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Response

Conscious Congressional Overriding of the Supreme Court, Gridlock, and Partisan Politics

By James Buatti* & Richard L. Hasen**

I. Introduction

Here is a philosophical inquiry along the lines of the "if a tree falls in the forest" question, but offered to those studying the relationship between the Supreme Court and the United States Congress, especially during times of congressional gridlock: If Congress passes a new law which changes the meaning of an earlier statute as interpreted by the Supreme Court, but no one in Congress is aware that the new law reverses the Court's interpretation of the earlier statute, has Congress really "overridden" the Court?

In a pathbreaking 1991 study of congressional overrides, Yale law professor William N. Eskridge found a rise during the 1970s and 1980s in the number of times that Congress *consciously* overrode Supreme Court interpretations of congressional statutes.[1] As Eskridge explained his focus on deliberate congressional action, the term "override" does not "include statutes for which the legislative history—mainly committee reports and hearings—does not reveal a legislative focus on judicial decisions."[2]

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1. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n.1 (1991) (defining an "override" as "any time Congress reacts *consciously* to, and modifies a statutory interpretation decision." (emphasis added)).

2. *Id.* As evidenced by this language, legislative consciousness was not merely one factor in determining whether a statute qualified as an override; it was an essential element of the definition of an override.

Replicating Eskridge's methodology and updating the Eskridge study through 2012, we found that the number of *conscious* congressional overrides of Supreme Court statutory interpretations had fallen markedly after 1991 and had slowed during the Obama presidency to a trickle.[3] The Hasen study suggested that increased party polarization in Congress was responsible for the decline in overrides since the Eskridge study, as well as for the shift from bipartisan overrides to more partisan overrides.[4]

Now, in a fascinating and wide-ranging study published in the *Texas Law Review*,[5] Matthew R. Christiansen and Professor Eskridge disagree with some of the conclusions of the Hasen study, both on the extent to which overrides have declined in the 1990s and also whether political polarization will likely keep the number of overrides low for the foreseeable future during periods of divided government.[6]

The Christiansen–Eskridge study offers important and counterintuitive insights on the nature of congressional legislation enacted following Supreme Court statutory interpretation. However, as well explained by Professor Deborah Widiss in her perceptive analysis,[7] the Christiansen–Eskridge study has shifted the meaning of "override" compared to the earlier Eskridge 1991 and Hasen studies. Instead of a study of *conscious* overrides, the Christiansen–Eskridge study uses new methodology to study cases in which congressional action *consciously* or *unconsciously* changed the understanding

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3. Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013). "In fact, in the last two decades the rate of congressional overriding of Supreme Court statutory decisions has plummeted dramatically, from an average of twelve overrides of Supreme Court cases in each two-year congressional term during the 1975–1990 period, to an average of 5.8 overrides for each term from 1991–2000, and to a mere 2.8 average number of overrides for each term from 2001–2012." *Id.* *See also id.* at 211 n.29 (noting the replication of Eskridge's methodology for a later time period). Hasen wrote the article and Buatti served as Hasen's research assistant, gathering and helping to analyze the data. They are co-authors of this Response.

4. *Id.* at 209.

5. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEXAS L. REV. 1317 (2014).

6. The authors open their article by attacking "the *New York Times*" for claiming "that overrides had fallen off dramatically after 1991 and that in the new millennium '[t]he number of overrides has fallen to almost none.'" Christiansen & Eskridge, *supra* note 5, at 1318 (quoting 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-paralysisof-congress.html, *archived at* http://perma.cc/GMQ4-KS4D). As they acknowledge, Liptak was quoting Hasen on that point and citing Hasen's study. This seems like a case of shooting the messenger. In any case, by the end of the study, the authors seem to agree that overrides have fallen dramatically; it is only that the decline happened a bit later according to their calculations. *See id.* at 1319 ("After 1998, however, we found that overrides declined as dramatically as they had ascended, though they have not (yet) 'fallen to almost none.'").

