

Articles

Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011

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Once upon a time, law professors and political scientists assumed that the Supreme Court was, as a practical matter, the final word on matters of statutory interpretation. Although Congress as a formal matter could alter a judicial construction with a statutory amendment, the conventional wisdom was that it rarely did so. In 1991, that conventional wisdom was shattered by one of our's empirical study demonstrating that congressional *overrides* of Supreme Court statutory interpretation decisions blossomed in the period between 1967 and 1990.¹ Later that year, Congress enacted the Civil Rights Act (CRA) of 1991, overriding as many as twelve Supreme Court decisions that had significantly cut back on workplace antidiscrimination protections.²

Since 1991, legal and political science scholarship has confirmed the importance of federal statutory overrides and has explored their incidence.³

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1. William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 app. 1 (1991); *see also id.* app. 1 at 424–41 (reporting statutory overrides of 121 Supreme Court statutory interpretation decisions).

2. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.); *see also infra* Appendix 1 (listing Supreme Court statutory decisions overridden by the 1991 CRA).

3. For important empirical analyses, *see, for example*, Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013); Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of*

Scholars have also debated what they tell us about Court–Congress interaction, as well as how they have been integrated (or not) into statutory policy and even constitutional norms.⁴ The override phenomenon has not gone unnoticed among Supreme Court Justices, who periodically invoke this tradition in important cases, including one overridden by the 1991 CRA.⁵ In June 2013, Justice Ginsburg reminded the Court that “Congress has, in the recent past, intervened to correct this Court’s wayward interpretations of Title VII” and importuned Congress to correct the Court once again after its decision in *Vance v. Ball State University*⁶ narrowed protections against workplace sexual harassment.⁷

Recently, however, the *New York Times* claimed that overrides had fallen off dramatically after 1991 and that in the new millennium “[t]he number of overrides has fallen to almost none.”⁸ Responding to this possibility, our current study updates the 1991 Eskridge study, bringing the overrides record forward twenty years (so accounting for overrides 1967–2011) and improving upon the methodology for identifying overrides, as

Congressional Responses to the U.S. Supreme Court, 30 LEGIS. STUD. Q. 5 (2005); Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353 (1994); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992); Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT’L REV. L. & ECON. 503 (1996); and Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340 (2007).

4. For some important normative examinations, see, for example, JEB BARNES, *OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* (2004); EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008); WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* (2004); James J. Brudney, *Distrust and Clarify: Appreciating Congressional Overrides*, 90 TEXAS L. REV. SEE ALSO 205 (2012); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); Staudt et al., *supra* note 3; and Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEXAS L. REV. 859 (2012).

5. *See* *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 112–15 (1991) (Stevens, J., dissenting) (assailing the “purely literal approach” of the majority opinion and citing recent examples of congressional overrides).

6. 133 S. Ct. 2434 (2013).

7. *Id.* at 2466 (Ginsburg, J., dissenting) (citing the 1991 CRA and Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, which overrode *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)). In her blistering *Ledbetter* dissent, Justice Ginsburg invited Congress to overrule the majority’s opinion. *See Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting) (“[T]he Legislature may act to correct this Court’s parsimonious reading of Title VII.”); *accord* *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2547 (2013) (Ginsburg, J., dissenting) (calling for “yet another Civil Rights Restoration Act”).

8. Adam Liptak, *In Congress’s Paralysis, a Mightier Supreme Court*, N.Y. TIMES, Aug. 20, 2012, <http://www.nytimes.com/2012/08/21/us/politics/supreme-court-gains-power-from-paralysis-of-congress.html> (quoting Professor Richard L. Hasen of the University of California, Irvine).

described in Part I. Like the earlier study, the current one treats as an override any statute that “(1) completely overrules the holding of a statutory interpretation decision, just as a subsequent Court would overrule an unsatisfactory precedent,” or “(2) modifies the result of a decision in some material way, such that the same case would have been decided differently,” or “(3) modifies the consequences of the decision, such that the same case would have been decided in the same way but subsequent cases would be decided differently.”⁹

Contrary to the *New York Times* and to a 2013 override study by Richard Hasen¹⁰ (which was the basis for the *Times*’s claim),¹¹ Part II of the current study finds that the 1990s was actually the golden age of overrides, with an unprecedented explosion of statutes resetting statutory policy in important ways. After 1998, however, we found that overrides declined as dramatically as they had ascended, though they have not (yet) “fallen to almost none.”

Overrides never went away, but the climate for overrides has changed. To appreciate the new era, Part III suggests an important distinction. The most-publicized overrides, such as the 1991 CRA, are what we call *restorative* overrides: maintaining that the Supreme Court has reneged on historic legislative commitments, Congress “restores” what it considers the correct understanding of the statutory scheme, often the understanding that an agency had implemented before being rejected by the Court. Restorative overrides such as the 1991 CRA are an important phenomenon and include other landmark statutes, such as the Pregnancy Discrimination Act of 1978,¹² the Voting Rights Act Amendments of 1982¹³ and the Voting

9. Eskridge, *supra* note 1, at 332 n.1. Thus, we do not consider statutes passed in response to Supreme Court decisions based on common law or constitutional grounds, see Ryan Eric Emenaker, *Constitutional Interpretation and Congressional Overrides: Changing Trends in Court-Congress Relations*, 3 J.L. (2 J. LEGAL METRICS) 197 (2013), nor do we include statutes that do nothing more than codify points of law announced by the Supreme Court, e.g., Act of June 30, 1967, Pub. L. No. 90-40, § 1(7), 81 Stat. 100, 104 (codifying *United States v. Seeger*, 380 U.S. 163 (1965)), or that decline to extend a Supreme Court baseline presumption to a different statutory scheme, e.g., Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. 110-175, § 4, 121 Stat. 2524, 2525 (inserting specific text to head off application of the interpretive presumption applied to a different statutory scheme in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Services*, 532 U.S. 598 (2001)); *infra* note 155 (listing other instances where we did not count this kind of provision as an override).

10. See Hasen, *supra* note 3, at 217 (concluding that “congressional overruling of Supreme Court cases slowed down dramatically since 1991”).

11. See Liptak, *supra* note 8 (citing Hasen’s study and claiming the Supreme Court “almost always has the last word”).

12. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2006)).

13. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973b (2006 & Supp. V (2012))).

Rights Act Reauthorization and Amendments Act of 2006,¹⁴ the ADA Amendments Act of 2008,¹⁵ the Lilly Ledbetter Fair Pay Act of 2009,¹⁶ and the Family Smoking Prevention and Tobacco Control Act.¹⁷ Justice Ginsburg's dissent in *Vance* urged Congress to restore the proper law for Title VII precisely along these lines. Most restorative overrides involve high-salience issues of public law, such as civil and political rights. Many of them divide Congress along strict party lines—more so today than twenty years ago.

Part III makes clear, however, that the large majority of overrides are not well-publicized restorative overrides like the 1991 CRA—but are instead more routine *policy-updating* overrides, namely, override statutes frequently supported by bipartisan majorities in Congress that have as their stated goal the updating of public law, rather than “correction” of judicial mistakes. Updating overrides often occur years, decades, or, in two cases, centuries, after the Supreme Court decisions being overridden and do not reflect ideological rebuffs of the Court. Landmark statutes such as the Copyrights Act of 1976,¹⁸ the Bankruptcy Reform Act of 1978,¹⁹ the Judicial Improvements Act of 1990,²⁰ the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996,²¹ the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,²² the Telecommunications Act of 1996,²³ and the IRS Restructuring and Reform Act of 1998,²⁴ are just some examples of broad bipartisan laws that ambitiously reset statutory policies and, in the process, override bushels of Supreme Court opinions. Notably, it is these policy-updating overrides, and not so much the restorative ones, that have dried up most dramatically after 1998.

In Part IV, we examine characteristics of Supreme Court decisions that render them particularly susceptible to being overridden by Congress. We

14. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified in scattered sections of 42 U.S.C.).

15. Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 42 U.S.C.).

16. Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29, 42 U.S.C.).

17. Pub. L. No. 111-31, div. A, 123 Stat. 1776 (2009) (codified in scattered sections of 5, 10, 15, 21 U.S.C.).

18. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

19. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.).

20. Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered titles of U.S.C.).

21. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of U.S.C.).

22. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered titles of U.S.C.).

23. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18, 31, 47 U.S.C.).

24. Pub. L. No. 105-206, 112 Stat. 685 (codified as amended in scattered titles of U.S.C.).

present our findings both generally (as applied to all 275 Supreme Court decisions in our study) and as applied to decisions targeted by restorative overrides like the 1991 CRA. We found statistically significant correlations between a congressional override of a Supreme Court statutory interpretation decision and the following variables:

- close division (plurality or 5- or 6-Justice majority) among the Justices when deciding the case;
- judicial rejection of the interpretation offered by a federal agency and usually defended by the Solicitor General;
- judicial narrowing of federal regulation, except in tax and intellectual property cases, where regulation-friendly interpretations are often overridden;
- reliance on plain meaning of statutory texts, especially when such reliance depends critically on whole act and whole code arguments or flies in the face of strong legislative history; and
- invitations for Congress to override, issued by majority, concurring, or even dissenting Justices.

We do not offer a causal account, only a strong set of correlations that might be the basis for probabilistic analysis. If the past is any guide, the Court's interpretation of Title VII in *Vance* ought to be vulnerable to a congressional override. A failure of Congress to override *Vance* in this decade would support the hypothesis that the current downturn in override activity is a long-term trend and will persist into the next presidential administration.

The big override winners are governmental institutions, as Parts III–IV document. Federal agencies win almost seventy percent of their cases before the Supreme Court, and Congress is much less likely to override the Court when a federal agency defends the Court's decision. Conversely, when the Court rejects a federal agency interpretation, that decision is much more likely to be overridden by Congress than the average Supreme Court decision, much less a decision supported by the agency. More generally, we found that the Department of Justice or another federal agency was noticeably involved in seventy percent of the 275 overrides reported in our study—and the agency view prevailed with Congress in three-quarters of those overrides.

In the last portions of this Article, we step back and consider some normative issues. We know that congressional overrides are, as a practical matter, the result of the sequential policymaking process of our separation of powers: Agencies and courts make important policy decisions, to which Congress often responds with statutory overrides. Part V explores the normative question: What values and goals does an override potentially serve? Do overrides actually serve those goals? We consider three important public-regarding goals: the predictable operation of the rule of

law, democratic legitimacy, and institutional efficiency and good public policy. Especially when adopted through an open and deliberative process, overrides most clearly serve democratic legitimacy goals—but we were surprised that overrides also frequently advanced rule of law values. Tentatively, from an empirical perspective, our study also supports the proposition that most overrides often advance the goal of “good” public policy—and almost always update public policy to reflect current values and priorities.

In Part VI, this Article deploys our findings to support some normative suggestions for the institutions that create and elaborate upon policy in our republic of statutes. We offer these suggestions in a spirit of realistic resignation: our study helps us understand the role each branch of government plays in national governance, and from that deeper understanding we offer some ideas about how each branch might play a more productive role in the process of statutory elaboration reflected by our study and how each branch might adapt to the new reality of fewer overrides.

For Congress, the central lesson of our study is that overrides are a sign of health for the greatest legislature in history: when Congress is churning out overrides of Supreme Court statutory decisions, it is making solid contributions to the legitimate evolution of public policy and even the rule of law. We are impressed with the ability of Congress to advance public projects after a transparent and deliberative process in which leading stakeholding groups and institutions are well represented. Indeed, one of the most surprising features of our study is that *Carolene*²⁵ groups and women fare better in the legislative process than in the judicial one. Another surprising feature is that conservative policies fare almost as well as liberal ones when Congress overrides the Court—so there is no necessary partisan political reason to reject or denigrate overrides.

Overall, the override process has operated pretty effectively (until recent years), and we have only a modest suggestion for improvement. That is, Congress ought to create a statutory certification process: if six Justices in a statutory case certify the issue to Congress, and if the substantive committees in each chamber report an override bill, our certification legislation would provide fast-track procedures for the override proposal to be considered and voted upon by each chamber (with filibusters, for example, eliminated).

Looking forward, Congress needs to pay greater attention to how courts interpret and apply overrides. In particular, the drafting offices or committee staff ought to bring to the attention of legislators the practical

25. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (articulating more aggressive judicial review for laws harming “discrete and insular minorities”).

effect of statutory overrides: by adding specific statutory protections in one place, Congress runs the risk of negating them elsewhere. It may be asking too much of congressional staff to search the entire U.S. Code for provisions that might be affected by changes to a provision the Court has construed narrowly—but there is another remedy those offices ought to consider: an amendment to the Dictionary Act (1 U.S.C. § 1 et seq.) negating the rule of meaningful variation for a particular statutory issue. Like many state legislatures, Congress might consider codifying certain canons (such as those reflecting the value of legislative history) that reflect legislative assumptions, as well as seeking to negate other canons (such as rules of negative implication). Perhaps most important, both committee and legislative drafting staff ought to make choice of enforcement an even more important focus for drafting and finalizing proposed legislation. If the enacting coalition wants legislation to be implemented in a manner that is more responsive to current political preferences and practical policy needs, and relatively less constrained by accidents of textual construction, the coalition should provide for implementation by an agency. On the other hand, if the enacting coalition is concerned that the relevant agency will be more responsive to presidential or interest-group influence, its proposed legislation should tilt toward judicial rather than administrative interpretation.

Our study demonstrates the importance of the Executive Branch to the legislative process, generally, and to the override process in particular. Article I, Section 7 of the Constitution gives the President a formal role in the legislative process,²⁶ and commentators have pointed to the President's power that flows from his or her leadership of a political party²⁷—but our study reveals the deeper involvement of the Executive Branch in legislative updates and overrides of landmark statutes. Federal agencies, especially the Department of Justice, play a critically important role in the override process—bringing issues to the attention of Congress, working with legislative staff to draft override legislation, and lobbying for such legislation (as well as implementing it). The Executive Branch process is both deliberative and effective.

Ironically, the decline of overrides reveals an even more dramatic role for the Executive Branch, which stands to assume a great deal more power when Congress leaves policy vacuums. If Congress remains unable to respond to Supreme Court decisions with override statutes, presidential and agency responses will increase, both in number and significance. If we are right that overrides serve important policy-updating purposes, then one

26. U.S. CONST. art. 1, § 7.

27. *See, e.g.*, GEORGE C. EDWARDS III, *AT THE MARGINS: PRESIDENTIAL LEADERSHIP OF CONGRESS* (1989).

would expect more *administrative overrides* of outdated Supreme Court decisions. As we demonstrate, agencies can often work around Supreme Court decisions or even override them altogether; we suggest a legitimate process by which agencies might accomplish this goal.

A further irony is that the Supreme Court, like Congress and the President, benefits from the override process, for it allows the Justices to avoid political heat for controversial policy updating and it frees up the Court to focus on the rule of law duties at which it excels. For example, the Court's super-strong *stare decisis* for statutory precedents rests upon a robust override process—and now that this process has dried up the Justices face new challenges in keeping the rule of law current as well as predictable. Additionally, the process we have described provides normative support for the Court's many *override-inviting canons* of statutory construction, such as the rule of lenity. Indeed, we propose a meta-canon, whereby close statutory cases ought to be resolved in favor of interests not well represented in the legislative process; our data show that very few overrides advance the interests of the poor or prisoners, especially when compared to the vast number of overrides addressing the interests of businesses, women, state and local governments, racial minorities, prosecutors, financial institutions, the disabled, and environmental organizations, to name a few.

A moribund override process leaves the Supreme Court with potentially more power to impose its (libertarian) values onto statutes, such as Title VII, which has been the source of much contention. Overall, however, we believe that long-term trends support a view of the Court as deferential to agency interpretations, a stance reflected in the Court's *Chevron*²⁸ jurisprudence. So long as congressional overrides remain scarce, as they have in recent years, we predict that the Court will usually (but not always) defer to administrative overrides. Indeed, this is precisely the point of the Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*,²⁹ which held that an agency was not bound by judicial precedents affirming previous agency views because they were within the agency's discretion under the statute.³⁰ Just as the Court welcomes most congressional overrides of its statutory decisions, so it will accept most administrative overrides.

This Article will conclude with some thoughts about the possibility that statutory overrides have sunk into a permanent funk, a prospect we

28. *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

29. 545 U.S. 967 (2005).

30. *See id.* at 981–86 (holding that judicial precedent can only trump agency deference when that governing statute makes the preemption unambiguous).

consider unlikely.³¹ As Professor Hasen has argued, the effect of governance without overrides would be “to empower the Court over Congress” in the short term and to threaten the legitimacy of the Court in the longer term.³² But we think the more important effect of a long-term override drought would be to empower the President and executive, as well as independent, agencies. Because the large majority of overrides are policy updates that transcend ideology, to some extent, the failure of Congress to update statutes would present an opportunity, and a strong public need, for the Executive Branch to fill the vacuum through agency updating, perhaps encouraged by White House organs such as OIRA. In turn, the Supreme Court would be under pressure to acquiesce in agency updating. Although we view governance without overrides as a distinctly inferior world, we urge the Court to take an even more tolerant view of agency updates, with less dogmatic statutory readings when reviewing those updates and more attention to the agency discretion underlying *Brand X*.³³

I. Methodology: Counting and Coding Overrides

It is hard to do empirical studies of statutory overrides, because it is very hard to find them all. Adding to our headaches, sometimes it was not easy to figure out whether some congressional responses were overrides or were partial codifications of Supreme Court statutory opinions. We have done a much better job identifying statutory overrides than any previous study has done, including the 1991 Eskridge study. Yet surely we have missed a few.

Once we identified an override, we coded both the Supreme Court decision and the statutory provision overriding it. This, too, proved difficult, but for a different reason: even when grounded upon factual research, some of the judgments involve an element of subjectivity. For that reason, we relied on Eskridge to code all the Supreme Court decisions and Christiansen and our research assistants to code all the override statutes, trying to make the judgments as consistent as possible.

31. In the short term, i.e., the remainder of the Obama Administration, we see no realistic possibility for a revival of statutory overrides, but in the medium and long term, they seem likely to make a comeback simply because there is bipartisan need for legitimate updating of statutory policy, which is the dominant story for overrides in the last two generations, but which have largely disappeared since the Clinton impeachment.

32. See Hasen, *supra* note 3, at 210.

33. 545 U.S. at 981–86. As we shall explain in the Conclusion, the Court in *Brand X* acknowledged that agencies operating within the discretionary boundaries of *Chevron* are sometimes not confined by judicial precedents handed down without the benefit of the agency’s views. See *id.* at 982–83. Of course, the agency remains limited by judicial precedents that define the limits of its discretion under *Chevron*. *Id.*

A. *Finding the Overrides*

In her 1983 study, political scientist Beth Henschen was the first scholar to engage in a reasonably thorough effort to identify all statutory overrides as well as codifications of Supreme Court decisions in a particular area of law (labor and antitrust) over a lengthy period of time (1950–1972).³⁴ Legal scholar Nancy Staudt and her colleagues recently engaged in a reasonably thorough effort to identify all statutory responses (codifications as well as overrides) to Supreme Court decisions in a particular area of law (tax) for a lengthy period of time (1954–2005).³⁵ The 1991 Eskridge study was the first reasonably thorough effort to identify all statutory overrides of Supreme Court statutory interpretation decisions for a lengthy period of time (1967–1990).³⁶

The methodology of the 1991 Eskridge study was simple but laborious: the author and his research assistants³⁷ identified all references to Supreme Court statutory interpretation opinions contained in the House and Senate committee reports published in the *U.S. Code Congressional and Administrative News* for each Congress and then determined whether the final statute included a provision significantly altering either the point of law, the result in the Supreme Court's opinion, or both.³⁸ This previous study did *not* identify as an override a statute containing legislative history critical of a Supreme Court decision *unless* there was a specific statutory provision that created a different point of law.³⁹ Nor did that study count as

34. See Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441 (1983) (reporting legislative responses, including codifications as well as overrides, to the Supreme Court's labor and antitrust decisions); see also Beth M. Henschen & Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J.L. & POL. 685 (1989) (examining how the Supreme Court's labor and antitrust decisions have affected congressional agenda-setting). Most, if not all, of the earlier efforts to report congressional overrides were anecdotal or case studies rather than systematic efforts to identify all overrides for a particular period of time. For an excellent article along these lines, see Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301 (1988).

35. See Staudt et al., *supra* note 3 (delineating how many Supreme Court tax cases between 1954 and 2004 led to a congressional response, how many times Congress cited a case positively or negatively, and how many cases yielded congressional proposals for codification or reversal).

36. See Eskridge, *supra* note 1, at 335 & nn.5–6 (surveying prior override studies).

37. Primarily Kathleen Blanchard and Robert Schoshinski, as well as Amy Birnbaum, Dixon Osburn, Jami Silverman, Ken Smurzynski, and Stuart Weichsel. All were wonderful students at the Georgetown University Law Center.

38. Eskridge, *supra* note 1, at 418–19.

39. *Id.* at 419 & n.309. In a similar way, the current study does not include the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 104, 109 Stat. 737, 757 (codified as amended at 15 U.S.C. § 78t (2012)), as an override (though we do include § 101 of the same statute). Although congressional committees heard testimony that was critical of the Court's failure to recognize a private cause of action for aiding and abetting securities fraud in one case, *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), see, e.g., S. REP. NO. 104-98, at 48–49 (1995), the statute left the private cause of action provisions alone and,

overrides statutes that codified, without significant change, the point of law found in an earlier Supreme Court opinion.⁴⁰ Also not overrides, for purposes of that and of the current study, were statutes overriding a Supreme Court decision that were interpretations of the Constitution or of federal or state common law.⁴¹ Finally, the 1991 study and the current one tried to avoid inflation in our findings; that is, we identified as an overridden Supreme Court decision only the leading case, and we did not include the Supreme Court decisions that did nothing more than routinely apply its point of law.

The methodology of the 1991 Eskridge study uncovered 121 Supreme Court statutory interpretation decisions overridden by Congress between 1967 and 1990—more than anyone had imagined would be the case. For the first time, legal as well as political science scholars started treating statutory overrides as a significant phenomenon in national governance.⁴²

instead, empowered the SEC to prosecute such activities, *see* § 104, 109 Stat. at 757. Section 104 was a congressional *response* to the Supreme Court decision, but not an override of the decision.

40. Eskridge, *supra* note 1, at 419 & n.311; *supra* note 9. For another example, the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(a), 104 Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367 (2012)), codified and expanded upon ancillary jurisdiction recognized in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 721–29 (1966). Hence, neither the 1991 Eskridge study nor the current study included this provision as an override of Gibbs, although § 310(a) did override other decisions.

41. Eskridge, *supra* note 1, at 418 & nn.304–05. For example, the Federal Employees Liabilities Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694, §§ 5–6, 102 Stat. 4563, 4564–65, overrode the Supreme Court’s decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), but was not an override for purposes of the 1991 Eskridge study or for the current study because the Court’s decision was entirely an interpretation of the federal common law of federal employee liability. Both the 1991 study and the current one do, however, include statutes overriding decisions that interpreted both the common law and federal statutes. *See, e.g.*, Longshoremen’s & Harbor Workers Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1251, 1263 (codified as amended at 33 U.S.C. § 905 (2006)) (overriding *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which interpreted both common law and statutory law).

42. *See, e.g.*, BARNES, *supra* note 4 (studying the effectiveness of congressional overrides); Brudney, *supra* note 4, at 205 (commenting on Professor Widiss’s articles regarding the Supreme Court’s “shadow precedents” and hydra-like tendencies when interpreting statutes); Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162 (1999) (examining the Court’s “invitations” for congressional revision and the Justices’ potential motivations behind these invitations); Hettinger & Zorn, *supra* note 3 (explaining how congressional overrides function within the separation-of-powers system according to both case-specific and branch-specific influences); Ignagni & Meernik, *supra* note 3 (discussing how electoral considerations and pressures influence congressional counteraction toward the Supreme Court); Spiller & Tiller, *supra* note 3 (applying a rational choice model of judicial behavior to the Supreme Court’s “invitations to override”); Staudt et al., *supra* note 3 (collecting and examining statutory codifications as well as overrides of tax decisions); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009) (identifying and examining the implications of “shadow precedents,” whereby the Supreme Court continues in some degree to apply a congressionally overridden precedent).

The 2007 Staudt study expanded the agenda to consider congressional codifications as well as overrides of Supreme Court decisions in tax cases.⁴³ We have not tried to identify all congressional codifications of Supreme Court decisions in all areas of statutory law; it is even harder to find all codifications, and the new methodology we deploy in this study (described below) would not be helpful to fill the inevitable gaps.

Strongly at odds with the assumptions of the post-1991 studies,⁴⁴ legal scholar Richard Hasen deployed the committee-report methodology of the 1991 Eskridge study⁴⁵ and reported that, after 1991, statutory overrides plummeted and, since 2009, have “slowed to a trickle.”⁴⁶ We have found more overrides than the 2013 Hasen study did, especially for the 1990s. The paucity of overrides in his study is, in large part, the result of the radical decline of committee reports as a useful source of information for major legislation.

In part motivated by the diminished value of committee reports after 1990, we turned to supplemental methods for discovering overrides. We located on Westlaw every Supreme Court decision between 1964 and 2010 and inquired of Westlaw the subsequent citation history of the Supreme Court opinion. For a large number of cases, Westlaw identified the Court’s opinion as having been “superseded by statute,” “superseded by statute/rule,” or “called into doubt by statute” and referred the reader to subsequent legal documents (usually lower court opinions) discussing the legislative response to the Supreme Court decision in question. We read all of those leads and the statutes they cited to determine whether the later mentioned statute was actually an override as we are using the term.⁴⁷ About half the time, they were not overrides, but this was still an invaluable source of data because it provided concrete leads that we then investigated and evaluated. Thus, not only were a large majority of the overrides after 1990 discovered by this Westlaw method, but we discovered many new overrides for the earlier period as well (1967–1990). Hence, the current study updates and adds to the 1991 Eskridge study.

43. Staudt et al., *supra* note 3.

44. Indeed, the leading political scientist opined that statutory overrides need to *increase* in the new millennium “because today’s statutes may be increasingly prone to obsolescence and inconsistency” and the judiciary is “increasingly overwhelmed” by the flood of statutes. BARNES, *supra* note 4, at 34.

45. See Hasen, *supra* note 3 app. IV at 259–61 (describing the author’s methodology and indicating that he included rather than excluded “questionable” overrides to make sure he was not undercounting the overrides).

46. *Id.* at 217–18.

47. Specifically, both Christiansen and Eskridge read the Westlaw leads and made independent evaluations as to the existence of a statutory override. Disagreements were resolved by further research on our part and by our excellent research assistants, specifically, Peter Chen, Chris Lapinig, Sam Thypin-Bermeo, and Jacob Victor.

The process of following up on the Westlaw leads and of coding the Supreme Court decisions generated yet more overrides. The coding process also weeded out statutory responses that we originally considered to be overrides but which reflection and input from our research assistants persuaded us were not overrides as we have used the term.⁴⁸ Appendix 1 reports the statutory overrides, Supreme Court statutory opinions overridden, and the subject matter of the overrides that we found using *both* the committee-report method of the 1991 Eskridge study *and* the Westlaw method of the current study. Altogether, we have assembled 286 overrides of 275 Supreme Court decisions that had interpreted a federal statute.

B. Coding the Overridden Supreme Court Cases

We coded each of the 275 overridden Supreme Court decisions. In addition to routine information, such as the name of the case and its citation, we identified for each case the votes of each participating Justice and the reasoning followed by the majority, concurring, and dissenting opinions. For the reasoning, we largely followed Professor James Brudney’s methodology for coding Supreme Court statutory interpretation decisions.⁴⁹ Specifically, we coded each separate opinion to determine

48. See *supra* text accompanying note 9 for our definition of “override.” For a tough case under our criteria, see, for example, *Brecht v. Abrahamson*, 507 U.S. 619 (1993). It appears that Congress may have overridden *Brecht*’s “substantial and injurious effect” standard of harmless error review, *see id.* at 637, in the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (codified at 28 U.S.C. § 2254 (2012)). However, that override was not obvious to us, nor did we find legislative history targeting *Brecht*. Moreover, in *Fry v. Pliker*, 551 U.S. 112, 119–20 (2007), the Supreme Court plausibly ruled that *Brecht*’s standard of review was codified in, and not overridden by, AEDPA. In the end, we did not include *Brecht*. For a tough case going the other way, see *Teague v. Lane*, 489 U.S. 288 (1989), which was overridden by AEDPA § 104. *Teague* established a dichotomy wherein “old rules” of criminal procedure announced by a court could apply retroactively to cases already decided, but that “new rules” could not. *See* 489 U.S. at 294–96 (limiting the applicability of new procedural rules); *id.* at 305–10 (plurality opinion) (detailing the contours of retroactivity). *Teague*, however, had two exceptions: one “if [the new rule] places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” and a second if the new rule established a “watershed rule[] of criminal procedure.” *Id.* at 311 (internal quotation marks omitted). AEDPA adopted the standards established in *Teague* but without explicitly mentioning the exceptions. *See* AEDPA sec. 104, § 2254(d)(1); *see also* *Williams v. Taylor*, 529 U.S. 362, 382 (2000) (plurality opinion) (recognizing the effect that AEDPA had on *Teague*); *id.* at 402–13 (majority opinion) (same). Moreover, AEDPA also required that the rule be clearly established by the Supreme Court, *see* AEDPA sec. 104, § 2254(d)(1), thereby limiting the role for lower federal courts both in announcing rules for the purpose of *Teague* and in recognizing an old rule’s retroactivity. *See* *Rodriguez v. Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 274 (1st Cir. 1998), *abrogated on other grounds by* *Bousley v. United States*, 523 U.S. 614, 622 (1998). For these reasons we have included *Teague* as an override.

49. The pioneering article for coding Supreme Court statutory decisions was James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005), which we followed in William N. Eskridge Jr. & Lauren E. Baer, *The*

what sources of statutory meaning the opinion discussed or invoked to support its conclusion. We not only coded for such basic sources of meaning as the plain meaning rule, the whole act rule, legislative history, statutory precedents, and deference to agency interpretations—but we also coded for the most prominent canons of statutory construction, such as the dictionary canon and the rule of lenity. And we coded for whether the opinion implored Congress to respond with a statutory override.⁵⁰ Because academics as well as judges focus so much on statutory plain meaning, often to the exclusion of contextual evidence, we recorded for each case whether the majority and dissenting opinions clashed on whether there was a plain meaning.

The large majority of overridden decisions attracted amicus briefs, which helped us identify the “winners” and the “losers” of the Supreme Court decisions that were overridden. We were most interested in the views of state attorneys general and, especially, the Solicitor General, who participated in most of the overridden Supreme Court cases, either as a party or as an amicus. From the government’s briefs and the opinions themselves, we derived information about the success of agency interpretations before the Court, the authority invoked by the agency, and the role of formal deference regimes in the various opinions in the case.

Appendix 2 reports the specific criteria and some explanation for our coding of the overridden Supreme Court statutory interpretation decisions.

C. *Coding the Overrides*

We coded each of the 286 overrides. For each Supreme Court decision overridden by statute, we identified not only the basic data (public law number and location in the *Statutes at Large*), but also the precise section or title of the statute that overrode the Court’s decision. How quickly was the override delivered by Congress? Was it delivered in a stand-alone statute, whose only point was to override the Court? Or was the override part of a comprehensive piece of legislation?

We were most interested in what override supporters, both inside and outside of Congress, represented to be the basic purpose of the override. Was the stated motivation primarily “restorative” (rebuking the Court for a “bad interpretation” and reinstating Congress’s understanding of its earlier

Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 GEO. L.J. 1083 (2008).

50. The academic literature has focused so much on Supreme Court “invitations” for Congress to respond to, and override, its results in statutory cases—but no one has ever collected all the instances where the Court has issued such invitations and Congress has responded. Hence, we not only coded for this feature, but we read every Supreme Court statutory opinion for seven Terms (1960, 1970, 1975, 1985, 1990, 1995, and 2005) to see how often the Court issues such “invitations” and how often Congress responds with an override.

purpose), was it “policy updating” (correcting what had emerged as a “bad policy”), or was it “clarifying” (cleaning up “confusion in the law” or supplying details that have little effect on policy)?

We also explored the direction and depth of the congressional override. Thus, each override was coded for political valence: Was Congress shifting policy in a conservative direction? A liberal direction? Or neither? We also coded for how thoroughly or deeply Congress overrode the Court’s point of law: Was the override a marginal one, merely modifying the point of law or adding some exceptions, without necessarily producing a different result in the case at hand? Or would the override have changed the result of the case as well as the point of law? More deeply, was the override an effort by Congress to renounce the reasoning as well as the result and the point of law? Obviously, the last would be the deepest form of override, and most commonly associated with restorative overrides.

Another primary focus of our override coding was to determine the “winners” and “losers” in the congressional override process. To make these determinations, our research assistants and we poured through the legislative history to figure out which interests and institutions supported the precise provision(s) that overrode the Court’s decision (so, who won?) as well as those opposed to the provision(s) (so, who lost?).

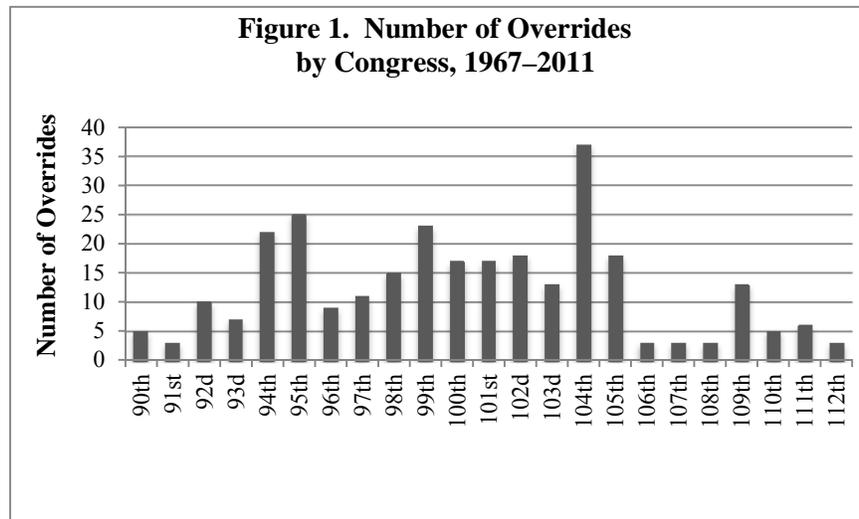
To help determine how much the override “mattered,” we coded the judicial response to each override: Were there reported cases interpreting or applying the new override provision? If so, did the override yield judicial consensus—or did it yield significant disagreement among judges? Relatedly, did judges nullify the override, either by striking it down as unconstitutional or by giving it an exceedingly narrow construction? Or did judges apply the override normally, i.e., applying its plain meaning in a reasonable way? Or did courts apply the override liberally, to reflect a broader principle of law? These questions allowed us to gain a perspective on how overrides affected the rule of the law in practice, which, in turn, allowed us to ground our normative recommendations in how overrides are actually applied by the judiciary.

Appendix 3 reports the coding criteria and categories that we applied to each of the congressional overrides.

II. Rise and Decline of Overrides, 1967–2011

We found overrides in every Congress between 1967 and 2011 (inclusive), and many overrides in most of the Congresses. Figure 1 sets forth, for each Congress between 1967 and 2011, the number of Supreme Court decisions overridden in that Congress. Overall, the primary phenomenon is that the number of congressional overrides of Supreme Court statutory interpretation decisions dramatically increased, starting with the post-Watergate 94th Congress and ending with the impeachment of President Bill Clinton in the 105th Congress (1975–1998, a period of

twenty-four years). Since Clinton's House impeachment and Senate trial in 1998, there has been a significant fall-off in the number of statutory overrides.



The boom in overrides started with the Democrats' post-Watergate landslide in the 1974 off-year elections. For the next twenty years, the Democrat-dominated Congress was energized, aggressive, and highly regulatory/interventionist in matters of state policy—not only happy to denounce and reverse antiregulatory Supreme Court constructions but also eager to update and revise major areas of federal law.⁵¹ Responsive to this activist regulatory agenda, Congress radically increased the size of its staff in the 1970s and early 1980s, which helped fuel a huge increase in substantive legislation generally and overrides in particular.⁵² Even after staff sizes stabilized and the partisan balance in Congress became more even, the overrides continued to roll. Indeed, the 1990s, a period of fierce party competition and divided government, was the golden age of statutory overrides.

Almost as dramatic as the twenty-four-year boom in overrides has been the more recent bust. Although Professor Hasen's study was premature to announce that the bust came right after 1991, overrides have fallen off substantially since 1998. Nonetheless this distinction is critical.

51. The Democrats controlled the House for the entire period of 1975–1995, and the Senate for most of that period, namely, 1975–1981 and 1987–1995.

52. See R. ERIC PETERSON, CONG. RESEARCH SERV., R40056, LEGISLATIVE BRANCH STAFFING, 1954–2007, at 1 (2008) (detailing the increase in congressional staffing).

Despite bitter partisan acrimony, the period between 1991 and 1998 was one of Congress's most productive in terms of overrides.⁵³ We consider the turning point to have been the congressional impeachment, but not removal, of President Clinton and the resulting collapse of successful override activity by the House and Senate Judiciary Committees. We do not consider the reduced level of override activity a permanent feature of national governance, but it will probably continue for the remainder of the decade, and perhaps longer.

A. *The Override Boom, 1975–1990*

Before 1975, Congress regularly overrode Supreme Court decisions interpreting federal statutes, but this was an occasional, low-salience phenomenon.⁵⁴ Thus, almost all of the override statutes we found in the period 1967 to 1975 were simple, routine laws overriding single Supreme Court decisions. There was only one statute overriding a cluster of decisions—the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, which overrode no fewer than six Supreme Court decisions interpreting the 1927 Act.⁵⁵ One of the overridden cases was the Court's celebrated decision in *Moragne v. States Marine Lines, Inc.*,⁵⁶ which expanded the Death on the High Seas Act to cover deaths in territorial waters,⁵⁷ a protection the 1972 Amendments retracted for longshoremen.⁵⁸ All of the other overrides in this early period were one-off: one statute overrode one Supreme Court decision, generally without much public attention.

The big turning point in our nation's history of statutory overrides was the 94th Congress (1975–1976), where the post-Watergate legislators overrode twenty Supreme Court decisions—for the most part not in one-off

53. See *supra* Figure 1. Indeed, the 104th Congress was the most productive on this measure and the 105th Congress was tied for the fifth most productive.

54. See, e.g., Act of Sept. 2, 1957, Pub. L. No. 85-269, 71 Stat. 595 (codified as amended at 18 U.S.C. § 3500) (overriding *Jencks v. United States*, 353 U.S. 657 (1957)); Hobbs Act, ch. 645, § 1951, 62 Stat. 683, 793 (1948) (codified as amended at 18 U.S.C. § 1951) (overriding *United States v. Local 807, Int'l Bhd. of Teamsters*, 315 U.S. 521 (1942)); see also *James v. United States*, 366 U.S. 213, 231 & n.13 (1961) (Black, J., concurring in part and dissenting in part) (listing statutes overriding the Court's interpretations of the Internal Revenue Code).

55. See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended in scattered sections of 33 U.S.C.) (amending the Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927)). *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), was also reversed by the 1972 Amendments but we did not include this as an override because we considered it a routine application of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), a leading decision overridden by the 1972 Amendments.

56. 398 U.S. 375 (1970).

57. *Id.* at 399–401.

58. § 18(a), 86 Stat. at 1263 (codified as amended at 33 U.S.C. § 905 (2006)).

overrides but, instead, in comprehensive landmark legislation that overrode several Supreme Court decisions in the process of comprehensive reform and updating of statutory law. Major legislation overriding multiple Court decisions included the Tax Reform Act of 1976⁵⁹ and the Copyright Act of 1976.⁶⁰ In an important departure from the pattern of these and prior overrides, Congress rebuked as well as overrode the Supreme Court in The Civil Rights Attorney's Fees Awards Act of 1976.⁶¹

This activity reflected the political energy of the post-Watergate Congress: overwhelmingly liberal, aggressively reformist, and suspicious of rather than acquiescent in the Supreme Court's conservative jurisprudence. Additionally, Congress had already started arming itself with large increases in committee and member staff needed to carry out the Democrats' aggressive regulatory program.⁶² Between 1973 and 1975, House committee staffs increased by two-thirds and Senate committee staffs by one-third, with even more dramatic increases in the staff of the House and Senate Judiciary Committees, the primary override-generating committees.⁶³

The post-Watergate Congress was followed by the election of Democrat Jimmy Carter as President in 1976. Spurred on by the voters' mandate and by unified party government for the first time since 1968, the 95th Congress (1977-1978) generated even more override activity, reversing or modifying no fewer than twenty-seven Supreme Court statutory decisions, including the famous Snail Darter Case, *TVA v. Hill*.⁶⁴ More important, Congress accomplished massive law revision projects, most notably the Bankruptcy Reform Act of 1978,⁶⁵ as well as the Clean

59. See Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended in scattered titles of U.S.C.) (overriding eight Supreme Court interpretations of the Internal Revenue Code of 1954).

60. See Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.) (overriding six Supreme Court interpretations of the Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, and its amendments).

61. See Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2006)) (overriding *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)). Both *Alyeska* and the 1976 Act were landmark policy pronouncements by the Court and Congress, respectively.

62. See *supra* note 52 and accompanying text.

63. See Eskridge, *supra* note 1, at 339 (citing NORMAN J. ORNSTEIN ET AL., *VITAL STATISTICS ON CONGRESS, 1989-1990*, at 136 tbl.5-5 (1990)).

64. 437 U.S. 153 (1978). The Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified as amended in scattered sections of 16 U.S.C.), overrode *TVA v. Hill*; however, when the 1978 override did not save the TVA dam in suit, Congress passed a second override saving the dam directly. See Energy and Water Development Appropriations Act of 1980, Pub. L. No. 96-69, tit. 4, 93 Stat. 437, 449-50.

65. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.) (replacing the Bankruptcy Act of 1898 and overriding ten Supreme Court statutory decisions).

Air Act Amendments of 1977,⁶⁶ the Foreign Intelligence Surveillance Act of 1978,⁶⁷ and the Contract Disputes Act of 1978.⁶⁸ All of these superstatutes overrode multiple Supreme Court decisions.

Additionally, the 95th Congress strongly rebuked the Court for its stingy interpretation of the jobs title of the Civil Rights Act of 1964 when it overrode *General Electric Co. v. Gilbert*,⁶⁹ and it directed that pregnancy-based discrimination is unlawful, via the Pregnancy Discrimination Act (PDA) of 1978.⁷⁰ Before the 1991 CRA, the 1978 PDA was probably the most politically charged statutory override in the nation's political history.⁷¹ With only a little less heat, the Age Discrimination in Employment Act (ADEA) Amendments of 1978 overrode the Supreme Court's stingy interpretation of the 1967 ADEA.⁷²

These Congresses opened the floodgates for legislative overrides of Supreme Court statutory opinions and set important patterns that would remain in place for the next two decades, even as staff levels stabilized and in some instances declined. The most important pattern is that, even after the zealous energy of the post-Watergate Congresses dissipated, legislators revisited and revised landmark statutes, and in the process cast aside Supreme Court constructions of those statutes. Among the most important law revision projects were the Comprehensive Crime Control Act of 1984,⁷³ which created the Sentencing Commission and the sentencing guidelines

66. Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 15, 42 U.S.C.) (amending the Clean Air Act of 1970 and overriding two Supreme Court statutory decisions).

67. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 18, 50 U.S.C.) (overriding *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972), an important statutory surveillance precedent).

68. Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended in scattered titles of U.S.C.) (replacing the Wunderlich Act of 1954, ch. 199, 68 Stat. 81, and overriding four Supreme Court statutory decisions).

69. 429 U.S. 125 (1976).

70. See Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2006)).

71. At least one politically charged constitutional amendment overrode a Supreme Court decision interpreting a federal statute as well as the Constitution. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 433–38 (1793) (interpreting the Judiciary Act of 1789), *overridden by constitutional amendment*, U.S. CONST., amend. XI. Even more important moments in American public law have been overrides of Supreme Court constitutional decisions by constitutional amendments. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *overridden by constitutional amendment*, U.S. CONST. amend. XVI; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *overridden by constitutional amendment*, U.S. CONST. amends. XIII, XIV. More recently, the Twenty-Sixth Amendment, giving eighteen-year-olds the right to vote in state elections, overrode *Oregon v. Mitchell*, 400 U.S. 112 (1970).

72. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189, 189 (codified as amended at 29 U.S.C. § 623 (2012)) (overriding *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 193 (1977), which interpreted the 1967 ADEA).

73. Pub. L. No. 98-473, tit. 2, 98 Stat. 1837, 1976 (codified as amended in scattered titles of U.S.C.) (overriding four Supreme Court statutory decisions).

project⁷⁴ and amended substantive federal criminal law after more than a decade of deliberation,⁷⁵ the Tax Reform Acts of 1984⁷⁶ and of 1986,⁷⁷ which were important revisions of the Internal Revenue Code of 1954; the Immigration Reform and Control Act of 1986,⁷⁸ updating the Immigration and Nationality Act of 1952; and the Sexual Abuse Act of 1986,⁷⁹ which updated the Mann Act of 1910 and other federal regulations of sexual abuse.

Another significant pattern involved overrides of Supreme Court statutory decisions that Congress considered not just poor policy, but serious judicial misreadings of statutory texts and legislative expectations. These were the restorative overrides described in the introduction: never more than a fraction of overrides in any given decade, the restorative overrides have received the lion's share of press attention. Bipartisan majorities in Congress rebuked the Court in a number of high-visibility civil rights statutes. Thus, the Voting Rights Act (VRA) Amendments of 1982⁸⁰ not only overrode *City of Mobile v. Bolden*,⁸¹ but subjected the Court's interpretation to severe criticism.⁸² The most aggressive, and perhaps the most angry, overrides were those found in the 1991 CRA, which kicked off what we consider the golden age of statutory overrides.

B. *The Golden Age of Overrides, 1991–1999*

Using just the committee-report method for identifying overrides, the 2013 Hasen study found that “congressional overruling of Supreme Court cases slowed down dramatically since 1991.”⁸³ Because congressional committee reports provided much less on-point discussion of judicial decisions after the 1980s, we supplemented that mechanism for identifying overrides with the Westlaw citation history method described above. Not

74. See § 217, 98 Stat. at 2017 (codified as amended at 18 U.S.C. §§ 991–998 (2012)).

75. See William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 362–64 (1991) (detailing the history of the Act).

76. Pub. L. No. 98-369, div. A, 98 Stat. 494 (codified as amended in scattered sections of 26 U.S.C.) (overriding four Supreme Court statutory decisions).

77. Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.) (overriding one Supreme Court decision).

78. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered titles of U.S.C.) (overriding four Supreme Court statutory decisions).

79. Pub. L. No. 99-654, 100 Stat. 3660 (codified as amended at 18 U.S.C. §§ 2241–2245 (2012)) (overriding one Supreme Court statutory decision).

80. Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973b (2006 & Supp. V (2012))).

81. 446 U.S. 55 (1980).

82. See Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749–50 (1998) (recognizing that *Bolden* was denounced “often and . . . vigorously”).

83. Hasen, *supra* note 3, at 217.

only did we find no “dramatic” slowdown of congressional override activity, but we found so many overrides that we proclaim the period 1991 to 1999 the *golden age of overrides*.

This was the golden age, both quantitatively and qualitatively. As a matter of pure counting, the 102nd through 105th Congresses (1991–1999) overrode eighty-six Supreme Court statutory decisions, an average of more than twenty per Congress.⁸⁴ That eight-year period accounted for twenty-eight percent of the total overrides identified in our study. Two of the biggest jumbo override statutes (the 1991 CRA⁸⁵ and the 1996 AEDPA⁸⁶) were enacted during this period. The 1991 CRA not only overrode twelve Supreme Court decisions, including the Court’s landmark effort to reset disparate impact liability for employment discrimination in *Wards Cove Packing Co. v. Atonio*,⁸⁷ but also recast the statutory rules governing workplace affirmative action.⁸⁸ While the 1991 CRA is the leading “liberal” override of the last two generations, the 1996 AEDPA is the leading “conservative” override.⁸⁹ Most of the fourteen Supreme Court decisions overridden by AEDPA had set relatively high hurdles barring many habeas petitions—and the new statute raised the bar even higher.⁹⁰

84. See *infra* Appendix 1.

85. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.) (overriding twelve Supreme Court statutory decisions).

86. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of U.S.C.) (overriding fourteen Supreme Court statutory decisions).

87. 490 U.S. 642, 658–60 (1989) (raising the bar for plaintiffs alleging a violation of Title VII based upon the “disparate impact” of plantation-like employment policies), *superseded by statute*, Civil Rights Act § 105, 105 Stat. at 1074 (codified at 42 U.S.C. § 2000e-2(k) (2006)). The Court had earlier split on the *Wards Cove* issue in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1000–01 (1988) (Blackmun, J., concurring in part and concurring in the judgment), which was not counted as an overridden decision because the Court was addressing the same point of law resolved in *Wards Cove*. After the 1991 override, circuit courts have updated the mandates of *Watson* and *Wards Cove* in light of their “legislative repeal” in 1991. See, e.g., *NAACP v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 477 n.9 (3d Cir. 2011).

88. See *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (explaining the statutory disparate impact regime created by the CRA of 1991).

89. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4–12 (1997) (describing the background of and motivations for the enactment of AEDPA). Ironically, the “liberal” override was supported and signed into law by moderately “conservative” President George H.W. Bush, see Philip S. Runkel, Note, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity?*, 35 WM. & MARY L. REV. 1177, 1177 (1994), while the “conservative” override was supported and signed into law by moderately “liberal” President William Clinton, Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996).

90. Many of the overridden decisions had denied relief to prisoners based upon a restrictive interpretation of the habeas statute. See *infra* Appendix 1 for the list including these cases. For example, AEDPA § 102, 110 Stat. at 1217 (codified as amended at 28 U.S.C. § 2253 (2012)), largely codified the Burger Court’s restrictive standards for certifying habeas appeals, see

During this golden age, overrides flourished in a variety of subject areas, not just civil rights and habeas. Among the other important override statutes adopted were the Rehabilitation Act Amendments of 1992,⁹¹ the Bankruptcy Reform Act of 1994,⁹² the Private Securities Litigation Reform Act of 1995,⁹³ the ICC Termination Act of 1995,⁹⁴ the Small Business Job Protection Act of 1996,⁹⁵ the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,⁹⁶ the Federal Courts Improvement Act of 1996,⁹⁷ the Prison Litigation Reform Act (PLRA) of 1995,⁹⁸ the Telecommunications Act of 1996,⁹⁹ the Individuals with Disabilities Education Act Amendments of 1997,¹⁰⁰ the Taxpayer Relief Act of 1997,¹⁰¹ the Internal Revenue Service Restructuring and Reform Act of 1998,¹⁰² the Digital Millennium Copyright Act of 1998,¹⁰³ and an act to throttle the criminal use of guns in 1998.¹⁰⁴ Not only did Congress reverse or adjust the results or reasoning of many Supreme Court decisions, but legislators revamped major areas of federal law.

What is perhaps most remarkable is that this steady stream of statutory overrides occurred during a period of divided government (1991–1993 and

Barefoot v. Estelle, 463 U.S. 880, 892–96 (1983), but made the standards more restrictive by denying certification on the basis of federal statutory rights, *see Slack v. McDaniel*, 529 U.S. 473, 480–85 (2000).

91. Rehabilitation Act Amendments of 1992, Pub. L. 102-569, §§ 102(p)(32), 506, 106 Stat. 4344, 4360, 4428 (codified at 29 U.S.C. 794 (2006))

92. Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C.) (overriding five statutory decisions).

93. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) (overriding one statutory decision).

94. Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered titles of U.S.C.) (overriding one statutory decision).

95. Pub. L. No. 104-188, 110 Stat. 1755 (codified as amended in scattered sections of 26 U.S.C.) (overriding two statutory decisions).

96. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered titles of U.S.C.) (overriding three statutory decisions).

97. Pub. L. No. 104-317, 110 Stat. 3847 (codified as amended in scattered sections of 28 U.S.C.) (overriding three statutory decisions).

98. Pub. L. No. 104-134, tit. 8, 110 Stat. 1321-66 (codified as amended in scattered titles of U.S.C.) (overriding three statutory decisions).

99. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18, 47 U.S.C.) (overriding two statutory decisions).

100. Pub. L. No. 105-17, 111 Stat. 37 (codified as amended in scattered sections of 20 U.S.C.) (overriding two statutory decisions).

101. Pub. L. No. 105-34, 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.) (overriding two statutory decisions).

102. Pub. L. No. 105-206, 112 Stat. 685 (codified as amended in scattered sections of 26 U.S.C.) (overriding seven statutory decisions).

103. Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.) (overriding one statutory decision).

104. Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (codified as amended at 18 U.S.C. § 924 (2012)) (overriding two statutory decisions).

1995–1999), when congressional staff levels were stable or declining and levels of partisan polarization were rising.¹⁰⁵ What we find in the 1990s, moreover, is not just a continuation of the trends of the 1980s but an acceleration of them. More partisan division—yet many more overrides.

One reason for the flourishing of overrides is that Presidents George H.W. Bush and Bill Clinton were willing and sometimes eager to make deals with the opposing party on big issues involving considerable Supreme Court activity, namely, civil rights, job discrimination, habeas corpus, the rights of prisoners, intellectual property, taxes, the regulation of litigation, and immigration reform.¹⁰⁶ Liberal-leaning Bill Clinton was President through most of the 1990s—a decade in which most of the overrides were conservative-leaning reversals, thanks to GOP domination of Congress after 1994 and the President’s willingness to compromise or even abandon liberal priorities.

In addition, both Democrats and Republicans campaigned on platforms geared towards reforming and revitalizing the role of the federal government. Whether it was Vice President Al Gore’s campaign to “reinvent” government through the National Performance Review¹⁰⁷ or the Contract with America advanced by House Speaker Newt Gingrich,¹⁰⁸ both parties believed that the road to political success lay in altering fundamentally the image and substance of federal government regulation.

105. See Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 90 (2006) (graphing the increasing levels of party polarization in the United States).

106. See, e.g., Andrew Rosenthal, *Bush Now Concedes a Need for ‘Tax Revenue Increases’ to Reduce Deficit in Budget*, N.Y. TIMES, June 27, 1990, <http://www.nytimes.com/1990/06/27/us/bush-now-concedes-a-need-for-tax-revenue-increases-to-reduce-deficit-in-budget.html> (discussing President George H.W. Bush’s compromise with congressional Democrats to raise taxes); Carolyn Skorneck, *Clinton Says He Will Sign Welfare Overhaul; House Passes It*, ASSOCIATED PRESS (July 31, 1996), <http://www.apnewsarchive.com/1996/Clinton-Says-He-Will-Sign-Welfare-Overhaul-House-Passes-It/id-f11a3d867b896908c6c598e31fb94ff8> (reporting on Clinton’s willingness to compromise with congressional Republicans on welfare reform). Our impression, from leading historians as well as from popular accounts, is that previous Presidents Carter and Reagan were not nearly as happy to compromise core beliefs as Presidents Clinton and Bush 41—and that subsequent Presidents Obama and Bush 43 are and were ideological throwbacks to Presidents Carter and Reagan. See, e.g., Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 411–12 (2009) (discussing the Bush 43 Administration’s efforts to expand presidential initiative); Martin A. Levin et al., *Getting Past No: Building Coalitions and Making Policy from Clinton to Bush to Obama*, in BUILDING COALITIONS, MAKING POLICY: THE POLITICS OF THE CLINTON, BUSH & OBAMA PRESIDENCIES I (Martin A. Levin et al. eds., 2012) (surveying the increasingly unilateral direction of the presidency since Bush 43). In the new millennium there is even less political space to reach deals.

107. Patricia E. Salkin, *National Performance Review: A Renewed Commitment to Strengthening the Intergovernmental Partnership*, 26 URB. LAW. 51, 51–52 (1994).

108. John Copeland Nagle, Review Essay, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2212 (1995).

When combined with more than a decade of pragmatic (or spineless, depending on your perspective) leadership from the White House, the accepted need for reform helped produce the sweeping changes to the statutory schemes discussed above.¹⁰⁹

C. *The Decline of Overrides, 1999–2011*

Astonishingly, right after overrides reached their peak, in 1995–1998, they fell off dramatically, as illustrated by Figure 1 above. Overrides have not been reduced to nothing, however: every Congress between 1999 and 2011 overrode at least three Supreme Court decisions.¹¹⁰

More important, Congress during this “down” period still enacted a fair number of overrides, including landmark statutes such as the Gramm-Leach-Bliley Act,¹¹¹ the Sarbanes-Oxley Act of 2002,¹¹² the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,¹¹³ the Class Action Fairness Act of 2005,¹¹⁴ the Detainee Treatment Act of 2005¹¹⁵ and the Military Commissions Act of 2006,¹¹⁶ the Voting Rights Act Reauthorization and Amendments Act of 2006,¹¹⁷ the ADA Amendments of 2008,¹¹⁸ the Lilly Ledbetter Fair Pay Act of 2009,¹¹⁹ the Fraud Enforcement and Recovery Act of 2009,¹²⁰ the Family Smoking Prevention and Tobacco Control Act of 2009,¹²¹ and the Dodd-Frank Wall Street Reform and

109. See *supra* notes 91–104 and accompanying text.

110. See *supra* Figure 1.

111. Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12, 15 U.S.C.) (overriding two statutory decisions).

112. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered titles of U.S.C.) (overriding one statutory decision).

113. Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.) (overriding two statutory decisions).

114. Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.) (overriding five statutory decisions).

115. Pub. L. No. 109-148, tit. 10, 119 Stat. 2739 (codified as amended in scattered titles of U.S.C.) (overriding one statutory decision).

116. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered titles of U.S.C.) (overriding one statutory decision).

117. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified in scattered sections of 42 U.S.C.) (overriding two statutory decisions).

118. Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 42 U.S.C.) (overriding four statutory decisions).

119. Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29, 42 U.S.C.) (overriding one statutory decision).

120. Pub. L. No. 111-21, 123 Stat. 1617 (codified in scattered sections of 18, 31 U.S.C.) (overriding two statutory decisions).

121. Pub. L. No. 111-31, 123 Stat. 1776 (codified in scattered sections of 5, 10, 15, 21 U.S.C.) (overriding one statutory decision).

