PACELLE, CURRY & MARSHALL, *supra* note 1, at 45–47, 51–62 (describing critiques of prior legal and strategic model empirical studies and presenting their approach to address these critiques).

69. BAILEY & MALTZMAN, *supra* note 2, at 119–20.

70. *Id.* at 101–20 (noting the lack of consensus in the studies designed to counter the attitudinal model and describing their corrective methodologies and results). *See also* PACELLE, CURRY & MARSHALL, *supra* note 1, at 47–48 (noting prior mixed results in examinations of the strategic model).

71. As one reviewer explains, these "innovative models" break out of the "stale" discussion of strategic influences and "persuasively" demonstrate that Justices are constrained by the elected branches. Kevin J. McMahon, *Book Review: The Justices Decide: Analyzing Attitudes, Politics, and the Law*, 48 TULSA L. REV. 265, 270–72 (2012).

72. PACELLE, CURRY & MARSHALL, *supra* note 1, at 71.

73. *Id.* at 134 ("[T]he results suggest that the Court does take the other branches into account in deciding non-constitutional civil rights and liberties cases. . . . [D]ecision-making in non-constitutional cases is a complicated mix of attitudinal, legal and strategic variables.").

understanding the ADAAA and for exploring the utility of the models. As Segal and Spaeth explain, a model must "validly and reliably explain and predict behavior."[74] Although the models use a large data set of cases to make their respective assessments and predictions,[75] unique examples can provide important insight; indeed, the models' proponents frequently turn to specific case examples, often concerning federal anti-discrimination laws, for illustrative or testing purposes.[76] In fact, throughout their seminal work, Lee Epstein and Jack Knight present concrete examples of strategically decided cases.[77] Although they acknowledge that their work does not seek to explain "any particular line of decisions or body of law," they offer their model as a framework for such substantive explanations in the future.[78] Attitudinal and integrated modelists have similarly addressed specific case decisions and defended their statistically established correlations by using particular decisions as supportive evidence.[79] From a normative, utilitarian, and interdisciplinary perspective, these models of judicial decision-making are relevant to the legal world if they help us to predict and understand judicial outcomes in a specific context. Analysis of a particular example can indicate the limitations of the models, while identifying lines for further inquiry and synergies with other areas of study.

Federal employment discrimination law offers a particularly fertile field to explore one of the central questions of the models of judicial decision-making—what is Congress's influence on judicial decisions?[80] Congress has repeatedly amended federal anti-discrimination laws to

74. SEGAL & SPAETH, *supra* note 3, at 46 (noting further that the criteria for evaluating the success of a model is whether it provides a better explanation of reality than alternatives).

75. *E.g.*, *id.* at 316; PACELLE, CURRY & MARSHALL, *supra* note 1, at 54.

76. For example, Bailey and Maltzman referenced the Supreme Court's decision *Ledbetter v. Goodyear Tire & Rubber Co.*, 580 U.S. 618 (2007), which restricted the ability of plaintiffs to bring discriminatory compensation claims under Title VII of the Civil Rights Act of 1964. BAILEY & MALTZMAN, *supra* note 2, at 99. They cite this case as an example of a situation where the "Court could set policy at its own ideal point without fear of being overturned." *Id*. Subsequently, as the authors explain, the political situation changed and the elected branches reversed the holding of this case through statutory amendment. *Id*. at 180 n.3. *See also infra* Part III (discussing the challenges to the models' attempts to explain such overrides).

77. EPSTEIN & KNIGHT, *supra* note 2, at 1–9, 15–17, 139 (discussing Craig v. Boren, 429 U.S. 190 (1976), Gen. Elec. Co. v. Gilber, 429 U.S. 125 (1976), and Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)).

78. EPSTEIN & KNIGHT, *supra* note 2, at xiv.

79. *E.g.*, SEGAL & SPAETH, *supra* note 3, at 288–95; BAILEY & MALTZMAN, *supra* note 2, at 140–41.

80. EPSTEIN, LANDES & POSNER, *supra* note 3, at 85–86. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 95–139; PACELLE, CURRY & MARSHALL, *supra* note 1, at 42–45, 64.

overturn particular Supreme Court decisions; Congress's amendments consistently sought to expand employee protections and to reverse holdings narrowing those protections.[81] In fact, the predominant authors cited in this Article use examples of federal, statutory employment discrimination cases to support their competing theories.[82]As described below, prior legislative overrides of Supreme Court employment discrimination decisions have not been completely effective in changing the Court's approach to these laws.[83] This Article therefore focuses on the ADAAA, a poignant example from employment discrimination law, to explore the predictive capacity of the various models.

III. THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT

The ADA prohibits employment discrimination on the basis of disability.[84] The original ADA[85] was passed in 1990 with the bipartisan support of Congress and President George H.W. Bush.[86] Its supporters hailed the statute for providing broad protection to disabled workers.[87] Subsequent Supreme Court cases, however, significantly curtailed the coverage of the ADA by narrowly defining the meaning of "disabled."

81. Widiss, *Shadow Precedents*, *supra* note 17, at 516–17, 537.

82. BAILEY & MALTZMAN, *supra* note 2, at 99 (using a Supreme Court decision under Title VII of the Civil Rights Act of 1964 to demonstrate strategic factors); EPSTEIN & KNIGHT, *supra* note 2, at 15–16 (using two Supreme Court decisions under Title VII to demonstrate strategic considerations affecting the Court); SEGAL & SPAETH, *supra* note 3, at 159, 413 (discussing Supreme Court decisions under Title VII as examples of Justices pursing political goals). *See also* BARNES, *supra* note 32, at 12–13 (describing the Civil Rights Act of 1991, which amended Title VII, as an example of an unsuccessful override); PACELLE, CURRY & MARSHALL, *supra* note 1, at 115–18 (discussing the Title VII decision Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

83. Widiss, *Shadow Precedents*, *supra* note 17, at 536–60 (describing how reliance on pre-override case law, *i.e.* shadow precedents, limits the efficacy of congressional amendments seeking to override conservative court decisions on federal anti-discrimination laws); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012) (demonstrating that the Supreme Court's decision in Gross v. FBL Fin. Servs., 557 U.S. 167 (2009) undermines the intent and efficacy of the 1991 Civil Rights Act, a statutory override of prior Court decisions on Title VII); Cross & Nelson, *supra* note 6 at 1456–57 (describing a series of Supreme Court decisions that limited the scope and impact of the Civil Rights Act of 1991).

84. 42 U.S.C. §§ 12111–12117 (2012).

85. Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (current version as amended at 42 U.S.C. §§ 12101–12213).

86. Wexler, *supra* note 14, at 370–71.

87. Feldblum et al., *supra* note 9, at 191.

A. RESTRICTIVE SUPREME COURT DECISIONS

In 1999 and 2002, the Supreme Court issued a series of decisions that significantly restricted employee protections under the ADA.[88] The original ADA defined "disabled" to mean having "a physical or mental impairment that substantially limits one or more major life activities . . . a record of such an impairment; or being regarded as having such an impairment."[89] However, in *Sutton v. United Airlines Inc.* and two companion cases,[90] the Supreme Court rejected the Equal Employment Opportunity Commission's ("EEOC") guidelines and held that when determining whether a plaintiff is disabled, courts must consider the plaintiff as he or she functions with mitigating measures.[91] As a result of this ruling, plaintiffs with significant medical conditions or physical challenges were excluded from the ADA's protection.[92] The Supreme Court continued its restrictive construction of the term "disabled" in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, in which the Court held that the definition of disabled should be strictly construed "to create a demanding standard for qualifying as disabled."[93] The *Toyota* decision further held that the phrase "substantially limits" within the ADA definition of disabled meant "prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives."[94]

88. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 194 (2002); Sutton v. United Air Lines, 527 U.S. 471 (1999). *See also* Carol J. Miller, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does "Substantially Limits" Mean?*, 76 MO. L. REV. 43, 50–51 (2011) (describing the Supreme Court cases that "significantly narrowed the scope of what constitutes a qualified disability").

89. Americans with Disabilities Act of 1990, Pub. L. No. 101–336, § 12102(2)**,** 104 Stat. 327, 329–30 (current version as amended at 42 U.S.C. §§ 12101–12213 (2012)).

90. Murphy v. UPS, 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

91. *Sutton*, 527 U.S. at 475.

92. Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 218 (2008) (discussing that under the original definition of disability under the ADA, "[p]eople with a variety of serious physical or mental impairments, ranging from AIDS, to cancer, to bipolar disorder, have been found not to have disabilities"); Feldblum et al., *supra* note 9, at 193 (explaining that after the *Sutton* decision, "it became yet more difficult for people with epilepsy, diabetes, psychiatric disabilities, multiple sclerosis, muscular dystrophy, arthritis, hypertensions, and other disabilities to prevail in court").

93. *Toyota*, 534 U.S. at 197. *See also* Miller, *supra* note 88, at 54.

94. *Toyota*, 534 U.S. at 198.

The overall effect of these decisions was to significantly restrict the definition of "disabled."[95] As a result, *Sutton* and *Toyota* "drastically curtailed the number of persons who may seek protection from discrimination on the basis of disability under the ADA . . . ."[96] Under this restrictive definition of "disabled," employers prevailed in more than ninety-three percent of employment discrimination cases under the ADA,[97] and courts found that conditions "ranging from AIDS, to cancer, to bipolar disorder" were not disabilities under the ADA.[98]

B. ADAAA SEEKS TO REVERSE THESE CASES

Disability advocacy groups realized the need for a legislative response to these decisions, but political realities delayed statutory amendment for nearly a decade.[99] In September 2008, President George W. Bush signed the ADAAA, a statute clearly intended to reverse the Supreme Court precedents and to reestablish the original intent of the Act.[100] Congress' intent to overturn the Court is clear on the face of the amending statute. For example, in the "Findings and Purposes" section, it states:

> The purposes of this act are . . . to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures . . . to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially

95. *E.g.*, Miller, *supra* note 88, at 55 ("[I]t became nearly impossible for the Court to find anyone who was sufficiently disabled and still able to perform essential job functions."); Long, *supra* note 92, at 218 ("In one case, an individual with cancer brought suit against his employer and died before the resolution of the case, only to be told (posthumously) that his cancer was not limiting enough to amount to a disability under the Act.") (citing Hirsch v. Nat'l Mall & Serv., Inc., 989 F. Supp. 977, 980–82 (N.D. Ill. 1997)).

96. Miller, *supra* note 88, at 50 (citations omitted). *See also* Joseph A. Seiner, *Pleading Disability*, 51 B. C. L. REV. 95, 107 (2010).

97. Miller, *supra* note 88, at 51 (citing Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999)). *See also* Long, *supra* note 92, at 217 ("Studies consistently reveal that, despite the ADA, employees who claim to be the victims of disability discrimination in the workplace face long odds.") (citations omitted).

98. Long, *supra* note 92, at 218.

99. Feldblum et al., *supra* note 9, at 193–291.

100. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2, 42 U.S.C. § 12101 (note) (2012).

> limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.'[101]

Thus, the ADAAA is expressly aimed at reversing the judicial interpretations that precede the amendment's passage.[102] However, the portion of the ADAAA aimed at overturning the Court's restrictive definition of "disabled" did not change any substantive words of the statute; instead, it instructed the courts to interpret the same words in a different, broader manner.[103] These "instructional amendments" give rise to a unique question of congressional and executive influence on judicial decisions.

1. Substantive Amendments to the ADA

To be sure, the ADAAA did enact a number of explicit changes to the original statutory text. For example, to reverse the holding of *Sutton*, the ADAAA amended the statutory text to state that a plaintiff's disability should be determined "without regard to the ameliorative effects of mitigating measures."[104] In another example of explicit override, the ADAAA specifies that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[105] The latter change of language alters prior judicial decisions interpreting the original ADA, which held that a person may not be considered disabled unless his or her disease is active.[106]

2. Instructional Amendments in the ADAAA

Despite its explicit alterations to the original language of the ADA, the ADAAA did not change the basic definition of "disabled." A disabled individual is still defined as a person with "a physical or mental impairment that substantially limits one or more major life activities," who has "a record of such impairment" or is "regarded as having such an

101. *Id*.
102. *Id*.; Miller, *supra* note 88, at 51.
103. *E.g.*, ADAAA § 4(a); 42 U.S.C. § 12102(4)(A) (2012).
104. ADAAA § 4(a); 42 U.S.C. § 12102(4)(e) (2012).
105. ADAAA § 4(a); 42 U.S.C. § 12102(4)(d) (2012).
106. Long, *supra* note 92, at 221 (citing Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 194, 198 (2002)).

impairment."[107] This is precisely the language the Supreme Court narrowly interpreted in *Toyota*.[108]

The retention of the same basic definition appears to have been a political choice made to enhance the ADAAA's likelihood of passage. The ADA Restoration Act of 2007, which was the original legislative attempt to overturn *Toyota* and *Sutton*, would have substantially broadened the definition of disabled by removing the "substantially limits" and "major life activity" language altogether, and defining a disability as merely "a physical or mental impairment; a record of physical or mental impairment; or being regarded as having a physical or mental impairment."[109] That bill, however, received significant opposition by business interests.[110] Subsequently, the ADAAA's sponsors, disability advocates, and business representatives negotiated some mutually acceptable changes to the ADA, but did not change the same basic definition of "disabled."[111] Instead of an actual change to that statutory language, the compromise ADAAA made specific smaller changes; these include the interpretive measures change noted above, an expanded list of "major life activities," and new "Rules of Construction" that call for a broader interpretation of the basic definition.[112]

Specifically, the ADAAA provides as follows:

> The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act . . . . The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.[113]

Moreover, the amendment's statement of purpose is:

> [T]he intent of Congress [is] that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and . . . that the question of whether

107. ADAAA § 4(a), 42 U.S.C. § 12102(1) (2012).

108. *Toyota*, 534 U.S. at 193, 197–98.

109. H.R. 3195, 110th Cong. (July 26, 2007), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-110hr3195ih/pdf/BILLS-110hr3195ih.pdf.

110. Feldblum et al., *supra* note 9, at 229.

111. ADAAA § 4(a), 42 U.S.C. § 12102(a)(1) (2012).

112. ADAAA § 4(a), 42 U.S.C. § 12102(2)–(4) (2012).

113. ADAAA § 4(a), 42 U.S.C. § 12102(a)(4)(A)–(B) (2012).

> an individual's impairment is a disability under the ADA should not demand extensive analysis.[114]

Finally, the instructional amendments include the above-described language that explicitly rejects the *Toyota* interpretation of "substantially limits," while failing to provide a new definition of that term.[115]

These sections of the ADAAA show Congress's intent to overturn the Supreme Court's narrow interpretation of disabled.[116] Congress ultimately placed its trust in the efficacy of instructional amendments as a check on judicial meddling when political considerations prevented it from explicitly changing the text of the statutory definition of disabled. Congress essentially told the Court, "Your interpretation of these words was wrong—try again."

C. INSTRUCTIONAL AMENDMENTS

For purposes of this Article, instructional amendments are defined as statutory language that does not create a legal requirement or prohibition, but instead attempts to direct the courts how to interpret statutory language that *does* create some legal requirements or prohibition. This type of language, also sometimes termed "statutory directives," is language that "simply put, tell[s] judges how to interpret statutes."[117] Instructional amendments or directives may encompass a wide range of statutory language, from simple definitions of statutory terms to broad proclamations about the process of statutory interpretation itself.[118] Legal scholars have asserted different views about whether statutory directives are a proper use

114. ADAAA § 2, 42 U.S.C. § 12101 (2012).

115. The purposes section of the ADAAA includes a specific rejection of the Court's decision in *Toyota*. *See id.* ("The purposes of this Act are . . . to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.'").

116. *Id.*

117. Linda D. Jellum, *"Which Is to Be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 837 (2009).

118. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086–87 (2002). Linda Jellum separates statutory directives into three distinct categories: definitional directives "that define terms for either one or many statutes"; interpretive directives that "tell judges how to interpret either all statutes or a particular statute"; and theoretical directives that "tell judges what process to use to interpret statutes." Jellum, *supra* note 117, at 847–49.

of legislative power,[119] and some have actively called for their use as a benefit to the judicial decision-making process.[120] Regardless of the normative value and potential separation of powers concerns that instructional amendments raise—subjects beyond the scope of this Article—legislatures continue to employ them.[121]

Instructional amendments offer a unique circumstance for examining the models of judicial decision-making. In enacting the ADAAA, Congress explicitly declared that the Supreme Court was not fully or properly constrained by the ADA's initial statutory language.[122] Additionally, by using instructional amendments that propose that the judiciary change its interpretation of the same statutory language, the ADAAA is a particularly direct attempt by the legislature to affect judicial decisions and creates a head-on conflict between the legislature and the judiciary.[123] Specifically, because the ADAAA leaves crucial statutory language in the identical form that the Court originally interpreted, the Court will only change that interpretation if it is affected by the congressional or executive

119. *Compare*, *e.g.*, Rosenkranz, *supra* note 118, at 2102–03 ("Rules mandating tools of statutory interpretation may be necessary and proper for carrying into execution the legislative power, because they may improve the precision with which the legislative power may be exercised. They might be improper, however, if they violate principles of separation of powers. The primary objection of this sort is that at least some such statutes encroach on the power of the judiciary. . . . This line of argument proves generally unsound, because whatever judicial power exists over interpretive methodology must be common lawmaking power, which may be trumped by Congress."), *with* Jellum, *supra* note 117, at 841–42 (asserting that certain types of instructional statutory language are proper, but others, particularly those that seek to control the process a court uses to interpret statutes, are improper and violate the principle of separation of powers).

120. *E.g.*, Rosenkranz, *supra* note 118, at 2089 (calling for the creation of Federal Rules of Statutory Interpretation).

121. For example, state legislatures have used this technique with some frequency. Jellum, *supra* note 117, at 846, 851 n.83.

122. *E.g.*, ADAAA, § 2(b)(5), 42 U.S.C. § 12101 (2012) ("The purposes of this Act are . . . to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA.")

123. *See* Thomas G. Hansford & James F. Spriggs II, *Supreme Court Responses to Congressional Overrides* at 1, prepared for presentation at the 2007 Annual Meeting of the Midwest Political Science Association, Chicago IL, April 12–15, *available at* http://faculty.ucmerced.edu/thansford/Working%20Papers/Supreme%20Court%20Responses%20to%20Congressional%20Overrides.pdf (noting the particular significance of overrides to understanding the interaction between Court and Congress); BARNES, *supra* note 32, at 5 (noting that where Court and Congress have conflicting statutory interpretations, "overrides offer Congress a direct means to send follow-up signals to the courts . . . to reverse errant judicial decisions").

preference.[124] There is no substantive statutory language to move the Supreme Court, only an expression of the co-equal branches' intent.[125] Thus, the instructional amendments of the ADAAA provide a valuable, pertinent example for examining the models of judicial decision-making and allow evaluation of the models' competing claims as to whether the Court changes its position in response to the elected branches' preferences.

IV. MODEL ANALYSIS AND THE ADAAA: AN INCOMPLETE PICTURE

As discussed above, the models of judicial decision-making use empirical evidence to make broad assertions about what motivates Supreme Court decisions.[126] The various theories present different claims as to whether the Justices will modify their political preferences to issue statutory decisions more aligned with legislative and executive intent. From a theoretical perspective, each model should provide a clear prediction of the efficacy of the ADAAA as a mechanism for changing judicial interpretations of the ADA. Nevertheless, an examination of the empirical evidence underlying those theories reveals some limitations to the models' predictive utility. The models' main proponents generally fail to examine enacted legislative overrides such as the ADAAA.[127] Thus, these models appear to offer an incomplete picture of the ADAAA's impact.

A. PREDICTIONS OF THE ATTITUDINAL MODEL

Proponents of the attitudinal model would expect conservative Justices to interpret the ADA in a restrictive manner—the *Toyota* and *Sutton* decisions are simply consistent with an ideologically conservative

124. Congress did not change the definition of "substantially limits" and instead added rules of construction that direct the courts to set that standard at "a reasonably attainable level to be in accord with congressional intent." Miller, *supra* note 88, at 60–61. The EEOC's subsequent regulatory guidance on "substantially limits" further failed to provide a definition of that term beyond rejecting the *Toyota* interpretation of "prevent, or significantly or severely restrict." *Id*. at 78. In the absence of a clear definition of "substantially limits" in the ADAAA or its regulations, and the retention of the prior statutory language, logically, the Supreme Court will only change its interpretation if the Court heeds these signals of the intended purpose of the statute. *See* Widiss, *Shadow Precedents*, *supra* note 17, at 534, 560 (explaining that where the override is not explicit in overturning statutory interpretation, the outcome depends on whether the Court follows congressional intent or, as is more often the case, the Court follows its own precedents regardless of Congress' purposes).

125. *See supra* note 122.

126. *See infra* Part III.B.

127. Hansford & Spriggs, *supra* note 123, at 1, 22. *See also* BARNES, *supra* note 32, at 55 n.74.

Court.[128] As set forth above, the attitudinal model asserts that the Justices pursue their policy preferences without concern for congressional or executive intent.[129] As Segal and Spaeth explain, Justices are not deterred from their political pursuits by the risk that Congress will override the decision, even when the Court interprets federal statutes.[130] As proof of this assertion, attitudinalists point to various empirical studies, including studies that demonstrate that the risk of congressional override does not curb the Supreme Court's ideological decision-making.[131]

According to Segal and Spaeth, the Court's lack of concern for a potential congressional override is logical given the rarity and difficulty of passing such legislation:

> [T]he difficulty of overriding Supreme Court decisions, even statutory ones, in a decentralized legislative environment means that the Court typically has little to fear from Congress. . . . Congress incurs both transactional costs and opportunity costs [to enact legislation]. At the very least, this expands the Court's discretionary zone, and thus makes it less likely for the Court to defer to Congress for fear of being overturned . . . . Thus, under a potentially more realistic view of the legislative process, the Court's ability to act sincerely might be guaranteed most of the time.[132]

With the ADAAA, however, the override is not an unlikely future event. Despite the odds, the politically difficult process of override *has* occurred and the Court has been overturned. This raises the question of whether the attitudinal model will continue to predict that the Court will disregard legislative overrides explicitly aimed at overturning Supreme Court precedent. From a theoretical standpoint, the answer appears to be "yes."[133] The attitudinal model seems to predict that even the explicit

128. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); Sutton v. United Air Lines, 527 U.S. 471 (1999).