7. Deborah A. Widiss, *Identifying Congressional Overrides Should Not Be This Hard*, 92 TEXAS L. REV. SEE ALSO 145, 146 (2014).

of a congressional statute as the Supreme Court had interpreted it.[8] In other words, the new study includes statutes in which there is no indication Congress knew that it was overriding a Supreme Court decision through a new statute. This methodology capturing inadvertent overrides depends in part upon *ex post* Westlaw coding, conducted by a West research attorney, that a Congressional statute overrode or otherwise modified a Supreme Court interpretation of a statute.[9] While unconscious overrides can be important to study for many reasons, they are less relevant for purposes of studying the Congress–Supreme Court dialogue.

Importantly, however, the Christiansen–Eskridge methodology also provides a much better way of identifying conscious overrides than the methodology used in either the original Eskridge 1991 or Hasen studies, and it has led us to add 25 additional conscious overrides to the 1991–2012 period of the Hasen study. Nonetheless, looking only at conscious overrides identified in the Hasen study and augmented by the later Christiansen–Eskridge study, we conclude that the Christiansen–Eskridge study mostly supports the two main claims of the Hasen study: (1) conscious overrides are on the decline, precipitously so in recent years, and (2) partisan polarization is to blame.[10]

This short Response makes four points. First, for purposes of measuring Congress–Supreme Court relations, it makes sense to limit a study of overrides to conscious overrides. Second, the Hasen study and Christiansen–

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> As discussed more fully below, Hasen, using the methodology first pioneered by Professor Eskridge in his 1991 study, identified overrides primarily by looking for statements in Congressional committee reports that indicated an intent to override a prior decision; in the new study, Christiansen and Eskridge combine review of legislative history with a review of all court decisions on Westlaw that flagged a prior precedent as having been affected by subsequent statutory action. Thus, although Christiansen and Eskridge do not characterize their research methods in this matter, they moved from a methodology that focuses primarily on *ex ante* signals from Congress to one that relies heavily on *ex post* analysis by courts. Below, I do original analysis of Christiansen and Eskridge's data and find that the data set of overrides they identified differed from Hasen's not only in *number* but also in *kind*. In short, the Congress-centered methodology that Hasen employed was far more effective at identifying overrides that Christiansen and Eskridge classify as "restorative" and "deep" than it was at identifying updating or clarifying overrides.

Id. at 147. *See also id.* at 149–52 (contrasting methodologies in detail). We find it somewhat odd that in their reply to this Response, Christiansen, Eskridge, and Thypin-Bermeo so strongly attack the focus on congressional consciousness. That focus originated in the Eskridge 1991 study and was merely replicated in the Hasen study. Matthew R. Christiansen, William N. Eskridge Jr., & Samuel N. Thypin-Bermeo, *The Conscious Congress: How Not to Define Overrides*, 93 TEXAS L. REV. SEE ALSO 289 (2015). In addition, although the authors appear to suggest the Hasen study and this Response focused solely on committee reports in determining conscious congressional override attempts, we did not do so. *See infra* note 33 (describing the methodology in detail).

9. For an explanation of their methodology, see Christiansen & Eskridge, *supra* note 5, at 1328–29.

10. Hasen, *supra* note 3, at 209.

Eskridge study, while differing in their particulars, are consistent in finding a marked decline in conscious overrides, especially during the Obama administration—a trend which continued through 2014. Third, committee reports and legislative history surprisingly do not appear to have become a less reliable way of identifying overrides. Fourth, political polarization best explains the decline in conscious overrides, and there is good reason to believe the trend will continue during periods of divided government, with spurts of (conscious) overriding during periods of united government, until political polarization diminishes.

II. Why Focus on Conscious Overrides?

The Christiansen–Eskridge study is a *tour de force*, offering new insights on many questions, including a relative assessment of how "discrete and insular minorities" fare in Congress compared to the Supreme Court and the role of executive agencies in influencing the subsequent judicial interpretation of legislation.[11]

However, the Christiansen–Eskridge study's methodological change in defining "overrides" makes it a poor choice to determine the scope of the Congressional–Supreme Court dialogue over statutory interpretation. The Eskridge 1991 and Hasen studies both illustrate the extent to which Congress has been willing and able to consciously override Supreme Court statutory interpretation decisions. Such overrides first rose dramatically and have now fallen to a very low level. The Christiansen–Eskridge study, by including numerous examples of congressional statutes which inadvertently override Supreme Court precedent, does not shed as much light on the interbranch relationship.