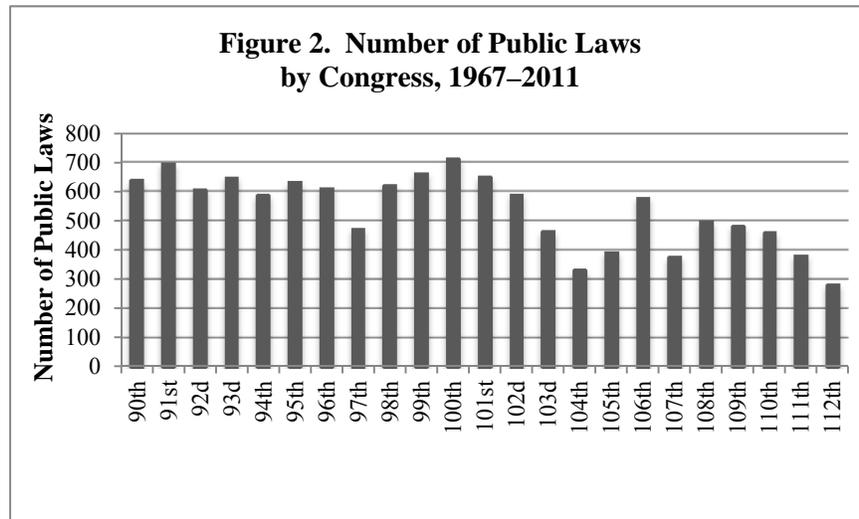
Consumer Protection Act.¹²² There has been a decline but not a disappearance of overrides after a boom in the 1990s. As Appendix 1 documents and Figure 1 illustrates, the 109th (2005–2006) and 111th (2009–2010) Congresses enacted multiple important overrides of the Court’s statutory decisions.¹²³

While it is important not to overstate the decline of congressional overrides of Supreme Court statutory interpretation decisions, there has been a very significant fall-off after the 105th Congress (1997–1998). Figure 2 compares the number of overrides per Congress with the total number of public laws per Congress. Although the total number of statutes passed by Congress has declined since the late 1980s and early 1990s, the decline in the number of overrides has far outpaced the decline in total number of statutes.¹²⁴ Moreover, Figure 2 makes clear that there is no strong relationship between the total number of acts passed by a particular Congress and the number of overrides contained in those acts. Indeed, the 104th Congress—by far the most prolific overrider of the Supreme Court—enacted the fewest number of public laws of any Congress we studied. That may not be a coincidence. The 104th Congress enacted several major pieces of legislation, including AEDPA, the PLRA, and the Illegal Immigration Reform and Immigrant Responsibility Act—endeavors that consumed significant legislative resources.

122. Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered titles of U.S.C.) (overriding one statutory decision).

123. As explained *infra* section II(C)(1), the number identified for both of these Congresses, and especially the 111th, may grow over the next several years.

124. Compare *supra* Figure 1, with *infra* Figure 2. Our findings are consistent with the 2013 Hasen study. Hasen, *supra* note 3, at 228–31.



The question then becomes: Why the big decline in overrides? Do the reasons for the big decline suggest that the fall-off is long term? Consider a few possible explanations.

1. Our Methodology for Finding Overrides.—Our methodology may provide a partial, but ultimately incomplete, explanation for the decline. As noted in Part I, committee reports have become significantly less helpful for identifying overrides in the years following the 1991 Eskridge study. Although we continued to review committee reports, we supplemented that methodology by KeyCiting on Westlaw every Supreme Court case decided between 1965 and 2010 and investigating the cases indicated as having been superseded or called into doubt by a statute. Although Westlaw will sometimes mark a case as superseded directly by statute,¹²⁵ it relies primarily on judicial decisions and administrative documents that indicate that the case has been superseded. Obviously it takes time before overrides are identified; a case will not immediately be marked as overridden the moment Congress enacts an override. Indeed, one of the most significant overrides of the past ten years, the override of *FDA v. Brown & Williamson Tobacco Corp.*¹²⁶ by the Family Smoking Prevention & Tobacco Control

125. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29, 42 U.S.C.).

126. 529 U.S. 120 (2000).

Act,¹²⁷ still did not appear as superseded by statute as this Article went to print in mid-2014.

To test the potential impact of this phenomenon, for every override we calculated the number of years between the override's date of enactment and the date on which the first case or administrative document identified by Westlaw reported the case as overridden. For all cases in our sample identified as overridden by Westlaw,¹²⁸ the average number of years between the enactment of the override and its identification on Westlaw was just under six years. We also suspected that the increased availability and prevalence of electronic research tools in the last couple decades might accelerate this process. That turned out to be the case. For cases identified as overridden by Westlaw during the 100th Congress or later, the number was just under four years. For the same period, more than half of the Westlaw overrides were identified within two years of enactment and nearly three-quarters were identified within five years.

If these numbers hold true, our method should have already uncovered most of the overrides for the 106th to 110th Congresses and more than half of the overrides for the 111th Congress. (The Westlaw method would miss almost all of the overrides for the 113th Congress (2013–2014), which is one reason we stopped with the first session of the 112th Congress (2011).) A little less than a third of the overrides we identified from the 106th Congress (1999–2000) and later have not yet been identified as overridden on Westlaw. This is a much higher figure than for the 100th through 105th Congresses (1987–1998), for which only ten percent of overrides were not identified on Westlaw. Although our analysis suggests that Westlaw will identify more overrides from the 106th to 111th Congresses over the next several years, many of those yet-to-be-identified overrides are already included in our sample via the other methods upon which we relied, such as committee reports. Although a few more overrides may be identified over the next decade, time alone will not make up the enormous decline in overrides after the Clinton impeachment in 1998.

2. Polarization and Paralysis in Congress/Committees.—The 2013 Hasen study demonstrates that political polarization has steadily increased in Congress since the 1970s. That is, the Republicans have become steadily more conservative and the Democrats have become more liberal, with diminishing overlap of moderate Republicans and blue dog Democrats.¹²⁹

127. Pub. L. No. 111-31, div. A, § 101(a), 123 Stat. 1776, 1783–84 (codified at 21 U.S.C. § 321 (2012)).

128. 56 cases are not identified as overridden by Westlaw for the overrides examined by this study. See *infra* Appendix 3.

129. See Hasen, *supra* note 3, at 233–38 (surveying the percentage of moderates and party polarization in Congress from 1879 to 2011).

From that, Professor Hasen argues that overrides, especially “bipartisan overrides” are becoming less common and will remain so for the longer term, with technical overrides remaining possible.¹³⁰ His thoughtful analysis does not explain the pattern of overrides we have found, however: Congress in the 1990s was much more polarized than it was in the 1980s or 1970s, yet the 1990s was the golden age of overrides. Were polarization the entire story, we would expect overrides to decline as polarization increased, yet we see the opposite: during the 1990s overrides *increased* during a time of increasing polarization.¹³¹ Even in the new millennium, when overrides have fallen off dramatically, Congress has managed to enact many partisan overrides—and in landmark legislation like the voting rights, disability antidiscrimination, and tobacco regulation laws. David Mayhew has shown that divided government is just as capable of adopting major legislation as unified government.¹³² Is polarized government unable to continue this pattern? It is not clear to us that this is inevitably going to be the case, so we continue to search for explanations.

As discussed above, the big decline is not a consequence of congressional lethargy, but perhaps it is affected by paralysis at the committee level. A large majority of the congressional overrides of Supreme Court statutory interpretation decisions originate in bills that are referred to the House and Senate Judiciary Committees.¹³³ Surely it is no coincidence, we surmise, that the golden age of overrides ended *immediately* after President Clinton was impeached by the House and tried (and acquitted) in the Senate. The House Judiciary Committee, which had in 1995–1998 been an engine of overrides under its chair, Henry Hyde,¹³⁴ was diverted in the middle of 1998 by its efforts to draft articles of impeachment, defend them before the full House, and prosecute the President in the Senate trial. Political exhaustion depleted the Committee after 1998, and the Committee chairs after Representative Hyde were less effective chairs beset by new controversies, sometimes of their own making.¹³⁵

130. *Id.* at 238–42.

131. Compare *supra* Figure 1, with Hasen, *supra* note 3, at 235 figs.7–8, 236 figs.9–10, 237 fig.11 (showing increasing polarization on various dimensions throughout the 1980s and 1990s).

132. DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002* (2d ed. 2005).

133. See Eskridge, *supra* note 1, at 342.

134. See Adam Clymer, *Henry J. Hyde, A Power in the House of Representatives, Dies at 83*, N.Y. TIMES, Nov. 30, 2007, http://www.nytimes.com/2007/11/30/washington/30hyde.html?_r=0; *supra* Figure 1 (illustrating the large number of overrides while Hyde was chairman).

135. Representative Hyde chaired the committee from 1995 to 2001 and was followed by Representatives Sensenbrenner (2001–2007), Conyers (2007–2011), and Lamar Smith (2011–2013). *Judiciary Committees of the U.S. Congress*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/admin_10.html. None of the successors had the practical skills or political

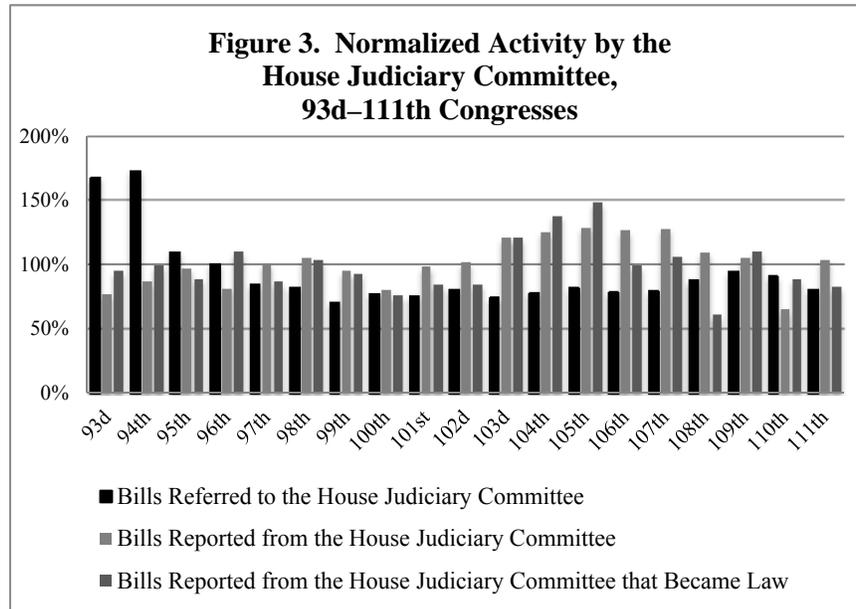
Unfortunately, the data do not lend much support to this hypothesis, at least in its simple form. Figure 3 below reveals that the House Judiciary Committee under Chairman Hyde was very productive in the 104th Congress (1995–1996), reporting more bills than average for that Committee and securing enactment for an abnormally high number of them. But the Committee was even more productive along these lines in subsequent Congresses.

To examine the activity by the two judiciary committees we studied three potential measures of committee activity: (1) the number of bills referred to the committee, (2) the number of bills reported from the committee, and (3) the number of reported bills that eventually became law.¹³⁶ Figures 3 and 4 present the normalized¹³⁷ activity for these three variables for both the House and Senate Judiciary Committees. These figures reveal that although there was considerable variation in these measures among the various Congresses, this variation does not appear correlated with the decline in overrides. That is, if the reason for the decline in overrides lies with the judiciary committees, it is not because they simply ceased considering and reporting bills, or even that Congress stopped passing the bills that they did report.

vision of Hyde or his predecessor as chair, Representative Jack Brooks (1989–1995), *see id.* (indicating that Brooks preceded Hyde), and each of the post-2001 chairs was occupied with controversies distracting the Committee from substantive legislation, such as Sensenbrenner's tiffs with the minority over the PATRIOT Act, *see* Mike Allen, *Panel Chairman Leaves Hearing*, WASH. POST, June 11, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/10/AR2005061002110.html> (reporting that Sensenbrenner walked out of a committee hearing on the PATRIOT Act), and the indictment of Conyers's wife, *see* Nick Bunkley, *Detroit Council Member Pleads Guilty to Accepting Bribes for Vote*, N.Y. TIMES, June 26, 2009, http://www.nytimes.com/2009/06/27/us/27detroit.html?_r=0 (detailing Conyers's wife's indictment and guilty plea).

136. We gathered this information from the Library of Congress's online database for legislative information, which is available at thomas.loc.gov. Using the site's advanced search function, we limited our searches by Congress, committee, stage in legislative process, and type of legislation, depending on our targeted dataset. Because the search engine does not provide the user with more than 1000 search results, we restricted our searches by date and performed up to eight, three-month searches for a single Congress. We then added each of these subsearches together to produce the total number of results per Congress.

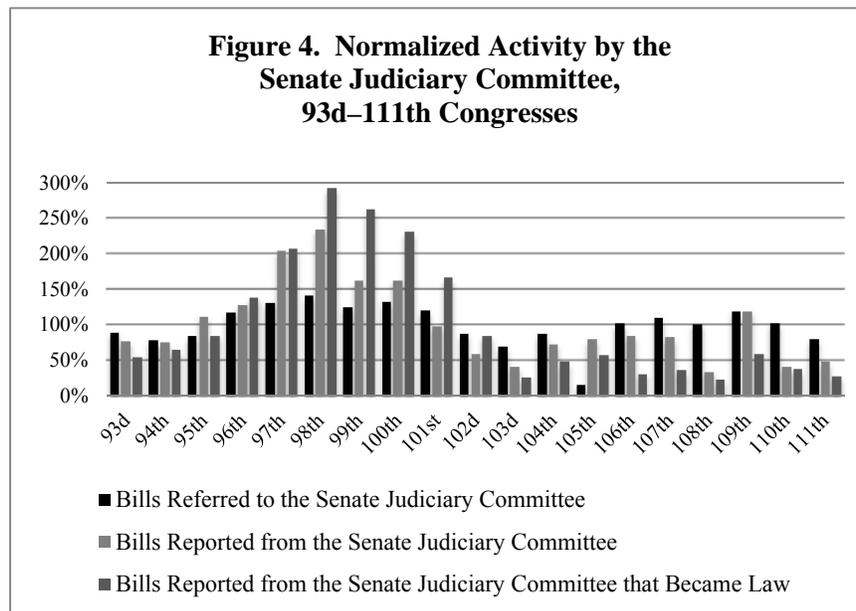
137. To normalize the data, we divided the number of bills referred, reported, etc., for each Congress between the 93rd and 111th Congress by the *average* number of bills referred, reported, etc., during the entire period. So each column shows whether a particular Congress was more or less active than the other Congresses in our sample and by how much.



The record of the Senate Judiciary Committee, chaired by highly competent lawmakers (e.g., Senators Biden, Hatch, Leahy, and Specter) during this period,¹³⁸ is even more perplexing. Figure 4 below reveals that the Senate Judiciary Committee was, relatively speaking, most productive during the 97th through 102nd Congresses (1981–1992), but secured enactment of relatively fewer of its bills after 1992. This pattern of diminished productivity might help explain the dearth of overrides after 1999—but is strongly contrary to our expectations for the golden age of overrides, during the 1990s. And on this measure as well, the 104th Congress—the most prolific overrider—has the lowest measures of activity of any Congress in our data set.¹³⁹

138. *Judiciary Committees of the U.S. Congress*, *supra* note 135.

139. *See supra* Figure 2.



3. *The Type of Statutes Enacted.*—The numbers alone do not help us understand why overrides have fallen off, and the increasing partisan polarization thesis does not sufficiently explain the lumpy data. So we turned to David Mayhew’s dataset on major legislation. Consistent with our account, the override-happy 104th Congress (1995–1996) enacted fifteen statutes that Professor Mayhew considers “important enactments of Congress” (such as AEDPA).¹⁴⁰ Interestingly, Mayhew’s dataset identifies even more examples of major legislation for the 107th Congress (2001–2002), which passed very few overrides, and for the 111th Congress (2009–2010), which enacted a number of overrides, but not nearly as many as the 104th.¹⁴¹ This is where the numbers must be supplemented with qualitative analysis. Examining Professor Mayhew’s list of major legislation for each Congress reveals some important patterns that help explain the decline of overrides after 2001 (when the Clinton effect had probably run its course). Consider Table 1.

140. See David Mayhew, *Datasets and Material: Divided We Govern*, <http://davidmayhew.commons.yale.edu/datasets-divided-we-govern/> (listing major legislation adopted in the period 1991–2002).

141. See *id.* (listing the major legislation for the 111th Congress under a different link, for important enactments in the period 2009–2010).

Table 1. Categories of Major Legislation, 1987–2010

Congress	Domestic Laws, with Judicial Involvement	War on Terror and National Security	Domestic Laws, Little Judicial Involvement
<i>111th Congress (2009– 2010)</i>	Ledbetter Fair Pay Credit Bill of Rights Dodd-Frank Finance Hate Crimes Expansion FDA Tobacco	START Treaty Gays in Military Repeal 9/11 Responders' Aid	Economic Stimulus Affordable Care Act Tax Cuts Deal Five Other Laws
<i>110th Congress (2007– 2008)</i>		9/11 Commission Domestic Surveillance India Nuclear Agreement Veterans Relief	Housing Relief Financial Bailout Economic Stimulus Congressional Ethics Energy Conservation Four Other Laws
<i>109th Congress (2005– 2006)</i>	Bankruptcy Reform Class Action Fairness	Three Big Trade Pacts Mexican Border Port Security Military Commissions	Pension Reform Postal Service Reorganization Gulf of Mexico Drilling Three Other Laws

<i>108th Congress (2003–2004)</i>	Partial Birth Abortion Unborn Crime Victims	Intelligence Overhaul	Medicare Prescription Two Tax Cuts AIDS Funding Three Other Laws
<i>107th Congress (2001–2002)</i>	Campaign Finance Corporate Responsibility	PATRIOT Act Afghan Use of Force Iraq Use of Force Fast Track Trade Five Other 9/11 Laws	Bush Tax Cuts Education Reform Election Reform Farm Subsidies Two Airline Laws
<i>106th Congress (1999–2000)</i>	Banking Reform	China Trade	Y2K Planning Three Other Laws
<i>105th Congress (1997–1998)</i>		Chemical Weapons Convention NATO Expansion	Balanced Budget Deal FDA Overhaul IRS Overhaul Two Other Laws

<i>104th Congress (1995–1996)</i>	Lobbying Reform Shareholder Lawsuits Telecommunications Reform AEDPA Immigration Reform Pesticides Regulation Safe Drinking Water	Antiterrorism Law	Unfunded Mandates Congressional Accountability Welfare Reform Agriculture Deregulation Minimum Wage Hike Health Insurance Portability Line Item Veto
<i>103d Congress (1993–1994)</i>	Family Medical Leave Assault Weapons Ban Brady Act Omnibus Crime Act Abortion Clinic Access	NAFTA GATT	Deficit Reduction Motor Voter AmeriCorps Three Other Laws
<i>102d Congress (1991–1992)</i>	Civil Rights Act Cable TV Regulation Water Policy Adjustment	Persian Gulf Resolution START Treaty Ratified Aid to Former Soviet Governments	Surface Transportation Omnibus Energy

<i>101st Congress</i> (1989–1990)	ADA		Savings & Loan Bailout
	Clean Air Act Amendments		Deficit Reduction
	Immigration Act		Four Other Laws
<i>100th Congress</i> (1987–1988)	Family Support (Welfare Reform)	Omnibus Foreign Trade	Water Quality
	Anti-Drug Abuse	Nuclear Treaty	Surface Transportation
	Civil Rights Restoration	Japanese–American Reparations	Three Other Laws

As Table 1 reveals, Congress's agenda has changed significantly in the new millennium. The most urgent and important issues on the congressional agenda have shifted away from substantive law reform in the areas where overrides of judicial decisions proliferate—namely, civil rights, workplace rules, criminal law and habeas, federal jurisdiction and civil procedure, immigration, tax, bankruptcy, business regulation, intellectual property, and antitrust. Conversely, the agenda has shifted toward terrorism, economic stimulus, international trade, deficit reduction and tax cuts, congressional ethics and responsibility, and agency reorganization—all areas where judicial decisions play a marginal role, or no role at all.

We do not discount the importance of partisan polarization as a factor in the decline of overrides, especially during the Congresses that met during and right after the impeachment of President Clinton. Nonetheless, our data suggest that polarization alone cannot explain the drop-off in overrides, given that overrides have flourished during the exceedingly polarized stretches of the 1990s. And even after the decline in overrides, Congress had continued to pass major legislation in partisan areas of the law, as Table 1 reveals. More important, in our view, is the new legislative agenda in the twenty-first century. As a great deal more congressional attention is devoted to the war on terror, macroeconomic tax and spending policy, health care and insurance, and international trade and nuclear proliferation, relatively less congressional attention has been paid to the superstatutes that the Supreme Court has been interpreting, and Congress has been overriding, for the last forty to fifty years.

This shift in congressional priorities is, in part, a natural response to post-2000 events. The terrorist attacks of September 11, 2001, affected the public's priorities in a way that few events have in the last century. It is thus unsurprising that the legislative agenda would shift to accommodate

those concerns. Two of the signature achievements of the Bush–Cheney Administration—the PATRIOT Act of 2001¹⁴² and the Military Commissions Act of 2006¹⁴³—were directed at this perceived new, almost existential, threat. Yet those statutes, together, contained just one override. The legislative shift may also be responsive to underlying structural developments. The rolling retirement of the baby boom generation has generated increasing interest in the scope and sustainability of the entitlement programs.¹⁴⁴ Thus, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003¹⁴⁵ and President Bush’s failed attempt to partially privatize social security¹⁴⁶ reflect this concern. Those efforts, together, produced zero overrides. The shift may also be the result of a changed political debate. Rather than seeking to update the superstatutes of the New Deal, the Great Society, and the Nixon–Ford Administration, the post-9/11 GOP Congresses and the Bush–Cheney Administration were skeptical of significant government regulation, including regulation advancing “conservative” values, and were not eager to pursue superstatute deals with Democrats. This is a marked change from the 1990s, when the Gingrich-led Congress was eager to work with—and even compromise with—President Clinton to achieve its goal of reforming major areas of federal regulation.¹⁴⁷

It is important to note that when the post-9/11 Congress did revisit the areas of law that depend on the judicial system, such as federal courts and civil rights, it produced a number of important override statutes: the Class Action Fairness Act of 2005,¹⁴⁸ the Voting Rights Act Reauthorization and Amendments Act of 2006,¹⁴⁹ the ADA Amendments Act of 2008,¹⁵⁰ and the

142. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles of U.S.C.).

143. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

144. See, e.g., Peter G. Peterson, *How Will America Pay for the Retirement of the Baby Boom Generation?*, in *THE GENERATIONAL EQUITY DEBATE* 41, 41–47 (John B. Williamson et al. eds., 1999) (proposing ways to prepare and pay for the growing retirement and health care costs of the rapidly aging population).

145. Pub. L. No. 108-173, 117 Stat. 2066 (codified as amended in scattered titles of U.S.C.) (creating Medicare Part D).

146. Elyse Siegel, *George W. Bush Reveals His Biggest Failure Was Not Privatizing Social Security*, HUFFINGTON POST (Oct. 22, 2010, 9:50 AM), http://www.huffingtonpost.com/2010/10/22/george-w-bush-reveals-his_n_772209.html.

147. See generally STEVEN M. GILLON, *THE PACT: BILL CLINTON, NEWT GINGRICH, AND THE RIVALRY THAT DEFINED A GENERATION* (2008).

148. Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

149. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified in scattered sections of 42 U.S.C.).

150. Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 42 U.S.C.).

Lilly Ledbetter Fair Pay Act of 2009,¹⁵¹ included no fewer than twelve overrides.

For the short term, the combination of the new legislative agenda and the continuing partisan polarization will depress Congress's inclination and capacity to enact override laws. In the longer term, however, countervailing pressures from interest groups, agencies, and the states ought to press Congress to update aging superstatutes, with the result being a resurgence of overrides. Moreover, the Obama Administration has produced a pair of laws that appear to have the potential to become superstatutes in their own right. As the Court interprets the (vast) expanse of statutory provisions contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010¹⁵² and the Patient Protection and Affordable Care Act of 2010,¹⁵³ it will no doubt produce new decisions with the potential to be overridden.

The number of overrides may not return to the level the country enjoyed in the 1990s, but they will be back

III. Topography and Politics of Override Statutes, 1967–2011

In this Part, we explore some of the basic facts about overrides in a systematic way. The systematic analysis, in turn, will illuminate some of the speculations we offered in the previous Part, our history of overrides in the last half century. On the other hand, no matter how systematic one's analysis, the central conclusion that ought to emerge from our survey is that there is no "standard override." Instead, overrides come in all shapes and sizes.

Take the 1991 CRA, for example. This is the best known override statute—and it could not have been more dramatic. Notwithstanding a presidential veto in 1990 and threatened veto in 1991, an engaged Congress angrily overrode twelve or more prominent Supreme Court interpretations of important job discrimination laws,¹⁵⁴ and did so swiftly after the decisions had been handed down—eight of the twelve decisions were handed down between 1989 and 1991.¹⁵⁵ As symbolically and practically

151. Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29, 42 U.S.C.).

152. Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered titles of U.S.C.).

153. Pub. L. No. 111-148, 124 Stat. 119 (codified in scattered titles of U.S.C.).

154. See Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1465–66 (1994) (describing the concern with ensuring the bill was veto-proof after the 1990 veto); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 614–15 (1991) (describing the fierce reaction to the contemporary Supreme Court decisions that prompted the Act).

155. We say "twelve or more" Supreme Court decisions as amended because there is a difference of opinion as to which Supreme Court decisions were overridden in the 1991 CRA. We list twelve decisions in our Appendix 1. That is two more than the 2013 Hasen Study. See Hasen,

important as this override was, it is unrepresentative of congressional overrides in most respects. In contrast to the 1991 CRA, most overrides are one-off rejections of judicial constructions, sometimes decades or even a century after the decisions have been handed down; are as often conservative as they are liberal policy shifts; and are much more likely to involve technical policy-updating rather than pointed rebukes of the Court. Consider the following account of the variety that characterizes our population of statutory overrides from 1967 to 2011.

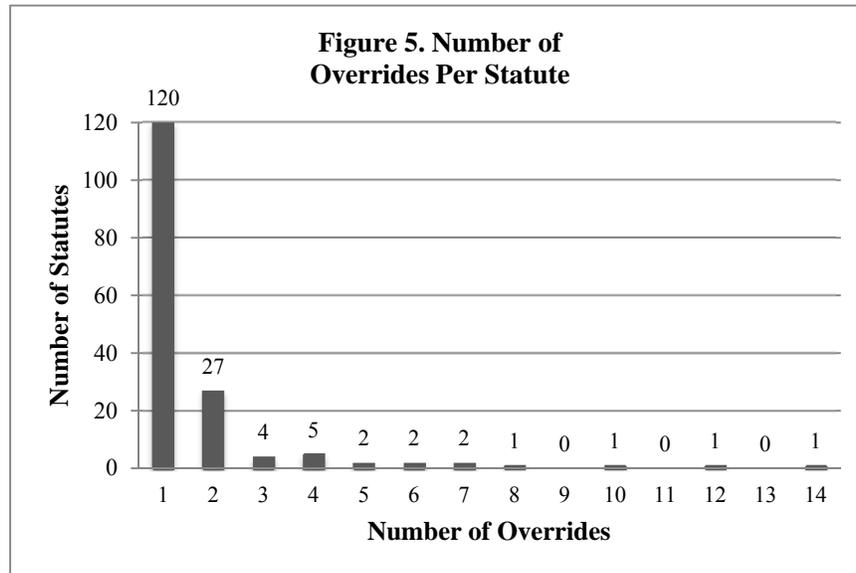
A. *Timing and Focus of Overrides*

The 1991 CRA was exclusively concerned with overruling twelve Supreme Court interpretations of the nation's job discrimination laws, and the override was adopted shortly after most of the cases had been decided. Like the 1991 CRA, three-fifths of the override statutes were adopted specifically to override the Court, and correction of judicial interpretations was the main point of the new statutes.¹⁵⁶ But in other important respects, the 1991 law is not representative of the overrides in our study.

Most obviously, the 1991 CRA was a jumbo override, supplanting the points of law established in as many as twelve Supreme Court decisions. Only the 1996 AEDPA and the 1978 Bankruptcy Reform Act were comparable to the 1991 CRA: all of these jumbo overrides superseded ten or more Supreme Court decisions. As Figure 5 below demonstrates, the typical statutory override affected only a single Supreme Court decision. (Recall that we do not count Supreme Court decisions applying the leading decision, unless there is a new point of law in the subsequent decisions.)

supra note 3, app.1 at 255. Through our Westlaw approach, we identified four decisions not identified by the 2013 Hasen study—offset somewhat by our not including two decisions that study identified. For example, the 2013 Hasen study includes *Marek v. Chesny*, 473 U.S. 1 (1985), as an overridden decision, and we do not. The Court in *Marek* interpreted Federal Rule of Civil Procedure 68 to bar a § 1983 plaintiff from recovering counsel fees when he had rejected a settlement offer that exceeded his ultimate award. *Id.* at 9–12. Congress in 1991 did not want the *Marek* result to apply to Title VII cases—and it knew from the case law that *Marek* would not apply if Congress identified counsel fees as a possible award to successful plaintiffs in addition to “costs” (the Rule 68 term) rather than as an element of “costs.” See *Gudenkauf v. Stauffer Commc’ns, Inc.*, 158 F.3d 1074, 1083–84 (10th Cir. 1998). Because Congress did not amend Rule 68 itself and because the new Title VII provision would not have affected the result in *Marek*, we did not consider this an override—although we cheerfully concede that the 1991 Congress did not approve the *Marek* result or analysis in any way. Also see *Evans v. Jeff D.*, 475 U.S. 717 (1986), which the 2013 Hasen study also identifies as overridden by the 1991 CRA, but we do not, for similar reasons.

156. Note that this does not include only cases in which Congress asserted that the Supreme Court case was wrong when it was decided. In many of these cases, especially in areas such as bankruptcy, intellectual property, and tax, Congress was updating the Supreme Court’s holding to meet new circumstances. Thus many of these overrides were not included in our list of “restorative” overrides. See *infra* section III(D)(3).



Just as important, the 1991 CRA was a swift congressional response to Supreme Court interpretations of federal statutes: Eight of the twelve decisions were rendered less than two-and-a-half years before the override statute, and all were less than ten years old.¹⁵⁷ Table 2 below suggests, initially, that the 1991 CRA may have been an extreme outlier, as the average (mean) period between the Supreme Court decision and the override is 11.39 years, with the average higher than ten for the 1970s, 1980s, and 2000s and closer to nine years for the 1990s. These statistics, however, are skewed by a handful of overridden decisions originating in the early twentieth century and before. The 2000s are especially skewed because of a few antique decisions overridden in the Class Action Fairness Act (CAFA) of 2005—for example, *Chapman v. Barney*¹⁵⁸ was decided more than 115 years before CAFA, and *Strawbridge v. Curtis*¹⁵⁹ was decided nearly two centuries before CAFA. If we remove those two cases, the 2000s fall much more in line with previous decades.

The more useful statistics are the median years between the decision and the override. Overall, the median for our period of study is roughly four years. As a perusal of Appendix 1 makes clear, slightly more than half of the overrides come rather expeditiously, within five years of the decisions in question. The 1991 CRA is unique as such a speedy override

157. See *infra* Appendix 1.

158. 129 U.S. 677 (1889).

159. 7 U.S. (3 Cranch) 267 (1806).

of so many decisions, but it is representative of most overrides in that it delivered a legislative correction sooner rather than later. Overrides that expressly criticize the Court's decision—as did many of the overrides in the 1991 Act—tend to come especially quickly. For overrides intended primarily to correct a “bad interpretation,” the average time between the decision and the overrides was four years, while the median was slightly less than two-and-a-half, both of which are well below the numbers for the total set of overrides.

Table 2. Time Between Supreme Court Decisions and Overrides

	Total Number of Overrides	Average Years Between Decision and Override	Median Years Between Decision and Override	Standard Deviation Between Decision and Override
<i>All Overrides</i>	286	11.39	4.64	19.32
<i>Overrides in the 2000s</i> ¹⁶⁰	28	20.93	7.84	42.44
<i>Overrides in the 1990s</i>	104	9.28	4.69	11.53
<i>Overrides in the 1980s</i>	75	10.50	4.44	15.74
<i>Overrides in the 1970s</i>	68	10.76	3.81	17.59

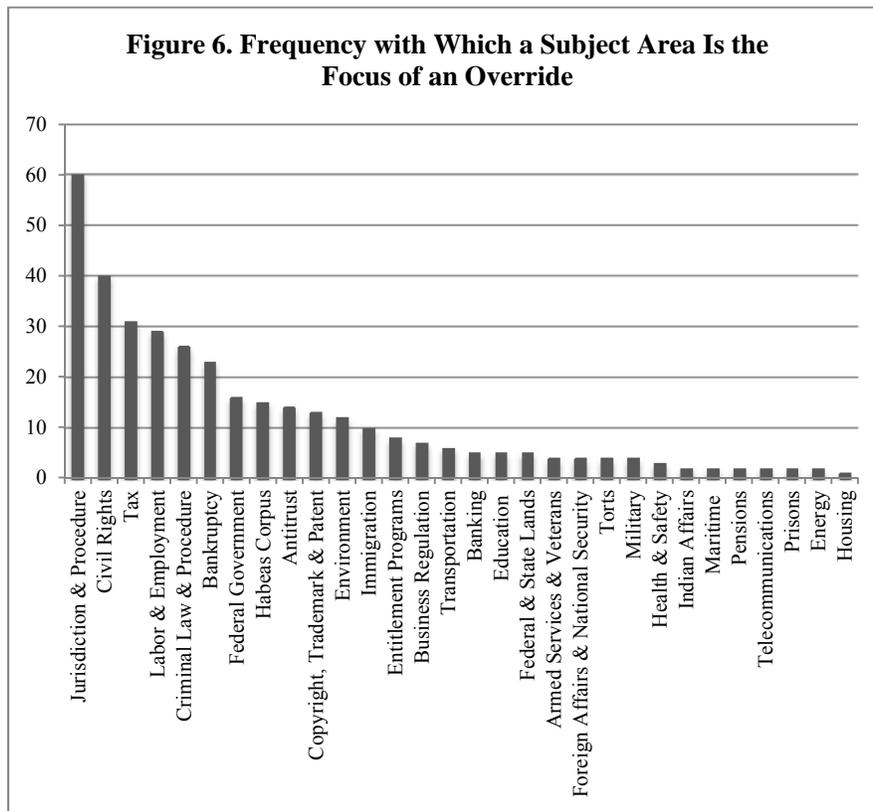
B. Subject Matter of Overrides

Attention to the subject areas where statutory overrides have been prominent helps us to understand not only the history of overrides but also the evolution of public law in this country. Figures 6 and 7 below provide an overview of the subject areas generating overrides. An override can affect multiple subject areas. For example, we coded the override of *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁶¹ as involving civil rights and workplace law, both of which map onto Title VII of the Civil Rights Act of

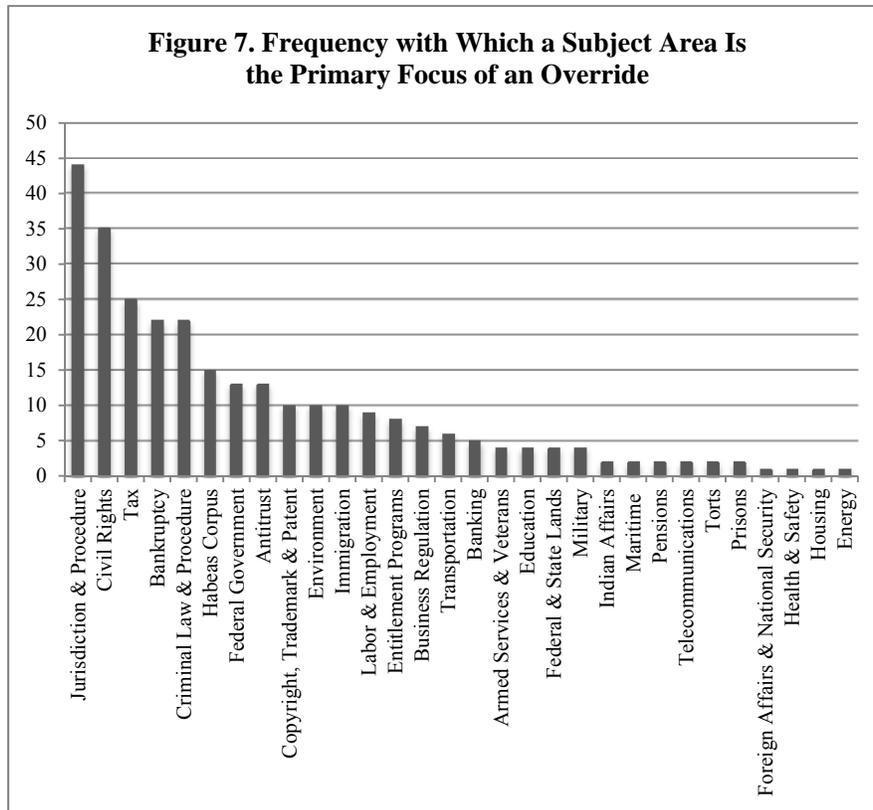
160. Excluding *Chapman* and *Strawbridge*—the two overrides of the nineteenth-century cases—the average for the 2000s was roughly ten years.

161. 550 U.S. 618 (2007).

1964; the precise issue in *Ledbetter* was a statute of limitations issue,¹⁶² which meant that the case also fit into the procedure category. Figure 6 reports the number of times a subject area was affected by an override. Figure 7 reports the number of times a subject area was the *primary* area affected by an override. With the notable exception of labor and employment, which is a commonly overridden area mostly because of its correlation with the civil rights statutes, Figures 6 and 7 are remarkably similar. But perhaps the most important feature of these figures is what they do *not* show, namely, significant override activity in several areas of public law that are of overwhelming importance to the nation's well-being.



162. See *id.* at 621.



Thus, in a period covering almost half a century, there have been surprisingly few override statutes in the areas of telecommunications, energy, maritime, housing, Indian affairs, pensions, and national security. In these critical policy arenas, there are numerous Supreme Court decisions, but most of the law is made by agencies, often interacting directly with Congress. By contrast, the overrides are concentrated in subject-matter areas where courts play a more critical role in enforcing the statutory scheme, such as civil rights, tax, bankruptcy, and intellectual property.

These different levels of override activity illustrate an important feature of overrides and why they matter. Agencies and Congress communicate directly, through phone calls and e-mails, budget negotiations, and congressional hearings; the Court and Congress do not communicate in this manner; indeed, such communication would be considered unethical.¹⁶³ Instead, the Court and Congress “communicate”

163. Cf. MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2010) (circumscribing the political activities of judges and limiting those activities that may create the appearance of a lack of impartiality).

through judicial decisions and congressional responses, both codifications and overrides.¹⁶⁴

Even more important is that there have been very few override statutes in some of the areas where Congress legislates most vigorously, namely, federal spending and emergency relief, water rights, federal land use, federal buildings, international trade, and miscellaneous institutional matters. These six subject matters constitute a large majority of the public laws adopted in each Congress and most of the pages in the *Statutes at Large* by each Congress in the last generation.¹⁶⁵ These areas of public law do not generate overrides in large part because they are what Edward Rubin calls *intransitive* statutes: they are not directives to the public but are, instead, directives to government officials and generally do not create judicially enforceable legal rights.¹⁶⁶

Figure 6 reveals twenty-nine subject areas where Congress has enacted multiple overrides of Supreme Court opinions. But this tremendous variety must be placed in context: most of the work of Congress—appropriations, the operation of the government, foreign affairs and national security, federal land and water policy—does not involve overriding the Court at all. And some of the most important areas of statutory policy, such as energy and telecommunications, generate only a trickle of overrides. Having said that, there are some exciting arenas for overrides.

1. Civil Rights and Workplace Equality.—As the 1991 CRA illustrates, a perennial focus of congressional override activity has been civil rights/antidiscrimination law, as well as labor and employment law.¹⁶⁷ Figure 6 confirms that both civil rights and labor law are two of the primary subject areas where Congress has been active in overriding the Supreme Court—but when one focuses on subject areas that were the *principal* focus of overrides, one sees that almost all the “labor” overrides involved antidiscrimination laws, primarily amendments to Title VII of the 1964 CRA but also to the 1967 ADEA and the 1990 ADA.¹⁶⁸ In the House and

164. Note Professor Staudt’s important point that as many as one-half of the congressional responses to unanimous Supreme Court decisions *codify* rather than *override* them. See Staudt et al., *supra* note 3, at 1388 (making this point for tax cases).

165. Thus, we collected from Volumes 119 and 120 of the *Statutes at Large* all the public laws falling under these six categories for the 109th Congress (2005–2006); we found 73.2% of the public laws fell into one of these categories, and 54.7% of the pages of the *Statutes at Large*. For comparison’s sake, we also examined the *Statutes at Large* for the 99th and 104th Congresses (1985–1986 and 1995–1996) and found similar percentages.

166. See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 381 (1989).

167. See generally Eskridge, *supra* note 150; J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEXAS L. REV. 667 (2008).

168. See *supra* Figure 7; *infra* Appendix 1.

sometimes the Senate, both the Judiciary and Labor Committees have handled override proposals for workplace discrimination decisions.¹⁶⁹ It is notable that “labor law” updating has neglected traditional areas of workplace regulation, such as the National Labor Relations Act (NLRA) of 1935, which occupies a declining role in the Supreme Court’s docket, but is virtually absent in our population of statutory overrides.

2. *Federal Jurisdiction and Civil Procedure.*—Notwithstanding all the well-justified attention workplace antidiscrimination overrides have received, the largest single category of overrides in Figures 6 and 7 is federal jurisdiction and civil procedure. This may be surprising to some readers, but not to the experts. Federal jurisdictional statutes and the Federal Rules of Civil Procedure generate a lot of Supreme Court decisions, and the legal establishment has for the last half-century understood that “procedure” rules affect and may alter “substantive” entitlements.¹⁷⁰ As Stephen Burbank has documented, both plaintiff-side and defendant-side lawyers, as well as Justice Department attorneys, besiege Congress with override proposals, which form a significant portion of work performed by the Judiciary Committees.¹⁷¹

3. *Criminal Law and Habeas Procedure.*—Figures 6 and 7 categorize substantive criminal law and procedure separately from habeas corpus procedure because those statutes are in different titles of the U.S. Code and

169. Thus, the initial House hearings for the 1990 civil rights override bill were joint hearings. *Hearings on H.R. 4000, The Civil Rights Act of 1990: Joint Hearings Before the H. Comm. on Educ. & Labor and the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. (1990). Chaired by Senator Kennedy, the Senate hearings were conducted by the Committee on Labor and Human Resources. *Civil Rights Act of 1990: Hearing on S. 2104 Before the S. Comm. on Labor & Human Res.*, 101st Cong. (1989). The 1990 bill was successfully vetoed by President George H.W. Bush. Steven A. Holmes, *President Vetoes Bill on Job Rights; Showdown Is Set*, N.Y. TIMES, Oct. 23, 1990, <http://www.nytimes.com/1990/10/23/us/president-vetoes-bill-on-job-rights-showdown-is-set.html>.

170. This is a lesson of legal realism, see David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433 (2010) (discussing at length the difficulties and nuances of designing procedural rules that have minimal impact on substantive rulings), and of strategic thinking by defense as well plaintiffs’ bars, see generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (examining litigation as an instrument of redistribution).

171. See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1723, 1729–30 (2004) (discussing the judiciary committees’ roles in passing legislation affecting the Judicial Branch and the role that lawyers can play in that process). For a recent dust-up, see the debate among Mark Herrmann and James M. Beck versus Stephen Burbank in Mark Herrmann, James M. Beck & Steven B. Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009), where Professor Burbank urges Congress to override certain procedure decisions. As of April 2014, Congress has not done so.

involve different kinds of values. Each field captures a large percentage of the total overrides—and altogether criminal law, criminal procedure, and habeas corpus rules account for almost 13% of the total overrides, making the combined category among the largest producers of overrides. As with the previous categories, this one generates a lot of Supreme Court opinions and great demand for overrides, especially when the Court decides against the government's interpretation and in favor of the convicted criminal. Like civil procedure and civil rights (for the most part), criminal law, criminal procedure, and habeas corpus fall within the jurisdiction of the House and Senate Judiciary Committees.¹⁷²

4. *Federal Income Taxation*.—It is no surprise that federal income taxation of individuals and corporations generates a lot of overrides. The Supreme Court decides several tax cases each term, the stakes are quite tangible and relatively high in such cases, and powerful institutions (the IRS and private groups) are poised to secure Congress's attention if they lose those cases. Not least important, the Senate Finance and House Ways and Means Committees are powerhouse committees that monitor the case law carefully and are not reluctant to respond to the Court—with statutes codifying judicial decisions, overriding them, or both.¹⁷³

5. *Bankruptcy*.—Rounding out the top five areas for congressional override activity is bankruptcy law.¹⁷⁴ In light of the Bankruptcy Reform Act (BRA) of 1978, which was a centerpiece of the 1991 Eskridge study,¹⁷⁵ we were not surprised that bankruptcy law remained an active area of congressional overrides. The Supreme Court regularly interprets the 1978 BRA, and losing interests just as regularly take their case to Congress, which sometimes overrides the Court. Like tax, civil procedure, federal jurisdiction, and most civil rights overrides, bankruptcy matters are handled by the judiciary committees of the House and Senate.¹⁷⁶ In addition to the

172. See *About the Committee*, U.S. HOUSE REPRESENTATIVES JUDICIARY COMMITTEE, <http://judiciary.house.gov/index.cfm/about-the-committee>; *Jurisdiction*, U.S. SENATE COMMITTEE ON JUDICIARY, <http://www.judiciary.senate.gov/about/jurisdiction>.

173. See Staudt et al., *supra* note 3, at 1351, 1357–58 (discussing the influence of these committees and recognizing that they pay close attention to Supreme Court decisions). The tax-writing committees are widely considered power committees. See, e.g., C. EUGENE STEUERLE, *THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA* 77–79 (1992) (explaining structural reasons for the power of the tax-writing committees).

174. See Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 900–10 (2009) (discussing some of the reasons for bankruptcy overrides).

175. See Eskridge, *supra* note 1, app.1 at 435–36.

176. See *About the Committee*, *supra* note 172; *Jurisdiction*, *supra* note 167.

1978 overrides, Congress again significantly revised the Bankruptcy Code in 1994.¹⁷⁷

6. *Other Important Subject Areas.*—The judiciary committees also have jurisdiction over many of the other top subject areas identified in Figures 6 and 7, namely, antitrust, intellectual property (copyright, patents, trademarks), immigration, prisons, and some matters of federal government organization and practices.¹⁷⁸ We were somewhat surprised that environmental law overrides are not more common; when such proposals are introduced, they are handled, for the most part, by the Senate Committee on the Environment and Public Works and the House Committee on Energy and Commerce.¹⁷⁹ Most entitlement programs, primarily those included in the Social Security Act of 1935 (as amended), are handled by the House Ways and Means Committee and the Senate Finance Committee.¹⁸⁰

Another angle for thinking about subject matter is to compare the portion of the 275 overridden Supreme Court decisions occupied by each subject matter with the portion that subject matter occupies on the Supreme Court's docket. Figure 8 below compares the subject areas found within our population of overridden decisions with the set of Supreme Court decisions between 1984 and 2006 assembled by the 2010 study by Connor Raso and William Eskridge.¹⁸¹ For the most part, prominence on the

177. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C.).

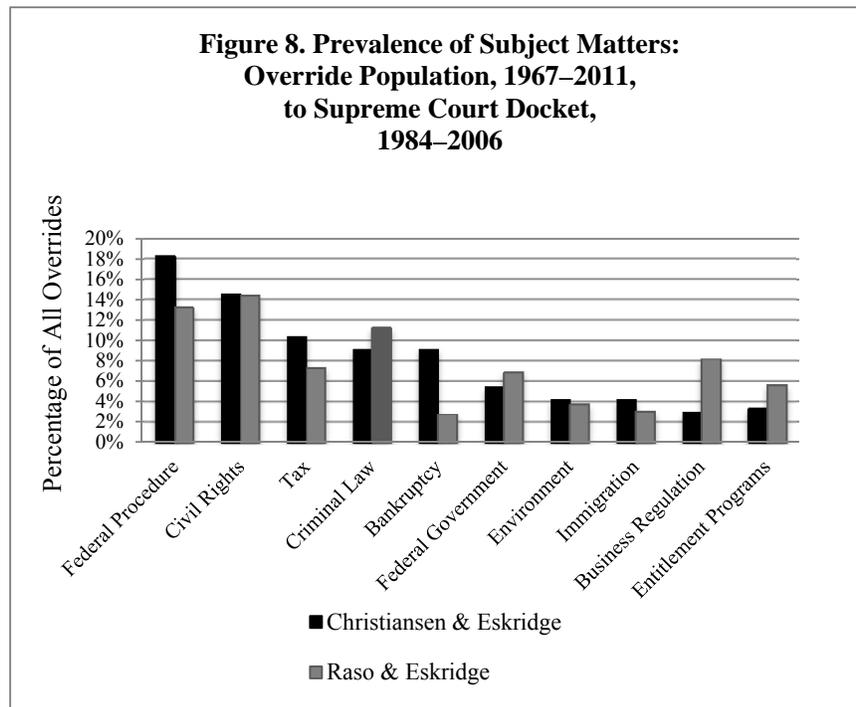
178. See *About the Committee*, *supra* note 172; *Jurisdiction*, *supra* note 172.

179. See *Committee History*, U.S. HOUSE REPRESENTATIVES ENERGY & COM. COMMITTEE, <http://energycommerce.house.gov/about/committee-history>; *Committee Jurisdiction*, U.S. SENATE COMMITTEE ON ENV'T & PUB. WORKS, <http://www.epw.senate.gov/public/index.cfm?FuseAction=CommitteeResources.CommitteeJurisdiction&CFID=71395850&CFTOKEN=57576748>. The committees handle clean air and water as well as environmental cleanup matters. See *Committee History*, *supra*; *Committee Jurisdiction*, *supra*. In both chambers, endangered species proposals originate with natural resources committees. See *Committee Jurisdiction*, COMMITTEE ON NAT. RESOURCES, <http://naturalresources.house.gov/about/jurisdiction.htm>; *Jurisdiction*, U.S. SENATE COMMITTEE ON ENERGY & NAT. RESOURCES, <http://www.energy.senate.gov/public/index.cfm/jurisdiction>.

180. See *Committee Jurisdiction*, COMMITTEE ON WAYS & MEANS, <http://waysandmeans.house.gov/about/jurisdiction.htm>; *Jurisdiction*, U.S. SENATE COMMITTEE ON FIN., <http://www.finance.senate.gov/about/jurisdiction/>.

181. See Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010). The dataset only includes statutory cases where there was a federal agency interpretation before the Court, *id.* at 1741—but that includes more than 90% of the statutory cases. The current study coded for more subject areas than the Raso & Eskridge study. For example, Raso & Eskridge included few state habeas cases because the Department of Justice rarely filed a brief in those cases. See *id.* (indicating that agency statutory interpretations were gleaned in part from amicus briefs). To make the numbers above comparable, the percentages for the Christiansen & Eskridge data reflect the number of overrides in a given subject area divided

Supreme Court docket paralleled override level. The biggest exception was bankruptcy, which generated a lot more overrides than would have been expected from the Court's docket. Tax cases also generated relatively higher levels of override activity.¹⁸² Significantly *less* represented in our override population than on the Court's docket were cases involving business regulation, entitlement programs, and federal government structure and rules.

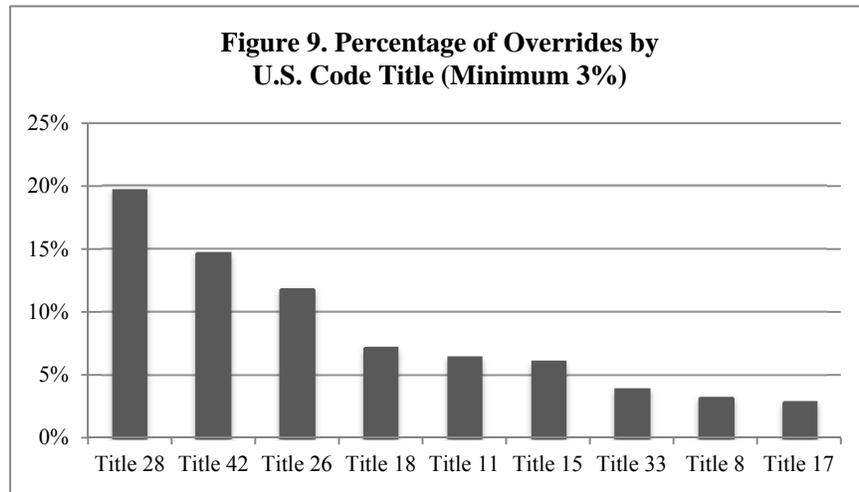


A final way of presenting, and understanding, the variety of subject matters where overrides have been prominent is to focus on the U.S. Code Titles that have been the situs for most overrides. As Figure 9 illustrates, six Titles have generated the overwhelming majority of overrides:

by the number of overrides for which both studies coded—i.e., excluding the habeas overrides. Consequently, the Christiansen & Eskridge numbers for a particular subject matter in Figure 8 are higher than they would be for the entire override population.

182. See, e.g., Staudt et al., *supra* note 3, at 1350–51 (noting that the Supreme Court has heard a disproportionate number of tax disputes). Notice that we make no claims about procedure. In the 2010 Raso & Eskridge dataset, the main statutory cases where there was not some federal agency position or submission were state habeas cases, and for that reason we would expect to see the procedure bars roughly equal.

(1) Title 28, federal jurisdiction and procedure, including habeas corpus; (2) Title 42, civil rights and entitlement programs; (3) Title 26, federal income taxation; (4) Title 18, criminal law; (5) Title 11, bankruptcy; and (6) Title 15, antitrust, securities, and other forms of business regulation.



C. Overrides and Superstatutes

It is also useful to think about statutory overrides through the lens of superstatutes. A superstatute is an ambitious law that supersedes common law baselines with a new public norm or structure, such that that norm or structure has become entrenched in American public law.¹⁸³ An approximation of what superstatutes are on the Supreme Court's radar is Nancy Staudt's list of nineteen federal statutes that were the most litigated laws during the Rehnquist Court.¹⁸⁴ Table 3 associates each statute on Professor Staudt's list, starting with the most litigated law, with the congressional committees having jurisdiction over the amendments and with the level of override activity during our period of 1967–2011.

183. ESKRIDGE & FERREJOHN, *supra* note 4, at 7 (defining and illustrating the notion of superstatutes).

184. See Staudt et al., *supra* note 3, at 1351.

Table 3. Most Litigated Statutes and Override Activity, 1967–2011

Most Litigated Statutes (Rehnquist Court)	Congressional Committees Having Jurisdiction	Level of Override Activity
<i>Internal Revenue Code of 1954</i>	House Ways & Means and Senate Finance Committees	Very High
<i>Federal Rules of Civil Procedure (1938)</i>	Judiciary Committees	Low
<i>Bankruptcy Reform Act of 1978</i>	Judiciary Committees	Very High
<i>Employee Retirement Income Security Act of 1974</i>	Judiciary Committees	Very Low
<i>Habeas Corpus Act of 1966</i>	Judiciary Committees	Very High
<i>Social Security Act of 1935, as amended</i>	House Ways & Means and Senate Finance Committees	High
<i>Civil Rights Act of 1871 (§ 1983)</i>	Judiciary Committees	Moderate
<i>Civil Rights Act of 1964, Title VII</i>	Senate Health, Education, Labor & Pensions Committee; House Education & Labor Committee—as well as the Judiciary Committees	Very High
<i>Federal Rules of Criminal Procedure</i>	Judiciary Committees	Moderate
<i>Immigration & Nationality Act of 1952</i>	Judiciary Committees	High
<i>National Labor Relations Act of 1935</i>	Senate Health, Education, Labor & Pensions Committee; House Education & Labor Committee	Low
<i>Voting Rights Act of 1965</i>	Judiciary Committees	Very High
<i>Securities Acts of 1933 and 1934</i>	Banking Committees	Moderate
<i>Racketeer Act of 1974</i>	Judiciary Committees	Low

<i>Administrative Procedure Act of 1946</i>	Judiciary Committees	Low
<i>Americans with Disabilities Act of 1990</i>	Judiciary Committees as well as Labor Committees	Moderate
<i>Federal Rules of Evidence of 1974</i>	Judiciary Committees	None
<i>Age Discrimination in Employment Act of 1967</i>	Labor Committees as well as Judiciary Committees	High
<i>Civil Rights Attorneys' Fees Awards Act of 1978</i>	Judiciary Committees	Low

The statutes that generated the most Supreme Court decisions (i.e., were most litigated) were, by and large, the ones that saw the most congressional overrides of those decisions. Among the top ten most litigated statutes in the Staudt list, six saw high or very high, and another two moderate, override activity in our period of study. To be sure, this fact ought not be surprising: As Figure 8 suggested, subject-matter salience on the Supreme Court's docket will also suggest salience on the congressional agenda, if for no other reason than the fact that the Supreme Court is the final word unless Congress overrides it, and frequently the losers at the Supreme Court level have enough political clout to secure the attention of the relevant congressional committee—typically the House or Senate Judiciary Committees.¹⁸⁵

Notice also the gaping exception from the top-ten superstatutes, namely, 1974 ERISA, the landmark pension law.¹⁸⁶ Not only is this law much-litigated, but the Supreme Court case law is poorly theorized, impractical, policy deficient, and internally inconsistent.¹⁸⁷ Yet Congress has done nothing to clarify and improve this area of law, presumably because the relevant interest groups (banks versus unions) are politically

185. See Eskridge, *supra* note 1, at 377; *supra* Table 3.

186. See Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered titles of U.S.C.).

187. See, e.g., John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003) (arguing that the Supreme Court has interpreted ERISA too narrowly); Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 392-93 (2000) (discussing hypotheticals in which justice would seem to require the finding of fiduciary duty but Supreme Court decisions on ERISA have found no such duty).

balanced and no agenda entrepreneur has taken on the boring complexities of ERISA. The same dynamic applies to the 1935 NLRA.¹⁸⁸

An important way to identify superstatutes is through the frequency of amendment: a statute whose norm or idea becomes entrenched is going to have to be updated, usually through statutory amendments. Table 4 below identifies, for each decade and for the population as a whole, how often the statutory provision at issue has been amended during our period of inquiry (1967–2011). Thus, statutes that absorbed overrides of the Court during the 1970s have been subject to almost ten amendments, on average (mean); to be sure, the median number of amendments for such statutes was much lower (six times). But the point is established that frequently amended superstatutes are likely to attract increasing numbers of overrides.

Table 4. Frequency with Which Provision Affected by the Override Is Amended

	Average Number of Amendments	Median Number of Amendments	Standard Deviation of Amendments	Mode Number of Amendments
<i>All Overrides</i>	7.64	4	12.21	2
<i>Overrides in the 2000s</i>	5.09	3	4.70	1
<i>Overrides in the 1990s</i>	7.28	3	13.59	2
<i>Overrides in the 1980s</i>	7.50	3	12.33	0
<i>Overrides in the 1970s</i>	9.91	6	12.57	6

The frequency with which override statutes were amended also declines slightly for overrides in the 1980s and 1990s (slightly more than seven times on average) and the 2000s (five times). This suggests that

188. A big difference is that the NLRA occupies less of the Court's docket each decade, while ERISA continues to occupy a big part of the docket. For the country as a whole, the NLRA is of sharply declining relevance, see Charles B. Craver, *The Relevance of the NLRA and Labor Organizations in the Post-Industrial, Global Economy*, 57 *LAB. L.J.* 133, 133–35 (2006), while ERISA will be increasingly relevant as a larger portion of the adult population lives in retirement, dependent on pensions.

override activity has changed in the last twenty years: the focus has moved to provisions that Congress has addressed less frequently.