129. *See infra* Part II.B.

130. SEGAL & SPAETH, *supra* note 3, at 94–95, 107 (citations omitted).

131. Cross & Nelson, *supra* note 6, at 1458–59 (citing Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 36–42 (1997)).

132. SEGAL & SPAETH, *supra* note 3, at 94–95, 107–08; Cross & Nelson, *supra* note 6, at 1452 (noting challenges to passing a congressional override and that as a result the likelihood of such action is low).

133. SEGAL & SPAETH, *supra* note 3, at 114 ("[A]ttitudinalists believe the structure of the American political system virtually always allows the Justices to engage in rationally sincere behavior on the merits.").

congressional override in the ADAAA will not ultimately change the Justices' pursuit of policy goals.[134]

Attitudinalists challenge the idea that a congressional override concludes the matter.[135] They note that after the override, the Court will interpret the meaning, reach, and validity of the new legislation[136] and may do so in a manner that maximizes the Court's policy preferences.[137] Further, proponents of the attitudinal model point to examples where repeated congressional overrides were ineffective.[138] Indeed, one can even argue that this is the pattern of employment discrimination law.[139]

Moreover, the ADAAA itself may provide the Justices with opportunities to interpret the statute according to ideology. As explained above, in its attempt to change the judicial interpretations of "disabled," the ADAAA did not change the underlying definition of disabled and instead relied on instructional amendments that direct the courts to interpret the same definition in a different manner. Thus, the ADAAA does not limit the Supreme Court with concrete, substantive language; consequently, the ADAAA will only constrain the Supreme Court *if* the Court is concerned with congressional and executive preferences. According to the attitudinal model, those other-branch preferences have no influence; therefore, the ADAAA will not act as an effective constraint on the Supreme Court.[140]

134. *Id.* at 109. *See also* PACELLE, CURRY & MARSHALL, *supra* note 1, at 38 ("Particularly strong precedents, clear language or unambiguous original intent would have no influence on decision-making if the extreme attitudinal claims were correct."); Cross, *Symposium: Perspectives on Judicial Independence*, *supra* note 54, at 204 (discussing how attitudinal model studies "demonstrate that Justices do not moderate their decisional outcomes in response to legislative preferences").

135. SEGAL & SPAETH, *supra* note 3, at 108–09.

136. *Id.* at 109. *See also* PACELLE, CURRY & MARSHALL, *supra* note 1, at 46–47 (noting the attitudinalist critique of the strategic model, that "[e]ven if a decision is overridden, the Court does not always comply with that override, nor does an override necessarily cause lower courts to cease relying on the initial precedent").

137. *See* SEGAL & SPAETH, *supra* note 3, at 108–09; Cross & Nelson, *supra* note 6, at 1451 ("[T]he Court itself may be able to respond to an override and adapt the new statute to an outcome that it also finds ideologically desirable.").

138. SEGAL & SPAETH, *supra* note 3, at 109 ("In at least one series of Court decisions-overrides-reinterpretations-reoverrides, Congress had to pass the same statute three times to achieve its original goal.") (citations omitted).

139. *E.g.*, Cross & Nelson, *supra* note 6, at 1455–56 (discussing the ways the Supreme Court undermined the effect of the 1991 Civil Rights Act which amended Title VII of the Civil Rights Act of 1964, the main federal employment discrimination statute).

140. SEGAL & SPAETH, *supra* note 3, at 108–09.

From a theoretical standpoint, the attitudinal model predicts that enacted overrides like the ADAAA will fail.[141] Most of the attitudinalists' empirical support, however, does not precisely match the ADAAA scenario. Empirical studies by attitudinal proponents have generally tested the effect of the *risk* of override, but not the effect of enacted overrides.[142] Logically, the Court is in a different posture once an override has been enacted. Although the Court may have felt free to pursue policy in the first instance, continuing to pursue those policy objectives post-override requires a willingness to more explicitly reject legislative influence.[143]

In fairness, the attitudinal model does concede that particularly strong congressional action can influence Supreme Court decisions. As Segal and Spaeth explain:

> [W]e do not say that the Supreme Court *never* engages in sophisticated behavior on the merits. Rather, given the difficulty of passing legislation in Congress, given the salience of Court decisions to members of Congress, and the short-lived duration of whatever Congress the Court is facing, we argue that the Court virtually never defers to presumed congressional preferences in the first instance.[144]

The ADAAA, however, is not the "first instance." It is an *enacted* override, with congressional intent placed within the statutory language itself. Segal and Spaeth assert that the times when the Supreme Court will defer to Congress are "rare," occurring only where Congress presents an

141. *See id.*

142. *E.g.*, *id.* at 312–26; Brian F. Sala & James F. Spriggs, II, *Designing Tests of the Supreme Court and the Separation of Powers*, 57 PUB. RES. Q. 197, 197 (2004). *See also* Hansford & Spriggs, *supra* note 123, at 1 (noting that attitudinal (and strategic) studies rest on the assumption that "if the Court is constrained it is because Congress can undo the Court's policy and create an enduring new policy it prefers"); BARNES, *supra* note 32, at 44 ("Although the override literature offers a number of important insights it . . . is largely silent on what happens after Congress acts: namely, do independent, politically selected judges acquiesce to congressional reversals of their statutory interpretations, or do they resist congressional oversight?").

143. *See* Thomas G. Hansford & David F. Damore, *Congressional Preferences, Perceptions of Threat, and Supreme Court Decision Making*, 28 AM. POL. RES. 490, 495 (2000) (describing a Congressional override as a particularly credible threat from Congress to the Court); BARNES, *supra* note 32, at 5 (explaining that overrides "offer Congress a direct means to send follow-up signals to the courts that aim to . . . reverse errant judicial decisions.").

144. SEGAL & SPAETH, *supra* note 3, at 350 n.102. Segal has subsequently conceded to the fact that evidence of strategic influence does exist, though not in the form of fear of override. *See* EPSTEIN, LANDES & POSNER, *supra* note 3, at 86 (citing Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011)).

"imminent threat to the Court's institutional policy-making powers."[145] The ADAAA does not fall into that exceptional category; nonetheless, it represents a particularly robust attempt by Congress to make its voice heard, and attitudinal empirical studies generally fail to address enacted overrides of this sort.[146]

B. PREDICTIONS OF THE STRATEGIC MODEL

As noted above, the strategic model predicts that Justices will act according to policy preference where they have room to do so, but that the Court is constrained by other forces, including the intent of the co-equal branches.[147] The strategic model therefore predicts that the ADAAA can succeed if the amendments trigger the particular circumstances where the Court's policy preferences are constrained by Congress or the President, or both.[148] The challenge to using the strategic model as a predictor for the Court's interpretation of the ADAAA, however, is that the model offers no clear guidance respecting in what circumstances the Court feels constrained,[149] and especially fails to describe when and how an overriding statute will trump the Justices' policy goals.[150] This unanswered question is

145. SEGAL & SPAETH, *supra* note 3, at 350 n.102.

146. *See* PACELLE, CURRY & MARSHALL, *supra* note 1, at 46–47. Moreover, Segal himself, together with Chad Westerland and Stefanie A. Lindquist, has recently discovered new empirical evidence that Congress does influence Supreme Court decisions. Segal, Westerland & Lindquist, *supra* note 144, at 99–102. This study found that "the greater the ideological distance between the Court and the house of Congress that is ideologically closest to the Court, the less likely the Court is to strike down a federal law." *See* EPSTEIN, LANDES & POSNER, *supra* note 3, at 86 (citing Segal, Westerland & Lindquist, *supra* note 144). Although this study does not address enacted overrides, given its finding of legislative influence, and given the model's absence of significant testing of enacted overrides, the attitudinal prediction that the ADAAA will fail appears to be less than conclusive. As set forth *infra*, the strategic model ultimately suffers from the same deficiency.

147. PACELLE, CURRY & MARSHALL, *supra* note 1, at 41–42 (discussing that the strategic model expects policy orientated behavior where it is possible for Justices to do so); Lee Epstein, Jack Knight & Andrew Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 592–94 (2001). *See also* EPSTEIN & KNIGHT, *supra* note 2, at 11–13 (explaining that Justices pursue their policy goals, but do so strategically, resulting in Justices following sincere preferences when able to so do and modifying them in other circumstances).

148. EPSTEIN & KNIGHT, *supra* note 2, at 10, 13.

149. *See* SEGAL & SPAETH, *supra* note 3, at 107–08 (describing weaknesses in strategic theory, including that "under a potentially more realistic view of the legislative process, the Court's ability to act sincerely [according to policy preference] might be guaranteed most of the time."); Hansford & Damore, *supra* note 143, at 494 (explaining the need "to develop an improved theoretical explanation specifying the conditions under which justices might be constrained by congressional preferences").

150. Hansford & Spriggs, *supra* note 123, at 22; BARNES, *supra* note 32, at 55 n.74.

particularly problematic given the history of the Supreme Court's resistance to overrides in employment discrimination law.[151]

1. Risk of Override

Many strategic modelists posit that Justices will consider the risk of legislative override when making decisions in statutory cases.[152] Specifically, a strategic Justice compares her ideal result with the range of results that would be acceptable to the legislative and executive branches.[153] If the Justice's ideal falls outside of the range, he or she compromises his or her preferred position and picks another posture to avoid the override, choosing a position closest to the preferred outcome but within the range acceptable to the other branches.[154] A number of strategic studies have tested this premise and found empirical evidence that the risk of override does influence the Court,[155] and proponents of the strategic model have relied on this evidence to conclude that Congress and the President can constrain the Court.[156]

This approach suffers from the same critiques that are made of the attitudinal model. The evidence and mechanism of this aspect of the strategic theory of judicial decision-making is limited to the effect of a *risk*

151. *See* Widiss, *Shadow Precedents*, *supra* note 17, at 536–60 (describing the limited efficacy of congressional amendments seeking to override conservative court decisions on federal anti-discrimination laws).

152. *E.g.*, EPSTEIN & KNIGHT, *supra* note 2, at 13–17, 140–41, 154–57. *See also* PACELLE, CURRY & MARSHALL, *supra* note 1, at 44–45 (describing the strategic premise that risk of overrides constrains the Court); Cross & Nelson, *supra* note 6, at 1451 (defining the risk of reversal view as the "first stage" analysis of the strategic model). As described in more detail *infra*, the "second stage" goes beyond congressional override, which has mixed empirical results, to locate the source of congressional influence in other legislative powers, such as budget. Cross & Nelson, *supra* note 6, at 1450.