Relatedly, the nineteen most litigated statutes in the Supreme Court might tell us something about the post-1998 fall-off in override activity. These nineteen superstatutes were the situs for seven override laws, reversing twelve Supreme Court decisions, in the dozen years after 1998.¹⁸⁹ Compare the output of the last pre-Clinton impeachment Congress (1995–1996), which amended the same nineteen statutes with six override laws that reversed or modified a whopping twenty-three Supreme Court decisions.¹⁹⁰ In other words, in a two-year period right before the impeachment drama, *one Congress* amended the most litigated superstatutes to override twice as many Supreme Court decisions as did the *six Congresses* after the Clinton impeachment.

This analysis suggests a new dimension to the fall-off in Congress's override activity after 1998. Whereas Congress continues to enact big partisan overrides like the 2009 FDA Tobacco Act, it has been passing fewer overrides updating the superstatutes that occupy most of the Supreme

189. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (codified at 42 U.S.C. § 2000e-5 (2006 & Supp. V 2012)) (amending Title VII of the 1964 Civil Rights Act to override one decision); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–57 (codified as amended at 42 U.S.C. § 12102) (amending the 1990 ADA to override four decisions); Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified as amended at 28 U.S.C. § 2241 (2012)) (amending the 1966 habeas law to override one decision); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81 (codified as amended at 42 U.S.C. § 1973c (2006)) (amending the 1965 Voting Rights Act to override two decisions); Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. 10, § 1005(e), 119 Stat. 2739, 2741–42 (codified as amended at 28 U.S.C. § 2241) (amending the 1966 habeas law to override one decision); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.) (amending the 1978 BRA to override two decisions); Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 402(a), 116 Stat. 21, 40 (codified as amended at 26 U.S.C. § 108) (amending the 1954 Internal Revenue Code to override one decision).

190. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (codified as amended at 42 U.S.C. § 1983) (amending § 1983 of the 1871 Civil Rights Act to override two decisions); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, §§ 301(a), 304, 604(a), 110 Stat. 3009-546, 3009-575, 3009-586, 3009-690 to -94 (codified as amended in scattered sections of 8 U.S.C.) (amending the 1952 Immigration and Nationality Act to override three decisions); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211(c), 110 Stat. 2105, 2189 (codified as amended at 42 U.S.C. § 1382) (amending the 1935 Social Security Act to override one decision); Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838–39 (codified as amended at 26 U.S.C. § 104) (amending the 1954 Internal Revenue Code to override two decisions); Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, §§ 101–102, 104–106, 110 Stat. 1214, 1217–21 (codified as amended in scattered sections of 28 U.S.C.) (amending the 1966 habeas law to override fourteen decisions); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101, 109 Stat. 737, 737–49 (codified as amended in scattered sections of 15 U.S.C.) (amending the 1933–1934 securities laws to override one decision).

Court's attention: the 1871 Civil Rights Act (no overrides after 1998), the 1935 Social Security Act (no overrides after 1998), the 1938 Federal Rules of Civil Procedure (no overrides after 1998), the Federal Rules of Criminal Procedure (no overrides after 1998), the 1952 Immigration and Nationality Act (no overrides after 1998), the 1954 Internal Revenue Code (one override after 1998), Title VII of the 1964 CRA (one override after 1998), the 1967 Age Discrimination Act (no overrides after 1998), the 1978 BRA (two overrides after 1998), and there have been no overrides in any of the major environmental statutes (Clean Air Act, Clean Water Act, etc.).¹⁹¹ While the post-Clinton impeachment Congresses have updated the 1990 Americans with Disabilities Act (ADA) and the 1965 VRA in important ways, and the 1966 habeas corpus law in minor ways, it is remarkable how many important areas of federal statutory law have been left unattended by Congress during this period, especially in light of the attention that Congress has historically paid to these laws.

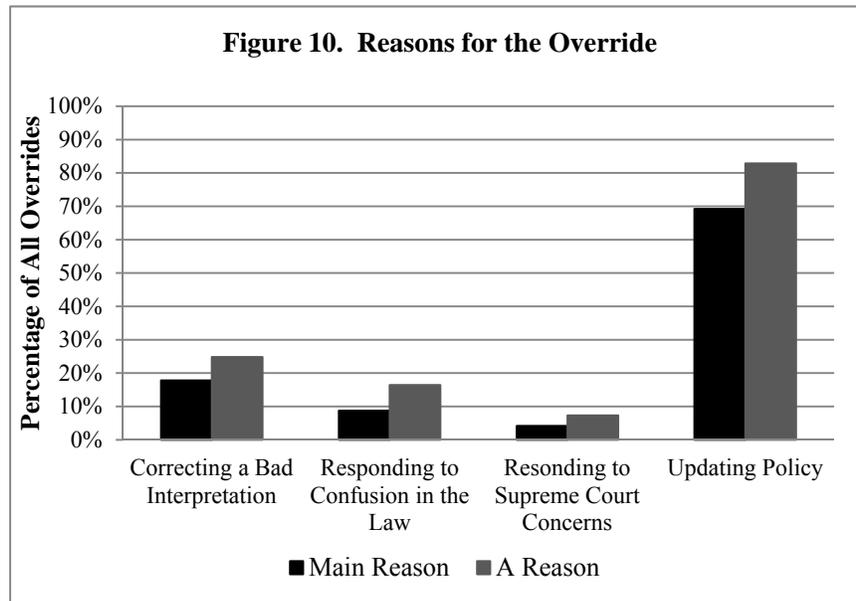
D. *Purposes of Overrides*

Why does Congress override the Court? One way of thinking about this question is to figure out the stated purpose of the override: Did the Supreme Court botch the decision making in an important case, deciding it the wrong way or announcing a point of law contrary to congressional expectations? Even if correct as a legal matter, was the result or point of law poor and perhaps outdated policy by the time Congress overrode the Court? Was there confusion as to the rules of law, and so need for clarification?

Based upon the committee hearings and reports, we coded all the overrides to reflect the stated justifications for upending a Supreme Court interpretation of a statute. Figure 10 below reports our findings. Consistent with the tenor of the legislative history that we read, the primary conclusion to be drawn from Figure 10 is that overrides are usually not the contentious process that characterized the 1991 CRA and other dramatic overrides of great interest to the media, law students, and many academics. Instead, overrides reflect the complex interactive process by which the three main organs of government—the legislative, executive, and judicial branches—cooperate as well as compete, all the time.¹⁹²

191. See *infra* Appendix 1.

192. For a theoretical statement of this point, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994). For an even stronger focus on the cooperative relationship between the Court and Congress, see STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010).



Drawing from the research reflected in Figure 10, we offer the following categorization of the overrides in our study.

1. Policy-Updating Overrides.—About two-thirds of the overrides we studied were primarily *policy updating*: Congress treated the Supreme Court decision without a great deal of negative judgment about the Court's performance, but replaced its point of law with a new one that Congress considered more equitable, more efficient, more consistent with current political values, or better suited to changed circumstances. These overrides generally correspond to the pair of columns on the right in Figure 10. In policy-updating overrides, Congress treats the judicial decision, often an older one, the same as it would treat a statutory provision that no longer meets the needs of the modern regulatory state. Just as a Congress repealing an obsolete statute is usually not making a harsh judgment about the competence of the enacting Congress, so a Congress overriding an obsolete Court decision is usually not making a harsh judgment about the competence of the deciding Court. And even where Congress was critical of a decision in this category, it criticized primarily the effects of the decision rather than the decision itself.

The 1978 BRA is the classic policy-updating override. The old bankruptcy law no longer met the needs of a dynamic society, including liberal demands that insolvent debtors have a more accommodating legal

structure that would allow them to have a “fresh start” in their financial lives.¹⁹³ A Bankruptcy Reform Commission recommended a comprehensive overhaul of the entire statutory scheme.¹⁹⁴ Congress, after years of hearings and negotiations, enacted the 1978 superstatute, which overrode many Supreme Court interpretations of the old law, as well as several lower court constructions.¹⁹⁵ Although many of the overrides were a direct response to the Supreme Court, they were incidental to the primary task of modernizing American bankruptcy law or, more precisely, recalibrating bankruptcy rules to reflect efficiency concerns raised by creditors, the fresh start idea favored by debtors and their advocates, and the practicalities of the modern market.¹⁹⁶ The Judicial Improvements Act of 1990,¹⁹⁷ which created supplemental jurisdiction (28 U.S.C. § 1367) and significantly modified Title 28’s venue provisions (28 U.S.C. § 1391), is another archetypal updating override.

Consider a more controversial example. The 1996 AEDPA is regarded in some circles as a congressional rebuff to the Supreme Court,¹⁹⁸ but that is not the way we read this particular superstatute. Since 1969, a Supreme Court dominated by Republican Justices had been setting new rules restricting prisoner access to habeas corpus, especially state prisoners who filed repeated habeas petitions.¹⁹⁹ Typically, the new restrictions were adopted over fierce dissenting opinions and reflected judicial compromises needed to secure the votes of moderate conservatives.²⁰⁰ In 1996, with

193. See *infra* notes 359–63 and accompanying text.

194. See Richard E. Mendales, *Intensive Care for the Public Corporation: Securities Law, Corporate Governance, and the Reorganization Process*, 91 MARQ. L. REV. 979, 989–90 (2008) (describing the creation of the Commission and some of its recommendations).

195. See Eskridge, *supra* note 1, app. 1 at 435–36 (listing the Supreme Court and lower court decisions explicitly discussed in the legislative history and overridden by the 1978 BRA).

196. For an excellent history of bankruptcy law, situating the 1978 BRA in a broader political setting, see DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 131–59 (2001).

197. Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered titles of U.S.C.).

198. See Padraic Foran, Note, *Unreasonably Wrong: The Supreme Court’s Supremacy, the AEDPA Standard, and Carey v. Musladin*, 81 S. CAL. L. REV. 571, 588–91 (2008) (discussing three theories of the genesis of AEDPA, including one which argues that “the passage of the AEDPA was retaliation against judicial activism”).

199. See Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2353–57 (1993) (documenting Nixon era proposals for legislative cutbacks to the broad 1966 habeas law and explaining how the legislative proposals found their way into Burger and then Rehnquist Court interpretations of the 1966 law).

200. The dissenters often had excellent legal arguments, based upon the Warren Court statutory precedents that not only bound the Court but that had been the premise of the Great Society Congress’s codification of habeas corpus procedures in 1966. See, e.g., *Stone v. Powell*, 428 U.S. 465, 507–09 (1976) (Brennan, J., dissenting) (criticizing the Court’s departure from *stare decisis*); see also Yackle, *supra* note 199, at 2377 (suggesting that Warren Court principles influenced the 1966 habeas law).

Republican critics of broad habeas in control of Congress, and an ideologically flexible Democrat in the White House, Congress adopted AEDPA. In our view, AEDPA reflects the synergy of cooperation and competition between the branches. Focusing on efficiency and federalism and deemphasizing factual claims of innocence, Congress approved of and codified the Supreme Court's doctrines barring most habeas claims—and in the process added new restrictions and abrogated some of the Court's due process-inspired exceptions and loopholes.²⁰¹ The policy update was responsive to a political climate hostile to prisoner litigation, even when such lawsuits raised claims of actual innocence. Every one of AEDPA's fourteen overrides was a direct response to a Supreme Court decision, but we identified only one override that was aimed at correcting a bad interpretation of the 1966 habeas corpus statute.²⁰² The other thirteen overrides were all updates to the habeas law that Congress justified based on policy grounds rather than the need to correct the Court's errant interpretation.²⁰³

Altogether, two-thirds of the overrides are policy-updating overrides. Almost all of the Court's overridden bankruptcy, tax, intellectual property, habeas, federal jurisdiction, and civil procedure decisions are policy updates—often reflecting new political values, responses to practical problems, or both. In each of these areas, Congress administers a coherent body of law (indeed, Congress administers the only bankruptcy law), and the Supreme Court is the court of last resort on a statute's meaning. And in almost all of these areas, the circumstances have changed significantly over the course of our study. For instance, copyright laws designed for books and recorded music have evolved to account for the challenges of cable broadcasting²⁰⁴ and digital technologies.²⁰⁵ It should thus come as no

201. *Compare, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (explaining that the compromise due process test for a properly presented habeas petition based on innocence is whether the rational trier of fact could reasonably have found guilt beyond a reasonable doubt), *with* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (adding 28 U.S.C. § 2254(d)(1), which provides that the new test is whether the state court's determination that evidence supported a conviction is objectively “unreasonable”).

202. *See* § 104, 110 Stat. at 1218–19 (codified as amended at 28 U.S.C. § 2254 (2012)) (overriding *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)).

203. The overrides justified on policy grounds were *Thompson v. Keohane*, 516 U.S. 99 (1995), *Schlup v. Delo*, 513 U.S. 298 (1995), *McCleskey v. Zant*, 499 U.S. 467 (1991), *Teague v. Lane*, 489 U.S. 288 (1989), *Granberry v. Greer*, 481 U.S. 129 (1987), *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), *Vasquez v. Hillery*, 474 U.S. 254 (1986), *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Rose v. Lundy*, 455 U.S. 509 (1982), *Jackson v. Virginia*, 443 U.S. 307 (1979), *Nowakowski v. Maroney*, 386 U.S. 542 (1967), *Sanders v. United States*, 373 U.S. 1 (1963), and *Brown v. Allen*, 344 U.S. 443 (1953).

204. *See, e.g.*, *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974) (using copyright laws from 1909), *overridden by* Act of Oct. 19, 1976, Pub. L. No. 94-553, § 111, 90 Stat. 2541, 2550–58 (codified as amended at 17 U.S.C. § 111); *Fortnightly Corp. v. United Artists Television, Inc.*, 392

surprise that a greater deal of Congress's override efforts have been directed at keeping current these areas of the law.

2. *Clarifying Overrides.*—Some congressional responses to Supreme Court statutory decisions are primarily *clarifying overrides*, where Congress is responding to confusion in the law or is fine-tuning statutes in ways that have few policy consequences. (Often, it is more important that a statutory rule be clear and be settled than that it reflect a particular policy.) A number of the clarifying overrides were Congress's response to Supreme Court decisions that summarily affirmed a lower court statutory interpretation but without creating a national rule, which Congress then provided in the form of the override.²⁰⁶ These overrides generally correspond to the middle-two pairs of columns in Figure 10. For example, in *Agsalud v. Standard Oil Co. of California*²⁰⁷ the Supreme Court issued a summary affirmance of the Ninth Circuit's holding that a Hawaii health care law was preempted by ERISA.²⁰⁸ Congress responded a year later with a statute that provided a universal, nationwide rule governing the exemption of certain local health care laws from preemption under ERISA.²⁰⁹

On other occasions, the Court delivers a complete decision on the merits that Congress finds problematic because it does not provide an understandable rule of law. Thus, the Court in *United States v. Santos*²¹⁰ interpreted the money laundering statute narrowly²¹¹—but there was no majority opinion, leaving the lower courts with difficulty figuring out how to treat pending prosecutions. To provide a rule of law that the Court could

U.S. 390 (1968) (same), *overridden* by § 111, 90 Stat. at 2550–58 (codified as amended at 17 U.S.C. § 111).

205. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (“In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated [new technological developments].”), *overridden* by the Digital Millennium Copyright Act, Pub. L. No. 105-304, § 103, 112 Stat. 2860, 2863–76 (1998) (codified as amended at 17 U.S.C. §§ 1201–1205).

206. See, e.g., Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 3(b)(2), 102 Stat. 4677, 4680 (codified at 15 U.S.C. § 80b-4a) (overriding *Carpenter v. United States*, 484 U.S. 19 (1987), where an equally divided Court had failed to resolve the important issue whether the purveyors of insider information can be prosecuted under the securities laws, and authorizing the SEC to go after such purveyors).

207. 454 U.S. 801 (1981).

208. *Id.* (affirming *Standard Oil Co. of Cal. v. Agsalud*, 633 F.2d 760, 763 (9th Cir. 1980)).

209. Act of Jan. 14, 1983, Pub. L. No. 97-473, tit. 3, § 301, 96 Stat. 2605, 2611–12 (codified as amended at 29 U.S.C. § 1144).

210. 553 U.S. 507 (2008).

211. See *id.* at 513–14 (plurality opinion).

not, Congress overrode *Santos* with a clear command in the Fraud Enforcement and Recovery Act of 2009.²¹²

Although a number of overrides are publicly justified in part as resolving “confusion” in the law, fewer than one in ten overrides are primarily justified along these lines.

3. *Restorative Overrides.*—Congress sometimes goes beyond tweaking statutes to reflect recent congressional values or to clean up confusing legal rules and adopts overrides in response to what it considers a bad interpretation by the Supreme Court. Frequently, but not always, these overrides restore the policy Congress vested in the original statute or as implemented by an agency and lower courts before a dust-clearing Supreme Court decision. About one-fifth of the overridden Supreme Court decisions fall under this category. These overrides generally correspond to the leftmost pair of columns in Figure 10.²¹³ Appendix 1 marks the overrides that restore the previous rule of law in italics because these are the overrides that garner the most attention and most obviously reflect institutional conflict.

When Congress claims to be “restoring” the proper rule of law, it sometimes makes the legislative rule retroactive, the way a court decision would be.²¹⁴ Most of the restorative overrides are not retroactive, however. An earlier version of the 1991 CRA retroactively overruled the Court’s stingy decisions cutting back on workplace discrimination protections,²¹⁵ but the 1991 Act did not contain those provisions, and the Court found none of the overrides retroactive.²¹⁶ Nonetheless, the 1991 CRA was primarily restorative, and its proponents were harshly critical of the Supreme Court, not just because conservative Justices read their own values into the statutory language but also because the leading override proponents

212. Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1617, 1618 (codified at 18 U.S.C. § 1956(c)(9)); *see also* *United States v. Abdulwahab*, 715 F.3d 521, 531 n.8 (4th Cir. 2013) (explaining that the 2009 override cleared up the confusion among lower courts).

213. But not all cases. Sometimes Congress criticized an opinion as a bad interpretation, but then enacted a *different* legal rule, which would not qualify as a restorative override.

214. *See, e.g.*, Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (codified at 15 U.S.C. § 78aa-1) (overriding *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and doing so retroactively); Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, §§ 2, 5, 100 Stat. 796, 796–98 (codified at 20 U.S.C. § 1415) (overriding *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984), and doing so retroactively).

215. S. 2104, 101st Cong., § 15 (1990), *discussed in* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 255 & n.8, 256 (1994).

216. *See Landgraf*, 511 U.S. at 263–86 (generating and applying a strong presumption against retroactivity of statutory provisions); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 309–14 (1994) (applying a strong presumption against retroactive application of the 1991 CRA as well).

complained that “the Supreme Court’s recent rulings represent an effort to renege on history.”²¹⁷ The supporters of restorative overrides not only want to reverse a statutory policy they do not like and to clarify the law but also to rebuke the Supreme Court for, basically, not doing its job.

Significantly, most of the decisions overridden in this manner involved civil rights and antidiscrimination statutes, where people’s preferences are strongly held and, increasingly, separated by a partisan divide, with Republican representatives and judges taking politically conservative positions and Democrat representatives and judges taking politically liberal ones.²¹⁸ Among the most prominent restorative overrides are the Pregnancy Discrimination Act of 1978, the Voting Rights Act Amendments of 1982, the Civil Rights Restoration Act of 1987,²¹⁹ the 1991 CRA, the Voting Rights Act Reauthorization and Amendments Act of 2006, the ADA Amendments of 2008, and the Lilly Ledbetter Fair Pay Act of 2009. Except for the Ledbetter Act, the earlier restorative overrides were at least somewhat bipartisan: although Democrats supplied most of the votes for enactment, each of the earlier overrides had significant GOP support, and five of the seven were signed into law by conservative Republican Presidents.

One payoff of our categorization is suggested by this analysis. Recall the big fall-off in overrides after the 1998 Clinton impeachment—and notice that Congress in the recent era of fewer overrides has still managed to adopt a good many restorative overrides.²²⁰ Conversely, the fall-off in updating and clarifying overrides becomes all the more dramatic. This bodes ill for Court–Congress cooperation—but also for updating statutory policy in an informed and orderly manner. In the last fifteen years, and probably also for the immediate future, Congress has all but dropped out of the business of updating statutory policy in the areas identified in this Part.

E. Politics of Overrides: The Government Wins—But So Do Women and Minorities

Why does Congress override the Court? Another way of thinking about this question, complementing our analysis above, is to focus on which interests and institutions participate in the override process and what

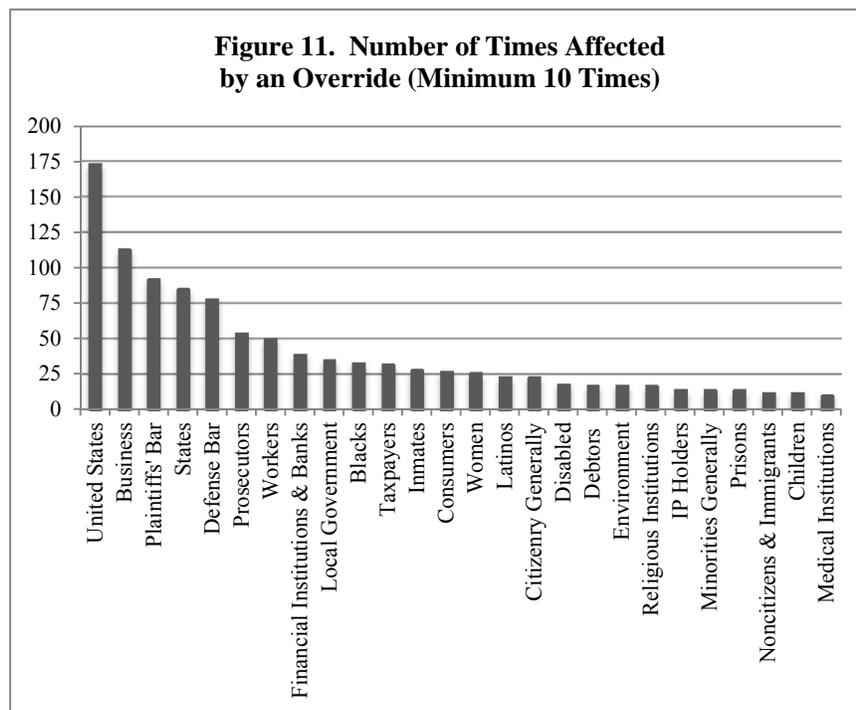
217. 136 CONG. REC. 1,657 (1990) (statement of Sen. Jeffords); *see also id.* at 1,653 (statement of Sen. Kennedy) (“The fabric of justice has been torn.”).

218. By “conservative” we mean constructions of statutes that favor the status quo (generally benefiting white males) and otherwise vest a lot of faith and discretion in decision making by companies and local governments. “Liberal” decisions are the flip side, supporting broad protections for women, racial minorities, and sexual and gender minorities and expressing skepticism of broad antidiscrimination needs for white males.

219. Pub. L. No. 100-259, 102 Stat. 28 (codified as amended in scattered titles of U.S.C.).

220. *See infra* Appendix 1.

positions they take. The primary take-home point is that the Executive Branch of the federal government is the biggest player, and usually the big winner, in the override process. As Figure 11 shows, the federal government is the institution or interest most often affected by override statutes, followed by state and local governments (when considered together); business and the plaintiffs' bar are often affected, but not nearly at the level as the United States. This is not too surprising. The Solicitor General takes a position in a large majority of the statutory interpretation cases heard by the Supreme Court, including most cases where the United States is not a party,²²¹ and the federal laws that form the basis for overrides frequently implicate fundamental interests of the national government.



The legal position of the United States prevails in more than two-thirds of the statutory cases decided by the Court,²²² and the United States is

221. See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1324 (2010) (noting the Solicitor General's involvement in the majority of Supreme Court cases and its increased participation in cases in which the United States is not a party).

222. See Eskridge & Baer, *supra* note 49, at 1122 (documenting the agency win rate in front of the Court).

usually a winner in the override process as well: a large majority of the overrides adopt the policy or legal position advanced by the United States during the congressional deliberation process. Figure 12 reflects some of what we learned through a massive study of the legislative committee hearings and reports for every one of the overrides adopted during our period of inquiry.²²³

No group or institution enjoys the attention of Congress more than the Executive Branch of the federal government: its officials testified, in depth, in a large majority of overrides and supported the large majority of those overrides. The federal government took an explicit position in just under three-quarters of the overrides, supporting the override in 75% of those instances.²²⁴ State and local governments had a similar record of success, just on a smaller scale, as did the American Bar Association. Business interests were widely heard but not usually followed, either because Congress enacted overrides business opposed or because business-oriented testimony was on both sides of the issue. The latter result is largely a function of the business groups' opposition to many of the employment-related civil rights statutes.

223. Christiansen quarterbacked this effort and did many of the legislative histories, but the bulk of them were accomplished through a herculean effort by Yale law students Peter Chen, Christopher Lapinig, Jacob Victor, Sam Thypin-Borromeo, and Amanda Elbogen, under the general supervision of Christiansen and Eskridge.

224. Some overrides were not discussed at the hearings before either house of Congress. In these cases we coded for the supporters and opponents of the statute generally, unless there was a compelling reason to deviate from this rule, such as when the override departed markedly from overall politics of the statute. Figure 12 does not include the overrides coded in this fashion. It includes only the overrides where the government affirmatively stated its position on the relevant provision(s).

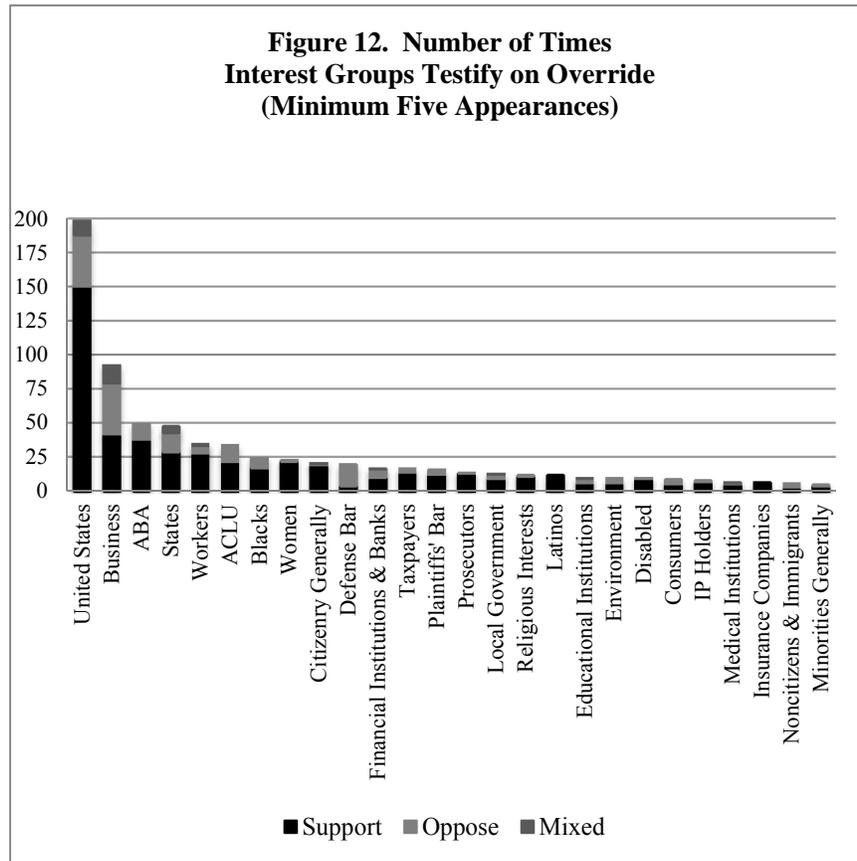
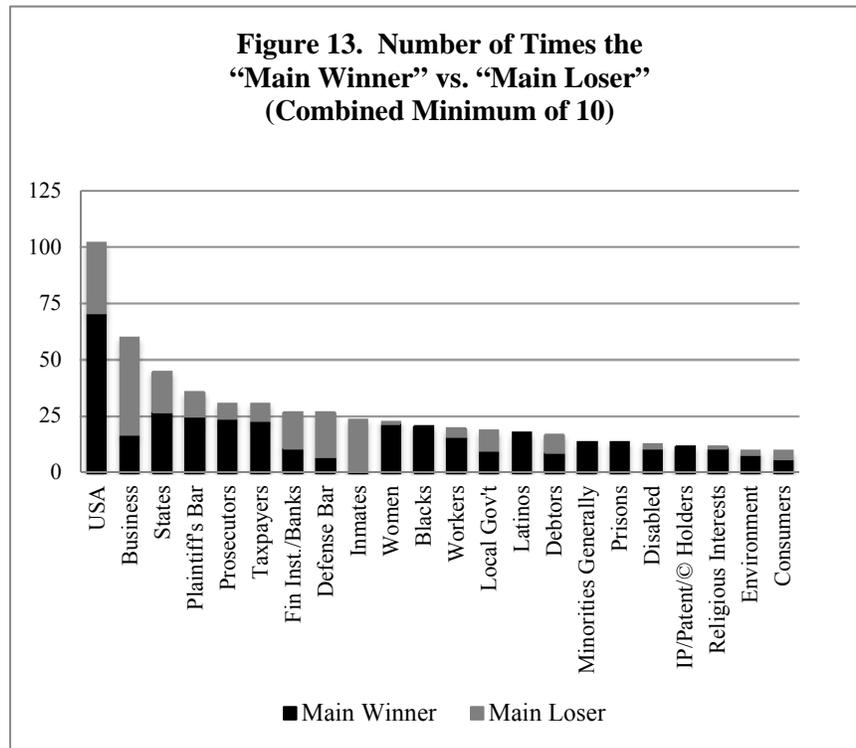


Figure 13 below offers a dramatic graphic demonstrating which institutions prevail in the override process. As suggested by the foregoing analysis, the United States leads the pack by a huge margin: the Department of Justice, the Internal Revenue Service, the Department of Health and Human Services, the Equal Employment Opportunity Commission, the Departments of State and of Defense, and the Federal Trade Commission are among the most prominent agencies providing important congressional testimony. As Figure 13 reveals, their position usually prevails. But even when it does not, the Executive Branch’s position often affects the compromise ultimately reached.²²⁵ For example, the Department of Justice

225. One reason is the bargaining power the President has because of his veto authority, which could impose a two-thirds majority requirement on the override coalition that it could rarely achieve. See CHARLES M. CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF

supported several of the overrides in the 1991 CRA but pointedly opposed the override of *Wards Cove*, whose result Solicitor General Charles Fried had urged the Court to adopt.²²⁶ Not coincidentally, the override of *Wards Cove* was much more modest than the overrides of decisions the Administration had not supported before the Court.²²⁷



NEGATIVE POWER (2000); *see also* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992) (examining the bicameral presidential model of legislation and how statutes incorporate presidential preferences).

226. *See* William T. Coleman Jr., Op-Ed., *A False Quota Call*, WASH. POST, Feb. 23, 1990, <http://digitalcollections.library.cmu.edu/awweb/awarchive?type=file&item=562870> (observing Fried's opposition to the override bill).

227. Decisions the Department of Justice agreed were wrong, such as *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), were overridden more completely than *Wards Cove*, which remains a citable and influential precedent. *See, e.g.*, *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005) (following *Wards Cove* when interpreting a similar text in the ADEA); *NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 477 (3d Cir. 2011) (relying on a line of precedent including *Wards Cove* to explain a rule for statistical comparison in racial discrimination); *Phillips v. Cohen*, 400 F.3d 388, 397–400 (6th Cir. 2005) (noting the statutory overrides of parts of *Wards Cove* but also citing to the opinion for the proper disparate impact standard).

Contrast the success of federal agencies and departments with the mixed record of organized business in the override process. Like the federal government, business interests usually prevail at the Supreme Court level—but very much unlike the agency and department interests, business interests fare poorly in the override process. Business leaders testify more than any other group, outside the Executive Branch, yet often to no avail: their record in blocking override laws they oppose is not impressive.²²⁸

Figures 12 and 13 also confirm that state governments and local prosecutors have great success in the politics of federal overrides. Surely their greatest success was the 1996 AEDPA, which made it much harder for state prisoners to secure even a federal judicial hearing of habeas claims that their convictions violated federal constitutional and civil rights.²²⁹ Interestingly, although the Department of Justice supported the idea of habeas reform, it remained largely neutral on the individual overrides contained in AEDPA, just as the Solicitor General had declined to file amicus briefs in most of the Supreme Court cases determining the procedural rights of state habeas complainants.²³⁰ AEDPA also illustrates the stunning lack of success of prisoners and criminal defendants in the override process: they almost never succeed in securing overrides that protect their interests and routinely lose when state governments, prosecutors, or prisons assemble coalitions in support of serious law-and-order overrides.

The foregoing are some general observations about the politics of overrides. Just as important, however, are local observations about the operation of overrides in particular subject areas. Each area is distinctive

228. Our findings do not foreclose the notion that business interests are successful in preventing most of their Supreme Court “wins” from serious consideration on Congress’s override agenda. The Court, for example, has expanded the preclusive effect of the Federal Arbitration Act (FAA) of 1926 against consumer and even discrimination claims, *see, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (evincing vigorous debate between the majority and dissenting Justices concerning the proper application of the FAA in the context of a consumer arbitration agreement), but there has been no congressional pushback against this important business-friendly judicial activism. Hence, the many rights-protecting overrides of probusiness employment discrimination decisions might be swallowed up by rights-denying arbitration agreements that, the Court has held, trump judicial enforcement of Title VII. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33–35 (1991). For support for this hypothesis, consider Figure 8, *supra*, showing that business regulation is a much more significant percentage of the Court’s ordinary statutory interpretation docket than it is of the override population. The relatively few overrides in the area of business regulation is consistent with the theory that business groups succeed in keeping many of their Supreme Court victories off the congressional agenda.

229. *See supra* notes 194–97 and accompanying text.

230. *Cf.* David Blumberg, *Habeas Leaps from the Pan and into the Fire: Jacobs v. Scott and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALB. L. REV. 557, 577 (1997) (discussing two studies, the latter commissioned by the Department of Justice, refuting statistics underlying the positions of many habeas reform proponents).

because of the different institutional judicial and legislative preferences, different agencies involved (or not), and different arrays of private interests and values.

1. Civil Rights and Workplace Equality: An Inversion of Carolene Products.—Although Congress in our forty-four year time frame has bounced back and forth between conservative Republican and liberal Democrat control, it is on the whole highly sympathetic to the equality demands of women, racial minorities, and people with disabilities. As Figure 11 illustrates, those groups are not directly affected by most override statutes—but Figure 13 shows that *Carolene* groups and women have been highly successful in pursuing overrides of Supreme Court decisions rejecting their equality claims.²³¹ Some of the most dramatic restorative overrides of the period—such as the Pregnancy Discrimination Act of 1978, the Voting Rights Act Amendments of 1982, the Civil Rights Restoration Act of 1987, the 1991 CRA, the Voting Rights Act Reauthorization and Amendments Act of 2006, the ADA Amendments Act of 2008, and the Lilly Ledbetter Fair Pay Act of 2009—were statutes claiming to “restore” rights to minorities and women that the Supreme Court had erroneously “taken away” by stingy constructions of antidiscrimination laws.

Perhaps our most dramatic finding is that the override process reveals the inversion of *Carolene Products*: no longer does the Supreme Court go out of its way to protect the interests of “discrete and insular minorities” (and women) against denigration in the political process—instead, those groups go to Congress to protect their equality interests against denigration in the judicial process. This inversion of *Carolene Products* is nothing new; it has been going on since the 1970s. What drives it is the fact that feminist and civil rights social movements have transformed American political culture, which once discriminated against women and racial minorities but now supports measures that penalize private discrimination. Compared to Congress, the Supreme Court is relatively libertarian (i.e.,

231. We call these “*Carolene* groups,” after *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which suggested an exception to deferential judicial review when laws harm a “discrete and insular minorit[y]” subject to “prejudice” in the political process. See *id.* at 152 n.4. Racial minorities were of course the classic *Carolene* groups, and people with disabilities fit the bill as well because they are marked by discrete traits and have often been ghettoized (isolated) in American society. While women are discrete, but neither insular nor a minority, the ACLU’s campaign for their equal rights analogized them to the traditional *Carolene* groups. See Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 192, 229 (2006). Ironically, the Supreme Court has never provided equal protections for *Carolene* groups until they showed pugnance in the political process. See Eskridge & Frickey, *supra* note 187, at 53–56 (discussing how the Supreme Court recognizes minority groups only when they become key players in national politics and have the resources to challenge a lack of equality).

antiregulatory). As a result, once *Carolene* groups become the beneficiaries rather than the targets of government regulation, the Court will give way to Congress and the President as the primary forum for advancing their proregulatory agenda.

2. *Federal Jurisdiction and Civil Procedure: Congress Gives What the Court Will Not Take.*—While the Supreme Court's stingy approach to equality mandates is a phenomenon of the last generation, its cautious approach to congressional grants of jurisdiction to federal courts is a longstanding regime.²³² This regime is defensible not only because of its longevity and stability but also because it represents an institutional refusal to take on more authority than the democratic process has knowingly given it. It may be virtuous for an organ of government to decline to seize additional power and authority, but as a practical matter the regime also reflects judicial concerns that the limited capacity of the federal courts would be strained by a liberal application of the jurisdictional provisions.

Congress, of course, is happy to delegate authority, especially when interest groups push for it. And the plaintiffs' bar, increasingly powerful because of the boom in plaintiffs' tort judgments and settlements,²³³ is a strong voice for expansion of federal jurisdiction. Although trial lawyers have been associated with the Democratic Party, one of their most important overrides was signed into law by Republican President George H.W. Bush—the landmark Judicial Improvements Act of 1990, which overrode four important jurisdictional precedents, greatly expanding federal courts' ancillary jurisdiction.²³⁴ The business defense bar is puissant as well, and it was successful in securing enactment during the Bush–Cheney Administration of the Class Action Fairness Act of 2005, which partially overrode a landmark Marshall Court decision, as well as four other jurisdictional precedents, in order to allow class action defendants to seek removal from unfriendly state courts.²³⁵

232. The approach dates back to the Marshall Court. *See, e.g.,* *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting the grant of jurisdiction based upon diverse citizenship to require complete diversity between all plaintiffs and all defendants). Congress has partially overridden the *Strawbridge* baseline in the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–12 (codified as amended at 28 U.S.C. § 1332 (2012)), which makes *Strawbridge* our oldest overridden Supreme Court decision.

233. *See* Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar*, 30 LAW & SOC. INQUIRY 269 (2005) (detailing the growth of the plaintiffs' tort bar by surveying the life of a prominent Chicago tort lawyer).

234. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(a), 104 Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367) (overriding four restrictive jurisdictional precedents); *see also* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005) (announcing a broad application of the 1990 override).

235. *See* Class Action Fairness Act § 4, 119 Stat. at 9–12.

3. *Criminal Law and Procedure (Including Habeas): Criminal Defendants and Prisoners Almost Always Lose.*—Congress in the last half century has been increasingly punitive, with little pushback politically, as Democrats fall over Republicans in a rush to add or expand crimes, enhance punishments, and restrict access to the writ of habeas corpus for both federal and state prisoners. In contrast, the Court applies due process values to read criminal sanctions and penalties restrictively and sometimes to craft loopholes to allow prisoner challenges to their confinement in violation of federal statutory or constitutional rights. The Court’s liberal application of the rule of lenity is perhaps the most concrete example of this instinct.²³⁶ Notice that these are the same kinds of *governance* values noted for civil rights and federal jurisdiction: the Court is restrictive, cautious, and libertarian, while Congress is more aggressively regulatory. As our coding reflects, however, the same kinds of values have the opposite *political* valence: in criminal law and procedure, the GOP-dominated Court is relatively “liberal” on the conventional political spectrum, while Congress under either Democrat or Republican control is relatively “conservative.”

The politics of criminal law overrides is decidedly one-sided, even more so than the politics of civil rights overrides. If the Department of Justice believes the Court’s stingy interpretation of a criminal prohibition, penalty, or procedural rule stands in the way of effective implementation of a criminal law regime, it can typically gain the attention of Congress and can often secure an override. Of concern is the fact that when the Department presses for an override, there is often no effective group to resist such a push, and legislators of both parties are loathe to stand in the way of throwing the book at criminals. Being tough on crime is a political stratagem with few electoral risks, while showing mercy for those who have—or may have—transgressed the law is replete with such risk. Because there is no effective interest group capable of standing up to these tough-on-crime legislators, the process has for decades resembled what the late Professor William Stuntz memorably termed “an auction, not a political compromise,” where congressmen bid up the penalties associated with various crimes.²³⁷ The consequence is a proliferation of overrides further penalizing these much-maligned groups and virtually no overrides protecting them.

4. *Federal Income Taxation: Highly Diverse Array of Winners and Losers.*—Unlike the first three subject areas, tax law overrides are politically balanced. The IRS enjoys great success persuading the Supreme

236. See, e.g., *McNally v. United States*, 483 U.S. 350, 360–61 (1987) (applying the rule of lenity to interpret the statute in question against the government).

237. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 173 (2011).

Court to accept its interpretations of the 1954 Internal Revenue Code, but many of its victories are taken away by Congress, which also reverses many of the agency's defeats. While the IRS certainly has the ear of Congress, it is not alone and is often countered by other institutions and interests, including state and local governments. Although they work closely with the agency, the tax-writing committees are not afraid of rebuffing the IRS.

Contrary to the 2007 Staudt study, which found congressional overrides of tax decisions unrelated to general law reform,²³⁸ we find a strong correlation. The large majority of tax overrides came in comprehensive reform statutes that were not focused on the Supreme Court but that overrode its decisions as part of a larger revision in the 1954 IRC or in the operation of the IRS. The leading measures were the Tax Reform Acts of 1976,²³⁹ 1984,²⁴⁰ and 1986,²⁴¹ the Small Business Job Protection Act of 1996,²⁴² the Internal Revenue Service Restructuring and Reform Act of 1998,²⁴³ and the Job Creation and Worker Assistance Act of 2002.²⁴⁴ These five law-reform statutes overrode more than twenty Supreme Court tax decisions, the large majority of which had confirmed the IRS position. Interestingly, the United States, either through the Treasury Department or the IRS itself, supported roughly half of these overrides and opposed only one-fifth, even though most tax-related overrides resulted in a victory for the taxpayer. This result likely reflects the peculiar politics of the tax code: Congress and the Executive Branch are both eager to show their support for the taxpayer even while the federal government litigates against the taxpayer in order to enforce the IRC. No other area of overrides exhibits as much federal government support for overrides that would appear to make the federal government's job more difficult.

5. *Bankruptcy: Creditors Sometimes Trim Back the Fresh Start Policy of the 1978 BRA.*—Although there is no federal agency dominating

238. Staudt et al., *supra* note 3, at 1381.

239. Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended in scattered titles of U.S.C.) (overriding eight Supreme Court decisions, all but one of which expansively approved the IRS's authority).

240. Pub. L. No. 98-369, div. A, 98 Stat. 494 (codified as amended in scattered sections of 26 U.S.C.) (overriding four Supreme Court decisions, two favoring the IRS and two favoring taxpayers).

241. Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.) (overriding only one Supreme Court decision, but a big one, *Gen. Util. & Operating Co. v. Helvering*, 296 U.S. 200 (1935)).

242. Pub. L. No. 104-188, 110 Stat. 1755 (codified as amended in scattered sections of 26 U.S.C.) (overriding two Supreme Court tax decisions, both in ways that favored the IRS).

243. Pub. L. No. 105-206, 112 Stat. 685 (codified as amended in scattered sections of 26 U.S.C.) (overriding seven statutory decisions).

244. Pub. L. No. 107-147, 116 Stat. 21 (codified as amended in scattered sections of 26 U.S.C.) (overriding one Supreme Court tax decision, which had favored the taxpayer).

statutory policy the way the IRS does in the field of tax, the politics of bankruptcy decision overrides are strikingly similar to the politics of tax decision overrides. Like the 1954 IRC, the 1978 BRA forms the rock-solid foundation for bankruptcy policy, but both superstatutes have been periodically updated with comprehensive and balanced revisions that provide some relief to creditors and some rules favoring debtors. Those laws include the Bankruptcy Reform Act of 1994,²⁴⁵ the Bankruptcy Amendments and Federal Judgeship Act of 1984,²⁴⁶ and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.²⁴⁷ The politics of bankruptcy overrides are surprisingly balanced. Both financial institutions (the main group we assigned as creditors) and debtors win a significant number of cases, although debtors do slightly better as a result of the generally liberal 1978 BRA.

6. *Environmental Law, Transportation, Communications, Energy, and Other Areas.*—Another set of override statutes affects the regulatory regime for a specific industry or economic sector, such as energy, transportation, telecommunications, and environmental law.²⁴⁸ Although overrides in these areas have often disapproved of a particular decision,²⁴⁹ each such override was frequently motivated by the need to update the regulatory paradigm as a whole rather than to rebuke the Supreme Court. Thus the override of *Fri v. Sierra Club*²⁵⁰ was part of the Prevention of Significant Deterioration Program enacted by the 1977 Clean Air Act Amendments.²⁵¹ The overrides of *MCI Telecommunications Corp. v. AT&T*²⁵² and *Louisiana Public Service Commission v. FCC*²⁵³ in the Telecommunications Act of 1996 were part of the total restructuring of communications regulation.²⁵⁴ Even

245. Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C.) (overriding five Supreme Court bankruptcy decisions).

246. Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered titles of U.S.C.) (overriding one Supreme Court bankruptcy decision).

247. Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.) (overriding two Supreme Court bankruptcy decisions, which had favored creditor interests).

248. Although environmental law affects many industries, we include it here because the critical override statutes in this area (the Clean Air Act, the Clean Water Act, and the Superfund Amendments and Reauthorization Act) disproportionately affect large industrial entities.

249. See, e.g., *TVA v. Hill*, 437 U.S. 153 (1978), *overridden by* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 7, 92 Stat. 3751, 3762 (codified as amended at 16 U.S.C. § 1540 (2012)).

250. 412 U.S. 541 (1973).

251. See Pub. L. No. 95-95, § 127, 91 Stat. 685, 731–42 (codified as amended at 42 U.S.C. §§ 7472–7479 (2006)).

252. 512 U.S. 218 (1994).

253. 476 U.S. 355 (1986).

254. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18, 47 U.S.C.).

the override of *Exxon Corp. v. Hunt*,²⁵⁵ which corrected a narrow preemption holding, was part of the sweeping Superfund Amendments and Reauthorization Act of 1986.²⁵⁶ The few instances in which Congress did intervene to make a piecemeal change to one of these areas are notable primarily for the override's limited application and predictable effects.²⁵⁷ Notably, there have been no overrides in any of these subject areas since 1996.²⁵⁸

There are several possible explanations for this pattern, in which Congress is relatively hesitant to enact one-off updating overrides to complex regulatory schemes. The most simple explanation may be that Congress hesitates to address these complex areas in a piecemeal fashion, perhaps in part out of the entirely reasonable concern that addressing a single provision might alter the rest of the complex scheme in ways that a legislature struggles to anticipate.

Another possibility that we find even more useful is that many of these industries are overseen by a federal agency, often one with broad rulemaking authority, such as the Environmental Protection Agency (EPA), the Federal Energy Regulatory Commission (FERC), or the Federal Communications Commission (FCC). During litigation, the rulemaking authority often results in the agency having a significant *Chevron* deference advantage, meaning that the agencies governing these sectors are likely to prevail before the Court, reducing the need for overrides. This phenomenon seems especially likely in technically complex industries, such as energy or communications.²⁵⁹ After litigation, the broad rulemaking authority frequently afforded to these agencies may allow them to mitigate the adverse effects of a decision without the need for new legislation. We find this a particularly compelling explanation in the wake of the Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, which held that an agency may effectively reverse

255. 475 U.S. 355 (1986).

256. Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered titles of U.S.C.).

257. For example, the Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102, 106 Stat. 1505, 1505-07 (codified at 42 U.S.C. § 6961 (2006)), overrode *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992), which exempted federal facilities from certain permitting requirements under state environmental laws, *id.* at 611. The override simply required the government to comply with those permitting requirements. § 102, 106 Stat. at 1505-07.

258. The sunset of the Interstate Commerce Commission provides an obvious explanation for why there have been no overrides in the transportation area. The other areas, however, present a more interesting puzzle, especially given the considerable public attention accorded to communications, energy, and the environment.

259. Eskridge & Baer, *supra* note 49, at 1145 tbl.16 (reporting win rates in technical subject areas, energy and transportation, are among the highest government win rates, 93.3% and 78.6% respectively). *But see id.* (reporting that environmental regulation has a relatively low government win rate of 68.4%).

through rulemaking a judicial decision resolved at *Chevron* Step Two (where judges defer to reasonable agency interpretations within their realm of discretion) but not ones resolved at *Chevron* Step One (where judges announce a rule of law binding on the agency and the population).²⁶⁰

The litigation and postlitigation benefits accorded to an agency overseeing one of these areas may reduce the urgency of an override, allowing Congress to address the decision only when it has already taken up comprehensive reform of the subject matter.

IV. Supreme Court Opinions Overridden

What features of a Supreme Court decision render it particularly susceptible to an override? Perhaps surprisingly, there has been a shortage of rigorous empirical studies to that effect. Focusing on Supreme Court decisions whose subject matter fell under the jurisdiction of the congressional judiciary committees during the period 1978–1984, the 1991 Eskridge study compared (1) characteristics of overridden decisions with (2) those of decisions scrutinized by the committees but not overridden and (3) those of decisions not scrutinized or overridden.²⁶¹ The study reported that overridden decisions were, relatively speaking, much more likely to be nonunanimous and to reflect a close (5–4 or 6–3) and ideologically identifiable division within the Court; more likely to have relied centrally on a statute’s plain meaning or the canons of construction; and more likely to have been decided against the interests of local, state, and (especially) federal governments.²⁶²

Also examining Supreme Court decisions subject to judiciary committee review, Virginia Hettinger and Christopher Zorn’s 2005 study confirmed that decisions rejecting interpretations taken by the federal government and including a dissenting opinion were significantly more likely to be overridden.²⁶³ Most notably, they found no correlation between divergent congressional and judicial preferences (e.g., conservative Supreme Court decision rendered when Congress is dominated by liberals) and the odds of an override.²⁶⁴

260. 545 U.S. 967, 980–83 (2005). As we shall explain in subpart VI(B), the Court in *Brand X* acknowledged that agencies operating within the discretionary boundaries of *Chevron* are sometimes not confined by judicial precedents handed down without the benefit of the agency’s views. Of course, the agency remains limited by judicial precedents that define the limits of its discretion under *Chevron*.

261. Eskridge, *supra* note 1, at 350 tbl.8, 351 tbl.9.

262. *Id.* at 350 & n.41, 351. The study also found that women, racial minorities, and people with disabilities were, relatively speaking, much better able to secure overrides than business or even governmental institutions, but the numbers were too small to draw strong conclusions. *See id.* at 351 tbl.9.

263. Hettinger & Zorn, *supra* note 3, at 22.

264. *See id.* at 19–21.

Examining tax decisions subject to the jurisdiction of the congressional tax and finance committees, the 2007 Staudt study reported modest effects for media coverage and nonunanimous decisions: each renders a tax decision more likely to be overridden.²⁶⁵ The big finding of the 2007 Staudt study was that an invitation by the Court, explicitly urging Congress to take up the statutory issue, was strongly and significantly correlated with a statutory override.²⁶⁶ Lori Hausegger and Lawrence Baum's 1999 study found that the Supreme Court is most likely to issue invitations for overrides when the case generates a lot of amicus briefs, is of low interest to the Justices, or when the result is one that some or all of the majority Justices find objectionable or unjust.²⁶⁷

Our study permits the most ambitious effort to date for creating a model identifying the features of Supreme Court statutory decisions that render them most likely candidates for a congressional override. Our methodology is simple. We have coded overridden Supreme Court decisions along a variety of dimensions, as reported in Appendix 2 to this Article. We compared the data for the 275 overridden decisions with comparable data for the 1,014 Supreme Court statutory decisions identified and coded in the 2010 Raso & Eskridge study.²⁶⁸

Based upon previous studies and our own views, we focused on the following variables and posed the following hypotheses:

- Division in the Court. Existing studies make it clear that nonunanimous decisions are significantly more likely to generate overrides, but results are less conclusive beyond that finding. *Hypothesis 1: Closely divided decisions (five- or six-Justice majority or four-Justice plurality) are significantly more likely to be overridden than unanimous or even lopsided decisions.*
- United States Loses. The 1991 Eskridge study finding that the Court's rejection of an interpretation set forth by the United States made an override more likely is treated as the conventional wisdom²⁶⁹ but has not been tested for the period after 1990. *Hypothesis 2: Decisions rejecting the statutory interpretation offered*

265. See Staudt et al., *supra* note 3, at 1400 tbl.5.

266. *Id.* For an important theoretical model suggesting this result, see Spiller & Tiller, *supra* note 3, at 503–05.

267. Hausegger & Baum, *supra* note 42, at 181–82.

268. We made two comparisons between our dataset and that in Raso & Eskridge. The first was a comparison of all 275 decisions in our dataset with the 1,014 decisions in Raso & Eskridge. The second was a comparison of *only* those decisions in our dataset handed down between 1984 and 2006 (inclusive), the same period covered by Raso & Eskridge. As the figures below will demonstrate, the two comparisons do not differ markedly for any test we ran.

269. See BARNES, *supra* note 4, at 44 (inferring the increase in overrides has been caused at least in part by congressional responses to groups, particularly governmental entities, displeased with disadvantageous judicial decisions).

by a federal agency are significantly more likely to be overridden than decisions accepting agency interpretations.

- Amicus Brief Activity. The 2005 Hettinger and Zorn study found ambiguous evidence as to whether amicus brief activity is positively correlated with override activity. *Hypothesis 3: The more amicus briefs, the greater likelihood of an override, especially if the balance of amicus briefs favored the party that lost the Supreme Court case.*

- Congressional Versus Court Preferences. No study has found that override activity is positively related to diverse congressional and judicial preferences, measured in terms of the conventional political indices, but no study has considered systematic institutional, rather than raw political, preferences that differentiate Congress and the Court. Although Congress has rotated between the two parties, its relatively stable preference is proregulatory while the Court's baseline has tended to be prolibertarian for the last two generations. *Hypothesis 4: Overrides are more likely to be of libertarian (i.e., antiregulatory) than nonlibertarian decisions, either overall or in particular subject areas.*

- Methodology of the Court. The 1991 Eskridge study found decisions more likely to be overridden (1967–1990) if they followed a plain meaning or textualist methodology. *Hypothesis 5: Decisions relying primarily on textualist canons are significantly more likely to be overridden than decisions relying primarily on legislative context, stare decisis, or deference to agency interpretations.* As a corollary, we also hypothesized that archtextualist Justices Scalia and, perhaps, Thomas would lead the Court in writing decisions later overridden.

- Invitations to Override. All the studies assume, but none has comprehensively tested, the thesis that an invitation to override produces a significant bounce correlated with higher override activity. *Hypothesis 6: Majority decisions inviting Congress to override the Court are significantly more likely to be overridden than decisions without such an invitation.*

We confirmed most of the hypotheses, as modified in the discussion that follows.²⁷⁰ As a general matter, Supreme Court statutory decisions *most* likely to be overridden are ones where the decision attracted only five or six Justices, where the Court rejected the interpretation offered by the United States, where the Court found a plain meaning based in significant part on whole act or whole code canons, and where one or more Justices invited Congress to override its interpretation.

270. The main falsification went to the fun fact that Justices Scalia and Thomas were only middle of the pack in terms of overrides; we were surprised at who led the pack. Can you guess?

An excellent example of a decision ripe for override was the Court's ruling in *Silkwood v. Kerr-McGee Corp.*²⁷¹ Rejecting the position offered by the United States and the nuclear power industry, a closely divided Court ruled that the Atomic Energy Act of 1954 did not preempt state punitive damages for a worker injured by power-plant recklessness.²⁷² A complementary example was the Court's decision in *West Virginia University Hospitals, Inc. v. Casey*,²⁷³ which interpreted the Civil Rights Attorney's Fees Act of 1976 (itself an override statute) as not shifting fees for expert witnesses to prevailing civil rights plaintiffs.²⁷⁴ *Silkwood* and *Casey* were statutory decisions raising most of the "red flags" that increase the odds of a congressional override—and indeed Congress overrode both decisions within a few years.²⁷⁵ Consider the red flags in light of the data.

A. *Closely Divided Court: Red Flag*

One of the most widely accepted override variables is whether the Court was unanimous in deciding the statutory issue. If the Court was unanimous, that is a signal not only that the legal issue was one-sided but also that lawyers from different political perspectives found the result unproblematic. While Congress for its own reasons may choose to override such decisions, it is not likely to do so in the short term: such overrides would be harder to achieve and more costly to enact because they would disrupt the settled rule of law.²⁷⁶ Figure 14 illustrates this point graphically: compared with the general run of statutory cases decided by the Court between 1984 and 2006, overridden decisions were significantly less likely to be unanimous—unanimous decisions made up only 28.3% of the decisions overridden (with a similar number, 28.8%, for the overrides between 1984 and 2006, the period examined by Raso & Eskridge), but those same decisions constituted 35% of the general set of statutory decisions. This difference was statistically significant at the 95% confidence level.

271. 464 U.S. 238 (1984).

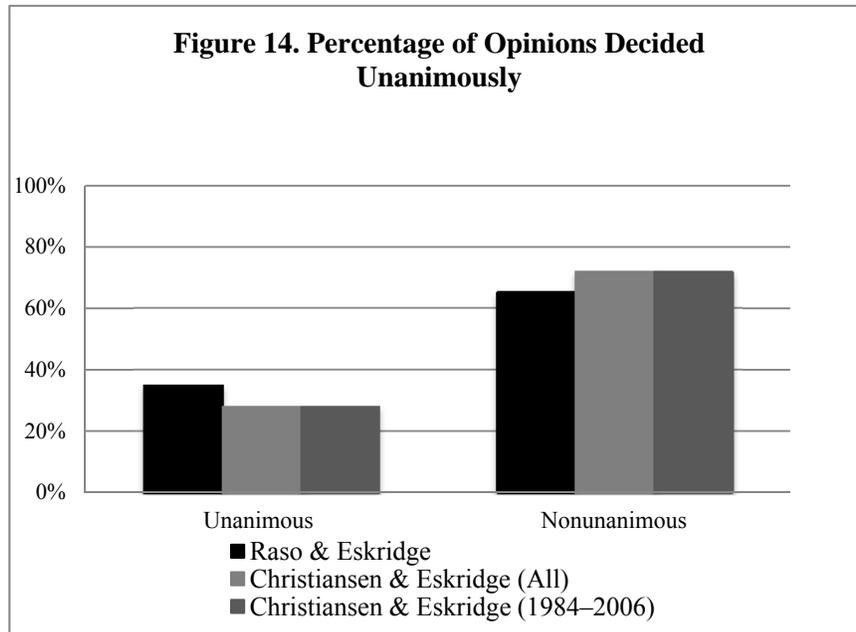
272. *See id.* at 249–50, 258.

273. 499 U.S. 83 (1991).

274. *See id.* at 102.

275. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 1988 (2006)) (overriding *Casey*); Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 14, 102 Stat. 1066, 1078 (codified at 42 U.S.C. § 2210(s)) (overriding *Silkwood*).