153. EPSTEIN & KNIGHT, *supra* note 2, at 154–57; BAILEY & MALTZMAN, *supra* note 2, at 98–99; PACELLE, CURRY & MARSHALL, *supra* note 1, at 44–45; Cross & Nelson, *supra* note 6, at 1451; Bergara, Richman & Spiller, *supra* note 44, at 250.

154. BAILEY & MALTZMAN, *supra* note 2, at 98–99; Cross & Nelson, *supra* note 6, at 1451; Bergara, Richman & Spiller, *supra* note 44, at 250.

155. *E.g.*, Bergara, Richman & Spiller, *supra* note 44, at 267; William N. Eskridge, Jr. *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 385–86 (1991). Strategic studies have extended this conclusion beyond statutory interpretation to constitutional cases as well. *See, e.g.*, Epstein, Knight & Martin, *supra* note 147, at 610; Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987-2000*, 31 LEGIS. STUD. Q. 533, 555 (2006).

156. *E.g.*, EPSTEIN & KNIGHT, *supra* note 2, at 154–57; Bergara, Richman & Spiller, *supra* note 44, at 264–66.

of override on the Court.[157] It does not offer a direct study or mechanism for understanding the effect of an *enacted* override such as the ADAAA. Some strategic modelists, however, have attempted to address this gap by providing some theoretical explanations for enacted overrides.[158] However, these theoretical discussions of overrides are incomplete and generally fail to empirically support the asserted explanations for a statute like the ADAAA.

2. Explaining Enacted Overrides: Extending the Evidence

The first way the strategic model might address enacted overrides is to simply extrapolate from empirical evidence concerning the risk of overrides on judicial decision-making. If courts are swayed by the risk of override, one might contend that an actual override—which sends an even stronger signal of congressional and executive intent—will constrain the Court to an even greater degree. Strategists' case studies seem to support this extension of the theory. For example, in their seminal work advocating for the strategic model, Epstein and Knight present *Newport News Shipbuilding & Dry Dock v. EEOC*,[159] an example (analogous to the ADAAA) of the Supreme Court reversing its position in direct response to a congressional override.[160] Rafael Gely and Pablo Spiller similarly find evidence of strategic position change by the Supreme Court in response to the congressional override of the *Grove City College v. Bell*[161] decision.[162]

The problem with simply extending empirical evidence regarding the risk of override to predict the influence of enacted overrides is that the very fact that the override occurred undermines the strategic claim of other-

157. *See, e.g.*, Bergara, Richman & Spiller, *supra* note 44, at 264–65; Tom S. Clark, *The Separation of Powers, Court Curbing and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 972 (2009) (explaining that "a generation of models" have posited that the Court considers the risk of override in choosing case outcomes); Hansford & Spriggs, *supra* note 123, at 1 (noting that strategic (and attitudinal) studies rest on the assumption that "if the Court is constrained it is because Congress can undo the Court's policy and create an enduring new policy it prefers").

158. *See infra* Part IV.B.2–6.

159. Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669 (1983).

160. EPSTEIN & KNIGHT, *supra* note 2, at 15–16.

161. Grove City Coll. v. Bell, 465 U.S. 555 (1984).

162. Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J. L. ECON. & ORG. 263, 290–95 (1990).

branch influence.[163] The strategic model claims that if an override is sufficiently likely, the Supreme Court will move its position to avoid that risk.[164] Yet when an override occurs, it seems apparent that the Court did not actually move its position. Thus, its decision-making may not have been constrained by the elected branches.

Our example of the ADAAA demonstrates this very problem. As noted above, the original intent of the bi-partisan ADA was to embrace a broad definition of "disabled."[165] Prior to the *Sutton* and *Toyota* decisions, a number of interested parties provided the Court with ample evidence of this broad intent in their party or amicus briefs.[166] According to the strategic model, the conservative court of 1999 and 2002 should have moderated its position and interpreted "disabled" in a way that more closely reflected the intent of Congress, thus avoiding subsequent legislative override. The Court nonetheless issued decisions that were so restrictive in their interpretation and so contrary to Congress' intent that the legislature went through the laborious process of enacting an override, which unanimously passed both chambers of Congress, and was signed by a Republican President.[167] This example seems to undermine the strategic model's claim that the Court is constrained by its co-equal branches. This is particularly problematic for the ADAAA, which relies on instructional amendments that do not change the statutory language, but instead direct the courts to interpret the same language in a different way. Consequently, the ADAAA's instructional amendments will only constrain the Supreme Court if the Court is concerned with congressional and executive intent.

Overall, the strategic model cannot explain the influence of enacted overrides by merely extrapolating from studies of the risk of override to actual overrides. To the contrary, enacted overrides undermine the claim

163. *See* Cross & Nelson, *supra* note 6, at 1457–58 ("The mere existence of reversals [of Supreme Court decisions] does not disprove the [strategic] theory, as they may only testify to strategic mistakes by the courts, but the existence is better evidence against the constraint theory than for it.").

164. *Id.* at 1451.

165. *E.g.*, Miller, *supra* note 88, at 55–56.

166. *See, e.g.*, Brief for Petitioners, Sutton v. United Air Lines, Inc., 572 U.S. 471 (1999) (No. 97-1943), 1999 WL 86487 at *7; Brief for the American Civil Liberties Union as Amicus Curiae Supporting Petitioners, Sutton v. United Air Lines, Inc., 572 U.S. 471 (1999) (No. 97-1943), 1999 WL 86517, at *2–*3; Brief of AIDS Action et al. as Amici Curiae Supporting of Petitioners, Sutton v. United Air Lines, Inc., 572 U.S. 471 (1999) (No. 97-1943), 1999 WL 88763, at *2–*9; Brief for the Judge David L. Bazelon Center for Mental Health Law et al. as Amici Curiae in Support of Respondent, Toyota Motor Mfg, Ky., Inc. v. Williams (No. 00-1089), 2001 WL 1002681, at *8, *30.

167. Feldblum et al., *supra* note 9, at 239–40.

that the risk of legislative override influences the Supreme Court.[168] However, some proponents of the strategic model have attempted to address this issue.

3. Explaining Enacted Overrides: Incorrect Assessment of Congressional Preference

Although the strategic premise is that the Court alters its position to avoid overrides, the literature reveals a few possible explanations as to why overrides still occur. For example, in a seminal study of congressional overrides, William Eskridge suggests that overrides may occur when the Court lacks complete information or misinterprets congressional preference.[169] As explained above, the strategic risk of override theory posits that if the Court perceives its decision to be within the range of political acceptability, the Justices will pursue their individual policy preferences unfettered by concern for the executive or legislative view, and if it is outside that range, the Court will move its position.[170] It is entirely possible, however, that the Court could make an incorrect assessment of political acceptability.[171] Thus, the *Sutton* and *Toyota* decisions that were reversed by the ADAAA could merely reflect an inaccurate prediction of the risk of override by the Court.[172] In fact, the ADAAA's history could suggest that congressional preference was a close question. As described in Part II above, the first attempt to amend the ADA in response to the conservative court decisions would have changed the definition of "disabled" to an explicitly broader standard, but this version did not have the political support for enactment. The ADAAA was a compromise bill, which passed only because the original definition remained, albeit with instructional amendments that direct the Court to revisit its interpretation of that language.

168. *See* Cross & Nelson, *supra* note 6, at 1457–58 ("The mere existence of reversals [of Supreme Court decisions] . . . is better evidence against the constraint theory than for it.").

169. William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 652, 660 (1991). *See also* Eskridge, *Overriding*, *supra* note 155, at 388.

170. BAILEY & MALTZMAN, *supra* note 2, at 99.

171. *See* Cross & Nelson, *supra* note 6, at 1457–58 (noting that overrides may be the result of a strategic mistake by the courts).

172. Indeed, the amicus briefs did not present the Court with a unified view of congressional intent; many claimed that the ADA was designed to be as limited as the Court ultimately decided. *See, e.g.*, Brief for Petitioner, Toyota Motor Mfg, Ky., Inc. v. Williams, 532 U.S. 970 (2001) (No. 00-1089), 2001 WL 741092, at *22–*26; Brief for Respondent, Sutton v. United Air Lines, Inc., 572 U.S. 471 (1999) (No. 97-1943), 1999 WL 164436, at *5.

Although the notion that overrides result from mistaken strategic predictions makes logical sense, the strategic modelists do not generally offer empirical support for this claim. If the Court was simply mistaken about the elected branches' preferences when issuing decisions later overridden, the Supreme Court would correct its mistake and decide subsequent cases in line with congressional and executive intent. The strategic model, however, has generally failed to empirically test whether this realignment occurs after an override is issued.[173] The few studies that have tested this theory, described in detail in Part V, have produced mixed results.[174] This is a significant omission, given that the attitudinalists' theory provides a viable explanation, supported by empirical evidence,[175] for why overrides occur—the Supreme Court is following its policy preferences and is not concerned with the views of the co-equal branches.[176]

4. Explaining Enacted Overrides: The Political Make-Up of Congress Changes

An alternative explanation for why a supposedly strategic Supreme Court would issue decisions that are later overturned by Congress is that the political environment has changed. As Eskridge asserts, "the Court's interpretations will be overridden when congressional preferences change over time."[177] Thus, the Supreme Court could issue a decision that strategically considered the risk of override and found that risk to be unlikely at the time of the decision. Then, after changes in the political makeup of the other branches of government, the decision is no longer in the acceptable ideological range and an override occurs. Following this theory, it is possible that the Supreme Court actually strategically considered the risk of override in its *Sutton* and *Toyota* decisions, and its prediction that the decisions would not result in override was accurate at

173. *See, e.g.*, Hansford & Spriggs, *supra* note 123, at 1 (describing the existing literature as focused on pre-override strategic action); BARNES, *supra* note 32, at 44 (noting a lack of empirical testing of whether overrides affect judicial decisions).

174. *See infra* Part V.

175. *E.g.*, SEGAL & SPAETH, *supra* note 3, at 312–26; Sala & Spriggs, *supra* note 142. *See also* SEGAL & SPAETH, *supra* note 3, at 331 (noting that Eskridge's explanation that the Court may have been mistaken about congressional preferences, among other explanations for enacted overrides renders the strategic model "completely unfalsifiable").

176. *See supra* Part II.B.

177. Eskridge, *Overriding*, *supra* note 155, at 387–88.

the time. It is possible that the prediction only became inaccurate due to the evolving political make-up of Congress.