276. For this settled-law reason, the 2007 Staudt study found that Congress was much more likely to codify or leave alone unanimous decisions in tax cases. Staudt et al., *supra* note 3, at 1365–66, 1396–97.



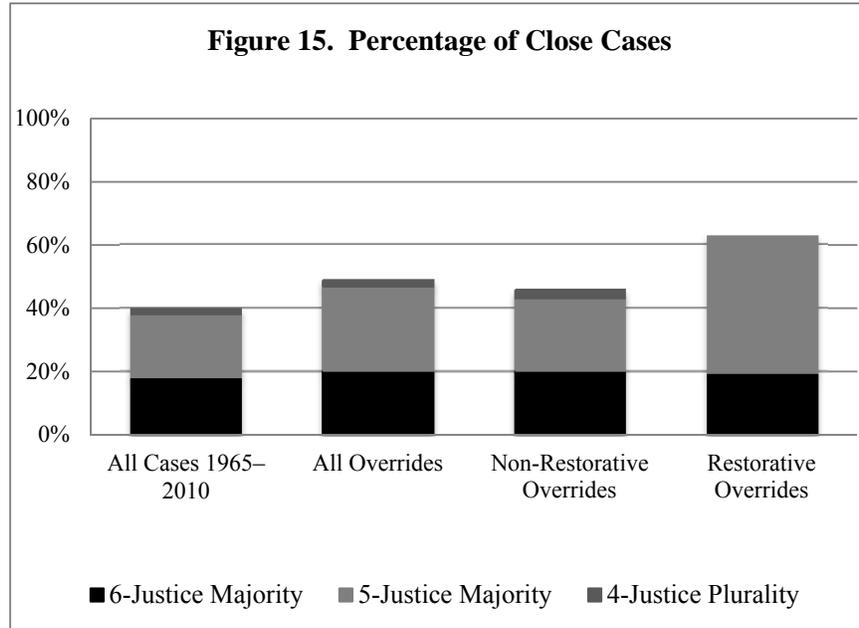
We also expected to see a significant difference for closely divided Courts. *Silkwood*, for example, was a 5–4 decision, with the four dissenters arguing that the regulatory scheme of the Atomic Energy Act preempts state punitive damages because they are inconsistent with the liability cap for nuclear power plants.²⁷⁷ The close vote, and the fact that the dissenting Justices included one judicial liberal (Justice Marshall), one conservative (Chief Justice Burger), and two moderates (Justices Blackmun and Powell), suggested much greater vulnerability than if the Court had voted 8–1 for the same result. The political science literature suggests that a whistleblowing dissent can get the attention of institutions with override authority, which was the strategy followed by the *Casey* dissenters, also in a closely divided (6–3) vote on the merits.²⁷⁸

The data lend stronger support to this hypothesis. Figure 15 reveals the following progression: for Supreme Court decisions handed down between 1965 and 2010, close decisions (defined as those with either five- or six-Justice majorities or four-Justice pluralities) constituted 40% of all Supreme Court cases. In contrast, close cases accounted for 49% of the

277. *Silkwood*, 464 U.S. at 283 & n.13 (Powell, J., dissenting). There were two dissenting opinions: one by Justice Blackmun joined by Justice Marshall, the other written by Justice Powell and joined by Chief Justice Burger, Justice Blackmun, and Justice Marshall. *Id.* at 258, 274.

278. 499 U.S. at 115 (Stevens, J., dissenting) (“In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes . . .”).

overridden decisions and a whopping 63% of the restorative overrides for decisions.



Notice here the contrast between restorative overrides and the rest of our data set. Even for relatively recent Supreme Court decisions, restorative overrides occur much more quickly than all others. As Table 5 shows, restorative overrides occurred in less than one-third of the time it took to enact other overrides.

Table 5. Time Between Decision and Override for Restorative Overrides

Average Time Elapsed (years)	
<i>All Overrides</i>	11.39
<i>Restorative Overrides</i>	3.52
<i>Non-Restorative Overrides</i>	13.18

This result is not surprising. For the restorative overrides, the disfavored Supreme Court decision provided a galvanizing moment for the affected interested groups and the legislators sympathetic to those groups. Congress

consequently had an incentive to act quickly in a way that was absent from many other overrides, a large component of which were enacted in response to changed circumstances many years after the decision.²⁷⁹ And because many of these restorative overrides were disproportionately likely in decisions that sharply divided the Court, as was the case for many of the overrides in the 1991 CRA, the set of closely divided cases bears many of the characteristics of its restorative-override subset.

B. Significant Amicus Brief Activity: No Red Flag

That a Supreme Court decision is a close case, legally, is often a clue that it will stir up political interests as well. Another indication of institutional interest in an issue is the presence of amicus briefs. Thus, we coded each overridden decision to determine whether amicus briefs had been filed, what institutions filed briefs, and whether briefs supporting the losing position before the Court outnumbered the winning briefs. In *Silkwood*, for example, there was some amicus activity, with five briefs filed, including one for the Atomic Industrial Forum.²⁸⁰ (In *Casey*, there were two significant amicus briefs.²⁸¹) The significance of amicus briefs is that the interests and institutions that lose a Supreme Court statutory case not only have an incentive but are more likely than the average party to have enough political clout to catch the attention of a congressional committee.

Can the *Silkwood* point be generalized? There is no dataset for amicus briefs filed before the Court, though everyone knows that such briefs have proliferated like wildfire in the last generation. So we assembled our own dataset of amicus briefs filed in every Supreme Court statutory case for every fifth Term after 1965. Overall, the average case attracted 5.3 amicus briefs while the overridden decisions averaged 3.5 amicus briefs. Of course this reflects the fact that the overridden decisions were clustered in the 1970s and 1980s and the filing of amicus briefs has grown tremendously throughout the 1990s and 2000s. To adjust for this phenomenon, we created a weighted average²⁸² of our baseline data to reflect the distribution

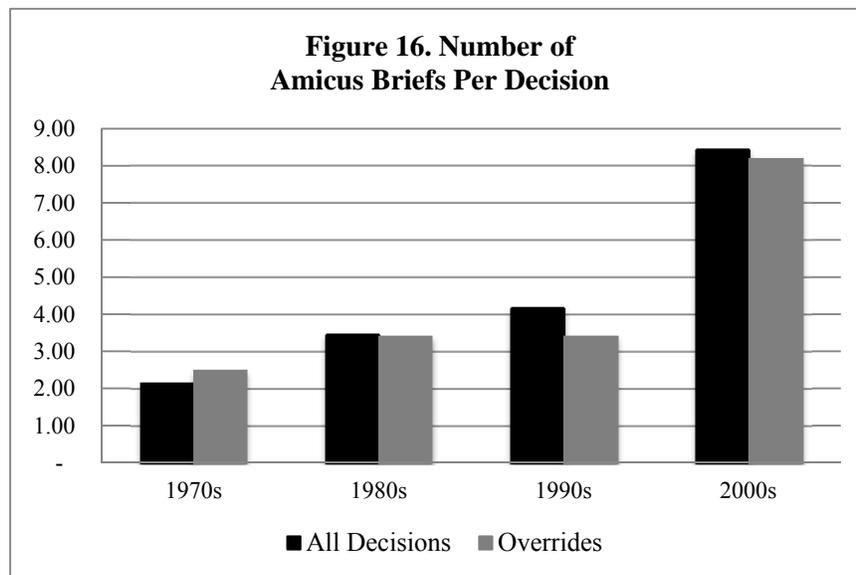
279. Recall, for example, the consensus that eventually developed around the 1978 BRA. *See supra* notes 193–97 and accompanying text.

280. Brief of the Atomic Industrial Forum, Inc. as Amicus Curiae in Support of Affirmance, *Silkwood*, 464 U.S. 283 (No. 81-2159), 1983 U.S. S. Ct. Briefs LEXIS 1571.

281. Brief Amicus Curiae of the Equal Employment Advisory Council in Support of the Respondents, *Casey*, 499 U.S. 83 (No. 89-994), 1990 WL 10022365; Brief of Lawyers' Committee for Civil Rights Under Law et al. as Amici Curiae in Support of Petitioner, *Casey*, 499 U.S. 83 (No. 89-994), 1989 WL 1128056.

282. Specifically, we calculated the percentage of overrides in each decade (1970s, 1980s, 1990s, and 2000s; we ignored the pre-1970s overrides when amicus activity was relatively low) and then weighted our baseline data by the measure for each corresponding decade. Thus if a

of our overrides. The weighted average of the baseline data was 3.5 amicus briefs. The difference between the average number of amicus briefs in overrides and in our composite figure was far from statistically significant. We repeated this analysis for the briefs supporting the winning party, the losing party, and neither party. Again we found no statistically significant difference. Thus, we conclude that the population of Supreme Court decisions overridden by Congress does not look very much different from the typical decision in terms of overall amicus activity. Figure 16 reports these results by decade.



In *Silkwood*, there were more amicus briefs and more amici on the side of the prevailing party, Karen Silkwood's father, the tort plaintiff, than on the side of the losing party, Kerr-Magee, the power company. In *Casey*, there was one important amicus brief on each side.²⁸³ For overridden decisions as a whole, there were, on average, more amicus briefs for the losing party before the Court, but the margin was not statistically significant. Again, we can make no generalization about the balance of amici.

quarter of the overrides were in the 1970s, our composite weighted the 1970s baseline by 0.25. We then added all the weighted averages to establish our composite figure.

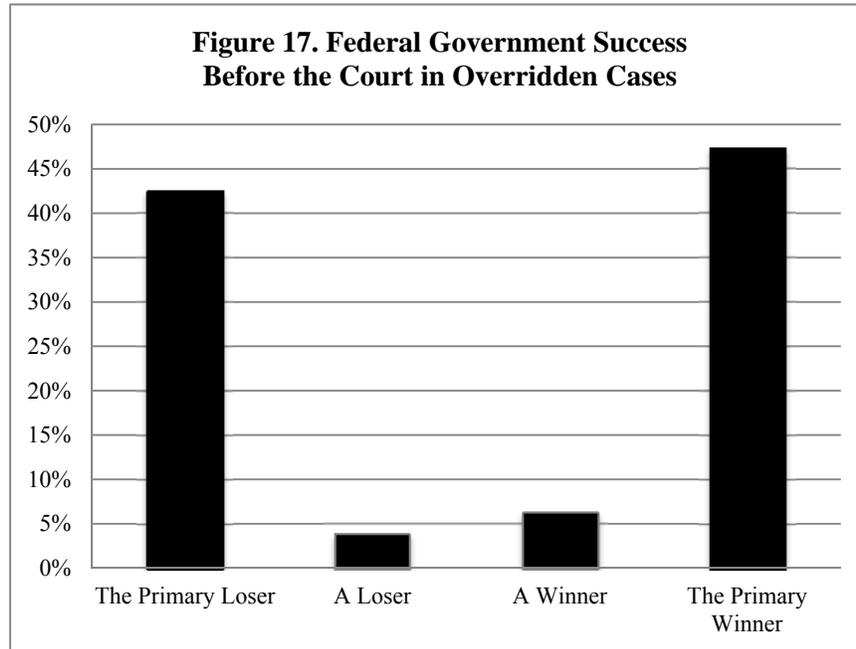
283. One brief represented the views of the ACLU and the Lawyers' Committee for Civil Rights Under Law—favoring fee shifting—and the other represented the views of the Equal Employment Advisory Council, a business group opposed to fee shifting. See *supra* note 281.

C. *Federal Agency Position Loses: Red Flag*

One of the amicus briefs that failed to persuade the *Silkwood* Court was filed by the Solicitor General, who made a powerful submission supporting preemption in that case.²⁸⁴ When the government's legal arguments failed to carry the day, the government became a powerful ally in the nuclear-power industry's campaign for an override. As we have seen above, federal agency officials often generate override proposals, typically participate in override deliberations, and enjoy an unparalleled record of success in persuading Congress to enact override legislation. Hence, it is no surprise that Supreme Court statutory decisions that reject the views of the federal government, whether expressed as a party to the case or in an amicus brief (as in *Silkwood*), are significantly more likely to be overridden than statutory decisions that accept the views of the federal government. When the federal government advances an interpretation before the Supreme Court, it prevails almost 70% of the time.²⁸⁵ In the cases that are ultimately overridden, however, the agency is a winner only about the half the time, as Figure 17 reports.

284. See Brief for the United States as Amicus Curiae, *Silkwood*, 464 U.S. 283 (No. 81-2159), 1982 U.S. S. Ct. Briefs LEXIS 969.

285. See Eskridge & Baer, *supra* note 49, at 1142 tbl.15 (finding a 68.8% overall win rate across deference regimes). The Eskridge & Baer study ended in 2006, and we believe that the Executive Branch's impressive win rate has apparently declined in recent Terms of the Court.



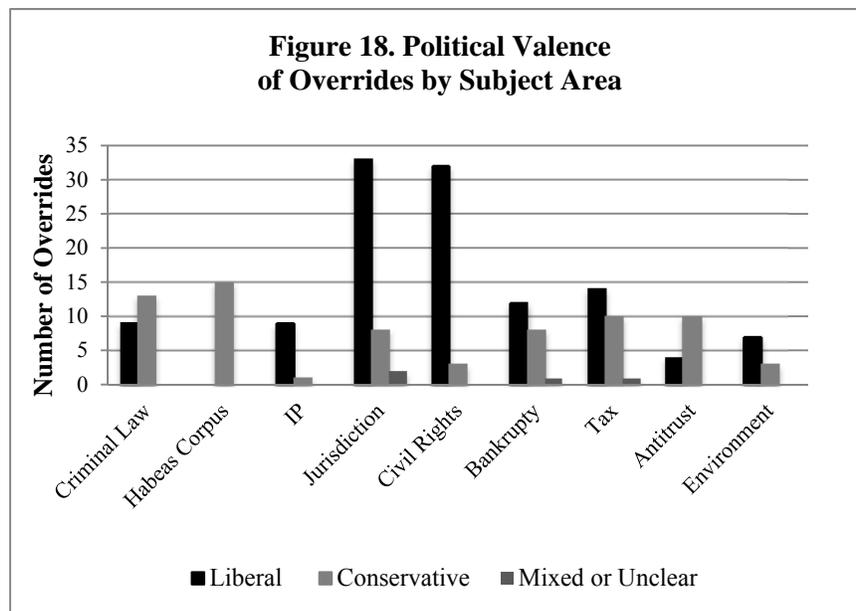
The federal government thus fared far worse before the Court in the cases that led to overrides than in the general population of Supreme Court statutory cases. And the government often succeeded in getting Congress to overturn these disfavored results through the legislative process. Recall Figure 13, which showed that the federal government was the main winner in roughly three-quarters of overrides. This should come as no surprise given our findings on the federal government's involvement in the override process before Congress,²⁸⁶ where it was by far the most involved nonlegislative player.

Our data also reveal that this phenomenon was particularly acute for the restorative overrides discussed in conjunction with Figure 15. The federal government was the primary loser before the Court in *two-thirds* of the cases in which it was affected that went on to become restorative overrides (and nearly 60% of all restorative overrides). These overrides were the most direct and forceful rejections of the Court in our study. Thus, we conclude that a loss for the government is not only a red flag for an override, but it may also be a red flag for an especially forceful override.

286. See *supra* Figure 12.

D. Court Narrows Government Regulation: Red Flag Except in Tax and Intellectual Property Cases

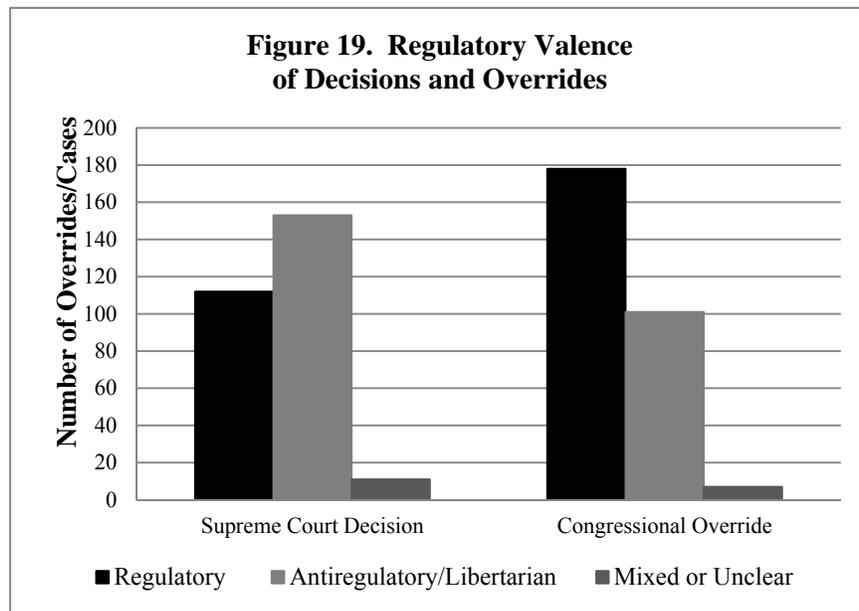
Previous studies have not found an ideological component to overrides. As Congress did in the 1991 CRA, which overrode *Casey*,²⁸⁷ most overrides do in fact move policy in a politically liberal direction. This difference is slight, but statistically significant. The ideological split is much more striking when we consider individual subject-matter areas. Figure 18 breaks down the political valence of overrides by subject area and thereby helps explain the variety we see in the overall data. Indeed, much of the trend in the political valence of overrides is the result of the extreme ideological disparity in two areas: federal jurisdiction and procedure and civil rights. Remove these areas and not only does the statistical significance disappear, but there are almost as many conservative overrides as there are liberal.



One generalization that emerges from Figure 18 is that “political” valence is not so much the key variable as “regulatory” valence. Relative to Congress, the Supreme Court tends toward libertarian, regulation-narrowing interpretations of federal statutes across a wide variety of subject areas—which means defendant-friendlier constructions in cases pitting a variety of persons and institutions against aggressive regulation. Thus, when the

287. See *infra* Appendix 1.

Supreme Court sets precise statutory rules, there is a much greater tendency for criminal defendants to get the benefit of the rule of lenity, prisoners seeking habeas corpus to face fewer obstacles, employment discrimination defendants to enjoy more defenses, civil defendants to avoid federal jurisdiction, polluting firms to face less severe regulations, creditors to enjoy more debt-collection rights in bankruptcy, and so forth. Conversely, when Congress resets the statutory rules through an override, it tends to support a more regulatory baseline than the Court had set. Figure 19 represents this point graphically.



In short, overrides share a familiar pattern. In many of the cases that produce an override, the Court reaches a libertarian outcome, which Congress supplants with a regulatory solution. Again, *Casey* is a classic example—and *Silkwood* is exceptional in this respect, perhaps because it does not fall within one of the main arenas for overrides. As before, consider how the libertarian–regulatory dialectic between Court and Congress plays out in different subject areas.

1. Criminal Law and Habeas Corpus: Congress Expands Punitive Sanctions and Limits Prisoner Access to Courts.—Recall from our earlier Figure 8 that criminal law decisions represent a slightly lower proportion of overridden decisions than they do of the Court’s statutory docket—but when they are overridden, they follow a predictable pattern: the Court’s relatively libertarian positions are often overruled by law-and-order overrides that reset the legal rule in favor of prosecutors and the state. The

results are even more dramatic for habeas corpus overrides, all fifteen of which went against prisoners, and in favor of prosecutors and the states, in the period we studied (1967–2011). Furthermore, many of the congressional responses in these areas overrode decisions where prosecutors or prisons won the Supreme Court case and Congress revised the point of law to narrow further the rights of criminal defendants and prisoners. This is a breathtaking imbalance. Some of the imbalance can be explained by the credibility of the Department of Justice and the dearth of powerful interests opposing the Department when it seeks an override. We suspect that more of the imbalance, however, is a feature of the popularity of anticrime and antiprisoner measures in our political culture since 1967.

2. *Civil Rights and Workplace: Congress Expands Employer Liability.*—Recall from Figure 8 that civil rights decisions are about the same portion of overridden decisions as they are of the Court’s statutory docket—but when they are overridden, they too follow a predictable pattern: overrides are disproportionately more likely to involve civil rights and workplace decisions favoring defendant employers and state institutions, such as *Casey*, than decisions favoring racial minorities, women, and people with disabilities (the primary complainants). This is the reverse-*Carolene* effect discussed earlier.²⁸⁸ Whether controlled by conservative Republicans or liberal Democrats, or whether control is split, Congress is more responsive to *Carolene* groups and women than the Supreme Court is. One reason for this responsiveness is that the Department of Justice and the EEOC tend to be supportive of minority groups and women, but Congress is even more supportive over the long haul, and the support has been bipartisan. The Civil Rights Act of 1991, easily the most sweeping civil rights legislation covered in our study, passed by a vote of 93 to 5 in the Senate²⁸⁹ and 381 to 38 in the House,²⁹⁰ despite much more balanced numbers of Democrats and Republicans in both chambers of Congress.²⁹¹ We surmise that our political culture has reached a consensus that racial and disability minorities must be treated fairly. And the culture seems to have reached a similar consensus with respect to women, although that consensus is also supported by the obvious

288. See *supra* section III(E)(1).

289. *Senate Vote on S. 1745 (102nd Congress): Civil Rights Act of 1991*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/102-1991/s238>.

290. *House Vote on S. 1745 (102nd Congress): Civil Rights Act of 1991*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/102-1991/h386>.

291. During the 102nd Congress, the Democrats controlled the Senate 56 to 44 and the House 267 to 167. *Party Divisions of the House of Representatives: 1935–Present*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Party-Divisions/74-Present/>; *Party Division in the Senate, 1789–Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm.

political calculus that women are more than half the population and a majority of voters.

3. *Immigration: Congress Expands the Authority of Officials to Exclude and Discipline Immigrants.*—Recall from our earlier Figure 8 that the percentage of immigration decisions in our override population is slightly greater than its representation in the general population of Supreme Court statutory decisions. Traditionally, immigration decisions favoring the rights of immigrants are more likely to be overridden than decisions favoring the government. This is consistent with the previous subject-matter areas just discussed. Overall, the Supreme Court follows a moderately libertarian path in criminal, workplace, and immigration cases—and Congress usually responds with more regulation. The political valence varies, with increased criminal and immigration regulation being conservative and increased workplace regulation liberal, but for these three areas each institution does follow a somewhat different approach to regulation. Other areas of law do not follow this pattern, however.

4. *Tax: Congress Often Gives Relief to Taxpayers.*—Recall from Figure 8 that the percentage of tax decisions in our override population is much greater than its representation in the general population of Supreme Court statutory decisions. And Figure 18 reveals that decisions favoring the government are slightly more vulnerable to overrides than decisions favoring taxpayers. This is one major area where the Court is more regulatory and Congress more libertarian. (As a matter of political valence, we coded tax decisions as liberal if the taxpayer won, conservative if the government won.) Although Congress does sometimes override the Court in order to address abusive tax shelters or to close loopholes opened up by a particular holding,²⁹² the majority of tax overrides either made it easier for taxpayers to sue for a refund or extended favorable tax treatment to an asset or expense. Note also that the agency involved, namely, the IRS, is considered a powerhouse in policy and judicial circles but not in the media and political circles, where it is a piñata.²⁹³

5. *Federal Jurisdiction and Civil Procedure: Congress Gives More Power and Authority to Federal Judges.*—Like tax and bankruptcy, the percentage of civil jurisdiction and procedure decisions in our override

292. See, e.g., Tax Reform Act of 1969, Pub. L. No. 91-172, § 121(b), 83 Stat. 487, 537–45 (codified as amended at 26 U.S.C. § 512 (2012)) (overriding *Comm'r v. Brown*, 380 U.S. 563 (1965)).

293. Cf. Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 531–32 (2012) (detailing the broad scope of IRS regulatory power).

population is very much greater than its representation in the general population of Supreme Court statutory decisions. Reflecting the centuries-old bias against expansive views of federal court authority, the Supreme Court tends to interpret jurisdiction statutes narrowly—and Congress typically responds with statutory expansions of federal jurisdiction and judicial authority. With some caution, we characterize the Court’s bias here as libertarian and Congress’s bias as regulatory because the existence of federal jurisdiction typically entails additional opportunities for litigants, like Karen Silkwood, who seek to impose duties on institutions, like the Kerr-Mcgee Corporation.

As a matter of political valence, however, the statutes expanding federal jurisdiction include both classically “liberal” and “conservative” statutes. For example, the Judicial Improvements Act of 1990 included several overrides that expanded federal courts’ ancillary jurisdiction, making it easier to bring multiple claims or involve multiple plaintiffs in a single lawsuit.²⁹⁴ In contrast, the Class Action Fairness Act of 2005 produced “conservative” outcomes by making it easier to remove class actions from plaintiff-friendly state courts to federal courts thought to be more skeptical of class litigation.²⁹⁵ Although both expanded the jurisdiction of federal courts, the political motivations and regulatory effects were very different.

6. Intellectual Property: Congress Often Curtails Intellectual Property Rights.—Figure 18 suggests political balance in bankruptcy overrides, one of the greatest areas for congressional override activity, but a surprising imbalance for intellectual property cases. We coded intellectual property cases as liberal if the rule narrowed intellectual property rights and left more opportunities for the general public; the result was conservative if it increased property protection. As Figure 18 reflects, override activity in this area, as in tax, was deregulatory, in contrast to the pattern found for criminal law, habeas corpus, workplace equality, and federal jurisdiction.

E. Hyper-Textualist Court Relies on Whole Act and Whole Code Arguments: Red Flag

The 1991 Eskridge study found that Supreme Court decisions applying a textualist methodology were most amply represented among the population of override statutes.²⁹⁶ Although handed down too late to be

294. See *supra* note 234 and accompanying text.

295. See *supra* note 235 and accompanying text.

296. See Eskridge, *supra* note 1, at 351 (finding overridden decisions were more likely to have relied on plain meaning or canons of construction arguments); accord Bussel, *supra* note 174, at 900–18 (finding textualist interpretations of bankruptcy statutes to be strongly susceptible to overrides and criticizing the new textualism for derailing bankruptcy policy).

included in the earlier study, *Casey* is an excellent example of this point: the Court's "literalist" interpretation of the 1976 fee-shifting law was assailed by the dissenters for missing Congress's purposes and policy choices,²⁹⁷ and Congress swiftly overrode the decision. In some contrast, the Court's methodology in *Silkwood* was far from "literalist." Ruling that state punitive damages penalizing a nuclear power plant for reckless endangerment of its workers were not preempted by the Atomic Energy Act of 1954, the Court relied on its own precedents,²⁹⁸ the statutory scheme created by the 1954 Act and its amendments,²⁹⁹ and the legislative history and debates surrounding the amendments to the statute.³⁰⁰ The current study finds that *Silkwood* is more representative of the override population than has been previously understood.

It is important to note that plain meaning decisions will most often be overridden because a large majority of Supreme Court statutory decisions rely critically on the plain meaning of the statutory text. In previous figures, we sought to provide a baseline for our override statistics through comparison with the Raso & Eskridge data for statutory decisions from 1984 to 2006. As Figure 20 below illustrates, we found that the Supreme Court relied on statutory plain meaning more than two-thirds of the time in decisions later overridden, in contrast to just under three-fifths of the decisions overall.³⁰¹ The modest differential accounted for in Figure 20 is statistically significant at the 95% confidence level. But as Figure 21 shows, the differential widens when we compare the overridden plain meaning decisions for 1984–2006, the period covered by the Raso & Eskridge data. This difference was also statistically significant, this time at the 99% confidence level. In other words, during the ascendancy of Justice Scalia's "new textualism," after *Silkwood*, textual plain meaning has emerged as a significant indicator that a statutory decision is more prone to an override. *Casey* is an example of that phenomenon.

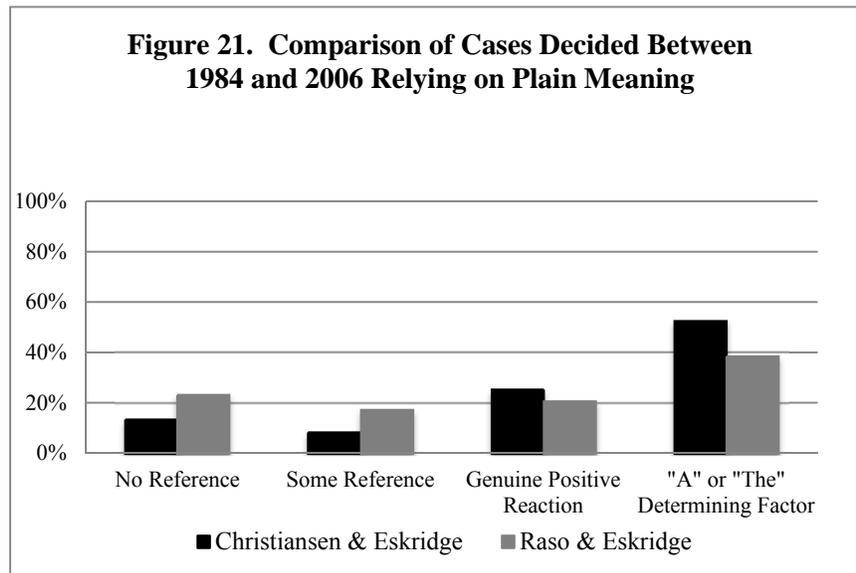
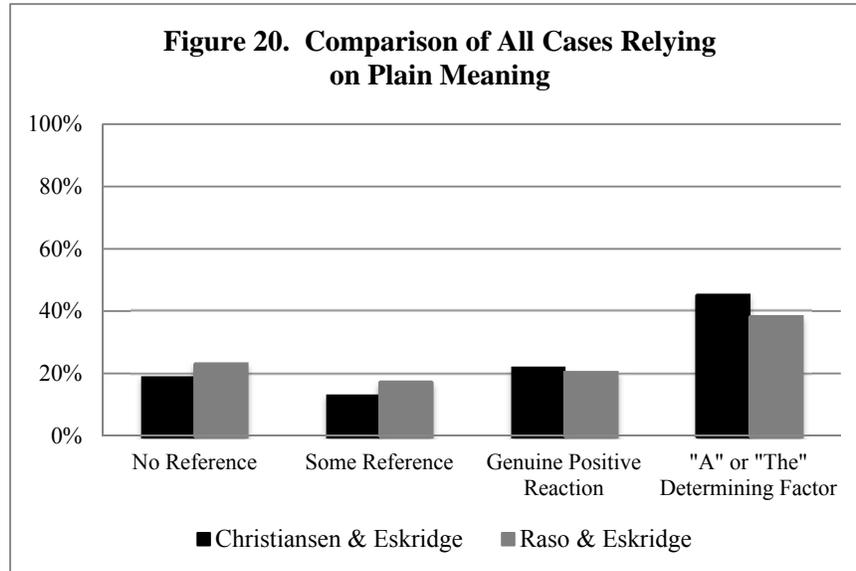
297. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 113–15 (1991) (Stevens, J., dissenting).

298. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248–50 (1984) (analyzing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983)); see also *id.* at 252 n.14 (relying on dicta in a landmark precedent, *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978), which sustained an amendment to the 1954 Act against constitutional attack).

299. *Silkwood*, 464 U.S. at 249–52 (discussing the statutory history of the 1954 Act and its amendments in 1957 and 1959).

300. *Id.* at 251–54, 255 & n.16, 256 (discussing legislative history in depth, including Atomic Energy Commission testimony that it did not believe state tort law to be preempted by the 1954 Act).

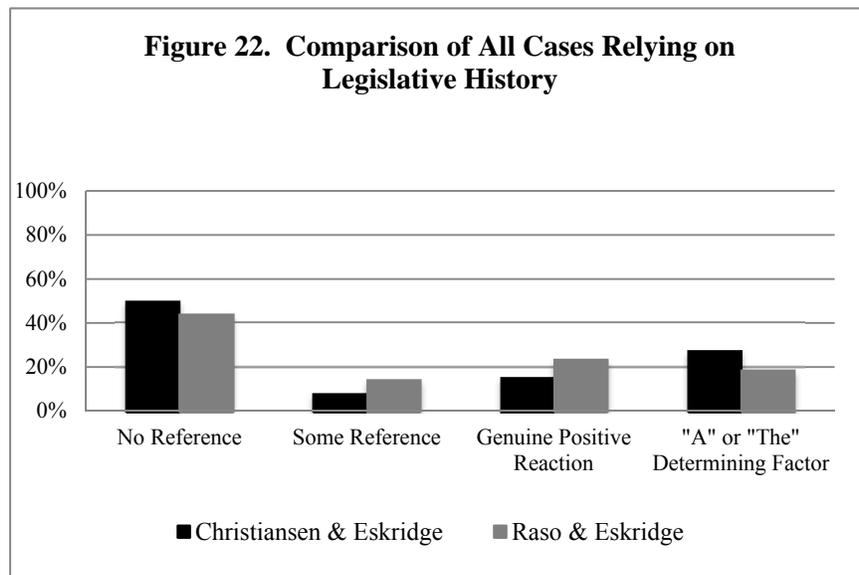
301. By "relied" we mean cases in which plain meaning was "a" or "the" determining factor in reaching the Court's interpretation or cases in which the Court had a positive reaction to the plain meaning when reaching its interpretation.

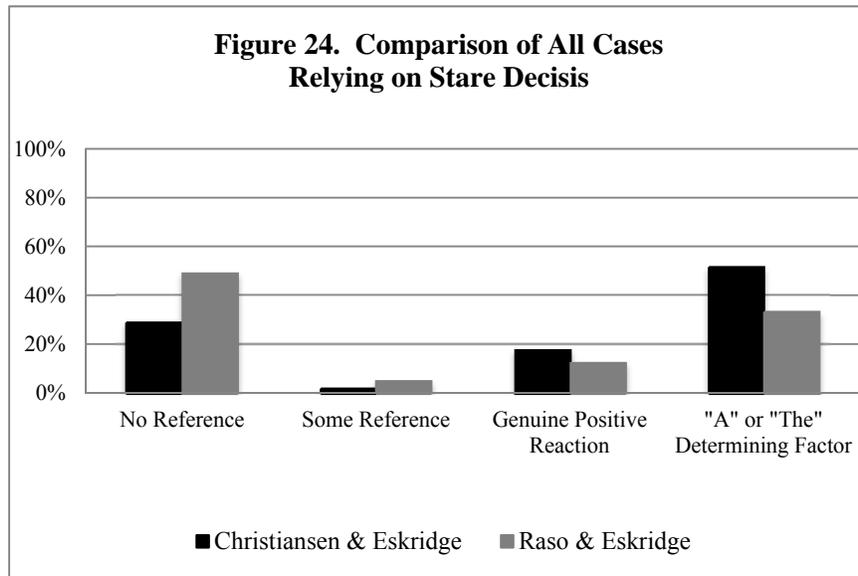
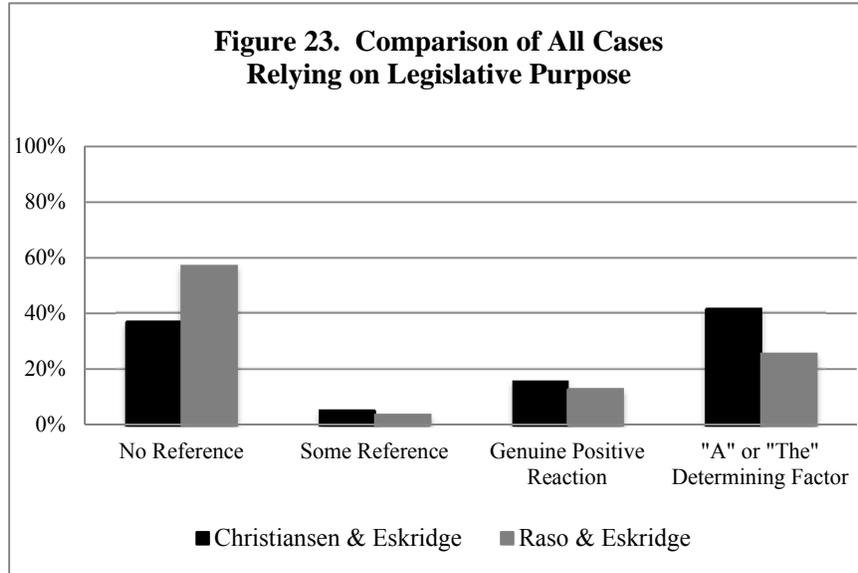


Figures 22, 23, and 24 below report similar comparisons for Supreme Court decisions, like *Silkwood*, that critically relied on legislative history, statutory purpose, and stare decisis. We were particularly interested in the cases in which a particular methodology was “a” or “the” determining factor in the majority’s decision. As Figures 22 through 24 show, all three methodologies were “a” or “the” determining factor at a greater rate than the mine-run of Supreme Court statutory cases. And these differences were all statistically significant at the 99% confidence level. Viewing Figures 22

through 24 together, moreover, we conclude that the typical decision that is overridden enjoys a thicker reasoning process, with more evidence assembled by the majority opinion, than for the typical Supreme Court statutory decision—an outcome suggesting that the cases ultimately overridden were more difficult than the average statutory interpretation case.

Although Figures 20 and 21 make clear that the Court did not deploy legislative purpose, legislative history, and stare decisis entirely to the exclusion of plain meaning, the higher reliance on the latter three interpretative methodologies in overridden cases suggests that the Court may have felt the need to supplement its plain meaning analysis in some of those cases. One interpretation of this phenomenon is that overrides may be more likely in those “plain meaning” cases where the meaning is really not so plain as the majority opinion might suggest.





An interesting twist is provided by Figures 25 and 26 below. Only one in ten Supreme Court statutory decisions critically relies on the whole act

rule³⁰² as a determining factor justifying an interpretation—but more than four in ten overridden decisions, including *Silkwood*, critically rely on such evidence.³⁰³ This is the most striking contrast we discovered. Only slightly less dramatic, and still highly significant, was the contrast in decisions relying on the whole code rule, of which *Casey* is the leading example.³⁰⁴ Roughly 8% of Supreme Court statutory decisions rely on the whole code rule as “a” or “the” determining factor, but the whole code canon is “a” or “the” determining factor in just under a quarter of Supreme Court overrides.³⁰⁵ Both differences are statistically significant at the 99% confidence level.

Together, these canons rest upon the assumption that Congress uses terms consistently, whether within a single statute or across the entire U.S. Code—an assumption ungrounded in congressional practice or even congressional capabilities.³⁰⁶ Moreover, neither canon is generally considered as reliable as plain meaning or as perceptive as a key piece of legislative history. The fact that decisions in which these canons are “a” or “the” determining factor are disproportionately likely to be overridden may suggest that the Court relies on these canons only when the more reliable means of interpreting congressional intent produce no clear outcome—or at least not the desired outcome.

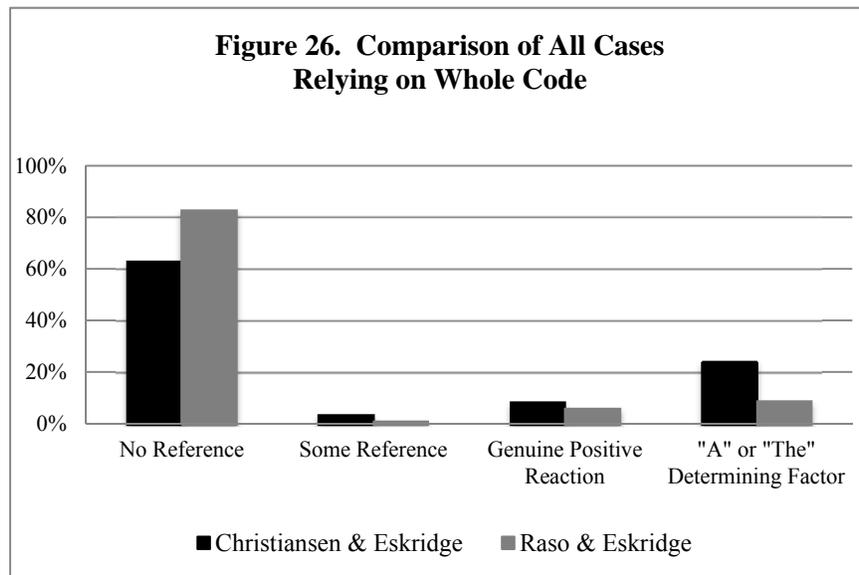
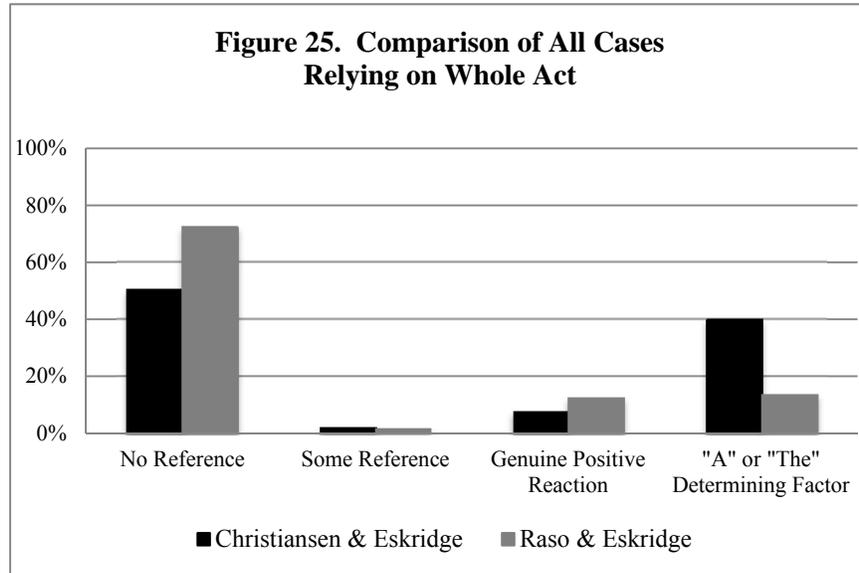
302. The whole act rule supports an interpretation that is more consistent with the statutory scheme as a whole or with other parts of a statute. Thus, if the Court interprets a term in one part of the statute, it will pay attention to how that term is used elsewhere in the statute. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (using the whole act concept in this way).

303. See *infra* Figure 25.

304. The whole code rule supports an interpretation that is more consistent with the U.S. Code. Thus, if the Court interprets a term in Statute 1, it will pay attention to how that term is used in Statute 2 and to meaningful variations in Statute 3. See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 87 & n.3, 88, 89 & n.4, 90, 91 & n.5, 92 (1991) (analyzing and comparing uses of the terms “attorney’s fees,” “costs,” and “expert witness fees” throughout the U.S. Code).

305. See *infra* Figure 26.

306. See Gluck & Bressman, *supra* note 302, at 936–37 (asserting that while consistent meaning is the goal for statutory terms, there are significant organizational barriers for realizing that goal).



Overall, our study concludes that methodology does not drive statutory overrides as strongly as other factors. Supreme Court decisions later overridden, like most Supreme Court statutory decisions, follow a heterogeneous methodology—indeed, probably a thicker array of sources than the average decision invokes. The variable that stands out the most is structural analysis: Where the Court relies significantly on the statutory

scheme, or various whole act or whole code canons, it is much more likely to be overridden. Again, both *Silkwood* (whole act) and *Casey* (whole code) are excellent representatives of overridden decisions.

The 1991 Eskridge study considered textualist Justices like Antonin Scalia the culprits for a lot of the override activity. As the author of *Casey*,³⁰⁷ Justice Scalia might appear to be the ideal override object. Examining forty-four years of data, however, we were surprised to learn that the Justice most prone to write for the Court in statutory cases later overridden by Congress was Byron White, a resolute centrist and (as it turns out) the author of *Silkwood*.³⁰⁸ Figure 27 reports the results, normalized for the number of years each Justice served on the Court.³⁰⁹ While liberal, purpose-loving Justices Brennan and Marshall were near the top of the list, conservative, textualist Justices Rehnquist, Scalia, and Thomas were pretty far down. Four of the other most overridden Justices were methodologically eclectic centrists like Justice White (especially Justices Powell and O'Connor). The dominance of centrists highlights an important take-home point of our study: The large majority of overrides are routine policy-updating changes and not the dramatic responses to highly charged cases that dominate the headlines.

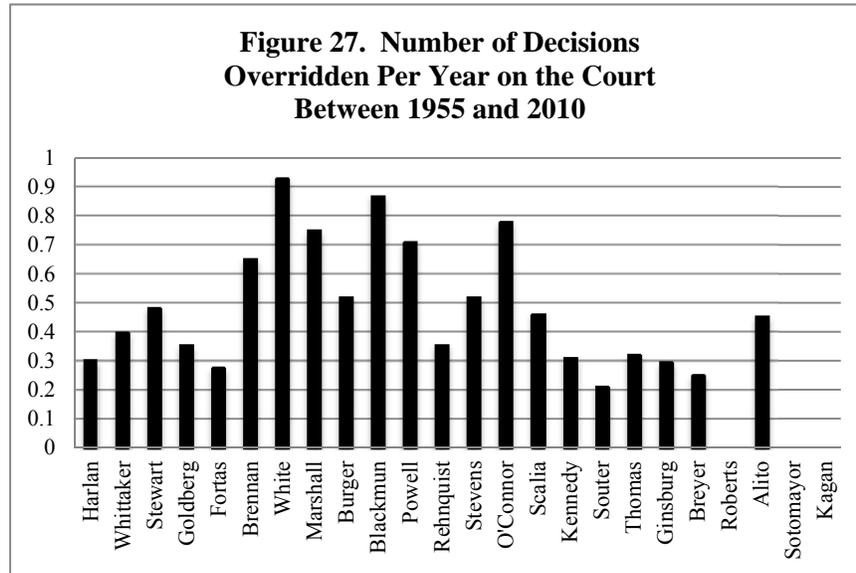
The relative paucity of overrides among the Justices appointed in the 1990s and 2000s may be more a function of the decline in overrides than any of their judicial characteristics. As Part II of this Article explained, overrides declined precipitously after 1998, likely explaining a significant part of the decline in overridden opinions among more recent appointees. Even though Justices Souter, Thomas, and Ginsburg were on the Court during the Golden Age of overrides, they were all relatively junior and therefore unlikely to be assigned to write the close cases, those with five- and six-Justice majorities that make up a disproportionately high number of overrides.³¹⁰ The prominence of Justice O'Connor as the author of overridden decisions is all the more striking in comparison with Chief Justice Rehnquist and Justices Scalia and Kennedy, for example.

307. 499 U.S. at 84.

308. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 240 (1984).

309. This figure includes only Justices who served their entire term during the period 1965–2010 or who are currently sitting on the Court. Although the 1991 Eskridge study found overrides before this period, we performed the Westlaw Keycite analysis for cases decided between 1965 and 2010. Thus to enable an apples-to-apples comparison, we have included only those Justices for whom we have looked at committee reports and Westlaw Keycites. The only major author of subsequently overridden decisions omitted by this limit is Justice William O. Douglas, who during his 37 years on Court wrote the opinion underlying nine overrides.

310. See *supra* Figure 15 and accompanying text.



F. *Invitation to Override: Red Flag*

Most political scientists who have written about overrides assume that invitations from the Court or from dissenters will increase the odds of an override,³¹¹ and there can be no doubt this point has an intuitive appeal. Thus, in *Casey*, the majority opinion noted the possibility for an override,³¹² while the dissenters closed their assault on the Court's analysis with the claim that in individual rights cases, judicial literalism constantly misinterpreted statutes and imposed undue burdens on Congress, as it had to spend scarce resources correcting the Court.³¹³ It hardly seems a coincidence that *Casey* was one of the most swiftly overridden Supreme Court decisions in our nation's history.

Although we found suggestions that Congress might override the Court's statutory interpretation as early as 1908,³¹⁴ affirmative invitations for Congress to override the Court did not become explicit and fairly regular until the Warren Court (1953–1969). Direct as well as indirect invitations for Congress to supplant the Court's interpretation flourished

311. See, e.g., Spiller & Tiller, *supra* note 3, at 503–04 (describing, generally, the process by which the Court may insulate its decisions from congressional override and correlatively implying that invitations to override are not so insulated).

312. 499 U.S. at 101 n.7.

313. See *id.* at 113–15 (Stevens, J., dissenting).

314. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (suggesting that policy arguments were better addressed to the Legislative, rather than Judicial, Branch); see also *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 355 (1941) (suggesting that certain decisions with “far-reaching” impact should be left to Congress).

during the Burger Court (1969–1986), especially in the 1970s. The Court’s most famous override invitation came in the Snail Darter Case, *TVA v. Hill*, where the majority opinion applied statutory plain meaning to halt construction of a \$100 million dam and positively implored Congress to override its result, as did the dissenting opinion.³¹⁵ Exactly as the Justices expected, Congress did so quickly, creating an administrative process to exempt particular federal projects from the absolute protections identified by the Court.³¹⁶ *TVA v. Hill* is something of a landmark for our study: it was probably the most explicit plea for an override up to that point in the Court’s history.

The Snail Darter Case is also a model for override invitations: When the Court majority, or a few Justices within the majority, do not like the policy consequences flowing from a statutory interpretation they believe compelled by the legal considerations, they acknowledge that fact and, with varying degrees of explicitness, suggest that Congress might override the Court’s interpretation. Conversely, dissenting Justices very unhappy with both the majority’s result and its legal analysis might call for a congressional correction, as the dissenters did in both *TVA*³¹⁷ and *Casey*.³¹⁸

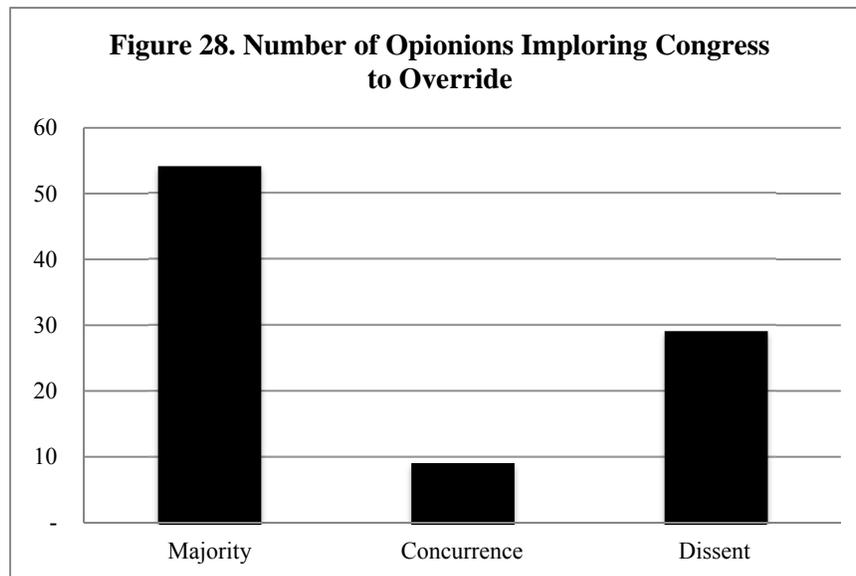
How significant is this phenomenon? We coded all 275 overridden Supreme Court statutory decisions to determine whether any Justice noted the possibility of an override or invited Congress to override the Court’s interpretation. We were surprised to find a great deal of judicial prodding, usually near the end of the decision. In one-third of the total, there was some discussion of the possibility of a congressional correction in one or more of the published opinions, and in roughly a fifth of the total, the opinion for the Court or a concurring opinion (or both) explicitly invited Congress to override its result. In slightly more than a tenth of the total, a dissenting opinion either suggested the possibility or (typically) invited an override of the majority’s interpretation. Although concurrences may play an important role in prodding Congress to act, we found that majority or dissenting opinions imploring Congress were far more common. Figure 28 reports the breakdown of opinions imploring Congress for an override. All told, in nearly one-third of the overridden decisions at least one member of the Court addressed Congress’s authority to override the point of law, and roughly one-fifth expressly urged Congress to override the statutory holding.

315. 437 U.S. 153, 194–95 (1978); *id.* at 196 (Powell, J., dissenting).

316. See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752–60 (codified as amended at 16 U.S.C. § 1536 (2012)). See generally Elizabeth Garrett, *The Story of TVA v. Hill: Congress Has the Last Word*, in STATUTORY INTERPRETATION STORIES 59 (William N. Eskridge, Jr. et al. eds., 2011).

317. See *supra* note 315 and accompanying text.

318. See *supra* note 313 and accompanying text.

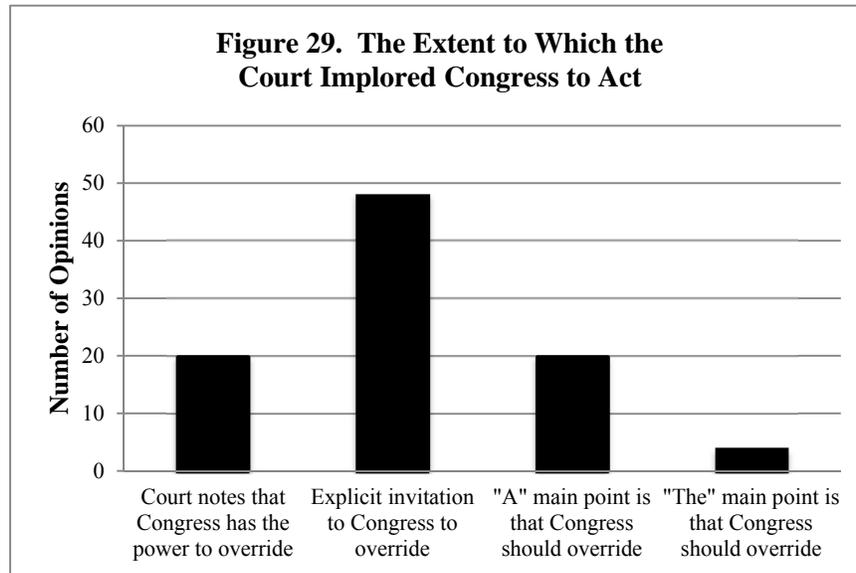


We were impressed as well as surprised by these high numbers. But the critical question is how they compare with the typical Supreme Court statutory interpretation decision. Again, we created a dataset for comparison purposes. We followed a sampling methodology, examining all statutory decisions for seven Supreme Court Terms, between 1960 and 2005.³¹⁹ The difference is striking. Whereas 30% of the overridden decisions either invited an override or discussed the possibility, less than 10% of the Court's statutory decisions in those seven Terms did so. More important, one in five of the majority or concurring opinions in our population of overridden decisions explicitly invited an override (i.e., they did more than simply mention the possibility), while only one in fifty of the nonoverridden decisions had an explicit invitation in a majority or concurring opinion in the seven Terms that we surveyed. Stated another way, there were very few override invitations (and almost none by a majority opinion) among the Court's decisions in those seven Terms that did *not* yield an override.

We also examined the force with which the Court implored Congress to override its decision. As Figure 29 shows below, roughly half of the opinions mentioning the possibility of an override invited Congress to override the holding but did not go so far as to say that Congress

319. For purposes of determining override invitations that were *both* accepted *and* not acted upon, we read every statutory decision for the following Terms of the Court: 2005, 1995, 1990, 1985, 1975, 1970, and 1960.

necessarily *should* override the Court. This is where concurrences played an important role. Although concurrences imploring Congress were far less frequent, they were typically more aggressive; concurrences made up all four opinions whose main point was to beseech Congress for an override.



An intriguing payoff of this approach comes when we compare our “implored” data with the time between the decision and the override. When the majority or a concurrence issues a strong invitation for Congress to override its decision (i.e., the three rightmost columns in Figure 29), the average time between the decision and override is roughly 8.5 years³²⁰ as opposed to nearly 11 years without an equivalent opinion imploring Congress. When the dissent issues a similarly strong opinion the difference is somewhat starker: 5.5 years versus just under 11. Although both differences fell just shy of being statistically significant, they tend to reinforce our intuition that a strong opinion from the Court beseeching Congress to act tends to prod the Legislature into motion. Further confirmation comes when we consider the *median* time to override. When the majority or concurrence strongly implores Congress to act there is almost no difference in the median time between the decision and the override: roughly 4.5 years with such an opinion and without. But a very different story emerges when the dissent strongly implores Congress to act.

320. In calculating the numbers in this paragraph, we excluded the Class Action Fairness Act’s override of *Strawbridge* and *Chapman*—the overrides of the nineteenth-century decisions—neither of which had an imploring opinion.

In those cases the median time between the decision and override is just 1.5 years as opposed to 5 years without a strong imploring opinion from the dissent.

Of course, there may be other explanations here, and we stop short of proclaiming a causal relationship. It may be that topics that produce strong imploring dissents are high-salience issues that are already on the congressional docket—although we note that the strong imploring dissents are in a diverse set of subject areas³²¹ and not concentrated among a few prompt congressional responses, such as the 1991 CRA (one of our initial hypotheses). Nonetheless, we can confidently say that the story painted by the time between the decision and the override is highly consistent with the hypothesis that a dissent that strongly implores Congress to act (such as Justice Ginsburg’s dissent in *Ledbetter*) may catalyze a speedier congressional response.

* * *

Having examined several characteristics among Supreme Court statutory decisions that are overridden by Congress, we are prepared to suggest a model for identifying decisions most likely to be overridden in a given Term of the Court. Under this model, a statutory decision (1) by a closely divided Court, (2) rejecting the views of a federal agency, (3) finding a statutory plain meaning based upon the whole act or whole code rules, (4) construing regulatory authority narrowly, and (5) accompanied by an invitation for Congress to respond is vastly more likely to be overridden than an average statutory decision. A statutory decision handed down (1) by a unanimous Court, (2) following the views of a federal agency, (3) employing an eclectic and legislatively attentive methodology, (4) applying a broad interpretation of Congress’s or the agency’s regulatory authority, and (5) ignoring the possibility of a congressional override will almost never be overridden in the short term and rarely in the long term either. *Silkwood* waves three or perhaps four red flags, *Casey* waves five. To be sure, that would not have guaranteed that either decision *would* have been overridden, only that those decisions were much more likely to generate overrides than the average Supreme Court decision. Under this model, the Court’s recent decision in *Vance v. Ball State University*, furiously waving all five red flags (including an override-inviting dissent), ought to be a prime candidate for an override. The failure of Congress to do so in this decade will provide some confirmation that overrides have dried up for the near future.

321. The twenty-five strong dissents were spread among ten primary subject-matter areas: intellectual property, jurisdiction and procedure, bankruptcy, civil rights, criminal law and procedure, banking, education, business regulation, immigration, and habeas corpus.

V. What Are the Potential Values for Overrides? Do They Serve Those Values?

Congressional overrides are expensive for the political system to pass and implement, for they gobble up scarce congressional resources and they may interfere with reliance interests based upon the overridden judicial decisions. Do they serve valuable functions that might justify the costs? The most obvious goal of overrides, democratic legitimacy, is a big one, though not easily quantified. We demonstrate through examples that this is a powerful role that overrides actually perform. A major policy decision rendered by the democratically accountable Congress is more legitimate than the same outcome handed down by the unelected Supreme Court. A vast array of interest groups participates in the override process, seizing the opportunity to be seen and heard before Congress. As explained in Appendix 3, we coded each override to identify institutions and interest groups that participated in the deliberative process before Congress. We were deeply impressed at the diversity of interests represented and the level of public participation in that process.