Indeed, it took six years after the *Toyota* decision for the ADAAA to pass, potentially indicating a reasonable prediction by the Court that, as of 2002, a conservative interpretation of the ADA would survive. Both *Sutton* and *Toyota* were issued at times when Republicans controlled the government.[178] In contrast, both the ADA and ADAAA passed when Democrats controlled both houses of Congress (though with a Republican President).[179] Thus, the strategic model might predict that the ADAAA will succeed if either the Supreme Court is majority liberal at the time of the decision or the co-equal branches are majority or significantly liberal leaning, thus constraining the Court by creating the risk of (yet another) override.

This prediction is not supported by empirical evidence. To prove this "evolving Congress" premise, the strategic model would need to test if the occurrence of overrides corresponds with a change in congressional ideology from the original enacting legislature. More significantly, the evidence would need to show that when an override occurs, the Supreme Court acknowledges it as signaling a change in congressional political ideology, and subsequently shows some related change in its strategic decision-making. If the Court does not move in response to the override, there is no clear way to ascertain whether the first interpretation was strategic and not merely a pursuit of policy preference. Moreover, if the Court does not move in response to an override, that alone shows a lack of strategic concern for Congress' position, regardless of Congress' evolving

178. *Sutton v. United Air Lines, Inc.*, 572 U.S. 471 (1999), was argued on April 28, 1999 and decided June 22, 1999. Although President Clinton was in office at the time, both chambers of Congress had Republican majorities that offered cover for the conservative decision. Similarly, the *Toyota* decision was issued when George W. Bush was President and the House was majority Republican, while the Senate had a one-vote Democratic majority. Thus, when *Toyota* was handed down, the elected branches were dominated by Republicans creating numerous political obstacles to overturning a conservative Court decision. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 99 (other branch constraints on the Court disappear if the decision is within the range of political preferences of those branches). That said, the ADAAA passed unanimously in both houses of Congress and was signed by President George W. Bush. Feldblum et al., *supra* note 9, at 239. This undermines the premise that *Toyota* was issued because the decision fit within the politically acceptable range for the Republican-controlled government at the time.

179. *See supra* note 178 and accompanying text.

ideology. Again, the limited study of overrides undermines the predictive utility of the strategic model.[180]

5. Explaining Enacted Overrides: They Signal the General Power of the Executive and Legislative Branches

A final explanation of why enacted overrides would succeed at constraining the Supreme Court, when the risk of override failed to do so, is that enacted overrides signal an entirely different sort of legislative threat. As set out in the discussion above, the accuracy of strategic predictions for enacted overrides, such as the ADAAA, is undermined by comparisons to instances involving the risk of override. However, some strategic scholars do not rely on the risk of override theory and data,[181] and theorize that risk of override does not need to be effective in order for Congress or the President to constrain the Court.[182] Instead, this version of the strategic model notes the other ways Congress can influence the Court, including threatened impeachment,[183] jurisdiction stripping,[184] "resource punishment"[185] and other "end-runs"[186] around the Court. This "power" version of the strategic model is supported by empirical studies that find additional evidence that congressional and executive power constrain the Supreme Court in ways other than the threat of an override.[187]

180. *See* SEGAL & SPAETH, *supra* note 3, at 331. Part V, *infra*, sets out the few studies of overrides that are available.

181. *See, e.g.*, Cross & Nelson, *supra* note 6, at 1452–54; Milligan, *supra* note 35, at 216.

182. *See, e.g.*, Cross & Nelson, *supra* note 6, at 1452–54. This analysis acknowledges the weaknesses of the "risk of override" theory. *See, e.g.*, *id.* at 1452–54. Echoing the views of the attitudinal model, this analysis concedes that overrides are rare, unpredictable, and difficult, and as a result, there is no strong incentive for Supreme Court Justices to change their viewpoint to avoid an override. *Id.* at 1452 ("Because of the difficulty in forecasting electoral returns and in anticipating congressional action and because of the extensive set of veto points that exists in the legislative policy-making process, Supreme Court justices need not always alter their behavior in anticipation of a congressional response.").

183. *E.g.*, *id.* at 1461.

184. *Id.* at 1463.

185. *Id.* at 1465.

186. Milligan, *supra* note 35, at 217.

187. For example, Cross and Nelson found empirical evidence of judicial deference to executive agency decisions and "congressional actions." Cross & Nelson, *supra* note 6, at 1484 (testing for deference to Congress by examining whether statutes were overturned or upheld). These congressional actions were not identified as overrides; the study only looked at the broader issue of sustaining or overturning a statute altogether. *Id.* They concluded that strategic elements, along with other factors, do play a role in judicial decisions. *Id.* at 1491 (concluding that ideological, legal and strategic elements all play a role in judicial decisions). *See also* Clark, *supra* note 157, at 981 (finding Congress' passing of court-curbing legislation has a constraining influence over the Supreme Court).

Unfortunately, this version of the strategic model generally fails to identify how and when these power-based constraints are operative, and under what circumstances the Supreme Court will actually change its position out of concern for these possible constraints.[188] As Thomas Hansford and David Damore suggest, overrides seem to be a particularly strong signal of congressional interest.[189] Perhaps the ADAAA, with its strong language rebuking the Court directly, will be effective because it signals to the Court that the legislature and executive are prepared to use their general power if necessary. This again is an untested possibility. The proponents of the strategic model have not generally conducted empirical studies to measure whether overrides have this particular signaling effect.[190]

Overall, the potential of the strategic model to predict the ADAAA's future is limited due to the model's failure to thoroughly test, examine, and explain the impact of enacted overrides on the Supreme Court. Most of the strategic study and analysis focuses on risk of override or, if not, they otherwise neglect the precise context of overruling legislation.[191] Part V sets outs the few override studies that are available, which offer decidedly mixed results, and in the context most relevant to the ADAAA, do not support the strategic model.[192]

C. THE PREDICTIONS OF THE INTEGRATED MODEL

As described above, one of the innovations of the integrated models is to offer a more nuanced theory of judicial decision-making that involves

188. One study does suggest that the Supreme Court alters its position when the legislature has recently engaged in a power play against the courts. Clark, *supra* note 157, at 981 ("[A]n increase in the level of Court curbing in one year is associated with a decrease in the number of laws held unconstitutional the following year."). Other studies merely find evidence that the Supreme Court is constrained by the elected branches and posit that the source of this influence is the legislative and executive powers described above without identifying what triggers that constraint. *See, e.g.*, Cross & Nelson, *supra* note 6, at 1484–85. In contrast, risk of override strategic theory identifies the exact circumstances where the constraint is active. The potential of override acts as a restraint when the Supreme Court's decisions are ideologically outside of the range of congressional and executive preferences. Otherwise the Supreme Court is unconstrained. *See, e.g.*, *id.* at 1451.

189. Hansford & Damore, *supra* note 143, at 491. The Hansford and Damore study is discussed in Part IV, *infra*.

190. *See infra* Part V (describing the few exceptions).

191. *See id.*

192. *See id.*

attitudinal, strategic, and a revival of legal factors.[193] However, as with the attitudinal and strategic models, the empirical basis for these integrated models limits their utility for predicting the effect of the ADAAA. First, the integrated models provide new empirical support for the role of law in Supreme Court decisions. In a broad sense this should support the efficacy of the ADAAA since the legal model asserts that courts are constrained by the sources of law, including statutory language and intent.[194] Both the Bailey and Maltzman and the Pacelle, Curry, and Marshall studies found that the Court was at least partly constrained by legal factors.[195] At the same time, the empirical basis for the respective conclusions of these researchers limits their applicability to the ADAAA.

As noted above, Bailey and Maltzman tested for the effect of three legal values: *stare decisis*, judicial restraint or deference to Congress and the President, and strict construction of the First Amendment's free speech clause.[196] The judicial restraint or deference factor is the most relevant for purposes of this Article. If deference to Congress and the President limits Justices' pursuit of policy goals, it then follows that the ADAAA should have a substantial chance of success. Bailey and Maltzman did find judicial restraint to have an effect on historical judicial decisions;[197] however, they also concluded that this factor did not play a significant role in the decisions of the modern Supreme Court.[198] Thus, the one legal factor that appears likely to predict the ADAAA's success was not proven to have any influence on the modern Court.

Bailey and Maltzman did find that the other two legal factors have an influence, even on the modern Supreme Court.[199] These have little bearing in the ADAAA context; the strict construction of the First Amendment factor clearly has no specific relevance to the Act. Moreover, the *stare*

193. BAILEY & MALTZMAN, *supra* note 2, at 15–16; PACELLE, CURRY & MARSHALL, *supra* note 1, at 53; Cross & Nelson, *supra* note 6, at 1491–93.

194. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 9–11; Cross & Nelson, *supra* note 6, at 1439.

195. BAILEY & MALTZMAN, *supra* note 2, at 121–139; PACELLE, CURRY & MARSHALL, *supra* note 1, at 51–62.

196. BAILEY & MALTZMAN, *supra* note 2, at 8–13.

197. *Id.* at 75–76. The following Justices were found to practice judicial restraint and defer to Congress: Stevens, Powell, Blackmun, Burger, White, Stewart, Whittaker, Brennan, Minton, Burton, Frankfurter and Reed. *Id.* In contrast, Thomas, Kennedy, Scalia, O'Connor, Douglas and Black demonstrated a lack of "constraint based upon a notion of congressional deference." *Id.*

198. *Id.* at 85 ("More recently . . . deference to Congress has not been a particularly constraining force.").

199. *Id.* at 74–78.

decisis factor weighs against the efficacy of the ADAAA. The ADAAA was designed to overturn specific Supreme Court precedents. If those precedents continue to have influence, the ADAAA will not fully succeed. Indeed, as set forth in Part V.A.2, there is real cause for concern that the lingering effect of precedent will undermine the effectiveness of the ADAAA. Pacelle, Curry, and Marshall similarly used precedent (and factors related to precedent) as their proxy to test for the influence of the law on the Court.[200] Thus, although they conclude that the law plays a role in Supreme Court decisions, a similar prediction on the ADAAA is not fully supported.

Even if more studies empirically examined the consequences of statutory language, instead of precedent, on the Supreme Court, such studies may not accurately predict the Court's interpretation of the ADAAA. As explained in Part III, the ADAAA does not change the underlying definition of "disabled" and relies, at least in part, on instructional amendments that direct the courts to interpret that same language in a different manner. Although the instructional amendments are the law (in the sense that they appear in statutory language), they are not substantive statutory language. Thus, the instructional amendments depend in large part on the Court's willingness to defer to congressional and executive intent more than its willingness to follow statutory language. Any proof of the influence of statutory law, therefore, might not extend to this unusual statute.

The second innovation of the integrated models of judicial decision-making is that they provide stronger empirical support for the role of strategic factors in Supreme Court decisions.[201] Both the Bailey and Maltzman and the Pacelle, Curry, and Marshall studies offer new and well-developed empirical support for the premise that the equal branches can constrain Supreme Court decisions.[202] This would seem to support the efficacy of the ADAAA, which was passed unanimously by Congress and

200. PACELLE, CURRY & MARSHALL, *supra* note 1, at 70.

201. BAILEY & MALTZMAN, *supra* note 2, at 101–20 (describing the lack of consensus in empirical strategic studies, describing challenges for empirical studies in this area, and presenting their methods to address those challenges); PACELLE, CURRY & MARSHALL, *supra* note 1, at 45–47, 51–62 (describing critiques of prior legal and strategic model empirical studies and presenting the research design of their approach designed to address these critiques).

202. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 119–20; PACELLE, CURRY & MARSHALL, *supra* note 1, at 134.

signed by President Bush.[203] The empirical basis for these conclusions, however, limits their relevance to the ADAAA. As with the attitudinal and strategic empirical studies discussed above, the integrated models test for the effect of congressional and presidential influence by looking for Court reaction to a risk of override.[204] As with the prior attitudinal and strategic studies, the risk of override evidence in the integrated studies simply does not provide a complete prediction for the enacted override of the ADAAA. Evidence from studies of enacted overrides is needed to determine which one of the model's predictions is the most likely outcome for the ADAAA.

V. STUDIES OF ENACTED OVERRIDES INDICATE THE ADAAA WILL NOT SUCCEED

As set forth above, the major works on judicial decision-making generally neglect the topic of overrides; however, a few direct studies of enacted overrides are available that enhance our ability to predict the future impact of the ADAAA. These studies of overrides draw uncertain conclusions, as some evidence supports the strategic model while other evidence supports the attitudinal model. Still, the evidence most relevant to the ADAAA is consistent with the attitudinal model and indicates that a conservative Supreme Court will interpret the ADAAA in a restrictive manner.

A. STUDIES OF ENACTED OVERRIDES

1. Hansford and Damore

In a study published in 2000, Thomas Hansford and David Damore posited that congressional preferences would be more likely to constrain the Supreme Court when Congress posed a "credible threat" to the Court.[205] They proposed that one example of a credible threat would be "prior congressional overrides of Court decisions."[206] Hansford and Damore then conducted an empirical analysis of Supreme Court cases to

203. Feldblum et al., *supra* note 9, at 239–40.

204. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 103–08; PACELLE, CURRY & MARSHALL, *supra* note 1, at 54–61.

205. Hansford & Damore, *supra* note 143, at 491. They also proposed that interest group activity at the Court would also create a credible threat, *id.*, but found no evidence that this factor influenced Supreme Court decisions, *id*. at 502.

206. *Id*.

test the effect of overrides on Court decisions.[207] Hansford and Damore found some evidence that overrides influenced the Supreme Court; specifically, "when an outlier Justice is faced by a liberal Congress, he or she becomes more likely to vote in a liberal manner as the number of recent overrides in the relevant issue area increases."[208] Their results were mixed, however, because they found that overrides did not have the same impact when congressional preferences were conservative.[209] Consequently, Hansford and Damore caution that their overall results do not strongly support the strategic or the attitudinal model.[210]

2. Hansford and Spriggs

In 2007, Thomas Hansford and James Spriggs II presented a study of enacted overrides that supported the attitudinal model.[211] Hansford and Spriggs concluded that in "a meaningful fraction of congressional overrides," the Supreme Court continued to follow the precedent that Congress overturned.[212] In constructing their study, Hansford and Spriggs originally posited that Congress' power to "alter the institutional playing field" by, for example, restricting the Court's jurisdiction, would constrain the Court and create an incentive for the Court to refrain from following overridden precedent.[213] Their results, however, showed no evidence of this constraint.[214] Hansford and Spriggs found that even when Congress used an override to instruct the Court to reject a precedent, the Court would decide whether to follow that precedent based solely on its own policy preference.[215] They concluded that in cases of override where "Congress has already demonstrated both the motivation and capability to respond to the Court . . . it does not appear that the Justices are much concerned with Congress."[216] This is consistent with the attitudinal model and suggests the ADAAA will not constrain the Supreme Court.

207. *Id*. at 499.

208. *Id*. at 502. An outlier Justice is "either to the left or the right of both Congress and the President . . . in ideological space." *Id*. at 496.

209. *Id*.

210. *Id*. at 504.

211. Hansford & Spriggs, *supra* note 123.

212. *Id*. at 22. "Of the 176 instances in which Congress overrode one of the Court's statutory decisions, there are 42 times (23.9%) in which the Court responded to the override by following and thus reaffirming the precedent." *Id*. at 14.

213. *Id*. at 6.

214. *Id*. at 19.

215. *Id*. at 22.

216. *Id*. at 23.

The Hansford and Spriggs results are consistent with Deborah Widiss's case study analysis of the effectiveness of overrides in employment discrimination law.[217] As noted above, employment discrimination is an area in which the effectiveness of congressional override "often takes center stage" because Congress has so frequently overruled the Supreme Court's interpretation of the federal employment discrimination statutes.[218] Widiss found that in employment discrimination, congressional overrides had little effect[219] because the Supreme Court and lower courts continued to follow the overridden precedent.[220] In relying on these "shadow precedents," the Supreme Court and lower courts issued decisions that were less protective of employee rights than the overrides. [221] Thus, the Widiss case examples are consistent with the Hansford and Spriggs results. Both the case study and empirical study provide more support for the attitudinal model and indicate that the Supreme Court may disregard the ADAAA's attempt to override prior precedent.

Although the Hansford and Spriggs results are telling and supported by case study, the authors note some important limitations. First, this study did not differentiate between partial and complete overrides.[222] Thus, situations in which the Court was legitimately following a portion of precedent that had not been overturned were construed as the Court wholly disregarding the override in the study.[223] Moreover, the authors noted a potential selection effect in their study that overrides "may only occur (or be most likely to occur) in cases which, for some reason, the Court is

217. Widiss, *Shadow Precedents*, *supra* note 17, at 516, 537. The ADA is an employment discrimination statute. *E.g.*, 42 U.S.C. § 12112. Although Widiss did not discuss the ADA or ADAAA specifically, she discusses analogous statutes such as Title VII of the Civil Rights Act of 1964. *See, e.g.*, Widiss, *Shadow Precedents*, *supra* note 17, at 538–45.

218. Widiss, *Shadow Precedents*, *supra* note 17, at 515.

219. *Id*. at 536–60. Widiss examined the override of three significant Supreme Court cases involving: (a) the standard for finding discriminatory motive under Title VII, (b) pregnancy discrimination and (c) the statute of limitations for challenging a discriminatory act. *Id*. at 516.

220. *Id*. at 512 ("[T]he Supreme Court and lower courts often narrowly construe the significance of congressional overrides and instead rely on the prior judicial interpretation of statutes as expressed in overridden precedents.").

221. *Id*. at 515–17. Significantly, Widiss finds this failure of override in the very example Epstein and Knight cite in favor of their strategic model—pregnancy discrimination. Thus, while Epstein and Knight point to *Newport News* as an example of the effectiveness of the Pregnancy Discrimination Act ("PDA") override of *General Electric v. Gilbert*, EPSTEIN & KNIGHT, *supra* note 2, at 15–16, Widiss offers a series of examples where, federal circuit and district courts used the reasoning of *Gilbert* to restrict the impact and reach of the PDA, Widiss, *Shadow Precedents*, *supra* note 17, at 554–55.

222. Hansford & Spriggs, *supra* note 123, at 21.

223. *Id*.

indifferent about congressional responses."[224] This could mean that their results do not necessarily reflect the Supreme Court's general refusal to listen to Congress, but instead, its refusal to do so in a particular category of cases.

3. Barnes' Study of Overrides

A study of overrides by Jeb Barnes bolsters the Hansford and Spriggs findings that overrides sometimes fail and demonstrates that there is a category of cases where the Court is particularly indifferent to congressional preference.[225] Barnes analyzed one hundred randomly selected overrides passed from 1974 to 1990[226] and measured their effectiveness by examining whether judicial consensus increased or decreased after their passage.[227] According to Barnes, a successful override increases the level of consensus, "*i.e.* significantly contribute[s] to turning hard cases, which produce litigation and disagreement among judges in the pre-override period into matters of routine rule application, which engender consensus or no litigation in the post-override period."[228]

Barnes acknowledges the relevance of this information to the debate on models of judicial decision-making.[229] For purposes of his study, he assumes that—as the strategic (or what he calls the institutionalist) model would predict—overrides "can send to the court effective signals that significantly increase levels of judicial consensus."[230] As Barnes explains:

> Congress has passed hundreds of overrides since the mid-1970s. So if overrides are largely symbolic and cannot send effective signals, why do sophisticated interest groups and governmental agencies spend so much time and energy lobbying Congress? Again, it seems the most common-sense approach assumes that the passage of overrides is part of an ongoing process that can send constraining signals, but allows that their effectiveness will vary across settings.[231]

224. *Id*.
225. BARNES, *supra* note 32, at 61–62.
226. *Id*. at 15.
227. *Id*. at 16–17.
228. *Id*. at 63.
229. *Id*. at 58–59.
230. *Id*. at 59.
231. *Id*. at 66. Barnes analyzes overrides in the context of three main "characterizations of American policy-making—pluralism, capture, and hyperpluralism." *Id*. at 5. Pluralism describes the dispersal of power in the American political system and assumes it acts for the good by hedging majority action against protection of minority rights and influence. *Id*. Capture theorists view the

Barnes's overall conclusion is that "overrides seem to matter, but their effect varies."[232] More precisely, he finds that overrides are typically pluralistic, meaning they result from a political process that is open and, more significantly for our purposes, typically result in judicial consensus.[233] This finding demonstrates that congressional overrides can change an area of law that lacked certainty and was characterized by judicial dissensus into an area of law marked by certainty and judicial consensus.[234] This conclusion supports the strategic model's premise and the integrated model's partial premise that institutions, such as the legislature and executive, can indeed constrain the Supreme Court. However, Barnes' study also shows that overrides are not effective in every context, and in fact, overrides fail in the context most relevant to the ADAAA.

B. JUDICIAL INTERPRETATION OF STATUTES PROTECTING MINORITIES

Although Barnes's study finds that overrides are generally effective, his study also finds that a significant minority of overrides did not result in judicial consensus.[235] Instead, these overrides involved either "weak congressional signals," which failed to send a clear enough message to create legal certainty; "delegation by default," in which Congress left important legal issues open that courts were forced to decide; or, most relevant to our purposes, "partisan judicial resistance," in which the dissensus is caused by judges interpreting the override along partisan lines.[236] Thus, Barnes's results reveal that in some override cases, there is

American system not as an effective, protective distribution of power, but instead as an "obstacle course" that favors well-organized special interests. *Id*. at 6. Finally, hyperpluralism posits that the division of power in the American system is overly fragmented to the point of being harmful. *Id*. at 7. Barnes posits that under the pluralist theory, overrides should result from an open political process and lead to judicial consensus. *Id*. at 8. Under the capture theory, overrides result from "one-sided policy-making" that creates judicial consensus in favor of the prevailing interest group. *Id*. at 8–9. Finally, according to the hyperpluralism construct, overrides result from an open process but do not create consensus because "either (1) Congress passes vague or partial overrides, or (2) politically selected, independent, and ideologically diverse judges resist congressional oversight and read the law along partisan lines." *Id*. at 9.