The override process also gives Congress an important opportunity to update public policy to reflect current norms, to correct outdated assumptions, and to address unforeseen problems. Even if it were democratically legitimate for agencies and courts to make important policy decisions, they often lack the expertise (especially judges) or resources to improve upon established statutory policies. To be sure, statutory overrides might make policy worse—they might be rent-seeking measures that sacrifice the common good in favor of narrow private interests. The judgments entailed in such evaluations are not easily subjected to empirical methods, but our study demonstrates that for the vast majority of overrides the committee(s) in charge of the statute expressed genuine public-regarding goals for the new statute. And those committees usually subjected the fit between ends and means to public scrutiny, soliciting inputs from a range of constituencies.

Finally, overrides might contribute to rule of law values by creating more clarity, predictability, and transparency in legal rules. Before assembling and analyzing our data, we expected that overrides would on the whole represent a “cost” rather than a “benefit” from the perspective of the rule of law because overrides by their very nature change the statutory point of law, potentially introducing ambiguities and unanticipated difficulties. Nonetheless, we were surprised at how often overrides clarified confusing rules and standards created by the Supreme Court and replaced the Court’s holdings with clearer legal regimes. As a caveat to this judgment, however, we note that the effectuation of these rule of law values depends critically on how courts apply new legislated rules. Although courts are sometimes resistant, we found, on the whole, that judges faithfully implement those rules and usually reach consensus as to their application.

Perhaps no override better encapsulates these values than the Family Smoking Prevention and Tobacco Control Act of 2009.³²² Nine years earlier, the Supreme Court had ruled that the Food and Drug Administration (FDA) did not have the authority to regulate tobacco or tobacco products and so invalidated the agency's rule barring the sale of tobacco products to minors.³²³ Although many academics, as well as ordinary citizens, supported the FDA's move to protect public health generally and young people in particular,³²⁴ the 2009 Tobacco Control Act was, in our view, an even better regulatory regime. It was more democratically legitimate, advanced a better mix of policies, and even created a clearer and more workable legal regime than the one contemplated by the FDA. Those considerable benefits suggest that many overrides represent an important political contribution, both in theory and in practice.

A. *Democratic Legitimacy*

Every time the Supreme Court interprets a federal statute, the decision impacts public policy; in the FDA Tobacco Case, the Court invalidated rules against sales of cigarettes to minors.³²⁵ If Congress disagrees with the Court's interpretation, however honestly arrived at, and if Congress passes a statute implementing its preferred interpretation, the statute has a legitimacy quotient that the Court's interpretation does not. Consider the 2009 Tobacco Control Act, which had the enormous virtue of reconciling an aggressive regulation of tobacco products with the array of previous tobacco-related statutes now considered too mild.³²⁶

As a formal matter, Article I, Section 7 of the Constitution provides a process whereby Congress, with the President, creates federal statutes³²⁷ that are entitled to supremacy under Article VI.³²⁸ That formal supremacy has a functional feature as well. Article I, Section 7 requires that any override legislation satisfy the House of Representatives, whose members represent small districts and face the voters every two years, *and* the Senate,

322. Pub. L. No. 111-31, 123 Stat. 1776 (codified in scattered sections of 21 U.S.C.).

323. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). See generally Theodore W. Ruger, *The Story of FDA v. Brown & Williamson: The Norm of Agency Continuity*, in *STATUTORY INTERPRETATION STORIES*, *supra* note 316, at 334.

324. *E.g.*, James T. O'Reilly, *Tobacco and the Regulatory Earthquake: Why the FDA Will Prevail After the Smoke Clears*, 24 N. KY. L. REV. 509, 530 (1997); David C. Vladeck & John Cary Sims, *Why the Supreme Court Will Uphold Strict Controls on Tobacco Advertising*, 22 S. ILL. U. L.J. 651, 659–63 (1998); Allison M. Zieve, *The FDA's Regulation of Tobacco Products*, 51 *FOOD & DRUG L.J.* 495 (1996).

325. *Brown & Williamson*, 529 U.S. at 161.

326. See *id.* at 137–39, 143–56 (providing a detailed history of statutory regulation of cigarettes).

327. U.S. CONST. art. I, § 7.

328. *Id.* art. VI.

whose members represent state-wide constituencies and have longer terms, *and* the President (who has a conditional veto authority), who represents a national constituency and is term-limited.³²⁹ This structure not only assures that democratically elected and accountable officials must sign off on the policy decisions of an override statute but also that officials with different terms of office and representing different kinds of constituencies must sign off. This is a process that invests an override statute with an exquisitely *democratic* form of legitimacy.³³⁰

Any override statute that passes through the many Article I, Section 7 vetogates has a democratic as well as formal lawmaking legitimacy that agency and court decisions cannot match. The 2009 Tobacco Control Act was unusually robust in this respect, as tobacco regulation was an issue espoused by Senator Barack Obama and his party during the 2008 presidential election. Only after Senator Obama was elected President and his party won sweeping majorities in Congress did tobacco legislation proceed through the legislative veto gates. Hence, there was a plebiscitary feature to this override that renders it an exemplar for the legitimacy value of overrides. That legitimacy was especially important in the tobacco context; after all, Justice O'Connor's majority focused heavily on how the FDA had upset the settled expectations of both Congress (as evidenced by any number of statutes relying on assumptions that seemed to contradict the FDA's actions) and important segments of the public.

Acutely aware of the "countermajoritarian" nature of its policy-affecting statutory decisions, the Supreme Court tends to be cautious and liberty-respecting when it interprets federal statutes. Hence, the Court's decision in the FDA Tobacco Case is far from exceptional: as Part IV of our study documents, the Court tends to *underenforce* statutory duties, and the regulatory goals underlying them, when compared with Congress.³³¹ Thus, the pattern we have uncovered in our forty-four-year survey is typically one where the Court interprets a statute in a manner that some institutions and

329. Cf. *INS v. Chadha*, 462 U.S. 919, 945–59 (1983) (examining the requirements of Article I, Section 7 and the legitimacy and democracy reinforcing values that Section embodies).

330. See generally Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119 (2011) (arguing that democratic legitimacy is increased if the judiciary takes a more liberal approach to determining congressional intent); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) (detailing how political factors can affect the structural distribution of powers among the branches).

331. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 111–40 (1994) (suggesting that liberal theories of statutory interpretation press the Court to underenforce rather than overenforce statutory duties); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 768 (1991) (outlining the differences between overenforcement and underenforcement through the lens of the theory of legislative supremacy).

political interests believe underenforces the statute, those institutions and interests take their case to Congress, and Congress enacts an override law that provides broader federal regulation than the Court decision found under then-current law. As illustrated by the 2009 Tobacco Control Act, this is a legitimate process that reflects a high degree of democratic input into and accountability for the expansion of federal policy.

An additional reason the Court tends to underenforce statutory purposes is that judges in our tradition follow statutory precedents. *Stare decisis* helps protect against judicial usurpation of the policymaking primacy of Congress and the President. It also respects public as well as private reliance interests—but at the risk of policy stagnation. Overrides are the safety valve that allows statutory policy to expand and adapt to new circumstances, but with the imprimatur of the various electorates reflected in the Article I, Section 7 process. Indeed, the Court has reasoned that the possibility of congressional override justifies the stronger *stare decisis* effect the Court says it gives to statutory precedents.³³²

The Supreme Court was not bound by precedent in the FDA Tobacco Case, but some of the other overridden decisions did involve Supreme Court decisions applying statutory precedents to deny regulatory solutions to new problems.³³³ Indeed, the most (in)famous example of the super-strong presumption of correctness the Court accords statutory precedents is an example of the legitimacy benefits of the override process.

In 1922, the Supreme Court interpreted the Sherman Antitrust Act of 1891 to be inapplicable to professional baseball contests because its business was not in “interstate commerce” (a jurisdictional requirement for antitrust liability).³³⁴ After the business of baseball had grown significantly, with pervasive interstate commercial features, the Court revisited the issue

332. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”).

333. E.g., Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (codified at 42 U.S.C. § 2000e-5 (2006 & Supp. V 2012)) (overriding *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 3, 108 Stat. 694, 694–97 (codified at 18 U.S.C. § 248) (overriding *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993)); Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101, 113, 105 Stat. 1071, 1071–72, 1079 (codified as amended at 42 U.S.C. §§ 1981, 1988) (overriding *Patterson*, 491 U.S. 164, and *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991)).

334. *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 209 (1922). This case was reaffirmed and applied to insulate the reserve clause from antitrust scrutiny in *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) (per curiam).

in *Flood v. Kuhn*.³³⁵ Curt Flood, a beloved star player, challenged the reserve clause, whereby baseball teams could trade players like baseball cards.³³⁶ The league objected to the lawsuit on grounds of the sport's exemption from antitrust regulation.³³⁷ To the surprise of the pundits and the everlasting amazement of law students, the Court reaffirmed the exemption—even though the Court had refused to exempt any other professional sport from the Sherman Act and recognized that the exemption was at odds with both antitrust policy and modern views about the reach of Congress's Commerce Clause power.³³⁸ A central concern of the Court was that Congress had acquiesced in the longstanding exemption and, indeed, had ignored pleas to terminate baseball's special treatment in favor of legislation modestly expanding the exemption to other athletic endeavors.³³⁹

As odd a decision as it was, *Flood v. Kuhn* fits snugly within the framework of our Article. Not only would overruling the earlier precedents (exempting baseball) have been a policymaking move on the part of the Court, but it would have been a *big* policy shift, requiring a complete restructuring of contracts with major league baseball players and exposing the owners to a wide array of antitrust lawsuits for price-fixing and market-sharing. Indeed, as the majority opinion expressed poetically, major league baseball had come of age under the protection of the antitrust exemption, which had pervasively influenced its practices and perhaps even its appeal as a popular part of our culture.³⁴⁰ Under those circumstances, the Court insisted that only Congress could properly untangle generations of practice under the umbrella of antitrust immunity.³⁴¹ Although Congress took a generation to respond, it did finally address the issue in the Curt Flood Act of 1998, a narrow response which removed baseball's antitrust immunity only for reserve clause issues.³⁴²

As the 2009 Tobacco Control Act and the 1998 Curt Flood Act reflect, the override process has particularly strong legitimacy advantages when the

335. 407 U.S. 258 (1972). See generally BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS (2006) (providing an absorbing account of *Flood v. Kuhn* and its aftermath).

336. See *Flood*, 407 U.S. at 259 & n.1.

337. See *id.* at 282 (acknowledging the anomalous exemption for baseball).

338. See *id.* at 282–85.

339. See *id.* at 272–73, 281–82. For a skeptical analysis, see Stephen F. Ross, *The Story of Flood v. Kuhn: Dynamic Statutory Interpretation, At the Time*, in STATUTORY INTERPRETATION STORIES, *supra* note 316, at 36.

340. See *Flood*, 407 U.S. at 260–64. Justice White and Chief Justice Burger pointedly refused to join that part of the Court's opinion, depriving it of a majority. *Id.* at 285.

341. See *id.* at 273–74, 277, 280–82, 284 (stating repeatedly that any remedy for the anomalous treatment of baseball had to come from Congress); see also *id.* at 285–86 (Burger, C.J., concurring) (insisting that “it is time the Congress acted to solve this problem”).

342. Pub. L. No. 105-297, § 3, 112 Stat. 2824, 2824–26 (codified at 15 U.S.C. § 26b (2012)).

federal government is called upon to make a big policy decision, especially one that would unsettle strong and justified reliance interests. Even agencies, operating under the eye of the President, are not considered legitimate policy organs under such circumstances.³⁴³ Because coding would have been unusually subjective, we do not try to quantify this point—but we do offer a rather tentative quantification of another feature of the legitimacy benefit of overrides.

To the formal and democratic legitimacy of overrides, compared with judicial or even agency policy shifts, we add a third feature of legitimacy, one that rests upon the *open, deliberative, and pluralist* process by which statutes are supposed to be enacted. That is, a policy adopted after open public debate, in which interested persons and institutions believe their perspectives have been considered, is a more legitimate policy than one adopted through a less open and less pluralist process.³⁴⁴ Examining a sample of 100 overrides, political scientist Jeb Barnes found that most of those overrides reflected precisely such a process.³⁴⁵ To figure out whether Professor Barnes’s findings can be generalized, we coded each of our 286 override statutes based upon an examination of the committee reports and hearings that preceded enactment of those overrides.³⁴⁶

To determine whether an override was “open” we reviewed the committee reports to see whether the override’s purpose and effects were clearly articulated by the relevant committee(s). We reasoned that an override is open when the members of Congress and other interested parties are put on notice that Congress is contemplating a substantive change to Supreme Court precedent, even where the report does not portray the law as a response to a decision by the Court.

To determine whether an override was “deliberative” we examined both the reports and hearings to see how thoroughly members of Congress, the Executive Branch, and private parties identified and debated the costs and benefits of the proposed override. Based on the level of debate, we gave each override a score ranging from not deliberative (e.g., where a single report identified that an override would affect a provision of the U.S. Code) to highly deliberative (e.g., where the committee reports identified the reasons for the override and interested groups testified on the wisdom of the override in the committee hearings).

343. See, e.g., *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 225, 231–32 (1994) (overturning an FCC rule that made a major, rather than “moderate,” change in statutory policy).

344. Cf. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–4 (1990) (theorizing that the more legitimate and respect-worthy a law is perceived by the public, the more likely the public is to adhere to the law’s prescribed behavior).

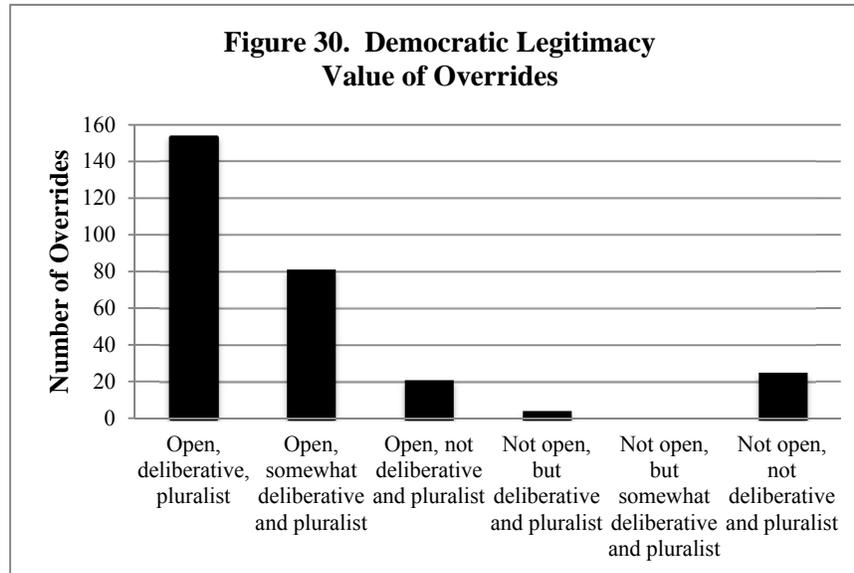
345. BARNES, *supra* note 4, at 187.

346. This was a herculean process, quarterbacked by Christiansen and carried out primarily by our research assistants Peter Chen, Jacob Victor, and Sam Thypin-Bermeo.

Finally, to determine whether an override was “pluralist” we looked at which of the affected groups testified on the override. Most overrides—roughly 54%—were highly pluralist, generating testimony from both supporters and opponents of the override. About one-third of the overrides generated testimony from groups on one side of the debate, usually only from supporters. And roughly 15% of the overrides did not produce testimony from any of the affected groups. These were usually when the override was a modest change contained in a large or complicated statute.³⁴⁷

Using these determinations, we then divided each override into one of six categories based on whether it was open and the extent to which it was deliberative and pluralist. Figure 30 below reports our findings. Although an increasing number of federal statutes are adopted through a process that involves party or interbranch “summits,” and not the traditional committee hearings and debate process, we found very few overrides that were not open, deliberative, and pluralist. More than half the overrides were highly open, deliberative, and pluralist, with their purposes and effects being clearly identified and their costs and benefits being debated by both sides. The next major group involved overrides that were “open” but less deliberative and pluralist either because the costs and benefits were debated less thoroughly or certain affected parties (almost always the losers) did not participate in the hearings. Only a small minority of overrides—less than 10%—was not open and at least somewhat deliberative and pluralist.

347. For example, the override of *Burns v. Alcala*, 420 U.S. 575 (1975), was buried in the hearings on the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2312(a), 95 Stat. 357, 853 (codified as amended at 42 U.S.C. § 606 (2006)). We found no testimony related to the override despite identifying seventy-seven published hearings related to the bill in the 97th Congress.



Unsurprisingly, the most high-profile overrides were also among the most open, deliberative, and pluralist. In these instances, committee reports clearly identified the override as a response to a specific Supreme Court holding, and most, if not all, interested groups discussed the pros and cons of the override at the hearings. Every override in the 1991 CRA, for example, was open and all but two were also highly deliberative and pluralist. But this category also included much lower profile overrides scattered across subject areas such as civil procedure, tax, and bankruptcy. At the other end of the spectrum, overrides involving crime control and prisoners were disproportionately represented among the overrides we found to be not open, deliberative, and pluralist. These included overrides in AEDPA,³⁴⁸ the Crime Control Act of 1990,³⁴⁹ the Controlled Substance Act amendments of 1974,³⁵⁰ and all three overrides contained in the Prison Litigation Reform Act of 1995.³⁵¹ Although we were not surprised by this

348. Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (codified as amended at 28 U.S.C. § 2254 (2012)) (overriding *Granberry v. Greer*, 481 U.S. 129 (1987)).

349. Pub. L. No. 101-647, § 2509, 104 Stat. 4789, 4863 (codified as amended at 18 U.S.C. § 3663(a)) (overriding *Hughey v. United States*, 495 U.S. 411 (1990)).

350. Act of Oct. 26, 1974, Pub. L. No. 93-481, § 2, 88 Stat. 1455, 1455 (codified as amended at 21 U.S.C. § 321) (overriding *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974)).

351. Pub. L. No. 104-134, tit. 8, §§ 803, 804(a)(5), 110 Stat. 1321-66, 1321-70 to -75 (codified as amended in scattered sections of 28, 42 U.S.C.) (overriding *Denton v. Hernandez*, 504

last finding, given the results reported in Figures 11 and 12 (showing that inmates and prisoners were frequently affected by overrides but almost never testified), we nonetheless found it troubling insofar that a major benefit of the override process is absent in statutes affecting an already maligned segment of society.

Thus, the 2009 Tobacco Control Act is, again, representative, for it was enacted only after thousands of pages of committee hearings across several Congresses and with significant input from smokers and tobacco companies, some of which ultimately supported the legislation. Indeed, we found that both the Tobacco Control Act and the Curt Flood Act were open and highly deliberative and pluralist. Because these overrides are representative of the majority of the overrides we uncovered, this is further evidence that overrides carry with them a large legitimacy bonus. Such a finding has big implications for our doctrinal recommendations in the next Part.

Stepping away from the data, we conclude this discussion with another intangible legitimacy point. When all relevant interests and institutions are consulted as part of the legislative process, the resulting statute is usually going to represent a compromise. Many compromises will enhance the legitimacy of the new policy. The 2009 Tobacco Control Act, for example, cleared up a point that had troubled the Supreme Court in the FDA Tobacco Case: If nicotine is a drug under the Federal Food, Drug, and Cosmetic Act (FDCA), and if science shows that tobacco products are always harmful when used as intended (i.e., smoking), doesn't the FDA have to ban tobacco products? The practical problem with a ban is that the (addicted) public would not go along with it, generating some of the same difficulties associated with Prohibition, such as evasion, criminal rings, and a loss of respect for legal rules. Also bearing on legitimacy is the obvious problem, identified by the Court,³⁵² that Congress never envisioned that the FDCA would be interpreted to prohibit use of tobacco. As part of the pluralistic deal with at least some tobacco companies, the 2009 override provided that the FDA *cannot* ban the sale of tobacco products altogether, nor can it require a doctor's prescription to secure those products.³⁵³ This is the type of deep compromise that best comes from the democratically accountable branches of government. Had the Court engaged in a similar effort to address these practical concerns, it would have been roundly, and rightly, denounced for acting beyond the prerogative of the Judicial Branch.

U.S. 25 (1992); *McCarthy v. Madigan*, 503 U.S. 140 (1992); and *Neitzke v. Williams*, 490 U.S. 319 (1989)).

352. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146–47 (2000).

353. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, Sec. 101(b), § 906(d), 123 Stat. 1776, 1795–97 (2009) (codified at 21 U.S.C. § 387f).

B. Policy-Updating Values

In our view, legitimacy is the most pervasive net benefit of statutory overrides, and sometimes, as with the 2009 Tobacco Control Act, that benefit is quite substantial. Another potential value overrides might serve is to modernize statutory policy so that it better serves the purposes of government. This might take many forms, including an updated solution to collective action problems, advancement of public/community values, removing inefficiencies (including discriminations) in the market and other institutions, etc. Thus, the tobacco law sought to modernize our nation's public health campaigns to include tobacco abuse, to educate the citizenry about the dangers of smoking tobacco products, and to offset biases of immature or addicted decision makers.³⁵⁴ These are worthy public-regarding goals that had not, before 2009, been deeply reflected in the statutes regulating tobacco.³⁵⁵

Most of the overrides in our study are what might be considered retail-level updates—congressional responses to particular issues. This includes many of the famous overrides discussed here—including the Endangered Species Act (ESA) Amendments of 1978, which overrode *TVA v. Hill* by creating an administrative mechanism to recognize cost–benefit exceptions to the endangered species protections for public projects.³⁵⁶ This is an excellent example of how overrides can create better policy. Almost no one believed that the Court's rule (i.e., stop any public project that threatened critical habitat for an endangered species) represented the best public policy, and it was reasonable to think, as the Justices in the majority did,³⁵⁷ that a regime of judge-created exceptions would be unwieldy and would generate too much litigation. By creating an administrative committee to evaluate cost–benefit claims, the 1978 override produced a better policy outcome than the judiciary ever could.³⁵⁸ In addressing this narrow issue, it presented a retail fix, although one with potentially larger consequences.

The 2009 Tobacco Control Act exemplifies a more wholesale approach, as it tackled a major public policy problem and created a comprehensive new statutory structure for the regulation of tobacco

354. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3, 123 Stat. 1776, 1781–82 (2009) (listing these aims as the Act's purpose).

355. The dominant regulatory approach was a mild disclosure regime mandated by the 1965 Federal Cigarette Labeling and Advertising Act and subsequent laws. See *Brown & Williamson*, 529 U.S. at 143–56. As the FDA reported in 1996, this was an ineffective regime. See *id.* at 134–35.

356. See *supra* notes 315–16 and accompanying text.

357. See *TVA v. Hill*, 437 U.S. 153, 193–95 (1978) (declining to create a special remedy for the TVA and describing such an exercise as beyond judicial authority).

358. For a useful examination of the exemption process, see Jared des Rosiers, Note, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825 (1991).

products. Consider an even better example, the Bankruptcy Reform Act (BRA) of 1978, which replaced the obsolete Bankruptcy Act of 1898 and its encrusted case law with a more up-to-date set of integrated bankruptcy rules.³⁵⁹ Unlike the 2009 Tobacco Control Act or the 1991 CRA, or the 1978 ESA Amendments, the purpose of the 1978 BRA was *not* to override Supreme Court decisions—of the eleven overrides, only two were a direct response to a Supreme Court decision. The many overrides in this superstatute were by-products of Congress’s systematic rethinking of federal bankruptcy policy and of its creating a structure that would best carry out that policy. Bankruptcy law has long been understood as a mechanism to solve collective-action problems with debt collection,³⁶⁰ and a major feature of the 1978 BRA was to make that process more efficient. More than prior law, moreover, the new statute emphasized the fresh start policy for debtors, allowing companies as well as individuals to restart their economic lives relatively unencumbered after going through bankruptcy.³⁶¹ In addition to more efficient debt collection and wealth-maximizing debt relief, the 1978 BRA also provided rules for debt adjustment that the political culture felt were more equitable and justified by risk-spreading precepts.³⁶²

Bankruptcy reform illustrates several of the different ways that override statutes can update and improve public policy. Inspired by this superstatute, our research assistants and one of us pored through the committee reports for each override to determine which, if any, public policy the sponsors represented that the override would advance. Among the public policies were (1) solving collective-action problems (such as how to regulate air pollution); (2) ameliorating market or institutional inefficiencies; (3) advancing public values; (4) redistributing government power to create a better regulatory regime; (5) redistributing resources or orienting rules to protect ordinary persons or minorities; (6) redistributing resources or orienting rules to benefit powerful groups or business; and (7) creating new rules to prevent unfair or arbitrary action by the government. Categories (1)–(5) and (7) represent public-regarding, wealth-maximizing public policies, at least in aspiration. Category (6), classic rent-seeking, is not wealth-maximizing for the population as a whole.

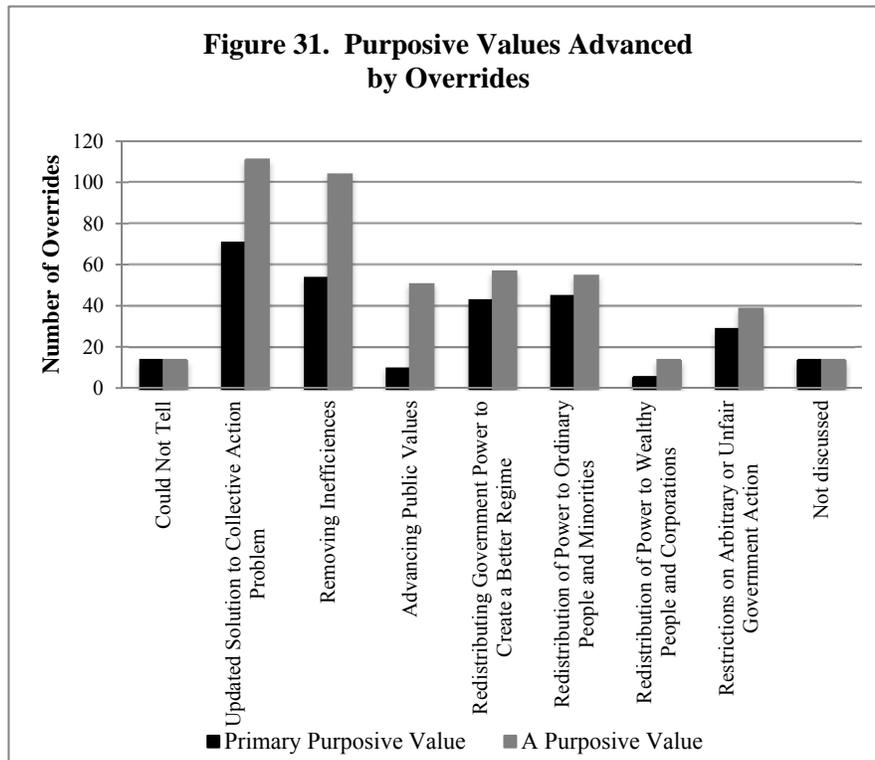
359. For background of the 1978 BRA and its reforms, see SKEEL, *supra* note 196, at 131–59.

360. See THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 10–19 (1986); Alan Schwartz, Essay, *A Contract Theory Approach to Business Bankruptcy*, 107 *YALE L.J.* 1807, 1807 (1998).

361. See ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 115 (6th ed. 2009); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 *HARV. L. REV.* 1393, 1393 (1985).

362. See G. Eric Brunstad, Jr., *The Three Faces of Bankruptcy Law* 300–46 (Feb. 2014) (unpublished J.D.S. dissertation, Yale Law School) (on file with author) (discussing the equity and efficiency functions of modern debt-adjustment policies).

Figure 31 below maps what we found—not only a legislative process that was procedurally open and pluralistic, but also one that was substantively focused on wealth-maximizing public policies.



At least in aspiration, congressional overrides are public-regarding in an impressive variety of ways. The devil, however, is in the actual consequences of the overrides. And there we must confront the fact that overrides enacted for assertedly public-regarding goals do not necessarily advance the public interest. At the most general level, the ambitious regulatory regime created by the 1978 BRA has been sharply criticized for distracting bankruptcy policy away from what some critics believe to be its only defensible goal, namely, efficient debt collection.³⁶³ If the critics are

363. See, e.g., Alan Schwartz, *Bankruptcy Contracting Reviewed*, 109 YALE L.J. 343, 343 (1999) (critiquing bankruptcy reformers' focus on improving mandatory bankruptcy rules); Schwartz, *supra* note 360, at 1810 (“[T]his Essay’s . . . claim is that the better arguments hold that bankruptcy systems should solve only the creditors’ coordination problem.”). Although we are dubious that a pure contracting approach would be optimal for determining bankruptcy policy, see, e.g., Brunstad, *supra* note 362, at 57–84 (criticizing Professor Schwartz’s contract-based

right about that, the 1978 law may have been a step backward in many respects rather than an overall rational policy update. To be clear, we are not persuaded by this criticism of the 1978 BRA, for we embrace the notion, supported by a wide array of scholars, that debt relief and debt adjustment policies can be wealth-maximizing, even when they sacrifice the goal of efficient debt collection.³⁶⁴

Moreover, the updating override must itself be applied by judges or, sometimes, agencies—often the same institutions and players whom Congress is overriding. As we report in more detail in the next subpart, judges for the most part faithfully applied overrides to new problems, but this is no guarantee that the well-motivated override in the hands of the same judges who were overridden is going to yield better public policy.

And sometimes the override process misfires, not only wasting the tremendous process and opportunity costs Congress incurred in passing the statute but also creating bad public policy. Recall the 1978 override of *TVA v. Hill*, which set up an administrative process to grant exemptions to ESA obligations when justified by a cost-benefit analysis.³⁶⁵ When the Tellico Dam came before that process for evaluation, the Endangered Species Committee created by the 1978 override refused to grant TVA the requested exemption, on the ground that the value of the completed dam was not nearly as high as TVA represented it to be.³⁶⁶ Members of Congress representing Tennessee remained determined to see the dam completed and secured a second override statute, specifically authorizing the dam's completion.³⁶⁷ In retrospect, the completed dam did not spell doom to the endangered snail darter, which had a thriving habitat elsewhere and graduated from the endangered species list in 1984, but neither did the dam have the economic and other benefits its sponsors claimed.³⁶⁸ Overall, the second override of *TVA v. Hill* was an example of rent-seeking legislation and probably a modest waste of the taxpayers' money.

C. *Rule of Law Values*

Our assumption when we started this project was that the main value of overrides would be democratic legitimacy, with many overrides also improving or at least updating public policy. Recognizing the public value of objective, easily determinable legal directives, we expected that over-

critique of bankruptcy reforms), we do not wade into the fierce normative debate among bankruptcy scholars.

364. See, e.g., WARREN & WESTBROOK, *supra* note 361, at 895–96 (presenting arguments to this effect).

365. See *supra* notes 315–16 and accompanying text.

366. See Garrett, *supra* note 316, at 85–88.

367. *Id.* at 88–89.

368. *Id.* at 89–90.

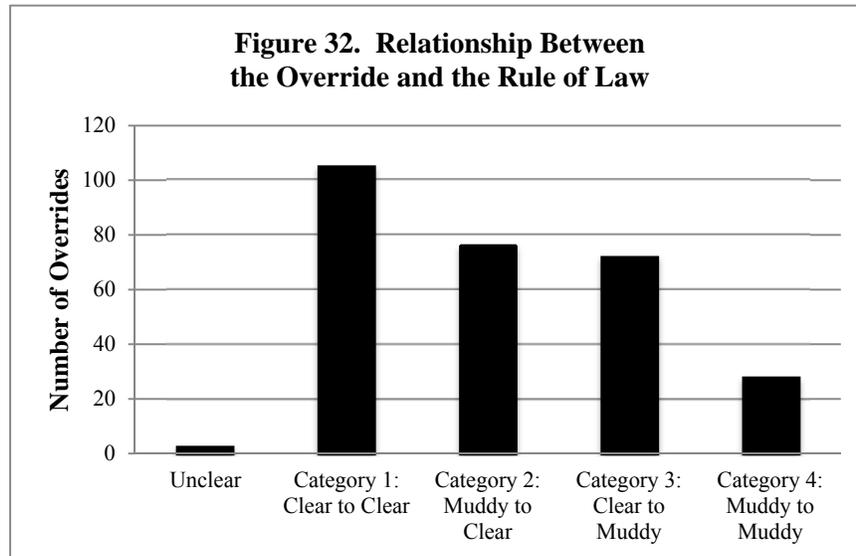
rides would on the whole impose costs rather than benefits on the rule of law. As it turns out, the matter is more complicated—and overrides actually offer positive opportunities for the orderly evolution of clear and helpful rules of law.

1. Rule of Law Benefits.—We coded all 286 override statutes to determine what kind of rule the Supreme Court had devised and how that compared with the rule Congress created in the override. The following grid reflects the possibilities, crudely put:

Table 6. Rule of Law Possibilities When Supreme Court Opinions Are Overridden

	Supreme Court Rule = Clear	Supreme Court Rule = Muddy
Override Rule = Clear	(1) Rule of Law Wash	(2) Rule of Law Benefits from Override
Override Rule = Muddy	(3) Rule of Law Costs from Override	(4) Rule of Law Wash

Category 2 overrides represent a potential rule of law contribution of the override process—and they were much more common than we expected. Figure 32 below reports the superficial rule of law effects from an override. Notice that nearly two-thirds of the overrides produced what we considered a “clear” rule of law—and almost a quarter of the overrides replaced a muddy Supreme Court rule with a clear override rule. Many of the overrides falling into Category 2 were what we earlier called *clarifying overrides*, where the main point of the override was to provide a rule of law that the Court had not provided satisfactorily.



Some of the clarifying overrides displaced decisions of evenly divided Courts, and others displaced decisions where there was no Court majority for a point of law.³⁶⁹ In *United States v. Santos*,³⁷⁰ the Court interpreted the federal money laundering statute, which makes it a crime to use the “proceeds” of criminal activity in otherwise legal business ventures.³⁷¹ The issue was whether the government had to prove the defendant was using the “profits” of crime, as the defense lawyers argued, or just “receipts” from criminal activities, as the government maintained.³⁷² The Court split 4–4 on this issue, with the critical fifth Justice (Stevens) opining that “proceeds” meant profits as applied to most cases but could mean receipts in cases involving large-scale organized crime.³⁷³ Although the Court was deeply divided, the division did produce a point of law—but one that depended on precisely what kind of enterprise was being prosecuted.³⁷⁴ *Santos* is an excellent example of the rule of lenity in action, but the sometimes narrow, sometimes broader interpretation was hard for prosecutors and lower court

369. See, e.g., Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 327, 119 Stat. 23, 99–100 (codified at 11 U.S.C. § 506(a)(2) (2012)). Section 327 overrode *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), in large part because there was no majority opinion yielding a clear rule of law for bankruptcy courts to apply. See *id.* at 468.

370. 553 U.S. 507 (2008).

371. See *id.* at 510–11 (plurality opinion).

372. *Id.* at 514–19.

373. *Id.* at 524–28 (Stevens, J., concurring). Neither the government nor the defendant, nor any appellate court, had endorsed this interpretation. *Id.* at 522–23 (plurality opinion).

374. See *id.* at 522–24.

judges to apply. When Congress overrode *Santos* the next year, it adopted the rule favored by the dissenters (and the government), which lower courts have been relieved to apply in future cases.³⁷⁵

Santos saw Congress legislate the legal rule that federal prosecutors had worked out to their satisfaction, a common phenomenon in our history of overrides: criminal prosecutors have great success in securing overrides of Supreme Court decisions denying them the defendant-grabbing, bright-line rules they prefer.³⁷⁶ This pattern shows up in civil legislation as well. In *Rosenberg v. Yee Chien Woo*,³⁷⁷ the Court ruled that immigration authorities evaluating an application for refugee status might consider as one factor whether the refugee had firmly resettled in a third country after fleeing his country of persecution and before seeking asylum in the United States.³⁷⁸ The Court's flexible balancing approach was one that the agency ultimately rejected by regulations in 1990, when it announced that firm resettlement would simply bar asylum applications.³⁷⁹ Codifying the agency's bright line rule, Congress formally overrode *Yee Chien Woo* six years later (and a quarter-century after the Supreme Court's interpretation).³⁸⁰

Yee Chien Woo reflects a large group of overrides whose rule of law benefits derive in large part from Congress's decision to codify or reinstate an agency's regime of rules that had been invalidated by the Court. A dramatic illustration of this phenomenon involved social security disability benefits for children; when awarding such benefits, the Social Security

375. See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1617, 1618 (codified at 18 U.S.C. § 1956(c)(9) (2012)); see also *United States v. Abdulwahab*, 715 F.3d 521, 531 n.8 (4th Cir. 2013) (noting that the 2009 override had created a workable rule for money laundering prosecutions).

376. For example, when the Court overruled a statutory precedent, established by *United States v. Bramblett*, 348 U.S. 503 (1955), that prosecutors had been using for decades, the Department of Justice persuaded Congress that the new *Hubbard* rule, *Hubbard v. United States*, 514 U.S. 695 (1995), was unworkable, and Congress simply reinstated the earlier precedent in the False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 3459 (codified as amended at 18 U.S.C. § 1001). A similar process of accommodating prosecutors and providing clearer rules for lower courts occurred in Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469, 3469–70 (codified as amended at 18 U.S.C. § 924(c)), which overrode *Muscarello v. United States*, 524 U.S. 125 (1998), and *Bailey v. United States*, 516 U.S. 137 (1995); and in Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411(c)(1), 108 Stat. 2160, 2253 (codified as amended at 31 U.S.C. § 5324(c)), which overrode *Ratzlaf v. United States*, 510 U.S. 135 (1994).

377. 402 U.S. 49 (1971).

378. *Id.* at 56.

379. See 8 C.F.R. § 208.13(c)(2)(i)(B) (2014) (requiring the denial of asylum applications filed before April 1, 1997, when the applicant had firmly resettled in a third country).

380. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 604(a), 110 Stat. 3009-546, 3009-690 to -91 (codified as amended at 8 U.S.C. § 1158(b)(2)(A)(vi)).

Administration must determine whether the child's disability is comparable to one that would prevent an adult from gainful economic activity.³⁸¹ In *Sullivan v. Zebley*,³⁸² the Court invalidated agency regulations that streamlined the determination along categorical lines; the Court ruled that the Administration had to make individualized determinations.³⁸³ This was a fair point, but Congress reinstated the agency's categorical approach in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.³⁸⁴ Although one might debate Congress's policy choice, making it harder for the most vulnerable group in our society (i.e., disabled children) to secure federal assistance, the override reduced the costs of administration and instantiated a regime of rules that was easier for the agency to apply and families to predict.

2. *Rule of Law Costs*.—Although two-thirds of the override provisions were rules rather than standards, the remaining third were the latter. When override standards replaced judicial rules, they imposed potential costs on the rule of law. Typical is the 1998 override of *United States v. Brockamp*.³⁸⁵ A unanimous Supreme Court flatly rejected any kind of equitable exception for the three-year limitations period within which taxpayers can file for refunds.³⁸⁶ Responding to taxpayer outrage, Congress created a tolling exception applicable when taxpayers are “financially disabled.”³⁸⁷ This strikes us as a less clear rule of law; it has offsetting policy advantages, but the new standard represents a (modest) cost from a rule of law perspective.

Most of the rule of law costs imposed by overrides are the result of those overrides falling within Category 3 of Table 6. But a small cluster of overrides imposed a different kind of rule of law cost because they traversed constitutional limits.³⁸⁸ The most dramatic example of this

381. See 42 U.S.C. § 1382c(a)(3)(C)(i) (defining disability for a person under the age of eighteen using essentially the same language as for a person over the age of eighteen); 20 C.F.R. § 416.924a (2013) (setting forth the agency guidelines for determining disability for a person under the age of eighteen).

382. 493 U.S. 521 (1990).

383. *Id.* at 539–41.

384. See Pub. L. No. 104-193, § 211(c), 110 Stat. 2105, 2189–90 (codified as amended at 42 U.S.C. § 1382c (2006)); see also *Colon v. Apfel*, 133 F. Supp. 2d 330, 337–38 (S.D.N.Y. 2001) (recounting the statutory response to *Sullivan v. Zebley*).

385. 519 U.S. 347 (1997).

386. *Id.* at 352–54.

387. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3202(a), 112 Stat. 685, 740–41 (codified at 26 U.S.C. § 6511(h) (2012)).

388. For example, when Congress overrode *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), in the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (codified at 15 U.S.C. § 78aa-1), it not only made the override retroactive but also authorized the reopening of judgments based upon a

process arose out of the Bush–Cheney Administration’s constitutional activism in the post-9/11 War on Terror. The Administration’s detention of suspected terrorists in Guantanamo Bay, Cuba, without hearings or reliable determinations of enemy status, was subjected to habeas review by the Court in *Rasul v. Bush*.³⁸⁹ Congress responded with the Detainee Treatment Act of 2005, which cut off habeas review for Guantanamo detainees.³⁹⁰ In *Hamdan v. Rumsfeld*,³⁹¹ the Court interpreted the habeas cutoff not to apply to pending habeas petitions, which Congress immediately rejected in the Military Commissions Act of 2006.³⁹² Finally, in *Boumediene v. Bush*,³⁹³ the Court invalidated the abrogation of habeas corpus on the ground that Congress acted outside the Suspension Clause authorization found in the Constitution.³⁹⁴ The War on Terror habeas overrides imposed some of the most important rule of law costs upon our system of any set of overrides in this study.

Consider another example of the rule of law costs sometimes posed by overrides. A regular, even if small, portion of the Supreme Court’s docket in the last generation has involved the Voting Rights Act (VRA) of 1965.³⁹⁵ Most of its provisions apply nationwide, but § 4(b) identifies a subset of mostly southern states with traditions of low minority voting, and § 5 requires those jurisdictions to preclear any changes in their voting rules or jurisdictions.³⁹⁶ Because the VRA has a sunset feature, Congress regularly revisits the law, always reauthorizing it and expanding its ambit in some

Supreme Court opinion Congress considered erroneous. The Court invalidated the judgment-reopening allowance in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217–18 (1995). Another example is the 1974 override, Act of Aug. 7, 1974, Pub. L. No. 93-368, § 5, 88 Stat. 420, 420–21 (codified as amended at 42 U.S.C. § 1383(g) (2006)), of *Employees of the Department of Public Health & Welfare of Missouri v. Department of Public Health & Welfare of Missouri*, 411 U.S. 279 (1973), which was invalidated in *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822, 826 (8th Cir. 1998) under the Eleventh Amendment and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

389. 542 U.S. 466 (2004).

390. Pub. L. No. 109-148, tit. 10, § 1005(e), 119 Stat. 2739, 2741–42 (codified as amended at 28 U.S.C. § 2241).

391. 548 U.S. 557 (2006).

392. Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified as amended at 28 U.S.C. § 2241).

393. 553 U.S. 723 (2008).

394. *Id.* at 732–33.

395. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.). The Court has repeatedly addressed constitutional issues concerning the VRA, starting with *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and culminating in the 2013 showdown in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Even more frequent has been the Court’s restrictive interpretation of the VRA, to which Congress has responded with overrides. *See generally* Kousser, *supra* note 162.

396. Voting Rights Act of 1965 §§ 4(b), 5, 79 Stat. at 438–39 (codified as amended at 42 U.S.C. §§ 1973b–1973c (2006)).

way.³⁹⁷ The most recent renewal came in 2006.³⁹⁸ Witnesses told Congress that minority voting in § 5 jurisdictions had approached or exceeded national averages, yet Congress reauthorized § 4(b) without change and, instead, expanded § 5,³⁹⁹ overriding a few mildly restrictive Supreme Court decisions in the process.⁴⁰⁰ In *Shelby County v. Holder*,⁴⁰¹ a closely divided Supreme Court invalidated § 4(b) on constitutional grounds and essentially left § 5 unenforceable.⁴⁰² One reason advanced by the Court for striking down § 4(b) was Congress's unwillingness to revisit its long-outdated formula, even as Congress eagerly overrode the Court's efforts to trim back § 5:

In 2006, Congress amended § 5 to prohibit laws that could have favored [minority] groups but did not do so because of a discriminatory purpose even though we had stated that such broadening of § 5 coverage would “exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5’s constitutionality.”⁴⁰³

Another way of considering the rule of law effects of overrides is to focus only on the effect the override had on the ultimate legal rule. Figure 33 below reports the same data, but based only on its rule of law costs and benefits—i.e., whether it clarified muddled rules, replaced clear rules with muddled ones, or did not meaningfully alter the level of clarity in the law.

397. *See Shelby Cnty.*, 133 S. Ct. at 2620.

398. *Id.* at 2621.

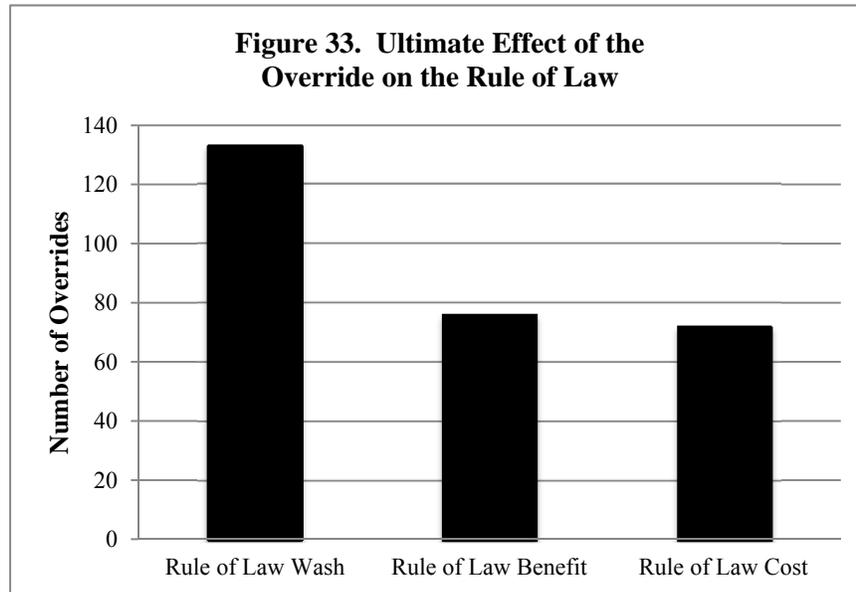
399. *See id.* at 2625–26 (summarizing the information garnered from witness testimony during hearings in the House and explaining Congress's strengthening of the Act's remedies).

400. *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81 (codified as amended at 42 U.S.C. § 1973e) (overriding two decisions).

401. 133 S. Ct. 2612 (2013).

402. *Id.* at 2648 (Ginsburg, J., dissenting).

403. *Id.* at 2626–27 (majority opinion) (citation omitted) (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000)).



Although the overrides we studied generally produced clear rules,⁴⁰⁴ they did not as a whole improve the clarity of the law. Indeed, as Figure 33 demonstrates, overrides imposed rule of law costs as often as they created rule of law benefits. But while predictably it is an important feature, it is not an end in itself. After all, the override of *Zebly* clarified the rule of law, but at a high, and arguably unacceptable, social cost.⁴⁰⁵ And half of the decisions overridden by the 1991 CRA replaced the Court’s efforts to establish clear legal rules with muddier standards, but ones that Congress believed would more effectively remedy employment discrimination. For example, it overrode the Court’s clear holding in *Patterson v. McLean Credit Union*⁴⁰⁶ that 42 U.S.C. § 1981, which provides all persons the right to “make and enforce contracts,”⁴⁰⁷ does not prohibit racial discrimination during the performance of the contract⁴⁰⁸ with a rule that applies § 1981 to “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”⁴⁰⁹ The new extent of § 1981 may be harder to

404. See *supra* Figure 32.

405. See *supra* notes 383–84 and accompanying text.

406. 491 U.S. 164 (1989).

407. 42 U.S.C. § 1981(a) (2006).

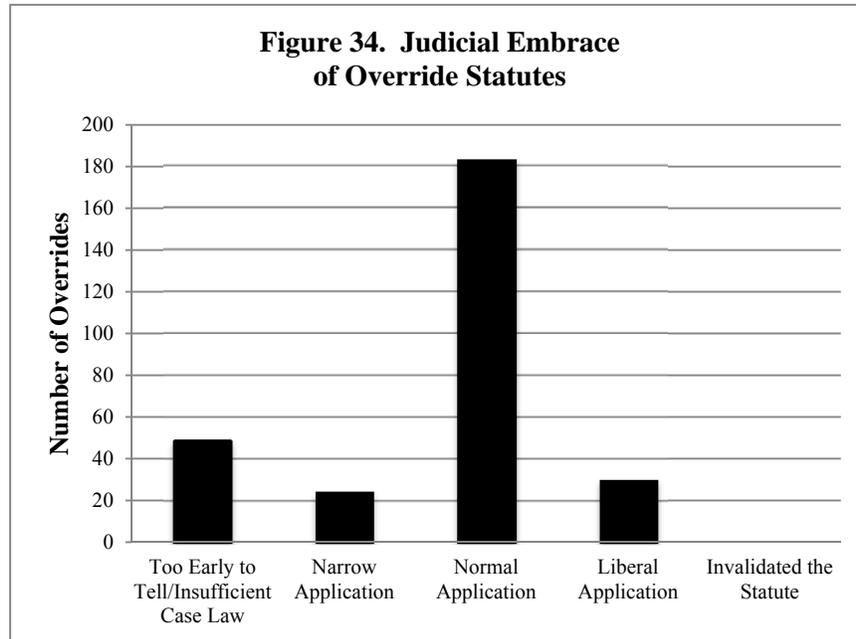
408. 491 U.S. at 176–78.

409. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72 (codified at 42 U.S.C. § 1981(b) (2006)).

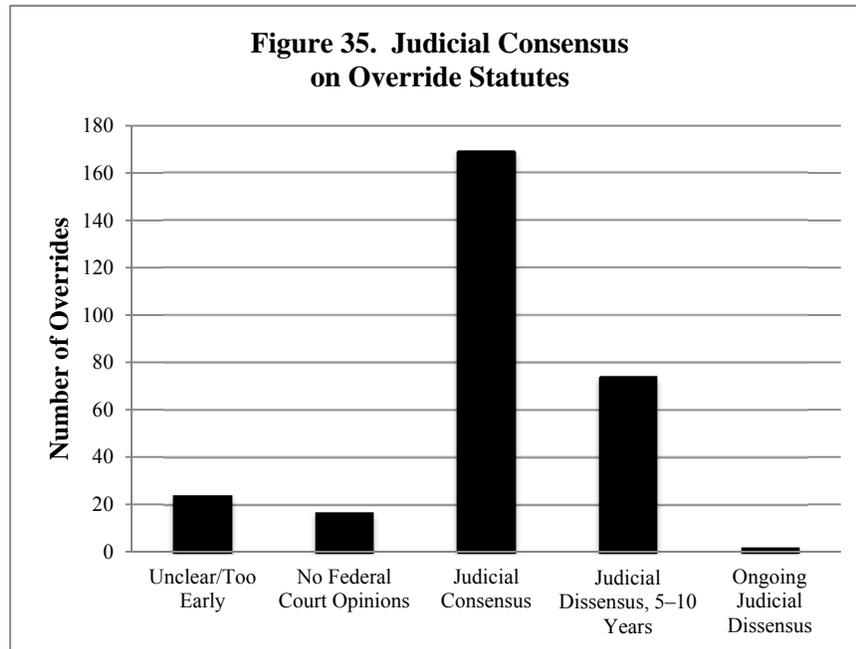
determine in the wake of the override, but it also, no doubt, better served the goals of the 102nd Congress.

3. *Implementation and the Rule of Law.*—Homing in on the relative clarity of the point of law, Figures 31 and 32 present a calculus that is too simple, without further investigation. If judges are determined to create exceptions, relatively clear override rules might not advance a predictable rule of law, while under other circumstances, open-textured override rules might do so—for example, where judges or agencies create detailed rules to fill out the standards created by Congress. To address this issue, albeit in a limited way, we examined published judicial opinions (easily searchable through WestlawNext) interpreting the provision added or amended by each of the 286 overrides in our study. For the large majority of overrides, we found judicial cooperation in neutrally applying the new point of law and only occasional disagreement among judges as to important points of law. As we shall now explain, judicial and agency implementation made a big difference in the rule of law impact of a fair number of our overrides.

We examined two different qualitative measures of how the judiciary treated the new rule or standard provided by the override. First, we looked at how courts applied the new provision(s). Did they apply the override broadly, perhaps by extending it to cases and questions covered by Congress's purpose in passing the override but that were not clearly included in its text? Or did courts give the override a narrow application, applying it to resolve only those cases similar to scenarios overruled in the prior Supreme Court cases? Figure 34 reports our findings on how the judiciary implemented the new override rules. Although an important set of cases were given a surprisingly broad or narrow interpretation, the vast majority (more than three-quarters of all overrides) were given what we determined to be a "normal" application.



Second, we examined the extent to which courts reached similar interpretations of the override. Did courts generally apply the override in a similar fashion, thereby reaching consensus about its meaning and effect? Did courts initially disagree about the override’s meaning but then settle into a consistent interpretation? Or have courts continued to disagree about how to apply the override? Figure 35 shows that courts immediately reached a judicial consensus on the override’s application for most overrides and within five to ten years for the vast majority of overrides. Indeed, courts reached judicial consensus on the application of the override immediately for two-thirds of overrides and within five to ten years in a staggering 99% of overrides for which there was adequate data to make a determination—i.e., excluding overrides that have not been applied by a federal court or where there are too few decisions to assess the level of consensus.



Thus, even when the override statute falls within Category 3 (i.e., it transforms a clear rule into a muddied standard), the legal regime it creates might still represent a predictable one if the implementing officials create a detailed and precise regulatory regime. In *Mahon v. Stowers*,⁴¹⁰ for example, the Supreme Court unanimously held that nothing in the Packers and Stockyards Act of 1921 gave livestock producers debt priority in a bankrupt packing company as against the claims of the packer's secured creditor.⁴¹¹ *Mahon's* simple rule (secured creditors come first) served the rule of law quite well; when Congress overrode the point of law two years later, it legislated a period in which packers were deemed to hold livestock in trust for the producers, which gave the latter some protection in the event of a packer's insolvency.⁴¹² Given the relative complexity of the new rule, we placed the override in Category 3. The statutory point may have advanced the public interest in a stable meat industry, as Congress claimed, but apparently with some sacrifice in predictable legal rules.

When we examined the post-override history of the new provision, however, our view about the rule of law effect changed. In the wake of the

410. 416 U.S. 100 (1974).

411. *Id.* at 111-14.

412. Act of Sept. 13, 1976, Pub. L. No. 94-410, § 8, 90 Stat. 1249, 1251-52 (codified at 7 U.S.C. § 196 (2012)).

statute, the Department of Agriculture promulgated detailed regulations setting forth the particular rules and procedures the parties needed to follow.⁴¹³ Even though the override itself offered a set of standards in place of the Court’s bright-line rule, agency implementation turned the standards into a set of clear rules.⁴¹⁴ There were a number of examples where Category 3 overrides did not undermine the clarity of a legal regime, partly because an agency established a clear set of rules within the broad parameters the override law had set.⁴¹⁵

Of course, implementation has also sometimes had the opposite effect, undermining the rule of law clarity and predictability of Category 2 overrides. An example comes from AEDPA, the 1996 habeas reform law. In *Vasquez v. Hillery*,⁴¹⁶ the Supreme Court had taken an equitable approach to the timing of state habeas petitions,⁴¹⁷ to which Congress responded with a provision in AEDPA that set a limitations period of one year, with a minor exception, for such petitions.⁴¹⁸ In the next fifteen years, almost every court of appeals recognized an equitable tolling exception to the limitations period, an interpretation ratified by the Supreme Court in 2010.⁴¹⁹ Although the override rule remained the presumptive limitation period, the judiciary, for standard due process reasons, transformed a clear bright-line rule into a presumptive rule with a hard-to-determine equitable exception.⁴²⁰ While Congress enacted AEDPA in order to substitute stricter congressional rules for softer Supreme Court rules or standards, the

413. See 9 C.F.R. § 201 (2014).

414. See *First State Bank of Miami v. Gotham Provision Co. (In re Gotham Provision Co.)*, 669 F.2d 1000, 1006–07 (5th Cir. 1982) (following Department of Agriculture regulations).

415. For another example, the Court’s decision in *U.S. Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), ruled that the Rehabilitation Act of 1973, prohibiting discrimination against disabled individuals in programs and activities receiving federal funds, did not extend to commercial air carriers. *Id.* at 599, 610–13. Congress provided an antidiscrimination rule in the Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (codified as amended at 49 U.S.C. § 41705 (2006)), a classic example of a rule replaced by a standard. But the Department of Transportation gave rule of law teeth to that standard through detailed rules it developed to guide carriers and their passengers. See *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 999–1002 (9th Cir. 2013) (describing the duties air carriers now owe disabled passengers, the training required for personnel, and the administrative enforcement mechanisms, including investigatory hearings and fines).

416. 474 U.S. 254 (1986).

417. See *id.* at 264–65.

418. Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217 (1996) (codified at 28 U.S.C. § 2244(d) (2012)).

419. *Holland v. Florida*, 560 U.S. 631, 645 (2010).

420. See *id.* at 654–55 (Alito, J., concurring in part and concurring in the judgment) (objecting that the majority’s equitable exception is too broad); *id.* at 660, 671 (Scalia, J., dissenting) (objecting to any exceptions beyond the ones adopted on the face of the override provision and characterizing the majority’s opinion as “refus[ing] to articulate an intelligible rule” on the issue of tolling).

judiciary has the chief responsibility for applying the AEDPA rules and has done so in light of equitable or constitutional principles that have repeatedly introduced equitable exceptions to those bright-line statutory rules.⁴²¹

The same process has accompanied Congress's override of some of the Court's prison reform cases in the Prison Litigation Reform Act (PLRA) of 1995, part of the same omnibus statute as AEDPA. PLRA's purpose was to purge the federal courts of excessive (i.e., frivolous or intrusive) prison reform lawsuits;⁴²² this was perhaps a harsh purpose, but one that judges have ameliorated in practice. For example, the PLRA overrode a Supreme Court decision that required lower courts to treat *in forma pauperis* (usually pro se) prisoner complaints leniently; the override imposed a rule requiring dismissal of complaints that do not clearly state a legal basis for relief.⁴²³ In practice, however, many federal judges have routinely allowed prisoners leave to amend their faulty complaints.⁴²⁴ This all but restores the overridden regime in those circuits and creates a disagreement among the circuits, which the Supreme Court has not addressed. Indeed, the Supreme Court itself has interpreted the PLRA narrowly, sustaining intrusive federal remedies a majority of the Justices believed necessary to protect the Eighth Amendment rights of inmates.⁴²⁵

Overall, as the gentle reader can see, one cannot say what the net rule of law effects are for the general run of congressional overrides. Our only goal here is to demonstrate that overrides do have potential rule of law benefits, that the actual rule of law effect depends on the process of implementation, and that the rule of law consequences (including costs)

421. See, e.g., *Williams v. Taylor*, 529 U.S. 420, 433–34 (2000) (narrow interpretation of AEDPA § 104); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (undertaking a precedent-based application of AEDPA § 105); *United States v. Shipp*, 589 F.3d 1084, 1087–88 (10th Cir. 2009) (allowing statutory issues to be certified for habeas appeal based on due process precepts and notwithstanding AEDPA § 102); *Noble v. Kelly*, 246 F.3d 93, 98 (2d Cir. 2001) (narrowing construction of AEDPA § 104); *Rogers v. Artuz*, 524 F. Supp. 2d 193, 200–01 (E.D.N.Y. 2007) (reporting that circuit courts have narrowly construed AEDPA § 102, which limited certificates of appeal in habeas cases); see also Tushnet & Yackle, *supra* note 89, at 2–3 (predicting, quite accurately, that the judiciary would take some of the edge off of AEDPA's hard rules).

422. *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002).

423. Pub. L. No. 104-134, § 804(a)(5), 110 Stat. 1321-66, 1321-74 (1996) (codified at 28 U.S.C. § 1915(e)) (overriding *Neitzke v. Williams*, 490 U.S. 319 (1989)).

424. E.g., *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (remanding the case to the district court in order to give the plaintiff an opportunity to amend his complaint).

425. See *Brown v. Plata*, 131 S. Ct. 1910 (2011), for an intense debate among the Justices as to the interpretation of the PLRA (as well as of the Eighth Amendment). See, e.g., *id.* at 1951 (Scalia, J., dissenting) (“[T]he mere existence of [an] inadequate system does not subject to cruel and unusual punishment the entire prison population in need of medical care”); *id.* at 1959 (Alito, J., dissenting) (“The decree in this case is a perfect example of what the [PLRA] was enacted to prevent.”).

include the broader operation of constitutional review as well as more routine statutory implementation.

VI. Doctrinal and Institutional Implications

Our data and normative analysis support a robust role for statutory overrides in American public law. In the republic of statutes in which we live, it is remarkable and admirable that Congress follows Supreme Court decisions interpreting federal statutes (and superstatutes) and responds to many of them with overrides and codifications. Ours is the first large-scale empirical roadmap for how the congressional override process actually works. In this Part, we consider the implications of our findings for each of the three branches of the federal government (i.e., Congress, the Executive Branch, and the Supreme Court). At the meta-level, our findings and analysis suggest the need for major revisions in how scholars think about the three branches of government, especially the Supreme Court. In the Conclusion that follows, we modify those implications if it turns out that the decline of overrides is a permanent phenomenon.

A. *The Role of Congress and Mechanisms to Render Statutory Overrides More Effective*

Most academic articles in the field of legislation, including most of the articles by one of the authors of this Article, focus entirely on the Supreme Court and judges. At the behest of scholars such as Peter Strauss and Jerry Mashaw,⁴²⁶ more articles in the last generation have discussed statutory interpretation by agencies and responses to agency interpretations. But, to this day, few articles have anything much to say to Congress. Given the central role that Congress plays in the field of legislation, this phenomenon is bizarre. A major reason Congress does not play more of a role in the field is that very few legislation professors have served in Congress. Neither have we, but we do believe that Congress ought to be an important audience for our findings.

Indeed, it really should be *the* most important audience. That Congress frequently overrides Supreme Court statutory interpretation

426. See generally, e.g., Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005) (posing and exploring numerous questions about agency statutory interpretation post-*Chevron*); Peter L. Strauss, Essay, “*Deference*” Is Too Confusing—Let’s Call Them “*Chevron Space*” and “*Skidmore Weight*,” 112 COLUM. L. REV. 1143 (2012) (arguing for conceptions of the seminal cases that account for “*Chevron space*” as an area of authority for agencies to make rules and “*Skidmore weight*” as describing situations in which courts should yield to agency statutory interpretation); Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987) (theorizing that in the absence of frequent Supreme Court review, agency statutory interpretation is a mechanism for uniform national rules).

decisions ought not to surprise most members of the House and Senate judiciary committees and their staff, but many other important participants in the nation's legislature would be surprised at the significant role overrides play in the evolution of statutory policy for so many areas of regulation. And many participants would be surprised at how swiftly and dramatically the policy-updating override process dried up after President Clinton's impeachment.

1. Process for Override Certifications.—Almost a hundred years ago, Judge Cardozo proposed the creation of a Ministry of Justice to advise the Legislature regarding law-reform ideas that ought to be considered.⁴²⁷ “The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged.”⁴²⁸ Within fifteen years of Cardozo's proposal, New Jersey, California, and New York had created Law Revision Commissions to advise their legislatures of areas of law in need of updating.⁴²⁹ The idea never caught on at the national level, and there is little interest in Congress (so far as we are aware) to set up such a commission or ministry.⁴³⁰

Administratively, however, Cardozo's Ministry of Justice has been replicated within the Executive Branch. Thus, the Department of Justice has an Office of Legislative Affairs; the Treasury and other departments have similar offices.⁴³¹ In the Department of Justice, for example, any official may propose consideration of override legislation; such proposals are discussed within the Department and, if pressed, are subject to an interagency review process quarterbacked by the White House's Office of Management and Budget.⁴³² Proposals passing this extensive administrative review process are presented to the relevant congressional

427. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 123–25 (1921).

428. *Id.* at 114.

429. See Dominick Vetri, *Communicating Between Planets: Law Reform for the Twenty-First Century*, 34 WILLAMETTE L. REV. 169, 174, 175 & n.25 (1998).

430. Judge Katzmann has been developing a more modest process by which lower courts refer statutory issues to congressional committees, mainly to inform them of issues relevant to statutory drafting. See ROBERT A. KATZMANN, *JUDGING STATUTES* (forthcoming 2014) (manuscript ch. 6) (on file with author); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 656–57 (1992).

431. *About the Office, Office of Legislative Affairs*, U.S. DEPARTMENT JUST., <http://www.justice.gov/ola/> (last updated Apr. 2013) (describing the duties of the Office, including generating and defending legislative proposals); *Legislative Affairs, About*, U.S. DEPARTMENT TREASURY, <http://www.treasury.gov/about/organizational-structure/offices/Pages/Legislative-Affairs.aspx> (last updated Feb. 28, 2014) (same for the Treasury Department).

432. Our understanding of the Department of Justice process is based upon communications with departmental officials and congressional staff who have coordinated with those officials.

committees, which have traditionally taken them very seriously, as documented in our own study.

Because the Department of Justice and federal agencies participate in a large majority of the Supreme Court's statutory cases as well as Congress's overrides, the Executive Branch is already an effective participant in the override process. The feedback loop of judicial decisions—executive proposals—congressional overrides does not operate effectively when there is acrimony between the President and Congress, however. One lesson of our present study is that the Supreme Court is an underutilized institution for bringing Congress's attention to override possibilities. Recall our finding that Supreme Court decisions suggesting the need for an override have been highly correlated with overrides (until the recent override drought). The Justices have deep knowledge of the difficult statutory issues and often have strong personal interest in engaging Congress to override interpretations they regret having to reach (as in *TVA v. Hill*).

This process can be regularized, and overrides encouraged as well as facilitated, if Congress were to create a statutory certification process. The proposal would entail three stages: (1) Six or more Justices in a statutory case certify the issue to the appropriate substantive committees in Congress.⁴³³ (2) If the substantive committees declined to act on the certified proposal, it would die. But if either committee reports the proposal to the chamber, the report triggers a fast-track process for the override legislation in that chamber. With a positive report, the override proposal would receive priority consideration, with an expeditious vote. (3) The override proposal would become law only if both chambers voted in favor of the same statutory language, and the President signed it (or it was passed over a presidential veto). While any role in the law revision process might seem to be a major change for the Court, our suggestion is less revolutionary than it appears. Recall that a vastly disproportionate number of overrides occur in cases where one or more Justices implore Congress to act and that these overrides tend to come more quickly than other overrides, especially when a dissent loudly proclaims the need for congressional action.⁴³⁴ Our proposal would give structure to these tendencies—structure that we believe is sorely needed in the face of the steep decline in policy-updating overrides that we have documented.

433. There might be a concern that a certification process would represent an intrusion into Congress's ability to set its own agenda. See Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1409–10 (2005) (raising this concern for judicial canons pushing Congress to override the Court). But the requirement of a supermajority on the Court would prevent merely partisan matters from being sent to Congress. More important, the fact that neither the House nor the Senate would have to fast-track any proposal not reported out of committee assures Congress that its agenda will not be hijacked by the Justices.

434. See *supra* Figure 29 and accompanying text.

Even if adopted by Congress, such a certification process would hardly be a panacea, but it would contribute to a more efficient override process. As we have seen in this study, the Justices themselves often see a conflict between the rule of law and good policy, so they have informational advantages. And the Court is properly motivated because it has an institutional interest in passing controversial policy moves to the political process.

2. *The Lilly Ledbetter Problem of Judicial Resistance to Restorative Overrides.*—Interestingly, restorative overrides have not dried up nearly as dramatically as policy-updating overrides. Restorative overrides pose a different dilemma for Congress, one to which legal academics might have something to contribute. We call it the “Lilly Ledbetter problem,” after a recent Supreme Court decision. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court ruled that women complaining of unequal pay under Title VII had to file their claim 180 or 300 days (depending on the state) after the first paycheck reflecting unequal pay—a difficult requirement for most complainants to meet because they did not have ready access to comparable pay information for male employees.⁴³⁵

The majority opinion relied on the Court’s earlier decision, *Lorance v. AT&T Technologies, Inc.*,⁴³⁶ which had imposed a similarly hard limitation on female employees complaining about the imposition of new seniority rules that they claimed were tainted by discriminatory intent: the Court ruled that they had to file an EEOC charge 180 or 300 days after the new seniority rules took effect.⁴³⁷ In *Ledbetter*, Justice Ginsburg’s dissenting opinion complained that Congress had overridden *Lorance* in the 1991 CRA based upon Congress’s finding that *Lorance* was a faithless interpretation of Title VII and that another line of more permissive precedents should have been the Court’s guide.⁴³⁸ Yet the *Ledbetter* majority not only persisted in its reliance on *Lorance*—but added that the override confirmed the futility of Lilly Ledbetter’s claim.⁴³⁹ That is, Congress in 1991 amended Title VII to provide a more permissive limitations period only for *seniority claims* and not for all sex or race discrimination claims—thus confirming *Lorance*’s viability for all other kinds of Title VII claims.⁴⁴⁰

435. See 550 U.S. 618, 623–24, 628–29 (2007).

436. 490 U.S. 900 (1989).

437. See *Ledbetter*, 550 U.S. at 626–27 (summarizing *Lorance*).

438. *Id.* at 652–54 (Ginsburg, J., dissenting).

439. *Id.* at 627 n.2 (majority opinion).

440. *Id.*

Red flags were flying all around the Court the day *Ledbetter* was handed down: the decision divided the Court 5–4, narrowed a regulatory scheme in an important way, disadvantaged a politically potent group (working women), rejected the longstanding position of the EEOC,⁴⁴¹ followed a plain meaning and whole code approach that denigrated legislative history arguments, and generated a plea for an override from the four dissenting Justices.⁴⁴² As advocated in Justice Ginsburg’s dissent,⁴⁴³ Congress swiftly and angrily overrode *Ledbetter* in the first statute enacted during the Obama Administration.⁴⁴⁴

The Lilly Ledbetter problem is that restorative overrides usually do not accomplish as much as Congress expects them to accomplish: when Congress corrects a disapproved Court rule with new statutory language, not only does the Court continue to apply the disapproved precedent (albeit not to the situations covered by the new statutory language), but the Court sometimes, as in *Ledbetter*, relies on the override as confirmation that the narrow rule applies everywhere outside of the narrow arena carved out by the override language.⁴⁴⁵ Professor Widiss has documented that the Lilly Ledbetter problem is a recurring one,⁴⁴⁶ though we would add that it is largely confined to restorative overrides and finds as its most dramatic illustrations workplace discrimination controversies that have proven highly polarizing within both the Court and Congress.

Professor Widiss urges the Supreme Court to reconsider what she argues is a misguided approach to statutory interpretation in cases like *Ledbetter*.⁴⁴⁷ What we contribute to her argument is the normative point that the 1991 CRA represented an important moment in American statutory law, for a Democrat-controlled Congress and the GOP President joined to

441. *Ledbetter* rejected the EEOC’s understanding of when charges need to be filed with that agency, *id.* at 655–66 (Ginsburg, J., dissenting)—but the Solicitor General also rejected the EEOC’s views and filed an amicus brief supporting Goodyear, Brief for the United States as Amicus Curiae Supporting Respondent, *Ledbetter*, 550 U.S. 618 (No. 05-1074).

442. *Ledbetter*, 550 U.S. at 643, 661 (Ginsburg, J., dissenting) (stating, in an opinion joined by Justices Stevens, Souter, and Breyer, that “[o]nce again, the ball is in Congress’ court”).

443. *Id.*

444. Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

445. See *supra* notes 439–40 and accompanying text. For another example of the Court construing a statute in this way, with arguably even more perverse results, see *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174–76 (2009), where the Court read the ADEA less liberally than Title VII, followed the overridden decision, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and adopted the reasoning of the dissenters, see *id.* at 281–86 (Kennedy, J., dissenting), whose approach was even more distant from that approved by Congress.

446. See Widiss, *supra* note 42, at 549 & n.175 (providing cases in which *Price Waterhouse* was applied as a “shadow precedent”); Widiss, *supra* note 4, at 860–62 (discussing *Gross v. FBL Financial Services, Inc.*).

447. See Widiss, *supra* note 42, at 515–17.

support legislation crafted in an open, fact-based, and pluralistic process that repudiated the Court's treatment of Title VII cases. The democratic legitimacy of the 1991 override ought to have contributed something more than the Court majority recognized in *Ledbetter*. But our admonitions to the majority Justices will not necessarily affect their votes in the next *Ledbetter*-like case.⁴⁴⁸

When Congress revamps whole areas of law in a relatively nonpoliticized manner, as it did in the 1978 BRA and the 1976 Copyrights Act,⁴⁴⁹ the Supreme Court has been pretty cooperative when implementing the congressional plan, as well as the particular rules of law inserted into the U.S. Code. The Lilly Ledbetter problem has arisen when a libertarian Court majority confronts a relatively partisan restorative override that changes particular rules in a proregulatory direction but without rethinking the general plan of the statute or of similar provisions in other statutes. There are three conditions undergirding the Lilly Ledbetter problem: (1) the issue is a partisan and politicized one; (2) a Court majority is libertarian on that issue, for a variety of reasons; and (3) Congress expands a particular regulatory rule, but without revising the statute or other statutes more broadly.

There is nothing that Congress can do about condition (1). Theoretically, Congress has political weapons at its disposal to address condition (2), such as budgetary pressure on the judiciary. Although it is rare for Congress to exert direct budgetary or other political pressure on the independent judiciary, Professor Ferejohn and Dean Kramer have argued, persuasively in our view, that the cooperation required from the political branches does exercise some overall constraint on the Supreme Court's willingness to thwart Congress in big ways.⁴⁵⁰ The Lilly Ledbetter problem, however, does not rise to this level of Court–Congress conflict.

The Lilly Ledbetter problem is one that Congress might better address when it adopts override legislation (assuming an override is politically possible). When a political coalition is working on legislation to override the Court and restore what it believes was always the proper rule of law, there need to be mechanisms within Congress to make the coalition aware

448. See, e.g., *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2465–66 (2013) (Ginsburg, J., dissenting) (criticizing the majority's adoption of a narrow reading of Title VII over the objections of Justices Ginsburg, Breyer, Sotomayor, and Kagan, who called for Congress to override the Court).

449. See *supra* notes 18–24 and accompanying text.

450. See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 984–86 (2002) (arguing that individual Article III judges are independent but that as a practical matter they are not inclined to take their independence “too far” because the Judicial Branch is highly dependent on the political branches for funding, support, and enforcement of judicial orders); accord BREYER, *supra* note 192.

of the limitations in statutory language that it plans to enact. Specifically, the coalition needs to be aware that the current Court majority, and future Courts as well, will not be eager to infer and implement a general policy based upon the insertion of narrow language doing nothing more than addressing the issue the Court had mishandled. Indeed, as in *Ledbetter*, Congress’s curative language might be used as a justification for reading uncorrected statutory language exactly the same way the Court did in the overridden precedent, which thus survives and might even flourish. Thus, not only might broader language be necessary in the original statute, but the coalition needs to be aware that the Court’s precedents will be applied to other statutes. Hence, Congress might want to revisit those statutes.

Is Congress even capable of such foresight? Yes indeed. In overriding *Atascadero State Hospital v. Scanlon*,⁴⁵¹ which held that the Rehabilitation Act of 1973 had not adequately abrogated state sovereign immunity under the Eleventh Amendment,⁴⁵² Congress wisely provided a clear statement abrogating immunity under several similar statutes.⁴⁵³ To be sure, this is the exception that proves the rule that Congress generally does not exercise such foresight. But we suggest that Congress redouble its efforts in this area. Congressional staff groups are in place to engage in the sort of analysis and drafting that we suggest. On the analysis side, a great deal of untapped potential is available from the Congressional Research Service (CRS), the nonpartisan research arm of Congress.⁴⁵⁴ CRS today has over

451. 473 U.S. 234 (1985).

452. *Id.* at 247.

453. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003(a)(1), 100 Stat. 1807, 1845 (codified at 42 U.S.C. § 2000d-7(a)(1) (2006)) (abrogating state immunity under “the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance”); *see also* S. REP. NO. 99-388, at 27–28 (1986). The Senate report stated:

In order to make certain that the States are covered by Section 504, the Rehabilitation Act Amendments of 1986 provide that states shall not be immune under the Eleventh Amendment from suit in Federal court for violations of Section 504. In addition, since language similar to that of Section 504 is contained in Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, and the Age Discrimination Act of 1975, these statutes have also been included in the specific abrogation of state immunity in the Committee bill.

Id. (citations omitted).

454. *See* Walter Kravitz, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1970*, 15 LEGIS. STUD. Q. 375, 383 (1990) (explaining that the objective, nonpartisan Congressional Research Service was created in response to members’ complaints “to the 1965 Joint Committee that their committees lacked the resources necessary for comprehensive and continuous reviews”); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting* (2014) (unpublished manuscript) (on file with author) (providing an excellent analysis of the drafting and research divisions that assist Congress).

700 employees from a variety of different fields of expertise.⁴⁵⁵ The American Law Division does excellent statutory analysis at the behest of committees and members of Congress, and that part of the CRS might provide a systematic analysis of how a disapproved Supreme Court decision might apply beyond the facts of the case that got to the Supreme Court, including how it might apply to other statutes.⁴⁵⁶

On the drafting side, the matter is more complicated. The House and Senate Offices of Legislative Counsel, which began their work in 1916 and 1919,⁴⁵⁷ respectively, do most of the major bill drafting in both chambers, taking up policy proposals and preliminary drafts from other staff and working them into professionally sophisticated bills.⁴⁵⁸ The offices have a sophisticated understanding of the canons of statutory construction and are well aware of the text-based and structural (whole act and whole code) canons that are now popular with the Supreme Court.⁴⁵⁹ Moreover, each Legislative Counsel is a specialist in one or a few areas of law, and so these Counsel are excellent resources for thinking about how the addition of one new provision to Title VII might relate to other problems arising under

455. See MARY B. MAZANEC, CONG. RESEARCH SERV., ANNUAL REPORT OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS FOR FISCAL YEAR 2012, at 1, 24 (2013); Shobe, *supra* note 454, at 24–27.

456. The CRS seems to be underutilized in general, and the deployment suggested above is one that has probably not been done in the past. See Shobe, *supra* note 451, at 27–32 (discussing the work of the American Law Division of the CRS, which is more concerned with constitutional analysis than statutory mapping).

457. *History and Charter*, OFF. LEGIS. COUNS., U.S. HOUSE REPRESENTATIVES, http://www.house.gov/legcoun/HOLC/About_Our_Office/History_and_Charter.html; *History of the Office*, OFF. LEGIS. COUNS., U.S. SENATE, <http://www.sl.c.senate.gov/History/history.htm>.

458. For an assessment of this process, see Robert A. Katzmann, *The American Legislative Process as a Signal*, 9 J. PUB. POL'Y 287 (1989), which analyzes the political and institutional dynamics influencing legislative policymaking, and for a more recent analysis, see Abbe R. Gluck & Lisa Shultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II*, 66 STAN. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2358074.

459. See BJ Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185, 189 (2010) (explaining that certain provisions from the manuals were “written in anticipation of judicial interpretation” and that these provisions reference “established canons of construction, Supreme Court precedent, and the United States Code to advise drafters on how courts are likely to interpret certain language”). Both Offices have drafting manuals that are available online. See OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE (1995), available at http://www.house.gov/legcoun/HOLC/Drafting_Legislation/draftstyle.pdf; OFFICE OF THE LEGISLATIVE COUNSEL, U.S. SENATE, LEGISLATIVE DRAFTING MANUAL (1997), available at [http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual\(1997\).pdf](http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf). And officials in the House Office have published a desk reference that is even more savvy and detailed about the new textualist rules often followed (and often not followed) by the Justices. See LAWRENCE E. FILSON, THE LEGISLATIVE DRAFTER’S DESK REFERENCE (1992).

Title VII (Lilly Ledbetter’s own case) or under other workplace discrimination statutes.

Based upon their survey of congressional drafting staff, Professors Gluck and Bressman have reported significant limitations in the role of Legislative Counsel, however. Because the committee or member staff working on the substantive legislation and the political maneuvering to press it through Congress are different from the drafting staff, there is a coordination problem—one that is virtually insuperable when last-minute changes are made in bills as they rush through Congress in the late days of a session.⁴⁶⁰ The division of drafting responsibility within Congress is in stark contrast with the practice elsewhere in the industrial world, where the norm is centralized drafting.⁴⁶¹ Congress ought to consider greater centralization—but for our purposes the eclectic arrangement is sufficient.

Thus, a partial solution to the Lilly Ledbetter problem is operationally simple—CRS research that contributes to Legislative Counsel drafting to create an override that not only reverses the particular Supreme Court case but also sets new policy for the statute as a whole and protects against the shadow precedent’s migration into other statutes with similar language. Operationally simple, but politically difficult. The broader the override language, the harder it is to assemble a coalition of legislators to override the Court.

Consider another approach. Every state has codified canons of statutory construction, and Congress long ago passed the Dictionary Act, which presumptively defines a few terms for the U.S. Code.⁴⁶² Congress ought to study the possibility of adding a few anticanons to Title 1 of the U.S. Code. Congress might pass an Interpretation Act that specifies presumptions that are applicable to language found in enacted statutes. Specifically, Congress might negate the presumption of consistent usage that was the basis for the repudiated rulings in both *Lorance* and *Ledbetter*,⁴⁶³ the presumption against surplusage, which presumes each term or phrase in a statute adds something and does not duplicate another term or phrase; and the presumption of meaningful variation, which presumes that different statutory language must have completely different meanings, and

460. See Gluck & Bressman, *supra* note 458 (manuscript at 19–20).

461. See Serge Lortie, *Providing Technical Assistance on Law Drafting*, 31 STATUTE L. REV. 1, 3 (2010) (identifying the United Kingdom and Canada as countries that use centralized drafting).

462. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431. The modern version can be found at 1 U.S.C. §§ 1–8 (2012). See also Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2152 (2002) (advocating for a congressional code of canons). See generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (analyzing the canons codified in the states).

463. See *supra* notes 439–40 and accompanying text.

which was the primary argument invoked by the Court in *Casey*,⁴⁶⁴ as well as an argument complementing the consistent usage point in *Ledbetter*. All these canons share one trait in common: they are whole act/whole code canons that are strongly correlated with congressional overrides.⁴⁶⁵

What these canons (consistent usage, no surplusage, meaningful variation) *also* have in common is that they often cannot, as a practical matter, be taken into account even when staff are aware of the canons and have an opportunity to seek input from Legislative Counsel and CRS. Professors Gluck and Bressman report that many congressional staff dismiss the presumption against surplusage because repetition (i.e., surplusage) is typically what supporting institutions and groups want from the legislative process.⁴⁶⁶ The presumptions of consistency and meaningful variation, even when congressional staff are aware of those canons, are hard to apply because different congressional committees are involved for multiple statutes and even for individual statutes.⁴⁶⁷

3. Delegation of Lawmaking or Adjudicatory Authority to Administrators, and Away from Courts.—The Lilly Ledbetter problem is part of a larger conflict between a libertarian Court and a proregulatory Congress. If Congress is serious about creating a strong and dynamic regulatory program for workplace diversity and other issues, it ought consider restructuring the process of statutory interpretation for particular statutes. The most successful congressional override in recent years was the 2009 Tobacco Control Act, which was backed up by public opinion and an electoral mandate.⁴⁶⁸ One of the big virtues of that override was that it vested implementation in a purposive, proregulatory agency (the FDA) and not in the foot-dragging, libertarian judiciary. This is a model that Congress might consider implementing more often.

For Title VII issues, the EEOC has been a more reliable barometer of congressional values and policy than the Supreme Court has been—and this cannot be much of a surprise. As Judge Katzmann has documented, agencies tend to be quite responsive to Congress because of commitments agency heads make to secure confirmation for their limited terms; formal and informal legislative history (including subsequent deliberations); the

464. *See* *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88–92 (1991).

465. *See supra* Figures 25 and 26.

466. Gluck & Bressman, *supra* note 302, at 934–35.

467. *See id.* at 936–37.

468. *See supra* notes 325–30 and accompanying text.

yearly campaign to secure appropriations; and oversight hearings as well as informal pressure through phone calls and e-mails.⁴⁶⁹

Most of the big restorative overrides of the Court's conservative Title VII jurisprudence have occurred for issues where the Court was rejecting the EEOC's interpretations—from *General Electric Co. v. Gilbert*, which triggered the 1978 Pregnancy Discrimination Act, to *Ledbetter v. Goodyear Tire & Rubber Co.*, which triggered the 2009 Ledbetter Act.⁴⁷⁰ In most of these Title VII cases, dissenting Justices have invoked the EEOC's interpretive stance—but the Court majorities responded that the EEOC's views are not entitled to strong deference from the Court because Title VII does not delegate lawmaking authority to the EEOC.⁴⁷¹

If Congress wants to reduce the Lilly Ledbetter problem in Title VII cases, one option would be to grant the EEOC the lawmaking authority Congress withheld when enacting Title VII exactly fifty years ago. Thus, the EEOC might be given the authority to issue substantive rules, after notice and comment, or to adjudicate at least some claims administratively, with EEOC orders being directly enforceable as a matter of law. While the Supreme Court would still have the authority to trump EEOC rules and orders if inconsistent with what the Court majority thought was the plain meaning of Title VII, as the Court claimed to be doing in both *Gilbert* and *Ledbetter*, the five-Justice majority might not hold firm in cases where the EEOC is making law rather than just stating its opinion.

A more drastic option would be to shift the situs of Title VII litigation. For example, Congress has the authority to remove Title VII cases from federal courts altogether—and refer them to EEOC adjudication, constituted as an Article I “court.”⁴⁷² Although Congress cannot preclude the Supreme Court from engaging in constitutional review of an Article I court's rulings, Congress does have the power to preclude the Court from reviewing such a court's judgments for consistency with the statutory scheme.⁴⁷³

469. Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 656–61 (2012). For leading political science accounts, see LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 155–211 (1979); JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964); Charles R. Shipan, *Congress and the Bureaucracy*, in THE LEGISLATIVE BRANCH 432 (Paul J. Quirk & Sarah A. Binder eds., 2005).

470. See *infra* Appendix 1.

471. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.11 (2007) (declining to extend *Chevron* deference to EEOC regulations); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (“Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations” (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976))); *id.* at 259–60 (Scalia, J., concurring in part and concurring in the judgment) (assuming EEOC regulations, as opposed to *guidelines*, deserve deference but still concurring with the majority's opinion on other principles of statutory construction).

472. See U.S. CONST. art. I, § 8, cl. 9.

473. Cf. *Crowell v. Benson*, 285 U.S. 22, 87–89 (1932) (Brandeis, J., dissenting) (opining that the requirement of due process, not any other “prohibition against the diminution of the

B. The Role of the Executive Branch: Administrative Overrides and Workarounds

Our study demonstrates the importance of the Executive Branch to the legislative process generally and to the override process in particular. The Department of Justice and other agencies already do a good job identifying and lobbying for overrides, as we document in Figures 11–13. This is one reason we do not follow Judge Cardozo in advocating for a new administrative officer or department focusing on legislative proposals and overrides. What we do highlight and support (especially in light of the decline of overrides) is *agency workarounds* and *administrative overrides* as a means of keeping statutory policy up to date.

The idea of an agency workaround is simple and commonplace. Through their narrowing constructions, judges may deny agencies regulatory options—but typically those agencies can rely on other grants of authority to advance their regulatory agendas. Recall *TVA v. Hill*. The Court’s ruling that the Interior Department could stop a costly public works project based upon its threat to an endangered species’s critical habitat left enforcement of the ESA with that department.⁴⁷⁴ Thus, President Carter could have directed the Department to review the project’s threat to the snail darter and to explore possibilities for saving the critter.⁴⁷⁵ Indeed, the President might have replicated the initial congressional override by requiring interdepartmental consultation before a “major” public project could be terminated to protect an endangered species.⁴⁷⁶

For an example where the Executive Branch promptly worked around a Supreme Court decision, consider 18 U.S.C. § 924(c)(1), which “enhances” a sentence for drug convictions if the defendant “uses or carries” a firearm in furtherance of the crime.⁴⁷⁷ In *Bailey v. United States*,⁴⁷⁸ the Supreme Court ruled that a drug dealer with guns in the trunk of his car does not “use” the guns.⁴⁷⁹ The Department of Justice had no problem working around this decision, by seeking the same enhancement on the ground that a defendant with guns in his trunk was “carrying”

jurisdiction of the federal district courts as such,” is what may prevent controversies from being subject to “conclusive determination of administrative bodies or federal legislative courts”).

474. See *TVA v. Hill*, 437 U.S. 153, 159–63 (1978) (describing the statutory scheme and the authority of the Interior Department).

475. See *id.* at 162, 163 & n.13 (describing efforts of the Department to find a suitable habitat for relocation of the snail darter population).

476. Indeed, after Congress directly legislated for the Tellico Dam to be completed, it was discovered that the TVA’s previous efforts at relocating the snail darter had been successful and that the fish enjoyed a habitat elsewhere that no one knew about. Garrett, *supra* note 316, at 89–90.

477. 18 U.S.C. § 924(c)(1) (2012).

478. 516 U.S. 137 (1995).

479. *Id.* at 139, 142–43.

firearms.⁴⁸⁰ Workarounds may not be perfect substitutes for overrides, but they are one way that agencies deal with adverse Supreme Court decisions in the absence of an override.⁴⁸¹

Our novel idea is that agencies can engage in *administrative overrides* as well as workarounds. Unlike a workaround, an administrative override modifies a point of law accepted in a Supreme Court decision. One of the high-profile Supreme Court cases of the 2013 Term, *Utility Air Regulatory Group v. EPA (UARG)*,⁴⁸² provides an excellent example of the process we are describing. In *Massachusetts v. EPA*,⁴⁸³ the Supreme Court held that greenhouse gases fit within the Clean Air Act’s broad definition of “air pollutant,” at least with respect to some parts of the Act.⁴⁸⁴ On remand from that decision, the EPA issued an “endangerment finding,” which required the agency to regulate greenhouse gases from mobile sources.⁴⁸⁵ Several rulemakings ensued, through which the EPA used various provisions of the Clean Air Act to limit different sources of greenhouse gases.⁴⁸⁶ In issuing these regulations, however, the EPA faced a challenge. One of the provisions it invoked was the Prevention of Significant Deterioration (PSD) program—itsself the product of an override⁴⁸⁷—which requires permits for certain new or significantly modified emissions sources.⁴⁸⁸ The statute, as interpreted and applied by the Supreme Court in *Alaska Department of Environmental Conservation v. EPA*,⁴⁸⁹ requires a

480. *Muscarello v. United States*, 524 U.S. 125, 131–32 (1998) (upholding the Department’s interpretation). Ironically, Congress overrode both decisions shortly afterwards. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469, 3469–70 (codified as amended at 18 U.S.C. § 924(c)) (rewriting § 924(c)(1) to include possession of firearms).

481. For more on the Executive Branch’s ability to respond to Supreme Court decisions, specifically in the tax context, see Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185 (2004).

482. 82 U.S.L.W. 3206 (U.S. Oct. 15, 2013) (No. 12-1146).

483. 549 U.S. 497 (2007).

484. See *id.* at 528–29.

485. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

486. *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *cert. granted in part sub nom. Util. Air Regulatory Grp. v. EPA*, 82 U.S.L.W. 3206 (U.S. Oct. 15, 2013) (No. 12-1146).

487. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 127, 91 Stat. 685, 731–42 (codified as amended at 42 U.S.C. §§ 7472–7479 (2006)) (overriding *Fri v. Sierra Club*, 412 U.S. 541 (1973), *aff’g by an equally divided Court* *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972)).

488. See Clean Air Act, 42 U.S.C. § 7475 (requiring permits for certain emitters); *Coal. for Responsible Regulation*, 684 F.3d at 115–16 (stating that the EPA was acting pursuant to the PSD program).

489. 540 U.S. 461 (2004).

permit for any source that emits more than 100 or 250 tons of the pollutant at issue, depending on the source.⁴⁹⁰

The dilemma facing administrators was that the PSD program, as originally enacted in 1977, surely did not contemplate the possibility of carbon dioxide as a statutory “air pollutant.”⁴⁹¹ Because carbon dioxide is a much more ubiquitous pollutant than those for which the program was originally intended, a staggering number of sources would have exceeded the thresholds and, therefore, would have required permits, sweeping large apartment buildings and hospitals into a regime meant for power plants and other industrial facilities. So the EPA decided to “tailor” the Clean Air Act’s applicability to these sources by limiting the permitting requirement to sources that emit over 75,000 or 100,000 tons of carbon dioxide, or its equivalent, per year⁴⁹²—several hundred times the thresholds that a straight-forward reading would have required. Had this rule been enacted through legislation, it would have qualified as an override because it carved out an exception from the 100- and 250-ton limitations that the Court had previously applied.⁴⁹³ But with no legislative solution to climate change on the horizon, the EPA chose to act unilaterally, justifying its departure from the statutory text and judicial precedent based on the “absurd results” that would have followed had permitting authorities been forced to regulate all these sources.⁴⁹⁴

The “Tailoring Rule” illustrates both the potential benefits and the pitfalls of administrative overrides. On the one hand, the endangerment finding and the EPA’s subsequent regulations, including the Tailoring Rule, have allowed the EPA to address a major environmental priority despite congressional inaction. When the Supreme Court granted certiorari to review parts of the EPA’s greenhouse gas regulations in *UARG*, it notably left untouched the question whether the EPA had the authority to treat greenhouse gases as a pollutant and to regulate them under the Clean Air Act—for all intents and purposes approving of the agency’s exercise of that authority.⁴⁹⁵ The Tailoring Rule’s administrative override has thus allowed

490. 42 U.S.C. § 7475(a) (requiring permits); *id.* § 7479(1) (defining the sources that fall within the statute’s ambit); *see also Alaska Dep’t of Env’tl. Conservation*, 540 U.S. at 472 (construing the statute).

491. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71) (stating that the EPA would be imposing control requirements on carbon dioxide for the first time in 2011).

492. *Id.*

493. *See Alaska Dep’t of Env’tl. Conservation*, 540 U.S. at 472.

494. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

495. *See Util. Air Regulatory Grp. v. EPA*, 82 U.S.L.W. 3206 (U.S. Oct. 15, 2013) (No. 12-1146) (limiting its review to only “[w]hether EPA permissibly determined that its regulation of

the EPA to address the issue of greenhouse gases with regulations considerably less burdensome than the statute's plain text would have produced. But at the same time, the administrative override is on much shakier footing than a legislative override would have been. A legislative override can change a statute's text; an administrative one cannot. And while it remains to be seen whether the Supreme Court reaches the validity of the Tailoring Rule in *UARG*, at oral argument several Justices were skeptical or hostile to the interpretive moves underlying the Tailoring Rule.⁴⁹⁶ Even if the Tailoring Rule survives *UARG* intact, the point is clear: administrative overrides are limited by the text of the statute and an attempt to stretch that text too far may undo the entire administrative override.

As the example of the EPA's Tailoring Rule illustrates, delegated authority and the ambiguity that usually accompanies it can provide the Executive Branch with considerable leeway to update policy. That leeway empowers an agency or the White House to step into the policy-updating gap left by the post-1998 Congresses. But delegated authority comes with limitations. Most obviously, any administrative override must conform to the policy architecture already in place; as the FDA Tobacco Case and other precedents make clear, the Court will not tolerate major policy shifts undertaken by agencies. For this reason, in the greenhouse gas example, a carbon tax and a cap-and-trade program—the two approaches to greenhouse gas regulation favored by most economists and policymakers—were off the table for the EPA. Its only option was to pursue a program originally designed to require pollution control devices for pollutants like sulfur dioxide and lead. And, as the Tailoring Rule illustrates, the assumptions that underlay the original statute may complicate any administrative override. The Tailoring Rule had to rely on the absurd results canon to avoid a program that would have proved unmanageable. Because the current Court is not friendly to the project of rewriting clear statutory text to avoid absurd results, the Agency faces an uphill battle to protect this particular interpretation.⁴⁹⁷

greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases”).

496. We went to press before the Court decided *UARG*, but oral argument in that case revealed strong resistance on the part of five or more Justices to the EPA's absurd results argument. See Transcript of Oral Argument, *Util. Air Regulatory Grp. v. EPA*, No. 12-1146 (U.S. Feb. 24, 2014).

497. Of course, consistent with the D.C. Circuit decision below, the Court may not reach the merits of the Tailoring Rule. See *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 146 (D.C. Cir. 2012), *cert. granted in part sub nom. Util. Air Regulatory Grp. v. EPA*, 82 U.S.L.W. 3206 (U.S. Oct. 15, 2013) (No. 12-1146). We express no opinion on whether it should or will.

A comparison with the override of *Brown & Williamson* makes the point even clearer. After the Court struck down the FDA's attempt to regulate tobacco, Congress (eventually) responded with an override that included several policy compromises and trade-offs that neither the FDA nor the Court could have shoehorned in under the text of the statute—including treating tobacco differently than a “drug” as that term is used in the FDCA.⁴⁹⁸ The FDA must ensure that drugs are actually “safe and effective,” a requirement that was central to the *Brown & Williamson* majority's decision that the Act was never intended to regulate tobacco products.⁴⁹⁹ This compromise—giving the FDA jurisdiction over tobacco, but exempting it from the safe and effective standard—was a more artful, and surely more efficient, compromise than anything an administrative override could have legitimately produced in this case. In short, while we believe that administrative overrides can help address the decline in legislative overrides, they are no substitute for the real thing.

But in some cases they can come close. If there is one area where administrative overrides are nearly identical to legislative overrides, it is with respect to agency interpretations rendered within the policymaking space left by Congress—namely, decisions made at what the Court deems “*Chevron* Step Two.” The Supreme Court laid the doctrinal foundation for this type of override in *National Cable & Telecommunications Service, Inc. v. Brand X Internet Services*, where it held that an agency may reinterpret—and replace entirely—a policy that a court upheld as reasonable—i.e., at *Chevron* Step Two. “A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”⁵⁰⁰ *Brand X*'s interpretation of *Chevron* explicitly gives agencies room to update their rules, guidance, and adjudications to reflect new circumstances that otherwise might require legislative overrides.

Brand X can be understood to vest the Executive with formal override authority for a limited subset of cases. This is most commonly understood in the context *Brand X* presented, namely, where a court upholds one interpretation as reasonable under *Chevron* Step Two. Subsequently, the agency (often after a change in presidential administration) decides to change its interpretation. *Brand X* thus gives the Executive Branch the authority to make such changes when the rule is made pursuant to an

498. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101(a), 123 Stat. 1776, 1783–84 (2009) (codified at 21 U.S.C. § 321(rr)).

499. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133–37, 161 (2000).

500. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

ambiguous statute. By itself, that is a significant power. And it might be even broader. In an earlier decision, the Court had suggested that even when an agency prevails under *Chevron* Step One, there might be some room for agency updating within the statutory scheme.⁵⁰¹ In other words, even where the text compels one option rather than another, the agency may nonetheless retain some flexibility to reinterpret the margins of the statutorily compelled policy. As Justice Scalia’s *Brand X* dissent demonstrated, the Communications Act and other regulatory statutes create a huge policy space for agencies to update statutes in ways that are the functional equivalent to policy-updating overrides by Congress.⁵⁰²

Because many cases are resolved at *Chevron* Step Two, *Brand X* has the potential to counteract statutory ossification in a number of important areas. The treatment of the Internet as an information service in *Brand X* is perhaps the best example.⁵⁰³ But there are also many narrower potential overrides that could prove excellent candidates for updating. Consider a recent example in a different area of law. In *Astrue v. Capato*,⁵⁰⁴ the Supreme Court upheld the Social Security Administration (SSA)’s interpretation of the Social Security Act that precluded survivor benefits for posthumously conceived children who could not inherit under state intestacy law.⁵⁰⁵ The groups most adversely affected by this decision—veterans, cancer patients (two groups that frequently utilize sperm banks), and children—would appear to be sympathetic parties capable of garnering Congress’s attention and securing an override. But in the absence of an override, a new interpretation by the SSA that reflects the evolving norms associated with assisted reproduction could achieve many of the policy benefits associated with overrides. Because *Capato* found the statute ambiguous and therefore deferred to the agency under *Chevron* Step

501. See *Edelman v. Lynchburg College*, 535 U.S. 106, 114 & n.8 (2002).

502. See *Brand X*, 545 U.S. at 1005, 1016–17 (Scalia, J., dissenting) (objecting to the Court’s roadmap for agencies to override judicial decisions, laid out in *Brand X* and suggested in *Edelman*). The Court rejected Justice Scalia’s alarm that allowing the FCC’s regulatory revolution was a deep sacrifice of judicial integrity. See *id.* at 983–84 (majority opinion).

503. See *id.* at 977–78, 989, 997 (indicating that the FCC classified the Internet as an information service and that its classification was reasonable). This example continues to have a lasting effect. Earlier this year, the D.C. Circuit struck down the FCC’s “net neutrality” regulations because they effectively imposed common carrier status on regulated cable companies, a status prohibited by the Communications Act. *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014). Although not a Supreme Court case, we note that this case could be considered a candidate for a second administrative override—undoing the rule at issue in *Brand X*. The FCC has indicated that it will not appeal the decision to the Supreme Court, instead focusing on rewriting its rules and potentially reclassifying Internet providers. See Statement of Tom Wheeler, FCC Chairman, on the FCC’s Open Internet Rules (Feb. 19, 2014), available at <http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules>.

504. 132 S. Ct. 2021 (2012).

505. *Id.* at 2033–34.

Two,⁵⁰⁶ the SSA has the discretion under *Brand X* to override its own interpretation.

The potential drawback for this option—as with all administrative overrides—is that it lacks the full legitimacy bonus of congressional overrides. But it can approximate that legitimacy bonus under some circumstances. An administrative override adopted through notice-and-comment rulemaking can involve the regulated community and interested parties in a way that parallels or echoes the legitimacy bounce of a congressional override. Notice-and-comment rulemaking possesses many of the attributes of the open, deliberative, and pluralistic process that we find so admirable for most congressional overrides.⁵⁰⁷ Through their statement of basis and purpose, agencies administering the process identify the goals of the statute and the impact of the new rule. In this respect, they function similarly to the committee reports and hearings that Congress uses to inform the public.

The notice-and-comment process also requires the agency to engage in a conversation with affected parties, responding to the comments and concerns that they place in the record. And the rulemaking process frequently draws in numerous supporters and opponents of the proposed rule, endowing it with a pluralistic character. Indeed, because it is so much easier to submit comments than to secure precious time before a congressional committee (especially for opponents of the override), the rulemaking may provide superior access for some of the groups that we find underrepresented in the override process—consumers, prisoners, etc.⁵⁰⁸ And although critics complain that notice and comment may not deeply affect final rules, and thus provides a forum without effect,⁵⁰⁹ these are problems with the legislative process as well. We are skeptical that the notice-and-comment process is less responsive than the process by which legislation is drafted. If it is less responsive, we doubt that it is significantly so.

506. *See id.* at 2026.

507. *See* HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 219–20 (2002) (acknowledging that notice-and-comment rulemaking allows “interested members of the public [to] make their voices heard” but arguing that this process in and of itself does not go far enough in enhancing democratic participation); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1559–62 (1992) (expressing a similar theoretical optimism about the democratic benefits of notice-and-comment rulemaking and a similar skepticism with regard to its actual benefits).

508. *See supra* Figure 12.

509. *See, e.g.*, RICHARDSON, *supra* note 507, at 220 (“The interested members of the public can certainly make their voices heard through [the notice-and-comment] process. What is less clear is how their voices will then influence the revision of proposed rules.”).

But the notice-and-comment process has its limits, and regulations are not a perfect substitute for congressional overrides. An agency cannot adopt an interpretation that the Court has rejected as a matter of law, nor can it adopt a new interpretation that conflicts with the statute's text. And in many of the principal override-generating areas, there is no agency with rulemaking authority. Recall that the EEOC lacks rulemaking authority for Title VII issues,⁵¹⁰ and the Department of Justice cannot change the criminal code by regulation. Importantly, there is no agency administering federal jurisdiction and procedure statutes (the single most fertile source of overrides), bankruptcy, or the habeas corpus statutes. The rulemaking route is only a partial fix.

The Executive Branch might also help reinvigorate congressional overrides. As the foregoing discussion makes clear, the Executive Branch is the single most important outside player in the legislative process.⁵¹¹ Officials from the Executive Branch testify more than any other group of persons or representatives. Departments and agencies play an influential role, both in submitting legislation and in shaping bills already under consideration. Thus, the Executive Branch might leverage this position to coordinate priorities for an override, thereby helping to spur the override process. As suggested above, the Department of Justice already has a process for identifying cases that no longer embody wise policy and should be candidates for an override.⁵¹² Consider a more ambitious Executive Branch approach to overrides. The White House is already a force to be reckoned with on this front, by means of the Office of Information and Regulatory Affairs (OIRA), located within the Office of Management and Budget. OIRA's primary function is to engage in cost-benefit analysis of agency rulemaking—but the office also serves as a policy clearinghouse.⁵¹³ In 2011, for example, President Obama asked all federal agencies to submit to OIRA proposals for trimming existing regulations.⁵¹⁴ OIRA then cooperated with the agencies to reduce regulatory burdens. The President might run a similar process for overrides, asking agencies to identify areas of the law where policy priorities were stymied by statutory decisions by the federal judiciary. The office might then come up with a list of override priorities that could inform the President's legislative agenda that might

510. See *supra* notes 471–73 and accompanying text.

511. See also, e.g., *supra* Figure 12 and accompanying text.

512. See *supra* pp. 1441–42.

513. See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEXAS L. REV. 1139, 1164 (2014) (describing OIRA's position within the Executive Branch).

514. See Exec. Order No. 13,579, 3 C.F.R. 256 (2012), *reprinted in* 5 U.S.C. § 601 app. at 103 (2012) (requiring federal agencies to develop and release plans for periodic review of existing regulations and implying that OIRA would have input in their development).

become priorities for overrides through executive orders. A renewed focus by the most important nonlegislative player (the President) thus might help to reinvigorate the override process, even marginally.

C. The Role of the Supreme Court and Implications for Statutory Interpretation Doctrine

The foregoing data and analysis upend the major models political scientists and many law professors have used to ground their thinking about the Supreme Court and its role in our system of separated powers. To begin with, many positive political theory models are inconsistent with our study. Most such models assume the Supreme Court is primarily a strategic actor, seeking to impose its political and institutional preferences onto statutes and to avoid overrides through crafty dodges.⁵¹⁵ These models have been the basis for much legal scholarship.⁵¹⁶ As Pablo Spiller and Emerson Tiller first demonstrated, even positive political theory has adjusted its strategic actor approach to account for the occasions where the Court invites an override⁵¹⁷—a phenomenon the current study documents as an important and common occurrence.⁵¹⁸

Thus, positive political theory needs to consider the Supreme Court as an institution that cooperates with as much as (or more than) competes with Congress and the President in developing the contours of American statutory law.⁵¹⁹ Nevertheless, as this study documents, there is a significant range of statutory issues, reflected in the restorative overrides such as the 1991 CRA and the 2009 Ledbetter Act, where competition and conflict between the libertarian Court and the regulatory Congress is the dominant motif.⁵²⁰

Among law professors, a much more popular (and more explicitly normative) model of Court–Congress relations is the precept that, for statutory interpretation, Congress is the principal and the Court is the “faithful agent,” carrying out the directives that have successfully passed through the Article I, Section 7 process.⁵²¹ The faithful agent model is

515. See, e.g., John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263 (1992) (providing an overview of such a model).

516. See, e.g., Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992). For an especially helpful survey of the field, see Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 (1992).

517. Spiller & Tiller, *supra* note 3, at 504–05; accord Staudt et al., *supra* note 3, at 1364–65.

518. See *supra* subpart IV(F).

519. This idea is prominently associated with HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS*, and has been recently articulated in BREYER, *supra* note 192, at 80–87, and Eskridge & Frickey, *supra* note 192, at 27–29.

520. See *supra* text accompanying notes 154–55, 216–17.

521. See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–72 (2006) (“In our constitutional system, federal courts act as faithful agents of

consistent with the cooperative model of Court–Congress interactions—but is strongly inconsistent with the Court’s behavior in the many cases that yielded restorative overrides. For example, in the cases overridden by the 1991 CRA, the Court was not being a “faithful agent” of Congress; the Justices were applying their own understanding of what the rule of law requires and/or their own policy preferences upon Title VII and § 1981, which protect employees against workplace discrimination.⁵²² Professors Brudney and Ditslear have demonstrated that these decisions are not explicable under neutral rule of law precepts.⁵²³ Professor Widiss has demonstrated that, in the arena of restorative overrides, the Court continues to obstruct congressional goals or slow down Congress’s regulatory agendas.⁵²⁴

Most important, the current study documents a more realistic picture of the institutional interaction in the federal government: the principal–agent dyad is the wrong way to look at an institutional interaction that is triadic and where each institution brings something different to the evolution of statutory policy. When there is a simple principal–agent relationship implicated in federal statutes, it is in the large majority of cases one where Congress is the principal and an executive or independent agency (rather than the Court) is the agent.⁵²⁵ Where federal courts are even relevant to the elaboration of statutory policy, they are more like monitors of agent actions rather than agents themselves. Within this triadic network, consider some implications of our study of congressional overrides for Supreme Court statutory interpretation doctrine.

Congress; accordingly, they must ascertain and enforce Congress’s commands as accurately as possible.”); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 102–05 (2001) (arguing that the faithful agent model is encoded into the original meaning of the judicial power in Article III).

522. As the analysis in this study makes clear, to say that the Justices impose their “policy preferences” onto statutes is not the same as saying that partisan GOP Justices are trying to thwart liberal Democrat statutes, though they might be doing that subconsciously. The main point is that Justices who are super-libertarian for institutional as well as other reasons are imposing that perspective on broadly written antidiscrimination laws.

523. *See* James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1205–10 (2010) (discussing the Court’s use of substantive canons and recognizing that these canons lack interpretive neutrality); Brudney & Ditslear, *supra* note 49, at 78–95, 108–11 (noting the ideological coloring of the Justices’ use of canons of construction and legislative history); James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 227 (2006) [hereinafter Brudney & Ditslear, *Decline and Fall*] (finding that the Justices’ use of legislative history breaks down along ideological lines).

524. *See* Widiss, *supra* note 42; Widiss, *supra* note 4.

525. *See* Farber & O’Connell, *supra* note 513, at 1146–49 (discussing the widely held assumption that agencies are agents of Congress).

1. Super-Strong Presumption of Correctness of Statutory Precedents.—The Supreme Court has long held that statutory precedents are entitled to a super-strong *stare decisis* effect, stronger than either constitutional or common law precedents.⁵²⁶ As suggested by Justice Brandeis, an important foundation for this doctrine is that Congress ought to have primary responsibility for correcting the Court's erroneous or outdated statutory decisions.⁵²⁷ Most scholars have rejected the strong *stare decisis* effect for statutory precedents because they believe Congress is not capable of following the Court's legisprudence and responding with overrides.⁵²⁸ This argument is undermined by the current study, which demonstrates that congressional committees devote enormous effort to evaluating Supreme Court statutory decisions in a wide range of subject areas and that Congress does override a lot of those decisions. Notwithstanding the formidable veto gates that render legislation quite difficult, for the most part, Congress is capable of policy responses even in periods of divided government and partisan acrimony. Recall that the golden age of overrides was the period of bitterly divided government between 1991 and 1999.

More important, the current study provides important support for Justice Brandeis's institutional judgment. Not only is Congress capable of responding to Supreme Court statutory constructions, but this study demonstrates the many ways in which a congressional resolution is superior to a judicial one. Recall *Flood v. Kuhn*, one of the Court's most universally criticized decisions and a piñata for critics of the super-strong presumption of correctness for statutory precedents.⁵²⁹ Refusing to overrule the Court's precedents exempting baseball, but no other sport, from the Sherman Antitrust Act, *Flood v. Kuhn* is defensible along several dimensions. Because professional baseball had matured under the umbrella of Sherman Act immunity, the Court was concerned about reliance interests that would

526. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938) (“If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.”); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (“Statutory precedents . . . often enjoy a super-strong presumption of correctness.”).

527. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting) (noting that the Court adheres to *stare decisis* “even where the error is a matter of serious concern, provided correction can be had by legislation”).

528. E.g., Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 425–29 (1988); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388–89 (1988); see also REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 252–55 (1975) (suggesting that courts should at least be willing to correct clear prior misreadings).

529. See *supra* text accompanying notes 334–42.

be unsettled by an overruling. Congress was the institution that could best deal with the reliance interest problem—and do so in a legitimate manner, through its open, deliberative, and pluralist process. When Congress did override the decision in the 1998 Curt Flood Act, it overrode antitrust immunity only for challenges to the reserve clause and not for other kinds of challenges (such as collusion among the team owners to set rules and restrict entry, for example). Because the reserve clause had already been abrogated through private arbitration, the benefit of the override was quite small. But so were the costs because Congress left in place baseball’s insulation from other forms of antitrust liability (such as price-fixing and market segmentation), a move that the Court would not have been able to make in 1972.

Flood v. Kuhn is instructive in another sense as well. One reason the Court gave for declining to overrule the baseball antitrust immunity precedents was Congress’s “positive inaction.”⁵³⁰ Far from ignoring the issue, Congress had devoted thousands of hours of attention to antitrust immunity for professional athletics and had considered many proposals—almost all of which sought to expand immunity to other sports rather than take it away from baseball.⁵³¹ Many scholars and Justices have expressed disdain for this kind of evidence, what its critics call “subsequent legislative history” or “legislative inaction.”⁵³² Our view is that this kind of terminology obstructs a proper understanding of a well-functioning interbranch dynamic. When the Court has interpreted a statute and Congress has engaged in an open, deliberative, and pluralistic appraisal of the Court’s decision without overriding it, that ought to be an additional reason for the Court to be reluctant to overrule its statutory precedent. And when the congressional deliberations reveal legislative approval for the Court’s decision, that ought to close the door on reconsideration of that precedent.

Contrast *Patterson v. McLean Credit Union*. The issue was whether the Civil Rights Act of 1866 provided a claim for relief to an employee who was allegedly harassed and fired because of her race.⁵³³ In 1976, the Supreme Court had interpreted the law to provide a cause of action against

530. *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972).

531. *Id.* at 281–83.

532. See, e.g., *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1092 (2011) (Sotomayor, J., dissenting) (“[P]ostenactment legislative history created by a subsequent Congress is ordinarily a hazardous basis from which to infer the intent of the enacting Congress.”); *Sullivan v. Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part) (“Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.”); Maltz, *supra* note 522 (stating that relying on “legislative inaction” is not always appropriate because such inaction may not reflect conscious congressional choice but instead might be the result of political forces).

533. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 169–71, 176 (1989).

private institutions for contract-based discrimination because of race.⁵³⁴ The *Patterson* Court, on its own, asked the parties to file briefs to determine whether the Court should overrule the precedent,⁵³⁵ which had arguably stretched the statute beyond its most obvious target of state actors. Invoking the super-strong presumption of correctness, the Court unanimously reaffirmed the 1976 precedent⁵³⁶—but the five-to-four majority opinion ignored evidence that the precedent had been ratified by Congress after 1976.⁵³⁷ The same slender majority then interpreted the precedent and the statute narrowly, to deny claims to employees with whom firms entered into contracts but then harassed and terminated because of their race.⁵³⁸

Patterson was inconsistent with stare decisis, whether super-strong or not, because a logical implication of the prior precedent was that institutions could not deny normal contractual rights because of race.⁵³⁹ The Solicitor General recognized this and had urged a more liberal application of the 1866 CRA—and the Bush Administration joined civil rights and other groups in urging Congress to override *Patterson*,⁵⁴⁰ which Congress did in the 1991 CRA.⁵⁴¹ As noted above, the 1991 CRA override of *Patterson* was restorative—indeed, one of the most lopsided and outraged political repudiations of a Supreme Court opinion in American history.⁵⁴² A positive lesson of the *Patterson* debacle is that the Court should be super-leery of overruling or drastically narrowing statutory precedents when both the Legislative and Executive Branches have taken positions supporting normal readings of statutory precedents. That Democrat Congresses and a GOP President joined in support of reaffirming the 1976 precedent and applying it in a normal manner should have been red flags cautioning the Supreme Court against the course that it took.

534. *Runyon v. McCrary*, 427 U.S. 160, 166–68, 186 (1976).

535. *Patterson*, 491 U.S. at 171.

536. *Id.* at 167, 171–75 (acknowledging that some Justices believed *Runyon* was wrongly decided but finding no justification for overruling it).

537. *Id.* at 190–95 (Brennan, J., concurring) (agreeing that *Runyon* should be reaffirmed but adding that Congress after 1976 ratified the Court's decision).

538. *See id.* at 178–89 (majority opinion).

539. Specifically, *Runyon* ruled that private schools violated § 1981 if they refused to admit children because of their race. 427 U.S. at 167–68, 172. A clear implication of this holding is that a school could not admit such children and then drive them out with racial harassment and race-motivated expulsions. *See Patterson*, 491 U.S. at 219–22 (Stevens, J., concurring in the judgment in part and dissenting in part) (discussing implications of *Runyon* for § 1981).

540. H.R. REP. NO. 102-40, pt. 2, at 53 (1991) (“[T]he Department of Justice recommended corrective legislation to overturn two of the [Supreme Court’s] decisions: *Patterson v. McLean Credit Union* and *Lorance v. AT&T*.”).

541. *See infra* Appendix 1.

542. *See supra* text accompanying notes 216–17.