232. *Id*. at 100.

233. *Id*. at 16.

234. *Id*. at 136–37 ("[T]he most common override scenario by far was the pluralist ideal of effective deliberative revision, in which congressional deliberation is open, Congress passes a prescriptive override, and the override triggers judicial consensus.").

235. *Id*. at 17.

236. *Id*. at 17, 123.

judicial resistance to congressional oversight caused by courts continuing to follow their policy preference.[237]

Significantly, Barnes was able to identify the type of overrides that triggered this judicial resistance—overrides that are on partisan issues, meaning pre-override decisions were divided along partisan lines.[238] Moreover and most significantly, Barnes found that a subgroup of these overrides was "particularly ineffective" at influencing the judiciary—overrides involving the statutory rights of "discrete and insular minorities."[239] As Barnes explains, "not a single civil rights override in the sample brought about judicial consensus."[240] Statutory protections of minority rights are a singular category of cases in which the Justices feel most free to disregard the overriding statute and follow their particular political preferences.[241] Thus, Barnes's study of enacted overrides predicts the ADAAA will fail because it seeks to protect a discrete minority group.

C. MECHANISM OF FAILURE

1. Do the Instructional Amendments Enable the ADAAA to Affect the Court?

Although a detailed examination of the ADAAA is beyond the scope of this Article, identifying how the courts could interpret its provisions in a restrictive manner will bolster the above-stated empirical basis for predicting failure. An isolated reading of the ADAAA makes the notion of failure surprising. As explained in Part III, *supra*, the statute makes many specific substantive changes that appear to leave no room for a conservative court to decide differently. For example, the statute now explicitly states that mitigating measures should not be considered when determining whether a person is disabled for purposes of the statute.[242] A court would be hard-pressed indeed to consider mitigating measures in contravention to such direct language.

237. *Id*. at 169.

238. *Id*.

239. *Id*. at 171.

240. *Id*. ("[A]s Lawrence Tribe describes them, groups that are 'perennial losers in the political process' due to 'widespread, insistent prejudice'. . . .") (citations omitted). Barnes cites African-Americans or immigrants as examples of this disfavored group, but certainly disabled persons would also qualify. *See id.*

241. *Id.*

242. 42 U.S.C. § 12102(4)(E)(i) (2012).

Nor would it, at first glance, seem possible to continue to use *Toyota*'s definition of "disabled," given the ADAAA's instructional amendments that explicitly reject that case.[243] As noted above, Widiss (as well as Hansford and Damore) identified the mechanism for override failure—a court's continued reliance on pre-override cases, or "shadow precedents." Through the instructional amendments, the ADAAA made a particular effort to overturn the contrary precedents. Indeed, Widiss may offer a ray of hope for the ADAAA. Although Widiss does not adopt statutory crafting as the ideal solution to the use of shadow precedent,[244] she does indicate that Congress could and should draft overrides in a way that makes it more difficult for courts to revive the precedents the override was meant to overturn.[245] Widiss suggests, for example, that "Congress could . . . state in a purposes clause that it disagrees with the court's interpretation or reasoning as expressed in a specific precedent or precedents, even if it is unwieldy to put such language in the substantive statutory text."[246] The ADAAA does precisely that. In the preamble, it explicitly states its intention to override the *Toyota* decision[247] and even incorporates this into the actual statutory language through instructional amendments.[248] Thus, the ADAAA is consistent with Widiss's suggestion that the override expressly indicates an intention to reject prior precedent. Potentially, due to this negation of shadow precedents, the ADAAA might succeed in affecting the Supreme Court.

2. Statutes Protecting Minority Rights Are Still Disfavored, Regardless of Language

The above paragraphs present the best-case scenario for the ADAAA. For several reasons, however, the strength of the ADAAA's instructional language does not directly counteract evidence that this *type* of override—statutory protection of insular minorities—is particularly ineffective at constraining judicial decisions.[249] First, even if the ADAAA's language successfully forecloses the use of shadow precedents, it likely does not

243. ADA Amendments Act of 2008, 42 U.S.C. § 12101(b)(4), (5) (2012).

244. Widiss, *Shadow Precedents*, *supra* note 17, at 517–18 (suggesting that certain norms and presumptions of statutory interpretation are the best solution).

245. *Id*. at 562.

246. *Id.*

247. ADA Amendments Act of 2008 § 2, 42 U.S.C. § 12101 (note) (2012).

248. 42 U.S.C. § 12102(4)(A), (B).

249. BARNES, *supra* note 32, at 171.

close all the avenues for conservative interpretation. Indeed, there is much room for courts to create conservative outcomes in ADAAA decisions.

To provide one example, although the ADAAA took pains to overturn *Toyota*'s definition of disability, it did not offer an alternative definition of that term. The very instructional amendments that are beneficial for expressing a clear intent to override shadow precedents are less influential because they do not change the underlying definition and merely state that the courts must "re-do" the definition in a broader, unspecified manner. Specifically, the ADAAA overturns *Toyota*'s holding that "substantially limits" (a key term in the definition of "disabled") must mean "prevent or severely restrict."[250] The ADAAA's instructional amendments make clear that the "prevent or severely restrict" standard is too high and call for a lower standard for "substantially limit";[251] however, the ADAAA does not clearly define this new lower standard.[252] Instead, the statute directed the EEOC to define "substantially limit" in regulations. The resulting regulations do offer nine principles that may provide a court with guidance in deciding what "substantially limits" means;[253] nonetheless, not one of those principles offers a definition for this key term. Moreover, even a cursory review of the principles shows that there is room for maneuvering.[254] Thus, although the Supreme Court would be acting directly contrary to statutory language if it continued use of the exact *Toyota* standard, because the ADAAA leaves the term undefined, the Court remains free to interpret "substantially limits" in a restrictive manner so long as it is arguably lower than the *Toyota* standard.

Similarly, the ADAAA leaves untouched other principles in the ADA that the Supreme Court could define in a manner that restricts employee protections. For example, to sue under the ADA, a plaintiff must be a qualified person with a disability.[255] As explained in Part III, courts initially defined "disabled" narrowly and the ADAAA specifically addresses that line of cases. However, nothing in the ADAAA explicitly prevents courts from aggressively limiting the term "qualified," or

250. ADA Amendments Act of 2008 § 2(a)(7), 42 U.S.C. § 12101 (note) (2012).

251. ADA Amendments Act of 2008 § 2(b)(4)–(5), 42 U.S.C. § 12101 (note) (2012).

252. 42 U.S.C. § 12102 (1), (4)(B).

253. 29 C.F.R. 1630.2(j).

254. *E.g.*, 29 C.F.R. 1630.2(j)(ii) ("An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.").

255. 42 U.S.C. § 12112(a).

imposing strict limitations on the ADA's other protections such as "reasonable accommodation."[256]

In fact, as Widiss's more recent work illustrates, removing shadow precedents alone cannot stop a conservative court from finding ways to narrowly interpret employment discrimination laws.[257] In Widiss's examination of *Gross v. FPL*,[258] a Supreme Court case interpreting the Age Discrimination in Employment Act ("ADEA"), she finds that the Court both misinterpreted a congressional override *and also* disregarded the prior precedent, to fashion a new, conservative interpretation of the ADEA.[259] In that instance, the Court did not need to rely on shadow precedents to pursue its policy aims. It simply pursued those aims unconstrained by relevant override or precedent.[260] Given this, it seems reasonable to predict that, even though the ADAAA rejects certain conservative precedents, conservative courts may nonetheless find room in the ADA to narrow employee protections in a manner that Congress did not intend.

3. ADAAA Decisions to Date Do Not Negate the Prediction

The ADAAA applies to conduct occurring after January 1, 2009, and is not retroactive.[261] As a result, there is currently limited case law interpreting the Act's provisions and, thus far, the results of the available cases appear to be mixed. In a forthcoming article, Kevin Barry analyzes the available decisions to come to an optimistic conclusion about the

256. 42 U.S.C. § 12112(b) (defining illegal discrimination under the ADA to include a failure to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").

257. Widiss, *Undermining Congressional Overrides*, *supra* note 83, 860–63.

258. 557 U.S. 167 (2009).

259. Widiss, *Undermining Congressional Overrides*, *supra* note 83, at 860–63.

260. *Id*. at 862–63 ("*Gross* dramatically changed the terms of debate by following neither the precedent nor the override. . . . [The decision] increases the risk of ideological judging by interpreting overrides to have the anomalous effect of granting courts freedom from the constraints typically imposed by precedent and by Congress. (Notably, *Gross* is an employer-favoring decision issued by a sharply divided Court, with the five 'conservative' Justices making up the majority.)"). Consistent with her prior article, in this latest work, Widiss advocates that the best solution is for the Court to adopt certain presumptions of statutory interpretation that would better capture the true congressional intent when it enacts overrides. *Id*. at 864–65.

261. ADA Amendments Act of 2008 § 8, 29 U.S.C. § 705 (note) (2012). *See also* Reynolds v. Am. Nat. Red Cross, 701 F.3d 143, 151 (4th Cir. 2012) (holding that the ADAAA is not retroactive).

ADAAA.[262] Based on more recent cases decided through July 2012, he concludes that "[w]hile case law under the [ADAAA] is still in its infancy, courts are, for the most part, applying a lower threshold in favor of broad coverage—exactly as Congress intended."[263] To exemplify his point, Barry lists a series of (previously unsuccessful) impairments that have been found to be disabilities under the broad amendments.[264] Barry does find that some courts have overlooked some of the ADAAA's provisions, which he attributes in large part to the failure of the plaintiff's counsel to use the best arguments and pleadings.[265] Barry concludes that these restrictive decisions, however, "are the exception and not a trend—yet."[266]

However, not all interpretations of existing case law are so positive. In December 2012, E. Pierce Blue, special assistant and attorney-advisor to Commissioner Chai R. Feldblum, U.S. Equal Employment Opportunity Commission, published an analysis of ADAAA cases to date.[267] Although he finds some basis for optimism, Blue comes to the "troubling" conclusion that "attorneys and courts are misinterpreting/misreading provisions in the ADAAA."[268] As a result, although he finds that a number of impairments, which were unsuccessful under the prior law, are now surviving summary judgment, he concludes that the misinterpretation of the Act is "frustrating the full potential of the law."[269]

A detailed analysis of the state of ADAAA case law is beyond the scope of this Article. With that said, a review of the ADAAA decisions from January 2012 through July 2013 reveals outcomes consistent with Blue's analysis. Plaintiffs are surviving motions to dismiss or summary judgment by meeting the broader definition of "disabled" under the ADAAA.[270] In a substantial number of cases, however, courts have

262. *See generally* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 1 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240043.

263. *Id*. at 27.

264. *Id.* at 27–31.

265. *Id.* at 32–33.

266. *Id*. at 33.

267. E. Pierce Blue, *Arguing Disability Under the ADA Amendments Act: Where Do We Stand?* 59 DEC FED. LAW. 38, 38 a.1 (2012).