2. *Representation-Reinforcing Statutory Interpretation: Deference to Agency Interpretations and Deliberation-Encouraging Canons.*—The current study also has interesting implications for the Supreme Court’s jurisprudence of deference to agency interpretations. As a practical matter, the Supreme Court has traditionally followed agency interpretations almost 70% of the time,⁵⁴³ an astounding record of success by the Solicitor General, who presents most of these interpretations to the Court. The actual record of cases before the Court refutes the notion that the Court defers only when an agency interprets a statute pursuant to congressionally delegated authority.⁵⁴⁴

Indeed, the leading case, *Chevron U.S.A. Inc. v. NRDC, Inc.*,⁵⁴⁵ relied on congressional delegation of lawmaking authority to the EPA as only *one* reason for deferring to the agency when Congress had not directly addressed an issue.⁵⁴⁶ *Chevron*’s distinctive rationale was that when a policy choice must be made to fill in a statutory gap, an agency connected with the President is a more democratically legitimate policymaker than the Supreme Court, whose members are not connected to the electorate in any formal way.⁵⁴⁷ One point that the current study adds to the *Chevron* analysis is that the democratic legitimacy of agency interpretations owes as much to administrators’ ongoing connections with *Congress* as to their connections with the President. As we have seen, the Department of Justice and other agencies are the most important nonlegislative players, by far, when Congress considers legislation overriding the Court’s statutory decisions.⁵⁴⁸

To the extent that the Supreme Court wants to advance the cooperative features of institutional interaction, the current study supports the Court’s attentiveness to agency views; indeed, we would advise the Court to be more deferential in cases like *Patterson*, where the Justices ignored the

543. Eskridge & Baer, *supra* note 49, at 1129 tbl.7.

544. The conventional wisdom is that the basis for deference is congressional delegation. *See* *United States v. Mead Corp.*, 533 U.S. 218, 230 & n.11 (2001) (following Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 872 (2001)). But the Court’s actual practice is all over the map. In most cases where there is lawmaking delegation, the Court has ignored *Chevron*. Eskridge & Baer, *supra* note 49, at 1123–29. The agency win rate is actually higher for cases where the Court follows a more informal deference regime. *Id.* at 1099 tbl.1, 1111–15.

545. 467 U.S. 837 (1984).

546. *See id.* at 859–66.

547. *See id.* at 865–66; *see also* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 312 (1986) (summarizing the implications of *Chevron*).

548. The key role played by agencies drafting legislation, lobbying Congress to enact it, interpreting such legislation, and then selling their interpretations to the Court is a phenomenon that dates back to the New Deal. Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 338–42 (2013).

Solicitor General's sage advice. Thus, we endorse Justice Scalia's campaign within the Court to expand formal deference to agencies beyond the category of cases where Congress has delegated lawmaking authority to the agencies.⁵⁴⁹

As the restorative overrides teach us, however, the Supreme Court is also sometimes at odds with the Legislative and Executive Branches—and so has incentives *not* to defer to the political branches. There are (at least) three kinds of potentially legitimate reasons, inherent in the Court's important role in our system, why the Court ought to push back against agencies.

The first are rule of law reasons: the Court has a systemic obligation to enforce statutory plain meanings consistently and honestly; when an agency interpretation deviates from the plain meaning of the text, the Court should usually trump the agency's view with its own insistence on clear statutory texts. If clarity is required, Congress can override the Court with the requisite language, a possibility that this study has demonstrated to be a tangible one (until recently). *Casey*, the expert witness fees case, is an example of this phenomenon, *if* one agrees with Justice Scalia that the Civil Rights Attorneys' Fees Act of 1976 is crystal clear against fee shifting for expert witnesses as well as for attorneys.⁵⁵⁰ Congress speedily provided the requisite statutory language.⁵⁵¹ Recall that most of the overridden Supreme Court decisions relied on statutory plain meaning; an important and legitimate role for congressional overrides is to supply clear statutory texts when the Court finds them lacking.

A second important role for the Court is enforcement of constitutional rules and values. The Court more often enforces due process, federalism, and separation-of-powers norms through narrowing statutory interpretations than through outright invalidations. Although the Court sometimes strikes down congressional efforts to subject the states to federal programs and rules, its most common strategy is to require explicit congressional deliberation and targeted language before the Court will find that Congress has abrogated state immunity from regulation or from private lawsuits.⁵⁵² Many of those narrow interpretations are then overridden by Congress,⁵⁵³ an

549. See *Mead*, 533 U.S. at 239–61 (Scalia, J., dissenting); accord David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 S. CT. REV. 201, 258.

550. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88–92 (1991).

551. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 1988 (2006)).

552. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 608–09 (1992).

553. See, e.g., Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 103, 104 Stat. 1103, 1106 (codified at 20 U.S.C. § 1403 (2012)) (overriding *Dellmuth v. Muth*, 491 U.S. 223 (1989)).

excellent set of examples where the Court in its thwarting mode is insisting that important constitutional values be considered by Congress, which our study has shown to be capable of open, deliberative, and pluralist consideration. The broader point to be drawn from these examples is that constitutional judicial review in this country is more often accomplished through deliberation-encouraging clear-statement rules than through direct invalidation. This bears a striking similarity to proportionality review that is the norm throughout the industrial world⁵⁵⁴ and is on the whole a more democratic and deliberative approach to the enforcement of constitutional values.

Third, the Court plays an important representation-reinforcing role in American governance.⁵⁵⁵ Underappreciated examples of this role are the cases where the Court enforces nondelegation values by requiring clearer statements from Congress when agencies are overreaching their statutory mandates. Thus, a central rationale of the FDA Tobacco Case was that the FDA was making a big policy move not contemplated by Congress when it enacted the FDCA in 1938 and contrary to the tobacco-regulatory laws adopted from 1965 onward.⁵⁵⁶ As the Court put it, “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁵⁵⁷ Rather than strike down the statute as unconstitutional as applied based upon the nondelegation doctrine, the Court interpreted the broad statutory authorization narrowly—and invited Congress to respond,⁵⁵⁸ which it did in the 2009 Tobacco Control Act.⁵⁵⁹ Our study lends some support to the canon that “[Congress] does not . . . hide elephants in mouseholes.”⁵⁶⁰ The canon not only enforces democratic values, but it places the burden of inertia upon institutions (agencies and sometimes the White House) that have political clout and can secure congressional consideration of serious override proposals.⁵⁶¹

554. See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008) (providing a large-scale account of the rise of proportionality review by courts and other tribunals all over the world).

555. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980), for an explication and justification of democracy-enhancing judicial review.

556. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143–60 (2000).

557. *Id.* at 160.

558. See *id.* at 161 (noting that regardless of the importance and severity of the issue at hand, grants of administrative power “must always be grounded in a valid grant of authority from Congress” and finding that it was “plain that Congress [had] not given the FDA the authority” it sought in the case).

559. See *supra* note 498.

560. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *Whitman* was followed in *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

561. Thus, in two of the four leading no-elephants-in-mouseholes precedents—namely, the FDA Tobacco Case, *Brown & Williamson*, and *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218,

As the 1991 Eskridge study maintained, the rule of lenity is the substantive canon that gains the most representation-reinforcing traction from any serious study of congressional overrides because the rule of lenity gently enforces important constitutional values in ways that encourage congressional deliberation and response *and* because the politics of lenity ensures that such deliberation will actually occur most of the time, as the Department of Justice (the typical loser in lenity cases) is usually able to secure a congressional hearing and often an override.⁵⁶² Thus, the rule of lenity gently enforces the due process idea that criminal statutes ought to be particularly clear⁵⁶³ and the nondelegation idea that punitive sanctions ought to be enforced against alleged wrongdoers only when the deliberative and pluralist legislative process has authorized those sanctions.⁵⁶⁴

In 1994, one of us proposed a representation-reinforcing meta-canon for allocating the burden of legislative inertia in cases where the legal arguments are evenly balanced: “In close cases, the . . . interpreter ought to consider, as a tiebreaker, which party or group representing its interests will have effective access to the legislative process if it loses its case, and to decide the case *against* the party (if any) with significantly more effective access.”⁵⁶⁵ Subsequently, Professor Elhauge advanced pretty much the same idea, but with the further suggestion that such a canon ought to weigh in favor of *Carolene* groups, namely, discrete and insular minorities.⁵⁶⁶ We agree with the general idea (as it was ours) but caution against Professor Elhauge’s effort to refocus it. Based upon our data, this tiebreaker is not a good representation-reinforcing justification for interpreting civil rights laws liberally because *Carolene* groups and women now have better override success than many of the traditional powerhouses in Washington, D.C. As documented above, women, racial and ethnic minorities, people with disabilities, religious minorities, and even sexual minorities and their allies have won impressive overrides of rights-denying Supreme Court decisions in workplace discrimination cases, for example.⁵⁶⁷

231 (1994)—the Court’s stingy renditions of delegated authority were overridden by statutes providing the needed authorization, after open, deliberative, and pluralist consideration in Congress. See *infra* Appendix 1.

562. See Eskridge, *supra* note 1, at 413–14; Elhauge, *supra* note 4, at 2193–96.

563. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 296–99 (2012) (contending that the rule of lenity, properly applied, is simply a mechanism for reinforcing the beyond a reasonable doubt standard).

564. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S. CT. REV. 345 (arguing for the retirement of the rule of lenity and acknowledging that the nondelegation rationale is the best support for lenity in criminal cases).

565. ESKRIDGE, *supra* note 331, at 153; see also *id.* at 151–61 (explaining, applying, and justifying this meta-canon).

566. Elhauge, *supra* note 4, at 2209–11.

567. See *supra* Figure 13. Sexual minorities have been much less salient on Congress’s agenda, until recently, when they secured an important repeal of their exclusion from the armed

Our list of groups lacking relative clout in the legislative process is a shorter one: consumers and other diffuse citizenry, criminal defendants and prisoners, and the poor and the dependent.⁵⁶⁸ For example, recall our finding in subpart V(A) that overrides affecting prisoners and those on the wrong end of criminal statutes were disproportionately likely *not* to be open, deliberative, and pluralist.⁵⁶⁹ An excellent example of representation-reinforcing statutory interpretation is *Brown v. Plata*,⁵⁷⁰ where the Supreme Court interpreted the PLRA of 1995,⁵⁷¹ one of the most important override statutes in the current study. The PLRA sought to curtail class action lawsuits seeking court-enforced reform of unconstitutional prison conditions by imposing more stringent procedural requirements in such lawsuits.⁵⁷² Following the letter of the law, the lower courts had imposed an order directing the release of prisoners until conditions could reach a constitutional floor, and the Supreme Court affirmed.⁵⁷³ In dissent, Justice Scalia propounded an antiprisoner interpretive rule, couched as a subsidiary of the absurd results canon, namely, that the Justices ought to “bend every effort to read the law in such a way as to avoid [the] outrageous result” of releasing prisoners.⁵⁷⁴ The majority opinion enjoyed the virtue of enforcing the reasonable meaning of the statutory text without undue “bending” of the law. To the extent that the majority read the text liberally, it did so to avoid constitutional difficulties—and our meta-canon strongly supports the majority’s reading.⁵⁷⁵ If dissenting Justices are concerned about state prisoners having “too many” statutory rights, the current study demonstrates that Congress is an eager audience for their concerns, and it might be a good thing for legislators to consider whether documented prison conditions are consistent with American constitutional values.

3. Apply the Plain Meaning Rule in Light of Congressional Deliberations.—The plain meaning rule has made a great comeback at the

forces (the nation’s most important employer). See Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES, July 22, 2011, http://www.nytimes.com/2011/07/23/us/23military.html?_r=0; see also Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067–77 (codified as amended at 8 U.S.C. § 1182 (2012)) (overriding the most antigay Supreme Court decision in our history, *Boutilier v. INS*, 387 U.S. 118 (1967)).

568. ESKRIDGE, *supra* note 331, at 153; accord Elhauge, *supra* note 4, at 2207–09 (identifying consumers and taxpayers as also lacking in political clout).

569. See *supra* notes 348–51 and accompanying text.

570. 131 S. Ct. 1910 (2011). None of the three overrides in the PLRA was open, deliberative, or pluralist; hence, those overrides lacked the important legitimacy bonus of the override process. See *supra* note 351 and accompanying text.

571. *Plata*, 131 S. Ct. at 1922–23.

572. See *id.* at 1929–31 (describing the procedural requirements set forth in the PLRA).

573. *Id.* at 1922–23.

574. *Id.* at 1950 (Scalia, J., dissenting).

575. See *id.* at 1937 (majority opinion).

Supreme Court in the last generation, as the Justices have devoted more of their opinions to textual and structural analysis and less often rely on legislative history and purpose as decisive evidence of statutory meaning.⁵⁷⁶ This development has encountered a chilly academic reception. For example, Professor Brudney and his political science coauthor have demonstrated that conservative Justices have deployed the plain meaning rule and various textual canons in a partisan manner to trump proworker legislative expectations.⁵⁷⁷ Nevertheless, Justice Scalia has continued a vigorous public relations offensive in support of his new textualist philosophy, with the publication of his book, with Professor Garner, on *Reading Law*.⁵⁷⁸ The current study lends potential support to the Supreme Court's insistence on plain meaning. Recall that Congress in the last five decades has responded to many such decisions by supplying statutory language that satisfied the Court's rule of law concerns.

We do sound a note of caution, however. Recall that Supreme Court decisions relying centrally on whole act and whole code arguments were much, *much* more likely to be overridden than decisions not critically relying on those text-based structural arguments.⁵⁷⁹ As *Casey* illustrates, whole act and whole code arguments assume consistent usage throughout the statute and the U.S. Code.⁵⁸⁰ Hence, the Court will assume that a term used in one part of a statute will have exactly the same meaning in another part, and sometimes in another statute altogether. Conversely, when a statute uses different terminology, the Court often presumes different

576. See Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 395 (1999) (observing that since Justice Scalia's appointment to the Court, opinions written by Justices Rehnquist and Stevens contained significantly fewer citations to legislative history); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1655 (2010) (concluding that the decline in the use of legislative history by Justices is due to "a rightward shift in the ideological composition of the Court").

577. Brudney & Ditslear, *supra* note 49, at 79–95 (examining specific cases that put language and substantive canons ahead of "legislatively expressed preferences" and noting that the use of canons in the majority and legislative history in the dissent reflected ideological differences in the Court); Brudney & Ditslear, *Decline and Fall*, *supra* note 523 (recognizing that both liberal and conservative Justices used legislative history in a way that cut away from Congress's proemployee purpose); *cf.* Brudney, *supra* note 523, at 1229–32 (criticizing the imprecise nature of canons of construction).

578. See SCALIA & GARNER, *supra* note 557. *But see* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing SCALIA & GARNER, *supra* note 563) (questioning the viability of the Scalia and Garner project of establishing a canons-based regime for neutral and predictable statutory interpretation).

579. See *supra* Figures 25 and 26.

580. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 91–92 (1991) (arguing that since attorney's fees and witness fees are referred to separately multiple times in the statute, they should be referred to separately when determining court costs).

meanings.⁵⁸¹ Relatedly, the Court likes to say that every term, phrase, or provision adds something to a statute and is not “surplusage” or “redundant.”⁵⁸²

Holistic canons such as these are now under heavy attack. Congress does not draft statutes with these holistic canons in mind, and a recent study documents that the process of enactment assures that these canons, especially the rule against surplusage, cannot be carefully adhered to even if legislative drafters focused on them.⁵⁸³ Hence, these canons are antidemocratic in a serious way, and our study demonstrates that their deployment burdens the legislative agenda more than any other kind of interpretive canon. Do the holistic canons have a compensating utility, such as assuring a reliable rule of law regime? We doubt it. Even some devout textualists maintain that the whole act and whole code canons detract from rather than contribute to a rule of law regime.⁵⁸⁴

Our study supports that conclusion. We found that, in the cases in which the Court relies on the whole act canon, it also relies on plain meaning nearly two-thirds of the time—a higher amount than even the baseline number for overrides in the last twenty-five years.⁵⁸⁵ By contrast, in the same cases, the Court relies on legislative history and congressional purpose only slightly more than one-third of the time. Although these numbers are roughly in line with the general population of overrides,⁵⁸⁶ we interpret our findings as evidence that the Court would be well-served to expand its interpretive toolbox in those cases in which it might be tempted to apply the whole act canon.⁵⁸⁷ Hence, our friendly suggestion to textualists is to follow a plain meaning rule that is not dogmatic about importing strong presumptions from elsewhere in the statute, much less from elsewhere in the Code, as the Court did in *Casey*.⁵⁸⁸

581. *See id.* at 99 (focusing on Congress’s choice to use restrictive language in the statute at issue instead of the more expansive language it employed in other statutes and using that difference to justify its strict application of the term “attorney’s fees”).

582. *See supra* notes 463–67 and accompanying text.

583. *See Gluck & Bressman, supra* note 302, at 934–35 (finding that a certain level of surplusage might be politically necessary); *see also Eskridge, supra* note 578 (criticizing Scalia and Garner for investing so much significance in textual canons that Congress does not know about or cannot easily anticipate when it drafts statutes).

584. *See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 202–04 (2006) (urging courts to follow a strict plain meaning approach to statutory interpretation and rejecting as wasteful reliance on whole act and whole code evidence).

585. *See supra* Figure 21.

586. *See supra* Figures 22 and 23.

587. We found a similar pattern for the whole code canon, although the Court did rely on plain meaning less often in those decisions than in decisions relying on the whole act canon.

588. Along these same lines, Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS

Our overrides study also has a broader lesson for the Court's deployment of the plain meaning rule, namely, that plain meaning ought not to be determined without reference to the ongoing congressional deliberations that produced the text. Perhaps the largest normative point to emerge from our study is the legitimacy power of the override process. Consistent with the work of political scientist Jeb Barnes,⁵⁸⁹ we found that the override process was typically open and well-publicized, deliberative and fact-oriented, and pluralistic, considering the perspectives of most relevant groups and interests. This is also a process that produces compromises that ought to be respected by judges. We shall illustrate this point with perhaps the most-taught statutory case of the last generation, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, where the Court confronted a superstatute, as amended to override both the Supreme Court and an agency rule (in part).⁵⁹⁰

The Endangered Species Act of 1973 was enacted for biodiversity purposes—to protect endangered species from becoming extinct.⁵⁹¹ Section 9(a)(1)(B) of the Act makes it an offense for any person to “take any [endangered] species within the United States or the territorial sea of the United States.”⁵⁹² Section 3(14) defines the statutory term “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁵⁹³ The Department of the Interior's 1975 regulation, as revised in 1981, defines “harm” in the statutory definition of “take” as any activity that “actually kills or injures” endangered species, including an activity that results in “significant habitat modification or degradation,” and includes acts that “significantly impair[] essential behavioral patterns, including breeding, feeding or sheltering.”⁵⁹⁴ Under that definition of “harm,” private landowners that disrupt breeding patterns by destroying a significant habitat for an endangered species are in violation of § 9(a)(1)(B).

In *Sweet Home*, the Supreme Court upheld the Department's regulation, based in part upon the plain meaning of “harm,” one of the terms included in the statutory definition of “take.”⁵⁹⁵ This would appear to

L. REV. 961 (2013), provides an excellent analysis of the perverse interaction of two liberal override statutes.

589. See BARNES, *supra* note 4, at 103–13.

590. See 515 U.S. 687, 690–92. For more information, see the discussion of the case in William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J., 865, 875–84 (2013).

591. Pub. L. No. 93-205, § 2(b), 87 Stat. 884, 885 (codified at 16 U.S.C. § 1531(b) (2012)).

592. *Id.* § 9(a)(1)(B), 87 Stat. at 893 (codified at 16 U.S.C. § 1538(a)(1)(B)) (emphasis added).

593. *Id.* § 3(14), 87 Stat. at 886 (codified at 16 U.S.C. § 1532(19)).

594. 50 C.F.R. § 17.3 (1982).

595. *Sweet Home*, 515 U.S. at 708.

be a routine plain meaning case; but, regardless of whether the language was ambiguous, the Court should have upheld the agency rule under Step Two of *Chevron* (which all Justices agreed was the governing framework).⁵⁹⁶ Yet Justice Scalia dissented.⁵⁹⁷ His best legal argument was that two other provisions, and not § 9, of the 1973 Act were Congress's exclusive response to habitat threats: Section 7 explicitly barred federal projects from harming the habitat of endangered species,⁵⁹⁸ and § 5 authorized the Department to use its eminent domain power to secure needed habitat from private landowners,⁵⁹⁹ thereby leaving § 9's antitake regulation probably concerned with more targeted activities.⁶⁰⁰

This was a good structural argument, but, as is often the case for structural arguments, it should not have been dogmatically asserted without more contextual evidence. Reading nothing but the text of the statute, it is reasonable to say that §§ 5 and 7 are the primary mechanisms for protecting habitat, with § 9 being an ancillary but important mechanism as well. Ever going for the analytical jugular, however, Justice Scalia supported his structural argument with floor speeches by both Senate and House sponsors articulating the protection-of-habitat purpose with greater precision and, probably, reflecting the compromises reached among the coalition of legislators supporting the statute.⁶⁰¹ As the House manager put it,

[T]he principal threat to animals stems from destruction of their habitat. . . . [The bill] will meet this problem by providing funds for acquisition of critical habitat. . . . It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, *but who are understandably unwilling to do so at excessive cost to themselves.*⁶⁰²

The sponsor then noted, “Another hazard to endangered species arises from those who would *capture or kill them for pleasure or profit*,”⁶⁰³ which the bill prohibited in § 9. The Senate floor manager made a similar speech

596. *See id.* at 715 (Scalia, J., dissenting).

597. *Id.* at 714.

598. Endangered Species Act § 7, 87 Stat. at 892 (codified as amended at 16 U.S.C. § 1536(a)); *see also* *TVA v. Hill*, 437 U.S. 153, 172, 193–95 (1978) (enforcing, dramatically, § 7's habitat-protective rule by requiring TVA to halt construction of a \$100 million dam that would, allegedly, have destroyed a necessary habitat for an endangered species).

599. Endangered Species Act § 5, 87 Stat. at 889 (codified as amended at 16 U.S.C. § 1534).

600. *Sweet Home*, 515 U.S. at 727–30 (Scalia, J., dissenting).

601. *See id.* at 727–28 (preferring the “direct evidence” from Senate and House floor managers of the bill over the majority's reliance on “various pre-enactment actions and inactions”).

602. *Id.* at 728 (alterations in original) (quoting 119 CONG. REC. 30,162 (1973) (statement of Rep. Sullivan)).

603. *Id.* (alterations in original) (quoting 119 CONG. REC. 30,162 (1973) (statement of Rep. Sullivan)).

before his chamber.⁶⁰⁴ Completing his analysis of statutory structure, Justice Scalia's analysis of legislative history persuades us that the 1973 Act did not require private property owners to avoid any harm to the habitat of endangered species. Thus, the Department went too far in 1975 when it originally adopted the habitat-protecting interpretation of "harm" for purposes of § 9(a)(1).

Good for Justice Scalia, but a central lesson of our study of congressional overrides is that the enactment of a major statute is never the end of Congress's deliberations. They continue as the statute is applied, and the statutory interpreter needs to consider the statute's ongoing deliberations, amendments, and overrides as well as the story of its birth. After the Department issued its broad habitat-protection regulation in 1975, Congress heard testimony from ranchers and farmers objecting to the Department's broad regulation and considered bills to override that regulation's statutory definition.⁶⁰⁵ Not only did Congress refuse to override the Department, but the 1978 ESA Amendments adopted to override *TVA v. Hill* included provisions premised upon the assumption that § 9(a)(1)(B) barred everyone from harming endangered species by destroying needed habitats.⁶⁰⁶ That, alone, should have caused judges like Scalia to consider whether the structure of the statute had changed in ways that undermined his argument.

In 1982, a more serious challenge to the 1975 regulation emerged. The Reagan Administration and the Republican-controlled Senate were sympathetic audiences for an override of the Department's habitat regulation—but the Democrat-controlled House was not. The ESA Amendments of 1982 represented a compromise between the proenvironmental forces in the House and the profarmer and prorancher forces in the Senate. The ESA Amendments partially overrode the Department's interpretation of § 9(a)(1)(B)—not by negating its definition of "harm" (and therefore "take"), but instead by providing for a broader exemption mechanism in new § 10(a)(1)(B), which authorized the

604. *Id.* at 727.

605. Brief for Petitioners at 31 & n.18, 32–36, *Sweet Home*, 515 U.S. 687 (No. 94-859) [hereinafter *Sweet Home* Brief] (indicating that Congress considered and rejected proposed measures to amend the Act and providing a list of congressional hearings on the subject).

606. When Congress enacted the Endangered Species Act Amendments, in part to override *TVA v. Hill*, not only did Congress reject serious proposals to override the Department's harm regulation, but the Amendments added § 7(o) to the ESA. Section 7(o) exempts from § 9 federal habitat-threatening projects (like the *TVA* dam) if they are granted an exemption from § 7(a)'s rules for federal projects through a new procedure Congress created in 1978. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3759 (codified as amended at 16 U.S.C. § 1536(o) (2012)); see also *Sweet Home* Brief, *supra* note 605, at 31–33 (recounting the legislative history of § 7(o)). Section 7(o) would have been superfluous if § 9(a) did not prohibit interference with the habitat of an endangered species.

Department to grant permits allowing incidental and cost-justified habitat “takings” by private enterprises.⁶⁰⁷ As the committee reports demonstrated, Congress was *both* accepting the Department’s reading of “harm” *and* ameliorating its potentially harsh application through the liberal exemption process.⁶⁰⁸ Although Justice Scalia had relied on floor statements to support his view of the 1973 Act, he refused to credit committee reports that went against his view of the 1982 Amendments, purportedly because the text of revised § 10 did not, in his view, codify the Department’s 1975 regulation.⁶⁰⁹ This is precisely the kind of structural reasoning that the Justices should eschew, for reasons of democratic legitimacy as well as the orderly rule of law.

Conclusion: What If Overrides Are Drying Up?

Recall Professor Hasen’s warning about the eclipse of statutory overrides and the *New York Times*’s alarm that congressional overrides in the new millennium have “fallen to almost none.”⁶¹⁰ Although these warnings are overstated, we also demonstrate that overrides have fallen off dramatically since the Clinton impeachment. Moreover, the invaluable policy-updating overrides have declined much more than the contentious restorative overrides. Finally, there is no relief in sight. The first year of the current 113th Congress has been one of the most unproductive sessions in decades,⁶¹¹ and divisions among Republicans in the House of Representatives have greatly reduced the already slim possibility of dealmaking among the House, the Senate, and the President.

A long-term decline in policy-updating overrides is very bad for the country, for reasons we have developed in this Article. Even during periods of divided government and partisan acrimony (such as the 1990s),

607. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 6, 96 Stat. 1411, 1422 (codified at 16 U.S.C. § 1539(a)(1)(B)) (establishing a permit system for takings incidental to lawful activities and not for the purpose of threatening endangered species); *see also Sweet Home* Brief, *supra* note 605, at 34–38 (providing the legislative history of § 10).

608. *See* H.R. REP. NO. 97-835, at 29 (1982) (Conf. Rep.) (stating that the new § 10(a) addresses “concerns of private landowners who are faced with having otherwise lawful actions . . . prevented by section 9 prohibitions against taking[s]”); S. REP. NO. 97-418, at 10 (1982) (same). The § 10 permit process was described in the Senate report as being modeled after the response to a specific situation in San Mateo County, California, in which the “taking” of endangered butterflies was incidental to “the development of some 3000 dwelling units” on a site inhabited by the species—i.e., was incidental to habitat modification. *Id.*; *see also* H.R. REP. NO. 97-835, at 30–32 (comparing a conservation plan under § 10(a) to habitat conservation plans in Northern California counties).

609. *See Sweet Home*, 515 U.S. at 730 (Scalia, J., dissenting).

610. Liptak, *supra* note 8.

611. Jonathan Weisman, *Underachieving Congress Appears in No Hurry to Change Things Now*, N.Y. TIMES, Dec. 2, 2013, <http://www.nytimes.com/2013/12/03/us/politics/least-productive-congress-on-record-appears-in-no-hurry-to-produce.html>.

congressional overrides have been an important part of a vigorous federal government. Overrides have kept the U.S. Code current with rapidly changing technologies in areas such as intellectual property. They reflected a changing consensus on important public norms, such as the importance of economic efficiency in bankruptcy and tax laws and the status of homosexuals in immigration law. And the legitimacy bonus, alone, of an override process that is open, deliberative, and pluralist is a boon to the country. Because we think the decline in overrides is a consequence of both Congress's post-9/11 agenda and its hyperpartisan divisions, we have no solution. Perhaps the political debate will shift away from entitlement programs and terrorism and back to the superstatutes that disproportionately generate overrides. But how to engineer such a shift is certainly well beyond our scope here.

Even if we cannot solve the problem, we should like to point out some of the consequences of the dry spell for overrides, especially if it turns out to be a longer-term phenomenon. The most obvious consequence is a reduction in the power of Congress to direct public policy in America. With declining relevance, Congress cannot serve the legitimating and policy-advancing role vested in it by the Constitution. And as Congress declines, other institutions will fill the power void.

A. *The Supreme Court: More Power to Narrow Statutory Directives*

Professor Hasen worries that the lower level of overrides shifts more power to slender Supreme Court majorities,⁶¹² and we agree. With fewer overrides, five Justices on the Supreme Court have more freedom to impose their values—which for the last four decades have been much more libertarian or antiregulatory than the values of Congress (whichever political party is in control)—and this increases Professor Widiss's concern that the Supreme Court undermines statutory overrides by reading them narrowly and even counterproductively. The 2012 Term of the Court saw this phenomenon at work in Title VII cases. Recall *Vance v. Ball State University*, where the Court made it harder for victims of sexual harassment to sue employers.⁶¹³ But *Vance* was not the most dramatic example of this process at work last Term.

The issue in *University of Texas Southwestern Medical Center v. Nassar*⁶¹⁴ was the standard of proof a plaintiff had to adduce to prevail upon a claim that she was subject to retaliation for complaining about race discrimination and illegal harassment under Title VII.⁶¹⁵ If Dr. Naiel

612. Hasen, *supra* note 3, at 224–27.

613. See 133 S. Ct. 2434, 2439 (2013).

614. 133 S. Ct. 2517 (2013).

615. *Id.* at 2522–23.

Nassar had made a claim of outright race discrimination, he would have enjoyed a burden of proving that discrimination was “a motivating factor,” as required by the 1991 CRA, which overrode the Supreme Court’s view in *Price Waterhouse v. Hopkins*⁶¹⁶ that plaintiffs needed to show the discriminatory motive was a “substantial factor.”⁶¹⁷ But Dr. Nassar’s claim was one sounding in retaliation, and a 5–4 majority of the Court ruled that he had to meet a much more demanding standard: that his complaints of discrimination were the “but-for cause” of the employer’s retaliation against him.⁶¹⁸ As in *Vance*, the EEOC had long viewed the matter the way Dr. Nassar did, and Justice Ginsburg again wrote for the four-Justice dissent, explaining how Congress had decisively rejected the Court’s approach in the 1991 override and how Congress’s rule was consistent with the Court’s precedents and the statutory structure.⁶¹⁹ As in *Vance*, the majority dismissed the EEOC’s views and invoked the 1991 override as a key reason in favor of applying a stricter standard for retaliation cases.⁶²⁰ Unlike *Vance*, however, the Court in *Nassar* did not treat the overridden Supreme Court decision as a precedent to be followed. Instead, the *Nassar* Court adopted the “but-for cause” standard advocated in the *Price Waterhouse* dissenting opinion—the standard which a 6–3 Court had decisively rejected in 1989 and that overwhelming majorities in Congress had even more decisively rejected in 1991.⁶²¹

The Court delivered *Vance* and *Nassar* in the last week of the Term, when their holdings were overshadowed by the Court’s big decisions striking down part of the Voting Rights Act and the Defense of Marriage Act.⁶²² But *Vance* and *Nassar* are important decisions that, as a practical

616. 490 U.S. 228 (1989).

617. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006)) (overriding *Price Waterhouse*, 490 U.S. 228). In *Price Waterhouse*, the plurality opinion would have allowed plaintiffs to state a claim that discriminatory intent was a motivating factor, see 490 U.S. at 249–50 (plurality opinion), but two Justices concurring only in the judgment required that the discriminatory intent be a “substantial” motivating factor, see *id.* at 259 (White, J., concurring); *id.* at 265 (O’Connor, J., concurring). The dissenters would have required the plaintiff to show but-for causation. *Id.* at 281 (Kennedy, J., dissenting).

618. See *Nassar*, 133 S. Ct. at 2534.

619. *Id.* at 2538–40 (Ginsburg, J., dissenting).

620. Specifically, the majority Justices ruled that, because the 1991 CRA only changed the burden of proof for discriminatory intent cases, the presumption of meaningful variation kicked in, creating strong textual evidence that the default rule in tort cases (but-for cause) should be the standard for retaliation claims. *Id.* at 2524–29 (majority opinion).

621. Justice Kennedy, the author of *Nassar*, wrote the dissenting opinion in *Price Waterhouse*. When Congress overrode *Price Waterhouse*, it was rejecting the more plaintiff-friendly standard of the majority Justices.

622. See *2012 Term Opinions of the Court*, U.S. SUP. CT., <http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=12> (indicating that *Vance* and *Nassar* were decided the day before their more newsworthy counterparts).

matter, make it hard for Title VII plaintiffs to sue discriminating employers. The boldness of the five-Justice majority in those cases, especially in *Nassar*, suggests that the sting of the 1991 CRA rebuke has worn off and that the majority does not fear a congressional response. Nor should it, so long as it marginalizes and isolates the 1991 congressional pushback in a polite and orderly manner.

A similar paring back has occurred in the context of the Voting Rights Act and may operate in ADA cases as well, if the Court treats the 2008 ADA Amendments with the same limiting approach strategy that it has used to interpret Title VII. If Congress remains paralyzed from pushing back against the Court and if Justice Kennedy remains the median Justice in these kinds of cases, the Court's antiregulatory tendencies may become more pronounced in other areas, such as environmental law.⁶²³ Also worrisome is the Court's potential for disrupting law and policy in areas of law that are not as charged with partisan politics as Title VII. In those areas, however, the Court is prone to follow federal agency guidance (in contrast to the Court's dismissive treatment of the EEOC in recent cases). This brings us to the second big consequence of Congress's torpor on the override front: As overrides recede, the power of the White House and of the Executive Branch increases.

B. The President and Agencies: Much More Power Through Administrative Overrides and Workarounds

If regulatory liberals ought to be concerned that a conservative, antiregulatory majority of the Supreme Court is left less constrained by a paralyzed or disengaged Congress, regulatory conservatives ought to be concerned that a liberal, proregulatory White House and agencies are left less constrained as well. The Solicitor General and federal agencies already win most Supreme Court statutory cases, and they have had continued success in securing overrides after 1998.⁶²⁴ Moreover, even for most areas of law where the Supreme Court plays a major role (tax, energy, communications, transportation, environmental law, etc.), policy is largely

623. Consider *Rapanos v. United States*, 547 U.S. 715 (2006), a 4–1–4 decision in which Justice Kennedy cast the deciding vote to invalidate the government's expansive (and long relied upon) interpretation but proposed his own test for narrowing the application of the Clean Water Act. *Id.* at 759–87 (Kennedy, J., concurring); see also *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009) (employing another restrictive interpretation of the Clean Water Act that Congress has proposed overriding, Clean Water Protection Act, H.R. 1310, 111th Cong. (2009), but on which it has not taken much action).

624. Recall that the biggest decline is with policy-updating overrides contained in legislation that comprehensively revises the law in a particular field. Restorative overrides have remained prominent in the post-1999 period, and restorative overrides championed by the Bush–Cheney (2001–2009) and Obama (2009–2017) Administrations have been particularly salient. See *supra* section III(D)(3).

set by agencies, with courts serving as monitoring or corrective checks. Because much of the Court's role in these cases is limited by the Administrative Procedure Act, and its own deference holdings,⁶²⁵ agencies enjoy considerable freedom in construing statutes to fulfill the priorities of the Executive Branch. Whatever policy void is left by a torpid Congress is more likely to be filled by agencies than by judges.

If policy-updating overrides continue to languish, the biggest challenge for national governance will be how to update ossified statutory policies—and Executive Branch officials are the first movers for such measures. Indeed, the OIRA might become a situs for the White House to take up some of the slack left by Congress. By executive order, President Obama in July 2011 requested that independent as well as executive agencies update their regulations to save money.⁶²⁶ As the policy consequences of congressional inaction accumulate, the White House ought to be inclined to press agencies toward other forms of substantive updating—and in our view the judiciary will probably accommodate the White House in areas of law where the Justices do not have strong political preferences.

The doctrinal structure is already in place—namely, the Court's various deference regimes, especially *Chevron*, as elaborated in the Court's important decision in *Brand X*. “A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”⁶²⁷ *Brand X* explicitly gives agencies room to update their rules, guidance, and adjudications to reflect new circumstances that otherwise might be appropriate for overrides and other forms of legislation. And we predict that agencies, perhaps prodded by the White House, will take this opportunity.

To be sure, the Supreme Court can be expected to exercise its power to veto agency moves it considers too aggressive.⁶²⁸ But most agency innovations are not subject to lawsuits, few lawsuits reach the Supreme

625. These holdings have been largely reaffirmed, or in some views expanded, in this Term alone. See *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013); *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

626. Exec. Order No. 13,579, 3 C.F.R. 256 (2012), reprinted in 5 U.S.C. § 601 app. at 103 (2012). Congress is considering legislation extending White House/OIRA jurisdiction to independent as well as executive agencies, Independent Agency Regulatory Analysis Act of 2013, S. 1173, 113th Cong. (2013), but President Obama's action, a request rather than a directive, is clearly legal. In our view, the President also exercises some supervisory authority over independent agencies, which are probably part of the Executive Branch of government.

627. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

628. See *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) (ruling that *Brand X* did not protect an agency update that contravened the outer boundary of agency discretion established by precedent).

Court, and the Justices do not have strong views on the merits in most areas of law. Regulatory agencies such as FERC, the FCC, the FDA, the EPA, and the Patent Office have radically updated regulatory policies without explicit congressional authorization or judicial disapproval for the last several decades.⁶²⁹ The EPA's regulation of greenhouse gases and the FCC's "net neutrality" regulations are examples of expansive, policy-driven interpretations that might at another time have gone through the legislative process. This kind of sweeping Executive Branch reinterpretation will probably increase, especially if the decline in overrides proves long-lasting. If the Executive Branch cannot secure its agenda through legislation, it will have every incentive to come as close to that agenda as possible through aggressive statutory (re)interpretation, often via the rulemaking process.

C. State Regulation: More Federalism Workarounds

While we believe the big institutional winners in a declining-role-of-Congress scenario are the President and federal agencies, there is also room for state entrepreneurship. Although many fertile areas for overrides are exclusively federal—e.g., bankruptcy, intellectual property, immigration, tax, and federal procedure—in others, such as labor and employment, business regulation, antitrust, and environmental law, the states may play an important role in responding to the Court. In all four areas, the Supreme Court has become increasingly libertarian and antiregulatory during the second half of our study. In the absence of overrides, states may fill the substantive gaps opened up in these regimes by the Court while also asserting a more forceful posture in enforcing state statutes already on the books. At the very least, it is a trend to keep an eye on and an avenue for future study.

Workplace antidiscrimination rules are the best example. Since 1991, Congress has struggled to update Title VII and other job discrimination laws to respond to narrow judicial constructions that allow a fair amount of workplace harassment and discrimination based upon race, sex, pregnancy, age, and disability, and a lot of harassment and discrimination based upon gender and sexual orientation. Because the Supreme Court is vigilant in policing what its majority views as the limits of these statutes, congressional overrides are narrowly construed and administrative overrides are highly unlikely. All the states have workplace antidiscrim-

629. In other words, the FDA Tobacco Case, where agency updating received a rebuke from the Supreme Court, is not the norm. More typical is the revolutionary revision of the wholesale electricity sector by FERC in the last 30 years, which transformed the sector almost beyond recognition (with little congressional supervision) and was completely undisturbed by the courts. See Matthew R. Christiansen, *The Administrative Constitutionalism of Electricity Restructuring: A Case Study in Statutory Reinterpretation* (2014) (unpublished manuscript) (on file with authors).

ination laws, and many states have copied features of the federal statutes. But state legislatures, judges, and administrators have often refused to follow narrow Supreme Court constructions when they face the same issues under state laws. For example, federal courts have declined to hold that federal job discrimination laws protect lesbians and gay men from open discrimination.⁶³⁰ In contrast, state courts have been more willing to outlaw that form of discrimination, through dynamic readings of their statutes and state constitutions.⁶³¹ And many state legislatures have explicitly added protections against sexual orientation discrimination.⁶³² These are what might be called *federalism workarounds* of federal court decisions.

* * *

A sustained decline in overrides will create winners and losers throughout the polity at large. Certain groups, such as those singled out in *Carolene Products*, may continue to secure the restorative overrides that have persisted even during the last decade's decline in overrides. Or perhaps these overrides too will diminish. Other groups that have recently fared poorly before the Court, such as debtors, environmental groups, and even the federal government during the 2012 Term, will likely suffer if they cannot secure overrides of adverse decisions. This may be a good thing or a bad thing depending on one's political stripe—though, of course, a single retirement or election could upend the relative regulatory leanings of the three branches.

But one of the most important conclusions of this Article is that overrides usually are not a zero-sum game in which rent-seeking groups expend their political capital for favorable but generally inefficient treatment by Congress. Instead, the majority of overrides update the U.S. Code to meet changed circumstances, to address largely uncontroversial changes in the public consensus, and to correct problems in the administration of the rule articulated by the Court. These overrides usually garner broad bipartisan support. And they achieve these results through a political process that better reflects the values of republican democracy than change driven by the other branches ever could. A sustained loss of these overrides would be an unfortunate result for the rule of law in this country.

630. I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991) (surveying early case law); cf. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–81 (1998) (evinced a strictly textual approach to Title VII and limiting discrimination claims to those strictly “because of sex”).

631. See, e.g., *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998). See generally WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 557–661 (3d ed. 2011) (summarizing and digesting state cases).

632. See *In Your State*, LAMBDA LEGAL, <http://www.lambdalegal.org/states-regions> (summarizing statutory protections for LGBT persons for all 50 states and the District of Columbia).

Appendix 1: Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011

Override Statute (Restoratives in <i>Italics</i>)	Supreme Court Statutory Decisions Overridden	Subject Area
112th Congress (2011)		
Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112- 63, 125 Stat. 758		
§ 202	Denver & Rio Grande W. R.R. Co. v. Bhd. of R.R. Trainmen, 387 U.S. 556 (1967)	Federal Jurisdiction & Procedure
§ 204	Hoffman v. Blaski, 363 U.S. 335 (1960)	Federal Jurisdiction & Procedure
Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 19(b), 125 Stat. 284, 331–32 (2011)	Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002)	Federal Jurisdiction & Procedure; Intellectual Property
111th Congress (2009–2010)		
Act of Jan. 4, 2011, Pub. L. No. 111-378, § 1, 124 Stat. 4128, 4128–29 (amending the Federal Water Pollution Control Act)	EPA v. Cal. <i>ex rel.</i> State Water Res. Control Bd., 426 U.S. 200 (1976) (2d override)	Environmental

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2077–79 (2010)	Graham Cnty. Soil & Water Conservation Dist. v. U.S. <i>ex rel.</i> Wilson, 545 U.S. 409 (2005)	Federal Jurisdiction & Procedure; Criminal Law
<i>Family Smoking Prevention and Tobacco Control Act</i> , Pub. L. No. 111-31, § 101, 123 Stat. 1776, 1783–1830 (2009)	FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)	Public Health & Safety
<i>Fraud Enforcement and Recovery Act of 2009</i> , Pub. L. No. 111-21, 123 Stat. 1617		
§ 2(f)(1)(B)	United States v. Santos, 553 U.S. 507 (2008)	Criminal Law
§ 4(a)	Allison Engine Co. v. U.S. <i>ex rel.</i> Sanders, 553 U.S. 662 (2008)	Federal Government
<i>Lilly Ledbetter Fair Pay Act of 2009</i> , Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6	Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)	Federal Jurisdiction & Procedure; Civil Rights; Labor & Workplace
110th Congress (2007–2008)		
<i>ADA Amendments Act of 2008</i> , Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56	Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)	Civil Rights; Labor & Workplace

109th Congress (2005–2006)		
<i>Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36</i>	Hamdan v. Rumsfeld, 548 U.S. 557 (2006)	National Security
Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2(1), 120 Stat. 1730, 1730–32	Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003)	Intellectual Property
<i>Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81</i>	Georgia v. Ashcroft, 539 U.S. 461 (2003); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000)	Civil Rights (Voting)
<i>Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. 10, § 1005(e), 119 Stat. 2739, 2741–43</i>	Rasul v. Bush, 542 U.S. 466 (2004)	National Security; Habeas Corpus
<i>REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a), 119 Stat. 302, 310–11</i>	INS v. St. Cyr, 533 U.S. 289 (2001)	Immigration
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 327, 119 Stat. 23, 99–100	Till v. SCS Credit Corp., 541 U.S. 465 (2004); Assocs. Commercial Corp. v. Rash, 520 U.S. 953 (1997)	Bankruptcy

Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–12	Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) (2d override); Snyder v. Harris, 394 U.S. 332 (1969); United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145 (1965); Chapman v. Barney, 129 U.S. 677 (1889); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)	Federal Jurisdiction & Procedure
108th Congress (2003–2004)		
Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, § 104, 118 Stat. 661, 663	Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982)	Antitrust Law
Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667–95	Koon v. United States, 518 U.S. 81 (1996)	Criminal Law
107th Congress (2001–2002)		
Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337–40	First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983)	Federal Jurisdiction & Procedure; Foreign Affairs

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804(a), 116 Stat. 745, 801	Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) (2d override)	Federal Jurisdiction & Procedure; Business Regulation
<i>Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 402(a), 116 Stat. 21, 40</i>	Gitlitz v. Comm'r, 531 U.S. 206 (2001)	Taxation
106th Congress (1999–2000)		
Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1464, 1486–90	United States v. Kozminski, 487 U.S. 931 (1988)	Criminal Law
Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999)		
§ 104(c)–(d)	Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25 (1996)	Banking & Financial Regulation
§ 302(a)	Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995)	Banking & Financial Regulation
105th Congress (1997–1998)		
<i>Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469, 3469–70</i>	Muscarello v. United States, 524 U.S. 125 (1998); Bailey v. United States, 516 U.S. 137 (1995)	Criminal Law

Digital Millennium Copyright Act, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2863–76 (1998)	Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)	Intellectual Property
Curt Flood Act of 1998, Pub. L. No. 105-297, § 3, 112 Stat. 2824, 2824	Flood v. Kuhn, 407 U.S. 258 (1972)	Antitrust
Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, tit. 5, § 523, 112 Stat. 2518, 2565–67	Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987)	Housing
Credit Union Membership Access Act, Pub. L. No. 105-219, § 101, 112 Stat. 913, 914–17 (1998)	Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998)	Banking & Financial Regulation
Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685		
§ 3001(a)	United States v. Janis, 428 U.S. 433 (1976); Welch v. Helvering, 290 U.S. 111 (1933)	Federal Jurisdiction & Procedure; Taxation
§ 3106(b)(1)	United States v. Williams, 514 U.S. 527 (1995)	Federal Jurisdiction & Procedure; Taxation
§ 3202(a)	United States v. Brockamp, 519 U.S. 347 (1997)	Taxation
§ 3401(a)	Comm'r v. Shapiro, 424 U.S. 614 (1976) (2d override); Laing v. United States, 423 U.S. 161 (1976) (2d override)	Federal Jurisdiction & Procedure; Taxation

§ 3411(a)	United States v. Arthur Young & Co., 465 U.S. 805 (1984)	Taxation
Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788		
§ 932(a)	Comm'r v. Soliman, 506 U.S. 168 (1993)	Taxation
§ 1282(a)	Comm'r v. Lundy, 516 U.S. 235 (1996)	Taxation
Balanced Budget Act of 1997, Pub. L. No. 105-33, tit. IV, subtit. H, 111 Stat. 251, 489-528 (1997)	Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990)	Entitlement Programs
Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37		
§ 101	Florence Cnty. Sch. Dist. Four v. Carter <i>ex rel.</i> Carter, 510 U.S. 7 (1993)	Civil Rights; Education
§ 617	Honig v. Students of the Cal. Sch. for the Blind, 471 U.S. 148 (1985)	Civil Rights; Education
104th Congress (1995-1996)		
Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847		
§ 206(a)	Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72 (1991)	Federal Jurisdiction & Procedure

§ 309	Pulliam v. Allen, 466 U.S. 522 (1984); Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719 (1980)	Civil Rights; Federal Jurisdiction & Procedure
<i>False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 3459</i>	Hubbard v. United States, 514 U.S. 695 (1995)	Criminal Law
Act of Oct. 1, 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022, 3022 (clarifying the rules governing removal of cases to federal court)	Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996)	Federal Jurisdiction & Procedure
Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, tit. 2, § 2305(a), 110 Stat. 3009–394, 3009–425	Heintz v. Jenkins, 514 U.S. 291 (1995)	Business Regulation
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009–546		
§ 304	Landon v. Plasencia, 459 U.S. 21 (1982)	Immigration
§ 301(a)	Rosenberg v. Fleuti, 374 U.S. 449 (1963)	Immigration
§ 604(a)	Rosenberg v. Yee Chien Woo, 402 U.S. 49 (1971)	Immigration

<i>Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 104-204, § 422(a), 110 Stat. 2874, 2926-27 (1996)</i>	Brown v. Gardner, 513 U.S. 115 (1994)	Veterans Affairs
Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211(c), 110 Stat. 2105, 2189-90	Sullivan v. Zebley, 493 U.S. 521 (1990)	Entitlement Programs
Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838-39	Comm'r v. Schleier, 515 U.S. 323 (1995); United States v. Burke, 504 U.S. 229 (1992)	Taxation
Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. 8, 110 Stat. 1321-66		
§ 803	McCarthy v. Madigan, 503 U.S. 140 (1992)	Federal Jurisdiction & Procedure; Prisons
§ 804(a)(5)	Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319 (1989)	Federal Jurisdiction & Procedure; Prisons
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214		
§ 101	Vasquez v. Hillery, 474 U.S. 254 (1986)	Habeas Corpus

§ 102	Barefoot v. Estelle, 463 U.S. 880 (1983); Nowakowski v. Maroney, 386 U.S. 542 (1967)	Habeas Corpus
§ 104	Thompson v. Keohane, 516 U.S. 99 (1995); Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Teague v. Lane, 489 U.S. 288 (1989); Granberry v. Greer, 481 U.S. 129 (1987); Rose v. Lundy, 455 U.S. 509 (1982); Jackson v. Virginia, 443 U.S. 307 (1979); Brown v. Allen, 344 U.S. 443 (1953)	Habeas Corpus
§ 105	Sanders v. United States, 373 U.S. 1 (1963)	Habeas Corpus
§ 106	Schlup v. Delo, 513 U.S. 298 (1995); McCleskey v. Zant, 499 U.S. 467 (1991); Kuhlmann v. Wilson, 477 U.S. 436 (1986)	Habeas Corpus
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56		
§ 101	La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986)	Telecommunications
§ 401	MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994)	Telecommunications
ICC Termination Act of 1995, Pub. L. No. 104-88, § 102, 109 Stat. 803, 804–52	Hayfield N. R.R. Co. v. Chi. & N.W. Transp. Co., 467 U.S. 622 (1984)	Transportation

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101, 109 Stat. 737, 737-49	Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)	Business Regulation
Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 3(9)-(10), 109 Stat. 691, 694-95	United States v. Harriss, 347 U.S. 612 (1954)	Government & Administration
Act of Nov. 15, 1995, Pub. L. No. 104-49, 109 Stat. 432	Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990)	Labor & Workplace
Paperwork Reduction Act of 1995, Pub. L. No. 104-13, § 2, 109 Stat. 163, 163-84	Dole v. United Steelworkers of Am., 494 U.S. 26 (1990)	Government & Administration
103d Congress (1993-1994)		
<i>Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106</i>		
§§ 113, 702(b)(2)(B)	United States v. Nordic Vill., Inc., 503 U.S. 30 (1992); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989)	Bankruptcy; Government & Administration
§ 301	Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993)	Bankruptcy
§ 305(c)	Rake v. Wade, 508 U.S. 464 (1993)	Bankruptcy
§ 310	Owen v. Owen, 500 U.S. 305 (1991)	Bankruptcy

Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 555(a), 108 Stat. 3518, 4057–58	<i>Suter v. Artist M.</i> , 503 U.S. 347 (1992)	Entitlement Programs
Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2(a), 108 Stat. 3149, 3149–69	<i>King v. St. Vincent's Hosp.</i> , 502 U.S. 215 (1991); <i>Monroe v. Standard Oil Co.</i> , 452 U.S. 549 (1981)	Veterans Affairs
<i>Riegle Community Development and Regulatory Improvement Act of 1994</i> , Pub. L. No. 103-325, § 411(c)(1), 108 Stat. 2160, 2253	<i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994)	Criminal Law
Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 3, 108 Stat. 694, 694–97	<i>Bray v. Alexandria Women's Health Clinic</i> , 506 U.S. 263 (1993)	Civil Rights
Negotiated Rates Act of 1993, Pub. L. No. 103-180, § 2(e), 107 Stat. 2044, 2047–48	<i>Maislin Indus., U.S., Inc., v. Primary Steel, Inc.</i> , 497 U.S. 116 (1990)	Transportation
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 103-121, § 111(d)(3), 107 Stat. 1153, 1165 (1993)	<i>United States v. Kras</i> , 409 U.S. 434 (1973)	Bankruptcy
Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13261(a), 107 Stat. 312, 532–38	<i>Newark Morning Ledger Co. ex rel. Harald Co. v. United States</i> , 507 U.S. 546 (1993)	Taxation

102d Congress (1991–1992)		
Rehabilitation Act Amendments of 1992, Pub. L. 102-569, §§ 102(p)(32), 506 (1992)	Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273 (1987)	Civil Rights; Labor Relations & Workplace
Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 211, 106 Stat. 3590, 3607–08	Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987)	Federal Jurisdiction & Procedure
Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102, 106 Stat. 1505, 1505–07	U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992)	Environmental Law; Government & Administration
<i>Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387</i>	Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) (1st override)	Business Regulation; Federal Jurisdiction & Procedure
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071		
§ 101	Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701 (1989); Patterson v. Mclean Credit Union, 491 U.S. 164 (1989)	Civil Rights; Labor Relations & Workplace
§ 102	Lehman v. Nakshian, 453 U.S. 156 (1981); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)	Civil Rights; Federal Jurisdiction & Procedure; Labor Relations & Workplace

§ 105	Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)	Civil Rights; Labor Relations & Workplace
§ 107	Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	Civil Rights; Labor Relations & Workplace
§ 108	Martin v. Wilks, 490 U.S. 755 (1989)	Civil Rights; Federal Jurisdiction & Procedure; Labor Relations & Workplace
§ 109	EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991)	Civil Rights; Labor Relations & Workplace
§ 112	Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989)	Civil Rights; Federal Jurisdiction & Procedure; Labor Relations & Workplace
§ 113	W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987)	Civil Rights; Federal Jurisdiction & Procedure
§ 114	Library of Cong. v. Shaw, 478 U.S. 310 (1986)	Civil Rights; Labor Relations & Workplace
<i>Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646, 646 (granting Indian tribes permanent criminal jurisdiction over Indians)</i>	Duro v. Reina, 495 U.S. 676 (1990)	Criminal Law; Indian Law

Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, § 102, 105 Stat. 130, 136-39	Demarest v. Manspeaker, 498 U.S. 184 (1991)	Federal Jurisdiction & Procedure
101st Congress (1989-1990)		
Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089		
§ 310	Finley v. United States, 490 U.S. 545 (1989); Aldinger v. Howard, 427 U.S. 1 (1976); Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) (1st override); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939)	Federal Jurisdiction & Procedure
§ 311	Leroy v. Great W. United Corp., 443 U.S. 173 (1979)	Federal Jurisdiction & Procedure
§ 313	Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Wilson v. Garcia, 471 U.S. 261 (1985)	Federal Jurisdiction & Procedure

Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067–77	<i>Boutilier v. INS</i> , 387 U.S. 118 (1967)	Immigration
Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789		
§ 2509	<i>Hughey v. United States</i> , 495 U.S. 411 (1990)	Criminal Law
§ 3103	<i>Pa. Dep't of Pub. Welfare v. Davenport</i> , 495 U.S. 552 (1990)	Bankruptcy; Criminal Law
Copyright Remedy Clarification Act, Pub. L. No. 101-553, § 2(a)(2), 104 Stat. 2749, 2749–50 (1990)	<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985) (2d override)	Intellectual Property
<i>Act of Nov. 15, 1990, Pub. L. No. 101-580, § 1(a), 104 Stat. 2863, 2863</i>	<i>Deepsouth Packing Co., v. Laitram Corp.</i> , 406 U.S. 518 (1972) (2d override)	Intellectual Property
Clean Air Act Amendments, Pub. L. No. 101-549, § 707(g), 104 Stat. 2399, 2683 (1990)	<i>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.</i> , 484 U.S. 49 (1987)	Environmental Law; Federal Jurisdiction & Procedure
Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6208, 104 Stat. 1388, 1388-307 to -08	<i>Sec'y v. California</i> , 464 U.S. 312 (1984)	Energy Policy; Federal Jurisdiction & Procedure; Federal Lands
<i>Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 103, 104 Stat. 1103, 1106–10</i>	<i>Dellmuth v. Muth</i> , 491 U.S. 223 (1989)	Civil Rights; Education

<i>Older Workers Benefit Protection Act</i> , Pub. L. No. 101-433, § 103, 104 Stat. 978, 978-81 (1990)	Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989)	Civil Rights; Labor Relations & Workplace
Civil Service Due Process Amendments, Pub. L. No. 101-376, § 2(a), 104 Stat. 461, 461-62 (1990)	United States v. Fausto, 484 U.S. 439 (1988)	Government & Administration; Labor Relations & Workplace
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 212, 103 Stat. 183, 222-43	Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp. <i>ex rel.</i> First S., F.A., 489 U.S. 561 (1989)	Business Regulation
100th Congress (1987-1988)		
Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 3(b)(2), 102 Stat. 4677, 4680	Carpenter v. United States, 484 U.S. 19 (1987)	Criminal Law
Act of Nov. 19, 1988, Pub. L. No. 100-703, § 201, 102 Stat. 4674, 4676 (1988)	Int'l Salt Co. v. United States, 332 U.S. 392 (1947); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942)	Antitrust; Intellectual Property
Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988)		

§ 1016(c)	Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988); Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938)	Federal Jurisdiction & Procedure
§ 1019(a)	Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	Federal Jurisdiction & Procedure
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, §§ 5–6, 102 Stat. 4563, 4564–65	Franchise Tax Bd. v. U.S. Postal Serv., 467 U.S. 512 (1984)	Government & Administration
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181		
§ 6470(a)	Bifulco v. United States, 447 U.S. 381 (1980)	Criminal Law
§ 7603	McNally v. United States, 483 U.S. 350 (1987)	Criminal Law
Veterans' Judicial Review Act, Pub. L. No. 100-687, §§ 201–303, 102 Stat. 4105, 4109–22 (1988)	Traynor v. Turnage, 485 U.S. 535 (1988); Johnson v. Robison, 415 U.S. 361 (1974)	Federal Jurisdiction & Procedure; Veterans Affairs
Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 11, 102 Stat. 2467, 2472–79 (1988)	California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	Indian Law

Prompt Payment Act Amendments of 1988, Pub. L. No. 100-496, § 9(a)(2), 102 Stat. 2455, 2460-63	F.D. Rich Co. v. United States <i>ex rel.</i> Indus. Lumber Co., 417 U.S. 116 (1974)	Government & Administration
Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 14, 102 Stat. 1066, 1078	Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	Energy Policy
<i>Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28-29</i>	Grove City Coll. v. Bell, 465 U.S. 555 (1984)	Civil Rights; Education
Water Quality Act of 1987, Pub. L. No. 100-4, § 306, 101 Stat. 7, 35-37	Chem. Mfrs. Ass'n v. NRDC, Inc., 470 U.S. 116 (1985)	Environmental Law
99th Congress (1985-1986)		
Sexual Abuse Act of 1986, Pub. L. No. 99-654, § 2, 100 Stat. 3660, 3660-63	Williams v. United States, 327 U.S. 711 (1946)	Criminal Law
Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(b)(1), 100 Stat. 3510, 3511	Cleveland v. United States, 329 U.S. 14 (1946); Caminetti v. United States, 242 U.S. 470 (1917)	Criminal Law
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359		
§ 101(a)	De Canas v. Bica, 424 U.S. 351 (1976); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973)	Criminal Law; Immigration

§ 103(a)	United States v. Campos-Serrano, 404 U.S. 293 (1971)	Immigration
§ 315(b)	INS v. Phinpathya, 464 U.S. 183 (1984)	Immigration
Act of Nov. 4, 1986, Pub. L. No. 99-598, 100 Stat. 3351 (amending Title 28, which relates to quiet title actions against the United States)	Block v. N.D. <i>ex rel.</i> Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983)	Federal Lands
Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 3, 100 Stat. 3342, 3342	Johnson v. Mayor & City Council, 472 U.S. 353 (1985)	Civil Rights; Labor Relations & Workplace
False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 6, 100 Stat. 3153, 3158–68	United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983)	Criminal Law
Tax Reform Act of 1986, Pub. L. No. 99-514, § 631(c), 100 Stat. 2085, 2272	Gen. Utils. & Operating Co. v. Helvering, 296 U.S. 200 (1935)	Taxation
Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341, 100 Stat. 1874, 2037–38	Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667 (1986); United States v. Erika, Inc., 456 U.S. 201 (1982)	Entitlement Programs; Federal Jurisdiction & Procedure
Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 301(a), 100 Stat. 1848, 1868–72	United States v. N.Y. Tel. Co., 434 U.S. 159 (1977)	Criminal Law

<i>Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845</i>	Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (1st override)	Civil Rights; Government & Administration; Labor Relations & Workplace
Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 114(a), 100 Stat. 1613, 1652	Exxon Corp. v. Hunt, 475 U.S. 355 (1986)	Environmental Law
Air Carrier Access Act of 1986, Pub. L. No. 99-435, § 2(a), 100 Stat. 1080, 1080	U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986)	Civil Rights; Transportation
Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796-97	Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Smith v. Robinson, 468 U.S. 992 (1984)	Civil Rights; Education
Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, 637	Lambert Run Coal Co. v. Balt. & Ohio R.R. Co., 258 U.S. 377 (1922)	Federal Jurisdiction & Procedure
Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986)		
§ 101(5)	Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983)	Criminal Law
§ 104(a)(3)	United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)	Criminal Law
Act of Dec. 23, 1985, Pub. L. No. 99-200, 99 Stat. 1663	California v. Nevada, 447 U.S. 125 (1980)	Federal Lands

98th Congress (1983–1984)		
Patent Law Amendments Act of 1984, Pub. L. No. 98- 622, § 101, 98 Stat. 3383, 3383	Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972) (1st override)	Intellectual Property
<i>Local Government Antitrust Act of 1984, Pub. L. No. 98-544, § 3, 98 Stat. 2750, 2750</i>	Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. La. Power & Light Co., 435 U.S. 389 (1978)	Antitrust
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. 2, 98 Stat. 1976		
§ 1005(a)	Busic v. United States, 446 U.S. 398 (1980)	Criminal Law
§ 1107	Williams v. United States, 458 U.S. 279 (1982)	Criminal Law
§ 1602	United States v. Maze, 414 U.S. 395 (1974)	Criminal Law
Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98- 426, 98 Stat. 1639		
§ 4	Wash. Metro. Area Transit Auth. v. Johnson, 467 U.S. 925 (1984)	Labor Relations & Workplace; Maritime
§ 21(c)	Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74 (1980)	Health & Safety; Labor Relations & Workplace; Maritime

Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494		
§ 211	Comm'r v. Standard Life & Accident Ins. Co., 433 U.S. 148 (1977)	Taxation
§ 421(a)	United States v. Davis, 370 U.S. 65 (1962)	Taxation
§ 422(a)	Comm'r v. Lester, 366 U.S. 299 (1961)	Taxation
§ 1026	Diedrich v. Comm'r, 457 U.S. 191 (1982)	Taxation
Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390-91	NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984)	Bankruptcy; Labor Relations & Workplace
Railroad Retirement Solvency Act of 1983, Pub. L. No. 98-76, § 419(a), 97 Stat. 411, 438	Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979)	Pensions
Social Security Amendments of 1983, Pub. L. No. 98-21, § 327, 97 Stat. 65, 126-27	Rowan Cos. v. United States, 452 U.S. 247 (1981)	Taxation
97th Congress (1981-1982)		
Act of Jan. 14, 1983, Pub. L. No. 97-473, § 301, 96 Stat. 2605, 2611-12 (amending ERISA)	Agsalud v. Standard Oil Co. of Cal., 454 U.S. 801 (1981)	Pensions

Futures Trading Act of 1982, Pub. L. No. 97-444, § 235, 96 Stat. 2294, 2322–24	Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	Business Regulation
Act of Dec. 29, 1982, Pub. L. No. 97-393, 96 Stat. 1964 (amending the Clayton Act)	Pfizer Inc. v. Gov't of India, 434 U.S. 308 (1978)	Antitrust
Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 702(a), 96 Stat. 1469, 1538	Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981)	Business Regulation
Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. 10, § 1002(a), 96 Stat. 730, 730–35 (1982)	McCarty v. McCarty, 453 U.S. 210 (1981)	Armed Forces
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a), 96 Stat. 324, 622	United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978)	Taxation
<i>Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134</i>	City of Mobile, Ala. v. Bolden, 446 U.S. 55 (1980)	Civil Rights (Voting)
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 39–40	United States v. King, 395 U.S. 1 (1969)	Federal Jurisdiction & Procedure; Government & Administration
Act of Dec. 29, 1981, Pub. L. No. 97-124, 95 Stat. 1666 (extending federal tort claims provisions to acts or omissions by members of the National Guard)	Maryland <i>ex rel.</i> Levin v. United States, 381 U.S. 41 (1965)	Armed Forces; Veterans Affairs

Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 8, 95 Stat. 1611, 1616	Reid v. INS, 420 U.S. 619 (1975)	Immigration
Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2312(a), 95 Stat. 357, 853	Burns v. Alcala, 420 U.S. 575 (1975)	Entitlement Programs
96th Congress (1979–1980)		
Miscellaneous Revenue Act of 1980, Pub. L. No. 96-605, § 107, 94 Stat. 3521, 3524	Comm’r v. Kowalski, 434 U.S. 77 (1977) (2d override)	Taxation
Equal Access to Justice Act, Pub. L. No. 96-481, tit. 2, § 204, 94 Stat. 2325, 2327–29 (1980)	Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975) (2d override)	Federal Jurisdiction & Procedure; Government & Administration
Installment Sales Revision Act of 1980, Pub. L. No. 96-471, § 2(a), 94 Stat. 2247, 2247–53	Pac. Nat’l Co. v. Welch, 304 U.S. 191 (1938)	Taxation
Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154		
§ 3	Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)	Federal Jurisdiction & Procedure
§ 6	United States v. Am. Bldg. Maint. Indus., 422 U.S. 271 (1975)	Antitrust

Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, § 2, 94 Stat. 939, 939 (1980)	Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)	Antitrust
Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7, 94 Stat. 349, 352–53 (1980)	Wilwording v. Swenson, 404 U.S. 249 (1971)	Civil Rights
Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (extending the protections of 42 U.S.C. § 1983 to rights violations occurring under color of the laws of the District of Columbia)	Dist. of Columbia v. Carter, 409 U.S. 418 (1973)	Civil Rights
Energy and Water Development Appropriations Act of 1980, Pub. L. No. 96-69, tit. 4, 93 Stat. 437, 449–50 (authorizing and directing the Tennessee Valley Authority to “complete construction, operate and maintain the Tellico Dam and Reservoir project”)	TVA v. Hill, 437 U.S. 153 (1978) (2d override)	Environmental Law; Federal Lands
95th Congress (1977–1978)		
Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 7, 92 Stat. 3751, 3762	TVA v. Hill, 437 U.S. 153 (1978) (1st override)	Environmental Law; Federal Lands
Revenue Act of 1978, Pub. L. No. 95-600, § 701(z), 92 Stat. 2763, 2921	United States v. W.M. Webb, Inc., 397 U.S. 179 (1970) (2d override)	Taxation

Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (making bankruptcy law uniform and enacting Title 11 of the U.S. Code)		
§ 101, new § 507(a)(4)	Joint Indus. Bd. of the Elec. Indus. v. United States, 391 U.S. 224 (1968); United States v. Embassy Rest., Inc., 359 U.S. 29 (1959)	Bankruptcy
§ 101, new § 523(a)(3)	Birkett v. Columbia Bank, 195 U.S. 345 (1904)	Bankruptcy
§ 101, new § 523(a)(6)	Tinker v. Colwell, 193 U.S. 473 (1904)	Bankruptcy
§ 101, new § 541(a)(1)	Lines v. Frederick, 400 U.S. 18 (1970); Lockwood v. Exch. Bank, 190 U.S. 294 (1903)	Bankruptcy
§ 101, new § 547(b)	United States v. Randall, 401 U.S. 513 (1971); Segal v. Rochelle, 382 U.S. 375 (1966)	Bankruptcy
§ 241, new § 1471	Phelps v. United States, 421 U.S. 330 (1975)	Bankruptcy; Federal Jurisdiction & Procedure; Taxation
§ 401, new § 101	Am. United Mut. Life Ins. Co. v. City of Avon Park, Fla., 311 U.S. 138 (1940)	Bankruptcy

Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383		
§ 7	Crown Coat Front Co. v. United States, 386 U.S. 503 (1967); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966)	Federal Jurisdiction & Procedure; Government & Administration
§§ 8(g), 14(h)	S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972)	Government & Administration
§ 10(b)	United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963)	Federal Jurisdiction & Procedure; Government & Administration
<i>Act of Oct. 31, 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (amending title VII of the Civil Rights Act of 1964 to prohibit pregnancy-based sex discrimination)</i>	Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976)	Civil Rights; Labor Relations & Workplace
Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 102, 92 Stat. 1783, 1786–88	United States v. U.S. Dist. Court (<i>Keith</i>), 407 U.S. 297 (1972)	National Security
<i>Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 30, 92 Stat. 1705, 1731</i>	Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)	Transportation
Act of Oct. 7, 1978, Pub. L. No. 95-427, § 4, 92 Stat. 996, 997–98 (amending the Internal Revenue Code to disallow regulation of fringe benefits)	Comm’r v. Kowalski, 434 U.S. 77 (1977) (1st override)	Taxation

<i>Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189, 189</i>	United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)	Civil Rights; Labor Relations & Workplace
<i>Clean Water Act of 1977, Pub. L. No. 95-217, § 61, 91 Stat. 1566, 1598</i>	EPA v. Cal. ex rel. State Water Res. Control Bd., 426 U.S. 200 (1976) (1st override)	Environmental Law
<i>Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685</i>		
§ 116	Hancock v. Train, 426 U.S. 167 (1976)	Environmental Law
§ 127	Fri v. Sierra Club, 412 U.S. 541 (1973)	Environmental Law
94th Congress (1975–1976)		
Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792	United States v. Midwest Oil Co., 236 U.S. 459 (1915)	Federal Lands
<i>Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (defining the jurisdiction of United States magistrates)</i>	Wingo v. Wedding, 418 U.S. 461 (1974)	Federal Jurisdiction & Procedure
Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 507(a)(2), 90 Stat. 2667, 2688	Philbrook v. Glodgett, 421 U.S. 707 (1975)	Entitlement Programs

<i>The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641</i>	Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (1st override)	Civil Rights; Federal Jurisdiction & Procedure
Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (amending Title 17 of the U.S. Code, dealing with copyrights)		
§ 101	Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908)	Intellectual Property
§ 108	Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975)	Intellectual Property
§ 111	Teleprompter Corp. v. CBS, 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)	Intellectual Property
§ 301	Goldstein v. California, 412 U.S. 546 (1973)	Intellectual Property
<i>Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520</i>		
§ 1204(a)	Comm'r v. Shapiro, 424 U.S. 614 (1976) (1st override); Laing v. United States, 423 U.S. 161 (1976) (1st override)	Federal Jurisdiction & Procedure; Taxation

§ 1205(a)	United States v. Bisceglia, 420 U.S. 141 (1975); Donaldson v. United States, 400 U.S. 517 (1971)	Federal Jurisdiction & Procedure; Taxation
§ 1207(e)	United States v. W.M. Webb, Inc., 397 U.S. 179 (1970) (1st override)	Taxation
§ 1306(a)	Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); Alexander v. "Ams. United" Inc., 416 U.S. 752 (1974)	Federal Jurisdiction & Procedure; Taxation
§ 2009(a)	United States v. Byrum, 408 U.S. 125 (1972)	Taxation
Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394-96	Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972)	Antitrust
Act of Sept. 13, 1976, Pub. L. No. 94-410, § 8, 90 Stat. 1249, 1251-52 (amending the Packers and Stockyards Act of 1921)	Mahon v. Stowers, 416 U.S. 100 (1974)	Bankruptcy
<i>Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247-48 (1976)</i>	Adm'r v. Robertson, 422 U.S. 255 (1975)	Government & Administration
Act of Aug. 12, 1976, Pub. L. No. 94-381, § 3, 90 Stat. 1119, 1119 (amending the requirement for a three-judge court in certain cases)	Hagans v. Lavine, 415 U.S. 528 (1974)	Federal Jurisdiction & Procedure

93d Congress (1973–1974)		
Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 201, 88 Stat. 2183, 2193 (1975)	FTC v. Bunte Bros., Inc., 312 U.S. 349 (1941)	Antitrust
Act of Jan. 2, 1975, Pub. L. No. 93-600, 88 Stat. 1955 (amending the Trademark Act by extending the time to file oppositions, eliminating certain filing requirements, and providing for the award of attorney fees)	Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)	Federal Jurisdiction & Procedure; Intellectual Property
Act of Nov. 21, 1974, Pub. L. No. 93-502, §§ 1(b)(2), 2(a), 88 Stat. 1561, 1561–63 (amending the Freedom of Information Act)	EPA v. Mink, 410 U.S. 73 (1973)	Government & Administration; National Security
Act of Oct. 26, 1974, Pub. L. No. 93-481, § 2, 88 Stat. 1455, 1455 (amending the Controlled Substance Act)	Warden v. Marrero, 417 U.S. 653 (1974)	Criminal Law
Act of Aug. 7, 1974, Pub. L. No. 93-368, § 5, 88 Stat. 420, 420–21 (amending the statute regarding employment compensation relating to individuals and vessels operated by or for any United States agency)	Emps. of the Dep't of Philpott v. Essex Cnty. Welfare Bd., 409 U.S. 413 (1973)	Entitlement Programs

<i>Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 55, 61</i>	Pub. Health & Welfare of Mo. v. Dep't of Pub. Health & Welfare of Mo., 411 U.S. 279 (1973)	Federal Jurisdiction & Procedure; Labor Relations & Workplace
Act of Dec. 27, 1973, Pub. L. No. 93-201, 87 Stat. 838 (amending the Interstate Commerce Act)	Gulf-Canal Lines, Inc. v. United States, 386 U.S. 348 (1967)	Transportation
92d Congress (1971–1972)		
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251		
§ 18(a), new 33 U.S.C. § 905(a)	Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969)	Labor Relations & Workplace; Maritime
§ 18(a), new 33 U.S.C. § 905(b)	Jackson v. Lykes Bros. S.S. Co., 386 U.S. 731 (1967); Reed v. The Yaka, 373 U.S. 410 (1963); Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp., 350 U.S. 124 (1956); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)	Labor Relations & Workplace; Maritime
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103	Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971)	Civil Rights; Labor Relations & Workplace

Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(31), 85 Stat. 348, 352–53 (amending the Military Selective Service Act of 1967)	Toussie v. United States, 397 U.S. 112 (1970)	Armed Forces; National Security
Act of Aug. 10, 1971, Pub. L. No. 92-79, 85 Stat. 285 (amending the Ship Mortgage Act of 1920)	Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Cal., 310 U.S. 268 (1940); United States v. Carver, 260 U.S. 482 (1923)	Government & Administration; Maritime
91st Congress (1969–1970)		
Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 702(a), 84 Stat. 922, 935–36	Alderman v. United States, 394 U.S. 165 (1969)	Criminal Law
Newspaper Preservation Act, Pub. L. No. 91-353, § 4, 84 Stat. 466, 467 (1970)	Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969)	Antitrust
Tax Reform Act of 1969, Pub. L. No. 91-172, § 121(b), 83 Stat. 487, 537–45	Comm'r v. Brown, 380 U.S. 563 (1965)	Taxation
90th Congress (1967–1968)		
Act of Oct. 17, 1968, Pub. L. No. 90-590, 82 Stat. 1153 (making amendments relating to false representation by mail)	Reilly v. Pinkus, 338 U.S. 269 (1949)	Government & Administration; Health & Safety

Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (1968)	Arizona v. California, 373 U.S. 546 (1963)	Federal Lands
Act of Sept. 26, 1968, Pub. L. No. 90-514, 82 Stat. 867 (amending the Federal Aviation Act of 1958)	World Airways, Inc. v. Pan Am. World Airways, Inc., 391 U.S. 461 (1968)	Transportation
Act of July 31, 1968, Pub. L. No. 90-446, 82 Stat. 474 (amending Title III of the Packers and Stockyards Act of 1921)	Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass'n, 356 U.S. 282 (1958)	Antitrust; Business Regulation
Act of Apr. 11, 1968, Pub. L. No. 90-284, § 101, 82 Stat. 73, 73-75 (amending the Civil Rights Act of 1968)	United States v. Guest, 383 U.S. 745 (1966)	Civil Rights

Appendix 2: Coding Overridden Supreme Court Statutory Interpretation Decisions

This Appendix elaborates on the coding methodology we followed for each of the 275 Supreme Court statutory interpretation decisions overridden by Congress, 1967–2011.

I. Basic Facts

Biographical Information

We listed the full case name, the official U.S. Reports citation, and the exact date for each case.

For cases decided after the 1946 Term, we listed the Spaeth number for each case (available at <http://scdb.wustl.edu/data.php>). We also assigned every case a unique “override case number” that extends to cover the cases excluded from the Spaeth database.

Subject Matter of the Issue Before the Court

Antitrust = 1	Federal Lands = 16
Armed Forces = 2	Health & Safety = 17
Banking & Finance = 3	Housing = 18
Bankruptcy = 4	Immigration = 19
Business Regulation = 5	Indian Affairs = 20
Civil Rights = 6	Labor Relations & Workplace = 21
Intellectual Property = 7	Maritime = 22
Criminal Law = 8	Pensions = 23
Education = 9	Taxation = 24
Energy = 10	Telecommunications = 25
Entitlement Programs = 11	Transportation = 26
Environment = 12	Veterans Affairs = 27
Federal Government = 13	National Security = 28
Foreign Affairs = 14	Habeas Corpus = 29
Federal Jurisdiction & Procedure = 15	Prisons = 30

Note: A case can have more than one subject matter. For example, a Title VII case posing a procedural issue would earn three subject-matter numbers, 6 + 15 + 21. See, for example, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

Was the Court's Decision Unanimous?

No = 0

Yes = 1

Note: Some cases included both statutory and constitutional issues, and a number of cases included more than one statutory issue; this study focused only on the statutory points of law overridden by Congress. Thus, a decision was coded as unanimous if there was no dissent from the disposition of the relevant statutory issue, even if there was nonunanimity as to a constitutional issue or another statutory issue in the case.

Number of Concurring Opinions?

Note: We noted only concurring opinions relevant to the statutory issue that was overridden. We considered opinions concurring in the judgment almost always relevant and also coded for most (but not all) concurring opinions.

Number of Dissenting Opinions?

Note: As above, only dissents as to statutory issues are noted.

Authors of Opinions

We coded for authors of majority, plurality, concurring, and dissenting opinions. The numbers for each Justice were as follows:

Kagan = 1	Marshall = 17	Burton = 34
Sotomayor = 2	White = 18	Rutledge = 35
Alito = 3	Brennan = 19	Murphy = 36
Roberts = 4	Goldberg = 21	Stone = 37
Breyer = 5	Stewart = 22	Butler = 38
Ginsburg = 6	Whitaker = 23	McKenna = 39
Thomas = 7	Harlan = 24	Cardozo = 40
Souter = 8	Warren = 25	Hughes = 41
Kennedy = 9	Burton = 26	J. Lamar = 42
Scalia = 10	Clark = 27	McReynolds = 43
O'Connor = 11	Minton = 28	Peckham = 46
Stevens = 12	Vinson = 29	L. Lamar = 47
Powell = 13	Frankfurter = 30	Marshall = 48
Rehnquist = 14	Jackson = 31	Per Curiam = 999
Blackmun = 15	Douglas = 32	
Burger = 16	Black = 33	

Votes of Individual Justices

The vote of each Justice on the Court at the time of the Court's decision in the case is recorded based upon the following code numbers:

Joined Majority Opinion = 1

Concurring Opinion = 2

Dissented = 3

Did Not Participate = 999

II. Interpretive Reasoning

Every opinion in every case was coded according to standard modes of statutory argumentation; the modes of argument are outlined below. For each opinion, each method of interpretation was coded with one of the following numbers:

Author (of the opinion) does not refer to this kind of argument = 999

Author refers to this kind of argument but does not rely on it = 1

Author relies on this kind of argument to support the result reached = 2

Author relies on this kind of argument as a central justification = 3

Author relies on this kind of argument as the central justification = 4

Plain Meaning

The author considers how an ordinary speaker would interpret the relevant statutory language, how words are defined in dictionaries, and what ordinary rules of grammar and syntax would suggest, as well as linguistic canons. If an opinion discussed the text and found it ambiguous, it was coded as 1; if the opinion found a textual "plain meaning," it was coded 2 or 3 depending on the reliance on this plain meaning in the opinion; if the opinion rested almost entirely on plain meaning, it was coded as 4. We also coded for the primary textual canons, to wit:

Dictionary Canon, asking how dictionaries or thesauruses define words and phrases;

Grammar Canon, considering the meaning of phrases and clauses parsed according to accepted precepts of grammar and syntax;

Inclusio unius est exclusio alterius, a presumption of negative implication, i.e., including one item suggests the exclusion of all others;

Noscitur a sociis and ejusdem generis, presumptions of similarity, i.e., a general word in a list should be understood in light of the similarity among the other words in a list (*noscitur*);

Common Law Canon, a presumption favoring the common law meaning of legal terms of art;

Absurd Results Canon, allowing departure from the plain meaning rule when it would generate absurd results.

Whole Act and Whole Code

This method of analysis asks which interpretation is most consistent with the entire statute (i.e., the whole act) or with other provisions of law (i.e., the whole code). We also coded for the primary holistic canons, to wit:

Consistent Usage Canon, presuming that a key term has the same meaning every time it is used in a statute or in the code, unless there is a specific definition or other evidence to the contrary;

Canon Against Surplusage, presuming that every statutory word or phrase adds something to the statute, and therefore presuming against interpretations that would leave some language superfluous or redundant;

Canon of Meaningful Variation, presuming that different terms have different meanings;

Principle of Analogy, whereby the author extends one statutory provision to resolve an ambiguity elsewhere;

Canon Against Implied Repeals, strongly presuming that new statutes do not implicitly repeal existing statutory provisions and rules.

Stare Decisis

The author considers whether an interpretation is required by, consistent with, or prohibited by authoritative binding statutory precedents. If an opinion only mentioned precedents but declined to find any that were dispositive or even persuasive, it was coded 1. If the author relied on precedent, including the reasoning found in precedent, it was coded 2. If the opinion relied critically or almost exclusively on statutory precedents, it was coded 3 or 4.

Legislative History

The author considers the history of legislative study, discussion, and voting prior to the enactment of a statute, consulting such materials as committee reports, public statements by sponsors of legislation, and formal votes and enactment. We followed the 1–4 coding method described above. We also coded for the primary canons dealing with special kinds of legislative history, to wit:

Statutory History, or the formal progression of enacted laws, including laws repealed or displaced by a new statute as well as amendments to that statute;

Legislative Acquiescence, where the author infers from legislative deliberations (or lack thereof) as well as formal action (such as amending a statute) a general legislative willingness to accept an agency or court interpretation;

Subsequent Legislative History, or the history of legislative study, discussion, and voting after the enactment of a statute.

Legislative Purpose

The author considers which interpretation will best advance the purposes and goals of the congressional project—that will eliminate or ameliorate the mischief that called forth the statute. We followed the 1–4 coding method described above.

Avoidance Canon

When a statute is susceptible of two readings, one of which raises “serious constitutional questions,” the author favors the reading that “avoids” those questions. We followed the 1–4 coding method described above. There are a number of other canons, or cluster of canons, that are also founded upon constitutional values:

Due Process Canons, especially the rule of lenity, which requires a clear statement of the elements of a crime before the government can impose criminal penalties on a person;

Federalism Canons, presuming that Congress does not normally intend to preempt states’ use of their traditional police powers, that Congress does not abrogate state Eleventh Amendment immunity without a super-clear statement, or that Congress does not intend to impose conditions on grants to the states without a clear description of the condition;

Sovereign Immunity Canons, strongly presuming against waiver or abrogation of sovereign immunity from lawsuits and liability.

Practicality and Other Substantive Canons

The author considers the practical effects of one interpretation as opposed to another: Which interpretation is easier to administer? Which imposes fewer costs on society? Likewise, there are many other substantive canons, such as the presumption against the extraterritorial reach of statutes.

Invitation to Override

The author lends rather indirect support to her or his result by observing that any policy problems or unfairness in the result demanded by the application of legal principles can be corrected by Congress—through a statutory override.

- 1 = opinion mentioned the possibility that Congress can pass a new statute
- 2 = opinion more explicitly “invited” Congress to intervene or even “correct” the Court’s result
- 3 = opinion made the plea for intervention a major point concluding its legal discussion
- 4 = the plea for intervention was the only point of the opinion (all 4s were concurrences)

In addition to the strength of the override invitation, we coded for whether there was invitation in the majority, the dissent, or a concurring opinion.

Political Valence of Decision

- Liberal = 0
- Conservative = 1
- Mixed or Unclear = 2

Note: Interpretations were coded as liberal if the Court’s decision favored the interests of bankruptcy debtors, antitrust and securities plaintiffs, civil rights plaintiffs and other victims of discrimination, criminal defendants, energy consumers, claimants seeking information or entitlement benefits from the government, citizens demanding environmental protection, plaintiffs seeking access to federal courts, governmental and private employees, persons benefiting from health/safety protections, immigrants, Native Americans, claimants opposing intellectual property interests, pension beneficiaries and state regulators of pension funds, taxpayers, telecommunications and transportation consumers, students and their parents seeking educational benefits, and tenants.

Interpretations were coded as conservative if the Court’s decision favored the interests of bankruptcy creditors, antitrust and securities defendants, alleged discriminators in civil rights cases, criminal prosecutors, energy companies, agencies withholding information, government institutions paying for statutory entitlements, companies accused of polluting the environment, defendants opposing access to federal courts, governmental and private employers, defendants charged with violating health/safety rules, officials opposing the rights of immigrants, state and federal entities denying claims by Native Americans, holders of intellectual property interests, pension funds and their managers, tax collectors, telecommunications and transportation companies, schools and school boards, and landlords.

Interpretations were coded as neutral or mixed if the agency interpretation was liberal on one issue and conservative on another.

Regulatory Valence of the Decision

The political valence is only half the story. We were interested not only in which side of the political spectrum “won,” but also whether the decision was libertarian (i.e., reducing regulation of the subject-matter area) or proregulatory (increasing such regulation). Generally a liberal political outcome corresponded with a decision that upheld a regulation of the relevant subject-matter area. But not always. Each side of the political spectrum favors more regulation in some areas and less in others. For example, in habeas we coded the political valence of a decision restricting habeas petitions as “conservative,” but we gave this outcome a proregulatory valence because it increased the regulation governing habeas petitions and cut back on the freedom with which judges could grant these petitions.

0 = Proregulatory

1 = Libertarian/antiregulatory

Did Majority and Dissent Clash on Plain Meaning?

Neither Majority nor Dissent Found Plain Meaning = 0

Majority Plain Meaning, Dissent Not = 1

Dissent Plain Meaning, Majority Not = 2

Both Majority and Dissent Found Plain meaning = 3

III. Agency Interpretations

In most of the cases that provoked overrides, the Court had before it the interpretation favored by a federal department or agency. Typically, the agency’s position was presented to the Court through a brief prepared by the Office of the Solicitor General, which presents a united Executive Branch voice to the Justices.

Was There an Agency Interpretation Before the Court?

No = 0

Yes = 1

Decision with Respect to Agency

Case decided in favor of agency’s interpretation = 0

Case decided against agency’s interpretation = 1

Neutral or Mixed decision = 2

No agency interpretation on which to decide = 999

Was the Agency Acting Pursuant to Congressional Delegation of Lawmaking Authority?

No = 0

Yes = 1

Note: To make this determination, the coder examined the underlying statutory authorization under which the agency was rendering the interpretation in suit. Agencies were coded as *acting pursuant to congressional delegation of lawmaking authority* if they were acting pursuant to a statutory authorization that met *either* the strict Merrill–Watts criterion (explained in the next Note) or the more lenient criterion developed by the federal courts in the 1970s. The Supreme Court’s opinion in *United States v. Mead Corp.*, 533 U.S. 218 (2001), includes all the cases that would be coded “yes” under Merrill–Watts and probably includes all or almost all of the cases that would be coded “yes” under the more liberal approach. *Mead* also theoretically includes some cases falling outside both categories, namely, those where there has been an “implicit” delegation of lawmaking authority, considering the broad context of the legislation. *Mead* did not supply sufficient guidance for this study to use in coding statutory delegations, and the lower courts have not been able to derive predictable standards, either. Hence, cases are not coded for *Mead*’s residual category, and delegated lawmaking authority under *Mead* might include some cases, but probably very few if any, that are not so coded under this study’s standards.

Type of Delegation

Delegation according to strict (Merrill–Watts) approach = 0

Delegation according to lenient approach = 1

Not Applicable = 999

Note: An agency rule or order was coded as falling under the *strict approach* if the statutory delegation met the rigorous standard set forth in Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). For statutes enacted before 1973, the Merrill–Watts standard requires that the statute vest an agency with the authority to issue rules or orders whose violation carries with it the possibility of immediate sanctions. Statutory delegations that *do* meet the Merrill–Watts standard include the Federal Water Pollution Control Act (as amended) § 307 (EPA) and § 403 et al. (Army Corps); the Longshore and Harbor Workers’ Compensation Act, delegating adjudication authority to OWCP within the Department of Labor; the Securities and Exchange Act § 10(b) (SEC); the Federal Power Act § 824e (FPC, now FERC). Statutory authorizations to the INS to detain, adjudicate, and deport noncitizens have the same lawmaking-

delegation feature. Some agencies, such as the IRS (under the IRC) and the DOL (under the FLSA) do not have lawmaking authority under their general delegations, but their authorizing statutes have been amended to provide specific lawmaking authority (i.e., meeting Merrill–Watts) to address certain problems.

Agency Format

Legislative Rule or Executive Order = 0

Formal Adjudication = 1

Informal Agency Interpretation = 2

Informal Interpretation

Agency Litigating Position = 1

Interpretative Rule/Guidance = 2

Agency Manual or Letter = 3

Agency/Solicitor General Amicus Brief = 4

Not Applicable = 999

Notice-and-Comment Rulemaking

Did the agency's interpretation go through notice-and-comment rulemaking?

No = 0

Yes = 1

Continuity (Agency position is . . .)

Longstanding and Fairly Stable = 0

Evolving = 1

Recent = 2

Not applicable = 999

Note: An agency position was coded as *longstanding and fairly stable* if the agency had publicly and stably adhered to that same interpretation for a number of years before the Supreme Court took the case. The coding did *not* rely on a bright-line cut-off point, such as any interpretation that was ten years old counted as longstanding. The main reason is that the category is “longstanding *and* fairly stable,” so time is not determinative without a judgment of stability. For recent statutes, therefore, a longstanding and fairly stable interpretation could be embodied in a formal declaration that was less than a decade old; if the agency had taken the same position since the early days of its enforcement of the statute, the position was coded as longstanding and fairly stable. For older statutes, an interpretation was not

coded as longstanding and fairly stable unless the relevant agency had adhered to it, without wobbling, for a somewhat longer period of time. As before, the coding was attentive to whether the agency's position was consistent with its prior ones.

Evidence of a continuing agency interpretation was culled from the briefs in the case and from the Court's opinion. The agency position did not have to be reflected in a formal rule or adjudication but did need to have repeated (quasi-)public expression over a period of time. In criminal cases, a pattern of lower court opinions accepting or rejecting the Department of Justice's interpretation over a period of five years or more was sufficient evidence of a longstanding and fairly stable interpretation on the part of the DOJ (which of course rarely engages in national rulemaking to announce its interpretations of the criminal code).

If Recent, Because. . .

New Issue for Agency = 0

New Administration = 1

New Statute = 2

Practical Experience = 3

Litigating Position = 4

Not Applicable = 999

Note: An issue was coded as a *new issue for the agency* when the agency addressed the precise issue only recently, based on the evidence outlined in the previous Note. Often agencies will take positions on new issues when the Supreme Court requests an amicus brief from the Solicitor General; often the whole point of the Court's request is probably to get the Solicitor General or the agency to think about an issue it has not taken a public position on, and so many of these cases will be coded as new issue for the agency. This is especially true in bankruptcy cases, where there is no agency in charge of bankruptcy policy, but the Court frequently asks for Solicitor General briefs on Bankruptcy Act issues.

Briefs Filed by State Attorneys General

0 = No state filed a brief on the statutory question

1 = At least one state filed a brief on the statutory question

Note: When a state did file a brief, we also recorded the number of states that signed on to the brief.

Deference Regime Invoked

No Regime Indicated, Directly or Indirectly = 0

Antideference (Lenity) = 1

Consultative (*Skidmore*-Lite) Deference = 2

Skidmore or similar = 3

Beth Israel et al. = 4

Chevron = 5

Seminole Rock = 6

Curtiss-Wright (Foreign Affairs and National Security) = 7

Note: “Deference regime invoked” captures the approach the Court takes towards agency deference. It does not measure whether the Court opinion was ultimately in favor of the agency interpretation, which is captured by the “decision with respect to agency” variable. Indeed, every deference regime includes both cases in which the agency interpretation is upheld and others in which it is rejected by the Court. There are *six* possible deference regimes, listed below in reverse order (highest to lowest):

Curtiss-Wright Super-Deference to Executive Branch interpretations touching upon foreign affairs or national security.

Seminole Rock (or Auer) Strong Deference, applicable to agency interpretations of their own valid rules. *See Auer v. Robbins*, 519 U.S. 452 (1997). If the Court said nothing or announced the applicability of another deference regime, the coding will not invoke *Seminole Rock*. In *Christensen v. Harris County*, 529 U.S. 576 (2000), for example, the agency claimed to have been interpreting its own regulation, but the Court only applied *Skidmore* deference because the regulation was clear and did not require interpretation.

Chevron Deference, a strong presumption of validity for agency interpretations grounded upon the agency’s delegated lawmaking authority. If Congress has not “directly addressed” the statutory issue, the courts are supposed to ratify the agency interpretation unless manifestly against the law.

Beth Israel Deference, again, a strong presumption of validity for agency interpretations grounded upon the agency’s delegated lawmaking authority.

Skidmore Deference. Decisions were coded as applying *Skidmore* deference if the Court announced that it would give deferential weight to agency views based upon considerations of expertise, continuity, and other functional, good government factors.

Consultative (*Skidmore*-Lite) Deference. This category arose from the coder’s perception that there were many cases where the Court’s statutory interpretation was significantly influenced by agency-generated factual materials, interpretations, and recommendations—

but where the rhetoric of “deference” or interpretive “weight” was absent.

Perhaps surprisingly, most of the Supreme Court decisions were coded “0” because the Court was applying no discernible deference regime. (In many cases because there was no federal agency interpretation.) We coded as **Antideference** those cases where the Court put the burden on the government to rebut a presumption against its interpretation, as the rule of lenity requires in criminal cases and the avoidance canon suggests in cases where one or more of the Justices believe there are “serious constitutional difficulties” with the government’s position.

Reasons Cited for Reliance on Agency Interpretation

- No Reliance = 0
- Agency Expertise = 1
- Delegation of Lawmaking Authority = 2
- Longstanding Interpretation = 3
- Contemporaneous Interpretation = 4
- Public Reliance = 5
- Rulemaking Authority = 6
- Congressional Acquiescence = 7
- Administrability = 8
- Political Question = 9
- Legal Language = 10
- Unclear = 11

Note: For each reason-category above, decisions are coded as *no* reliance on the reason if the Court says nothing explanatory and just cites and follows *Chevron* or another deference regime.

IV. Winners and Losers in the Supreme Court Case

There are winners and losers in every Supreme Court case. The parties and the groups whose interests they represent are the obvious winners and losers. In most Supreme Court cases nowadays, amicus briefs suggest a broader array of winners and losers. For example, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Supreme Court ruled that the nuclear energy regulatory scheme at the federal level did not preempt state tort law. The winning parties were not just the estate of Karen Silkwood but also its attorneys and plaintiffs’ tort lawyers everywhere. The losing parties were not just Kerr-McGee but the nuclear power industry, which filed an excellent amicus brief in the effort. Another loser at the Supreme Court level was the “United States,” for the Solicitor General filed an

amicus brief supporting the industry's preemption claim. Although they did not file briefs, the states were winners, in that the ruling obviously allowed them greater regulatory latitude.

Based upon this kind of analysis, we coded every Supreme Court case for winners and losers, along the following lines:

Direct Winner = 4

Indirect Winner = 3

Indirect Loser = 2

Direct Loser = 1

Not Strongly Affected = 0

Our coding included the following kinds of institutions, interests, and groups:

Governmental Institutions/Players, including the United States, the states, local governments, foreign governments, prosecutors, schools, universities, and prisons;

Private Institutions, including the organized business, financial institutions, labor unions, religious institutions, environmental groups, medical institutions, educational institutions, IP holders, the plaintiffs' bar, the defense bar, and the ACLU;

Women and Minority Groups, including groups representing the interests of women, blacks, Latinos, sexual and gender minorities, immigrants, Native Americans, inmates, the poor, the elderly, people with disabilities, and children; and

General Citizenry, including taxpayers, consumers, debtors, patients, investors, landlords, tenants, and prisoners.

Appendix 3: Coding Congressional Overrides of Supreme Court Statutory Interpretation Decisions

This Appendix elaborates on the coding methodology we followed for each of the 286 statutory overrides enacted by Congress between 1967 and 2011 (inclusive) that overrode one or more Supreme Court statutory interpretation decisions.

I. Basic Facts

As part of the coding process we recorded several pieces of “biographical” data on the override. These data included:

Case name

Date on which the case was decided

Override statute name

Congress enacting the override

Override public law number

Section of the public law containing the override

Statutes at Large citation

U.S. Code title in which the override was codified

U.S. Code provision at which the override was codified

Year the override was enacted

Years between the date the case was decided and the override enacted

Whether the override was enacted within five years of the decision overridden:

0 = Yes

1 = No

Whether the override has been recognized on Westlaw

If the override has been recognized on Westlaw, the date on which it was first recognized

The number of years between the override and the date it was first recognized on Westlaw

Number of amendments to the U.S. Code provision at which the override was codified. 999 was entered where the override was not codified or the statutory provision had been renumbered since the override was enacted.

President at the time the override was enacted:

- 0 = Johnson
- 1 = Nixon
- 2 = Ford
- 3 = Carter
- 4 = Reagan
- 5 = H.W. Bush
- 6 = Clinton
- 7 = W. Bush
- 8 = Obama

Political orientation of the President

- 0 = Liberal
- 1 = Conservative

Political orientation of the Senate

- 0 = Liberal
- 1 = Conservative

Senate sponsor

Political orientation of the Senate sponsor

- 0 = Liberal
- 1 = Conservative

With regard to votes for and against the override in the Senate, 999 indicates that no roll call vote was recorded (e.g., the bill was passed by voice vote, unanimous consent, etc.). When multiple votes were taken (e.g., when a vote was taken on the original bill and the bill produced by a conference committee) the last-in-time vote was recorded.

Political orientation of the House

- 0 = Liberal
- 1 = Conservative

House sponsor

Political orientation of the House sponsor

- 0 = Liberal
- 1 = Conservative

With regard to votes for and against the override in the House, 999 indicates that no roll call vote was recorded (e.g., the bill was passed by voice vote, unanimous consent, etc.). When multiple votes were taken

(e.g., when a vote was taken on the original bill and the bill produced by a conference committee) the last-in-time vote was recorded.

Subject Matter of the Override

Antitrust = 1	Federal Lands = 16
Armed Forces = 2	Health & Safety = 17
Banking & Finance = 3	Housing = 18
Bankruptcy = 4	Immigration = 19
Business Regulation = 5	Indian Affairs = 20
Civil Rights = 6	Labor Relations & Workplace = 21
Intellectual Property = 7	Maritime = 22
Criminal Law = 8	Pensions = 23
Education = 9	Taxation = 24
Energy = 10	Telecommunications = 25
Entitlement Programs = 11	Transportation = 26
Environment = 12	Veterans Affairs = 27
Federal Government = 13	National Security = 28
Foreign Affairs = 14	Habeas Corpus = 29
Federal Jurisdiction & Procedure = 15	Prisons = 30

A case can have more than one subject matter. For example, a Title VII case posing a procedural issue would earn three subject-matter numbers, 6 + 15 + 21. See, for example, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). For these cases we identified the *primary* subject matter as well as the secondary areas implicated by the decision. Thus we coded the *Ledbetter* override as primarily being a civil rights case, even though it also involved federal civil procedure and labor relations and workplace laws.

Supreme Court Decision Vote

For every overridden decision, we included the number of Justices in the majority based on the figures in the Spaeth database (available at <http://scdb.wustl.edu/data.php>).

Based on these figures we coded for whether the decision represented a “close case.”

0 = 7-, 8-, or 9-Justice majority and not a close case

1 = plurality opinion, equally divided Court, or 5- or 6-Justice majority and a close case.

Political Valence of Override

Liberal = 0

Conservative = 1

Mixed or Unclear = 2

Note: The political valence of the override was determined by which direction the override moved public policy away from the Supreme Court's point of law. Thus, an override adopted by a conservative Republican Congress might be coded as "liberal" if it codified a very conservative Supreme Court habeas corpus or criminal procedure decision but created an equitable exception not found in the Court's jurisprudence. Conventionally liberal Democratic Congresses enacted many "conservative" overrides of the Court's rule of lenity decisions because they expanded the regulatory regime of criminal statutes.

Overrides were coded as *liberal* if the override favored the interests of bankruptcy debtors, antitrust and securities plaintiffs, civil rights plaintiffs and other victims of discrimination, criminal defendants, energy consumers, claimants seeking information or entitlement benefits from the government, citizens demanding environmental protection, plaintiffs seeking access to federal courts, governmental and private employees, persons benefiting from health/safety protections, immigrants, Native Americans, claimants opposing intellectual property interests, pension beneficiaries and state regulators of pension funds, taxpayers, telecommunication and transportation consumers, students and their parents seeking educational benefits, and tenants.

Overrides were coded as *conservative* if the override favored the interests of bankruptcy creditors, antitrust and securities defendants, alleged discriminators in civil rights cases, criminal prosecutors, energy companies, agencies withholding information, government institutions paying for statutory entitlements, companies accused of polluting the environment, defendants opposing access to federal courts, governmental and private employers, defendants charged with violating health/safety rules, officials opposing the rights of immigrants, state and federal entities denying claims by Native Americans, holders of intellectual property interests, pension funds and their managers, tax collectors, telecommunication and transportation companies, schools and school boards, and landlords.

Overrides were coded as *neutral* or *mixed* if the agency interpretation was liberal on one issue and conservative on another.

Regulatory Valence of the Override

Of course the political valence is only half the story. We were interested not only in which side of the political spectrum "won" but also whether the override enhanced or expanded regulation compared to the post-decision law or instead paired back regulation. Generally a liberal political outcome corresponded with an override that increased the regulation of the relevant subject area. But not always. Each side of the

political spectrum favors more regulation in some areas and less in others. For example, in habeas we coded the political valence of an override that restricts habeas petitions as “conservative,” but we gave this outcome a proregulatory valence because it increased the regulation governing habeas petitions and cut back on the freedom with which judges could grant these petitions.

0 = Proregulatory

1 = Libertarian/antiregulatory

II. Characteristics of the Overrides

For each override, we located the relevant legislative history for the particular issue on which Congress overrode the Court. Using ProQuest Congressional, we identified the compiled legislative history for the statute, which included all related hearings, reports, and committee prints—frequently including documents from several Congresses. We limited our legislative history research to the reports and hearings produced by the Congress that enacted the override, unless there was a compelling reason to include materials from the prior Congress (e.g., where a law was passed early in a Congress and the reports referenced testimony from hearings conducted during the prior Congress). Based on these documents alone, we made determinations about the nature of the process by which Congress adopted the provision, and ultimately the legislation, that overrode the Court on a point of law. Thus, we did not delve beneath the public record through interviews or even newspaper accounts that might have revealed more knowledge, deliberation, and pluralist involvement than we found in the legislative record.

Using these documents, we coded for the following basic characteristics of the override statute.

Was the main focus of the override a response to the Supreme Court?

The Supreme Court was the main focus of the override when the report(s) framed the provision as a response to a particular Supreme Court precedent or where the report(s) discussed the need to modify Supreme Court precedent. Where Supreme Court decision received only ancillary discussion or no mention at all, the override was treated as primarily a response to the Court.

No = 0

Yes = 1

Was the override part of a comprehensive revision of the subject area?

Many of the overrides were part of a much broader revision to the law. These included the Tax Reform Act of 1976, and the Internal Revenue

Service Restructuring and Reform Act of 1998. Others contained only minor corrections to the law, such as the Installment Sales Revision Act of 1980. The distinction between the two was necessarily qualitative and some statutes could have gone either way. We treated a statute as a comprehensive revision where it provided a new rule or set of rules for a significant subsection of the area being regulated. Thus the Tax Reform Act of 1976 and the Internal Revenue Service Restructuring and Reform Act of 1998 were coded as comprehensive overrides because they provided new rules on overarching issues of the tax code, such as the burden of proof in deficiency litigation and the IRS's use of administrative summons, while also changing the tax treatment of many items. The Installment Sales Revision Act of 1980, by contrast, changed the tax treatment of only a small section of the tax code and thus was not treated as a comprehensive revision.

No = 0

Yes = 1

How deep was the override's response to the Supreme Court decision?

We also coded for the extent to which the override displaced the prior decision. In some cases the override made a minor change designed to affect only a limited set of individuals and cases. The override of *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), provides an excellent example of a marginal change to the law. At the other end of the spectrum, the restorative overrides not only replaced the decision's logic but also retroactively changed the legal regime prevailing prior to the override.

0 = Unclear

1 = Override made a marginal change to the law

2 = Override overrules the point of law but leaves the prior decision intact

3 = Override overrules the point of law and the outcome in the prior decision

4 = Override renounces the reasoning (often indicates a restorative override)

5 = Override renounces the reasoning and the outcome

Was the override "restorative"?

Did Congress state that it was putting back in place the legal regime predating the Supreme Court decision? Restorative overrides are indicated with italics in Appendix 1.

0 = No

1 = Yes

What was the override's effect on the rule of law?

To measure the override's effect on the clarity and predictability of the legal regime, we coded both for the type of rule articulated in the Supreme Court decision overridden and in the override statute. We then compared these standards to determine the override's effect on the law and whether the new statute helped or hindered the predictable application of the law.

0 = Unclear

1 = Override replaces a muddy Supreme Court standard with a clear rule (rule of law benefit)

2 = Override replaces a muddy Supreme Court standard with a different, but still muddy standard (rule of law wash)

3 = Override replaces clear Supreme Court rule with a different, but still clear rule of law (rule of law wash)

4 = Override replaces clear Supreme Court rule with a muddy standard (rule of law cost)

Did the override receive an explicit mention in hearings and reports?

Not all overrides were discussed in the legislative history leading to the override. We treated an override as being "explicitly considered" where the legislative history discussed the effect of the override or the problems with the Supreme Court decision to be overridden.

0 = Explicit mention in the override process

1 = No explicit mention

In addition we coded for two numeric variables about the statute's life in the U.S. Code.

How long was the statute?

To determine the size of the statute containing the override, we counted the number of pages it occupied in the *Statutes at Large*.

Override was the whole statute = 0

Short Override (<10 pages) = 1

Medium Override (10–25 pages) = 2

Long Override (>25 pages) = 3

Override was part of omnibus legislation = 4

III. Main Purpose for the Override

The committee reports usually provide a discussion about the background and need for the legislation as well as the intended effects of the override provision. We categorized the main purpose of each override into one of four categories based on these discussions:

- 0 = Bad Interpretation
- 1 = Confusion in the Law
- 2 = Response to Supreme Court Concerns
- 3 = Bad Policy

Bad Interpretation—The primary reason for the override was to correct a disfavored Supreme Court interpretation. In order to qualify, Congress must have stated expressly that the Court misinterpreted a statute, not just that the interpretation produced bad results. Many of the overrides in the Civil Rights Act of 1991 are excellent examples of these overrides.

Confusion in the Law—The primary reason for the override was to correct confusion created by a Supreme Court decision that lacked a clear majority or failed to provide a rule that the lower courts could apply effectively. The override of *United States v. Santos*, 553 U.S. 507 (2008), in the Fraud Enforcement and Recovery Act of 2009 is a prime example.

Response to Supreme Court Concerns—The primary reason for the override was to respond to a concern noted by the Court in interpreting the statute. Often, but not always, the concern related to the constitutionality of the provision or its application to a particular set of facts. Congress responded to such concerns in the override of *United States v. Maze*, 414 U.S. 395 (1974), by the Comprehensive Crime Control Act of 1984.

Bad Policy—The primary reason for the override was to replace the Supreme Court precedent with a new rule, but without suggesting that the Supreme Court misinterpreted the statute. The numerous overrides in the Bankruptcy Act of 1978 are the best examples of these overrides.

As with the subject area coding discussed above, the reports often identified multiple purposes for an override. For example, in overriding *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), with the Civil Rights Act of 1991, Congress focused on what it viewed as the Court's misinterpretation of the statute but also noted the negative policy effects of the Court's interpretation. In these instances, we identified the *primary* reason for the override (correcting the disfavored interpretation in both examples) and also the additional reasons for the override (remediating the policy consequences).

IV. What Goals and Values Do Overrides Promote?

The problems identified with the decision, and thus the need for an override, are only one side of the coin when it comes to justifying an override. In addition to identifying problems with the prevailing legal

regime, Congress frequently identifies the goals and values that it seeks to further through the override. These stated values are important in that they shed light on whether the override process is a public-regarding and utility-maximizing endeavor or instead a forum for rent-seeking by the well-connected. To test this consideration we categorized the different reasons commonly given for an override into the rough taxonomy below. As with the subject matter and purpose of the override, we coded for the main goals and values advanced by the override as well as secondary and ancillary ones.

0 = Could not tell what values and goals the override was intended to advance

1 = Updated Solution to Collective Action Problems (i.e., legal rules that standardize and preempt other confusing sources of guidance, deploy public resources to create positive projects the market would not provide, create proper incentives for institutions and persons, or penalize or lock up persons who harm others)

2 = Removing Inefficiencies in the Market and Other Institutions (i.e., legal rules that bar inefficient forms of discrimination, anticompetitive conduct and structures, etc.)

3 = Advancing Public Values (i.e., barring unfair discrimination and exclusions, advancing norms, etc.)

4 = Redistributing Governmental Power to Create a Better Regulatory Regime (i.e., overrides preempting state law or devolving authority to the states, delegating new authority to federal agencies, etc.)

5 = Redistribution of Resources or Power Toward Ordinary Persons or Minorities (i.e., consumer protection measures, creditor protections, protection of persons with disabilities, etc.)

6 = Redistribution of Resources or Power Toward Rich Persons and Corporations (i.e., tax breaks, creditor protections against debtors, rent-seeking exceptions to major public-regarding statutes, etc.)

7 = Restrictions on Arbitrary or Unfair Government Action (i.e., standards with which the government must comply before beginning prosecutions or issuing subpoenas or elimination of irrational or unfair categories and rules)

8 = Goals and values not discussed

V. Congressional Enactment Process

Again relying on the reports and hearings gathered through the process described above, we looked to three features of the enactment process to assess the representative values associated with the override process.

Was the Process Open?

To determine whether the legislative process was open with regard to a particular issue, we reviewed the committee hearings and committee reports to see whether the override's purpose and effects were clearly articulated by the relevant committee(s). An override was coded as "open" when the members of Congress and other interested parties were put on notice that Congress was contemplating a substantive change to Supreme Court precedent, even when the reports do not portray the law as a response to a decision by the Court. An override was coded as "not open" if the reports did not give observers notice, perhaps because the real deliberations were occurring behind closed doors in a party caucus or in summit sessions with party leaders and/or the White House.

0 = Not open

1 = Open

Was the Process Deliberative?

To determine whether an override was deliberative, we examined the committee hearings and committee reports to see how thoroughly members of the Legislature, the Executive Branch, and private parties identified and debated the costs and benefits of the proposed override. Based on the level of debate and the concerns mentioned in the hearings and reports, we coded for whether the process represented a deliberative process.

1 = Reports did not address the pros and cons or the counterarguments; the override also was not addressed in the hearings

2 = The override was mentioned only in the reports, but those reports provided a meaningful discussion of the pros and cons and/or the override received significant attention in the dissenting views attached to the reports

3 = Override received meaningful discussion in the hearings, but its merits were not addressed in the reports

4 = Override received meaningful discussion in the hearings and reports

Was the Process Pluralist?

To determine whether an override was pluralist, we looked at which affected institutions and groups took positions or testified about the override. Where only one side participated in the process (i.e., proponents or opponents of the override) we assigned a higher pluralist value to the instances in which opponents showed up, reasoning that proponents views were likely already well-represented through informal channels.

1 = No parties show up

- 2 = Proponents show up
- 3 = Opponents show up
- 4 = Parties on both sides

Was the Process Open, Deliberative, and Pluralist?

To answer this question, we calculated each override's composite score for the last three variables and then characterized the various combinations as listed in the table below.

Open, Deliberative, and Pluralist	144, 143, 134
Open and Somewhat Deliberative and Pluralist	142, 124, 133, 114, 141
Open but Not Deliberative and Pluralist	111, 112, 113, 121, 122, 123, 132, 131
Not Open but Deliberative and Pluralist	044, 043, 034
Not Open but Somewhat Deliberative and Pluralist	042, 024, 033, 014, 041
Not Open, Not Deliberative, and Not Pluralist	011, 012, 013, 021, 022, 023, 032, 031

VI. Winners and Losers from the Override

There are winners and losers in every congressional statute. Some institutions or groups are obviously affected by the very terms of a statute. Thus, the 2009 Tobacco Control Act imposed costs on the tobacco industry; although some tobacco companies supported the legislation, those business interests were the obvious "losers" for this override. Conversely, the override reinstated FDA regulations designed to protect minors against tobacco addiction, and so it would be obvious to find that children are "winners" in the override process. And the United States was a "winner," because an executive agency (the FDA) was given regulatory authority it had been denied by the Supreme Court.

Beyond the obvious winners and losers, and to confirm our intuitions, we and our research assistants examined the committee hearings and other legislative history to determine where particular institutions, groups, and interests lined up with regard to the *particular issue* on which Congress would ultimately override a Supreme Court statutory decision.

Based upon this kind of analysis, we coded every override provision for winners and losers, along the following lines:

- Direct Winner = 4
- Indirect Winner = 3
- Indirect Loser = 2

Direct Loser = 1

Not Strongly Affected = 999

Our coding included the following kinds of institutions, interests, and groups:

Governmental Institutions/Players, including the United States, the states, local governments, foreign governments, prosecutors, schools, and prisons;

Private Institutions, including organized business, financial institutions, labor unions, religious institutions, environmental groups, medical institutions, educational institutions, the shipping industry, the plaintiffs' bar, the defense bar, and the ACLU;

Women and Minority Groups, including groups representing the interests of women, blacks, Latinos, sexual and gender minorities, immigrants, Native Americans, inmates, the poor, the elderly, people with disabilities, and children; and

General Citizenry, including taxpayers, consumers, debtors, patients, investors, landlords, tenants, and prisoners.

VII. Hearings and Testimony

In addition to the winners and losers, we also tracked which of these groups testified at the hearings that led to the override statute and whether they supported the override, opposed the override, or took positions on both sides. Although interest groups were generally united in their support or opposition of an override, there were a number of instances where members of the same group testified on both sides. For example, telecommunications companies took positions on both sides of the override of *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) in the 1996 Telecommunications Act, which replaced some regulation of intrastate calling with market competition. For the most frequent witness, the United States, we also recorded which departments or agencies testified on its behalf.

0 = Supported the Override

1 = Opposed the Override

2 = Took Positions on Both Sides of the Override

VIII. Post-Override Judicial Response

How did courts respond to the override? The ultimate effect of an override depends, in part, on the gloss agencies and/or judges place on the new statutory language. Did judicial opinions reveal resistance or even hostility to the override, which after all was displacing a judge-made point of law with a legislator-made point of law? Was there judicial consensus?

We tackled this issue by calling forth all judicial decisions identified in WestlawNext and dated after the override had amended or added a new provision to the U.S. Code. We read the digest of those decisions provided by WestlawNext and read the entire text of decisions that seemed most relevant to the questions below.

Was There Judicial Consensus in Interpreting the Override?

In the wake of the large majority of overrides, district and circuit courts did all the work of applying the override; Supreme Court involvement was not the norm. We examined whatever judicial decisions that were available to make the following determinations. An override was coded “too early to tell” or “insufficient case law” if there were not enough WestlawNext cases to justify an opinion. An override was coded “consensus” if the judicial opinions revealed no significant disagreement in applying the override provision. An override was coded “short-term dissensus” if lower courts went different ways on one or more significant issues in the first 5–10 years after the override went into effect. (Sometimes, the short-term dissensus would ultimately be terminated by a Supreme Court opinion resolving it.) An override was coded as “long-term dissensus” if disagreement among judges persisted for a longer period.

Too Early to Tell = 0

Insufficient Case Law to Determine Consensus = 1

Judicial Consensus = 2

Short-Term Judicial Dissensus = 3

Long-Term Judicial Dissensus = 4

Was There Judicial Resistance to the Override?

A different question is how enthusiastically judges implemented the override. An override was coded as “too early to tell” or “insufficient case law” if there were not enough WestlawNext cases to justify an opinion. An override was coded “narrow” if judges interpreted it more narrowly than we would have expected from reading the new statutory language and “broad” if judges interpreted it more liberally than expected. An override was coded as “normal” if judges applied it pretty much as one would have expected. An override was coded as “invalidated” if judges (usually the Supreme Court) nullified it on constitutional grounds.

Too Early to Tell = 0

Insufficient Case Law to Determine Consensus = 1

Narrow Interpretation = 2

Normal Interpretation = 3

Broad Interpretation = 4

Invalidated on Constitutional Grounds = 5