268. *Id*. at 38.

269. *Id.*

270. *E.g.*, Szarawara v. Cnty. of Montgomery, No. CIV. 12-5714, 2013 WL 3230691 (E.D. Pa. June 27, 2013) (finding that Type II diabetes is a disability under the ADAAA); Kravits v. Shinseki, No. CIV. A. 10-861, 2012 WL 604169 (W.D. Pa. Feb. 24, 2012) (finding sleep apnea to be a disability).

dismissed the plaintiffs' claims,[271] often on other grounds, such as finding that the plaintiff was not "qualified."[272] Moreover, in at least a few cases, courts applied shadow precedents of the pre-ADAAA law.[273]

Furthermore, even if the ADAAA is influencing lower court decisions in the intended direction of the law, this does not portend the Act's efficacy at the Supreme Court level. In a 2013 work, Lee Epstein, William M. Landes, and Richard Posner empirically demonstrate that ideology plays a significantly greater role in Supreme Court decisions than in lower court decisions.[274] Therefore, any positive results under the ADAAA to date do

271. *E.g.*, Koller v. Riley Riper Hollin & Colagreco, 850 F. Supp. 2d 502 (E.D. Pa. 2012) (finding that knee surgery and related recovery issues did not create a substantial limitation, thus the plaintiff was not disabled).

272. *E.g.*, Hawkins v. Schwan's Home Serv., Inc., CIV-12-0084-HE, 2013 WL 2368813 (W.D. Okla. May 28, 2013) (finding that the plaintiff was disabled due to a heart condition but not qualified for the position). In order to be an individual covered by the ADA's protections, the plaintiff must show he or she is a "qualified person with a disability." 42 U.S.C. § 12112. More formal studies of ADAAA cases similarly find that although courts granted significantly fewer summary judgment motions on the basis of disability status, courts also granted a greater number of summary judgment motions on the basis of lack of "qualified" status. *See* Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 27, 33 (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314628 (describing these empirical results and concluding that this provides "at least some support for those commentators who harbored doubts about whether the ADAAA would radically transform overall ADA case outcomes in a pro-plaintiff fashion"). *See also* National Council on Disability, *A Promising Start: A Preliminary Analysis of Court Decisions Under the ADA Amendments Act*, 13 (July 23, 2013), *available at* www.ncd.gov/publications/2013/07232013/ ("Assessment of overall outcomes in court decisions interpreting and applying the ADAAA shows that the Act has had a dramatic impact in improving the success rates of plaintiffs in establishing disability. . . . This very positive development is tempered by the recognition that many plaintiffs who prevailed on establishing a disability still lost their cases on other grounds.").

273. *E.g.*, E.E.O.C. v. LHC Grp., Inc., 1:11CV355 LG-JMR, 2013 WL 2251742 at *3 (S.D. Miss. May 22, 2013) (citing *Toyota* to hold that the diabetic plaintiff could not be deemed *per se* disabled and must present evidence that condition was substantially limiting).

274. EPSTEIN, LANDES & PONSER, *supra* note 3, at 236–37. Epstein, Landes, and Posner go well beyond the confines of the models of judicial decision-making presented here to analyze decisions from a labor economics perspective. *Id.* at 5. They do not analyze the impact of Congress and the President on judicial decisions, however. *Id*. at 30. They do find "strong evidence that ideology does influence the [Supreme Court] Justices' judicial votes, and thus the Court's outcomes, in a variety of cases, and that this ideological influence has been growing." *Id*. at 103. Moreover, they find the "biggest ideological voting differences between Justices appointed by Presidents of different parties" in "union, *civil rights*, and due process cases." *Id*. at 113 (emphasis added). In contrast, at the district court level, Epstein, Landes, and Posner find that "whether a Republican or a Democratic President appointed the district judge has no statistically significant effect on the ideological direction of the decision except in cases in which there was no trial, and even in those cases the difference . . . is only 4 percent." *Id*. at 213.

not undermine the prediction that a conservative Supreme Court will interpret the ADAAA according to ideology and restrict its reach.[275]

VI. IMPLICATIONS AND AREAS FOR FURTHER STUDY

The most authoritative current scholarship predicts the ADAAA is likely to fail because it protects minority rights by means of a statute. Although there is ample evidence that courts can be constrained by Congress, the President, and even the force of law, in the realm of employment discrimination, constraints on the judiciary appear to dissipate. This raises serious concerns with respect to the legitimacy and fairness of the courts. As the scholars of judicial decision-making uniformly explain, if Justices engage in an unchecked pursuit of their personal policy preferences, the legitimacy of the courts, itself, is threatened.[276] Moreover, this context-specific refusal to listen to the elected branches gives rise to normative questions as to why this area of policy is treated differently and whether there is anything within the powers of Congress or the President that can shape judicial interpretations of the discrimination laws. As Bailey and Maltzman explain:

> [U]nderstanding the constraints faced by Justices helps us assess and possibly even reform the Court. Whether Justices simply follow their policy preferences affects the manner in which Congress and the President should interact with the judiciary. The optimal appointment process for justices who act as unelected policymakers looks different than one for Justices who operate within legal and institutional constraints. . . . [H]ow we view constraints on the Court [also] affects our normative views of the Court. Is the Court legitimate? . . . [M]ost believe that the Court derives its legitimacy from fealty to the Constitution and the law. A Court that is no different from a legislature may not have any moral standing."[277]

Barnes offers some theories on why minority rights are an area where judges are resistant to congressional influence. He explains that judges may

275. *Cf.* Widiss, *Undermining Congressional Overrides*, *supra* note 83, at 860–64, 891 n.176 (explaining how the Supreme Court acted contrary to consistent lower court precedent to come to an ideological decision on the ADEA that did not adhere to congressional intent).

276. EPSTEIN & KNIGHT, *supra* note 2, at 184 (noting that unconstrained courts are viewed as threatening to normative legitimacy and that if strategic elements are effective at constraining the Courts, the normative concern is mitigated); BAILEY & MALTZMAN, *supra* note 2, at 2 ("If Justices are indeed pursuing their personal policy preferences, those who believe that an independent judiciary undermines our democratic system have a strong argument.").

277. BAILEY & MALTZMAN, *supra* note 2, at 3–4.

be "least deferential when they have an ideological stake in the override issue" and notes that the rights of minorities are "an area in which the courts have long asserted a special role."[278] Barnes elaborates on the implications of his data: "judges believe that shaping minority rights represents their core institutional mission. Accordingly . . . judges seem willing to risk congressional overrides and challenge existing precedent when defining minority rights, even if inconsistent or partisan rule application threatens the appearance of neutrality that arguably bolsters the court's legitimacy."[279] Barnes further suggests that the Court is more activist on statutory protections of minorities because of their proprietary role in the analogous and constitutional realm of Equal Protection.[280]

Undoubtedly, further study of why judges are so resistant to legislative constraint in this area of law is warranted. It also seems appropriate to examine what, if anything, can be done to change this resistance. For decades, Congress, the executive, and various interest groups have expended many resources and much effort to override the Supreme Court's narrow construction of employment discrimination statutes. If this is indeed a futile effort, that strategy needs to be reexamined. The instructional amendments of the ADAAA at least hint at some possible statutory language approaches that are worth further study. The integrated model described above did not test the effect of such statutory language on judicial decisions. Nonetheless, that theoretical framework does at least offer some empirical basis for believing that the law, in the form of precedent, can sway the Supreme Court. Perhaps further study will indicate that the law, in the form of statutory language, can also sway the Court and help legislatures and advocates identify what types of statutory language have this effect. The key factor may be for the legislature to say enough, with sufficient precision. Ultimately, however, judicial resistance to protecting the disabled and other minorities may only change if and when the Supreme Court's ideological balance shifts and a majority of Justices support the protection of employment equality.

278. BARNES, *supra* note 32, at 177.

279. *Id*.

280. *Id*. at 171. *See also* Widiss, *Shadow Precedents*, *supra* note 17, at 537 (agreeing with Barnes on this potential explanation).

VII. CONCLUSION

The political science theories on judicial decision-making have the potential to inform our legal analysis of the unique language of the ADAAA. The ADAAA's direct purpose is to overturn Supreme Court precedent. Specifically, the ADAAA identifies a series of Supreme Court decisions that have incorrectly interpreted the original ADA definition of "disabled."[281] Instead of changing that definition, however, the ADAAA includes "instructional amendments" that direct the courts to reject the prior precedent and to interpret the *same* statutory language in a different way.[282] The ADAAA leaves crucial statutory language in the identical form that the Supreme Court originally interpreted; therefore, the Court will only change that interpretation if it is influenced by congressional and executive intent. In light of this, the various models of judicial decision-making and their respective predictions of the degree to which the legislature and executive actually constrain the Supreme Court seem particularly useful as a basis for predicting the effect of the ADAAA.

One of the dominant theories, the attitudinal model, asserts that judges are political actors who find a way to interpret law consistently with their policy preferences, unchecked by outside influence.[283] Another dominant theory, the strategic model, claims that the judiciary's political preferences are, at least to some degree, influenced by or subject to the control of outside actors, including the executive and legislature.[284] More recently, integrated models have emerged that take the best of these theories and offer a more nuanced application of their principles.[285] All models have different views on whether and to what degree congressional and executive preferences influence Supreme Court decisions.[286] The dominant studies, however, have not generally examined the effect of enacted statutory overrides, such as the ADAAA.[287]

281. ADAAA § 2(a)(3)–(7), 42 U.S.C. § 12101 (note).

282. *See supra* Part III.B.2.

283. SEGAL & SPAETH, *supra* note 3, at 86; BAILEY & MALTZMAN, *supra* note 2, at 4–6.

284. EPSTEIN & KNIGHT, *supra* note 2, at 10, 13.

285. *E.g.*, BAILEY & MALTZMAN, *supra* note 2, at 15–16.

286. *Compare, e.g.*, SEGAL & SPAETH, *supra* note 3, at 86–97, 320–25 (2002) (noting that Justices decide cases based on ideology, unconstrained by law or other branches of government), *with* EPSTEIN & KNIGHT, *supra* note 2, at 9–18, 139–57 (showing that Justices are constrained by a number of forces including institutions of government).

287. *E.g.*, SEGAL & SPAETH, *supra* note 3, at 312–26 (analyzing the risk of override, not the effect of enacted overrides).

The few available studies analyzing enacted overrides can enhance the prediction of the ADAAA's effect. Specifically, incorporating analyses of enacted overrides reveals that statutory protections of minority rights are a singular category of cases in which the Justices feel most free to follow their particular political preferences and unconstrained by the co-equal branches in that pursuit.[288] This Article therefore predicts that, if the Supreme Court majority is conservative at the time of a decision on the new law, then the ADAAA will fail to achieve its purpose of broadening the protection of disabled employees. This raises important normative and practical concerns that should be incorporated into the study of and advocacy for federal anti-discrimination laws.

288. BARNES, *supra* note 32, at 171.