As Professor Widiss explains:

> [I]n moving to the Westlaw approach, Christiansen and Eskridge most likely lose at least to some extent a distinction that the Eskridge 1991 study and Hasen both emphasized, between statutory amendments in which Congress "consciously intends" to enact an override and statutory amendments that might "implicitly" supersede a prior decision.[12]

The most useful part of their study for understanding interbranch relationships is their study of "restorative" overrides, which Professor Widiss found overlap a great deal (73%) with the conscious overrides in the Eskridge 1991 and Hasen studies.[13] Indeed, Christiansen and Eskridge call restorative overrides the types of overrides which "garner the most attention

11. *See* Christiansen & Eskridge, *supra* note 5, at 1381, 1477. We do not disagree with Christiansen and Eskridge that both the Supreme Court *and* the Executive are likely winners during a sustained decline in overrides. *See* Hasen, *supra* note 3, at 208 n.15 (drawing a parallel between the Supreme Court's and the presidency's growing power against Congress).

12. Widiss, *supra* note 7, at 152.

13. *Id.* at 155.

and most obviously reflect institutional conflict."[14] Limiting one's study to conscious congressional overrides keys into the "dialogic" model of interbranch relations. As explained in the Hasen study:

> The governing model of congressional-Supreme Court relations is that the branches are in dialogue on statutory interpretation: Congress writes federal statutes, the Court interprets them, and Congress has the power to overrule the Court's interpretations. The Court's interpretive rules are premised upon this dialogic model, such as the rule that Supreme Court statutory interpretation precedents are subject to "super strong" stare decisis protection because Congress can always correct an errant court interpretation.[15]

A key conclusion of the Hasen study is that the dialogue has changed in a significant way: conscious congressional overrides have declined precipitously, and this decline means that the Court's power to decide the scope of federal law has concomitantly increased.[16] The Court's interpretation of congressional statutes has become nearly as final as its understanding of the U.S. Constitution. This finding has many implications. Perhaps most importantly for Supreme Court doctrine, the Court's continued use of a super-strong stare decisis for interpreting statutes may no longer be justifiable given Congress's practical inability to participate the dialogue.

Federal statutory law is exceedingly complex, and the Christiansen–Eskridge study shows one measure of complexity: even when Congress is unaware of its effect on judicial precedent, it is changing the meaning of statutes which have been interpreted earlier by the Supreme Court. But this somnambulist Congress is no more engaging in a dialogue with the Supreme Court than someone talking in his or her sleep is engaging in a dialogue with a spouse. If we care about the relative power of the branches, a focus on consciousness makes sense.

There is one potential justification for the Christiansen–Eskridge *ex post* measure of overrides: the authors claim Congress is using committee reports less, making evidence of congressional intent to override the Supreme Court

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14. Christiansen & Eskridge, *supra* note 5, at 1374.

15. Hasen, *supra* note 3, at 208. The term "super-strong" stare decisis originates with Professor Eskridge. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

16. As Professor Widiss explains:

> Hasen's override database thus differed significantly from Christiansen and Eskridge's as to the *kind* of override included, as well as to the overall number of overrides included. Accordingly, one possible conclusion is that *ex ante* committee-report-focused research, as supplemented by secondary sources, does a relatively good job of identifying "restorative" overrides and "deep" overrides (which are themselves heavily overlapping categories), whereas the *ex post* Westlaw-based research captures far more of the interplay between large-scale reorganizations of statutory law and existing precedents.

Widiss, *supra* note 7, at 155.

harder to find and raising the potential that some intentional overrides could escape under the methodology used in the Eskridge 1991 and Hasen studies.[17] However, it seems wrong to include all of these *ex post* declared overrides in a count of conscious overrides. If there is no mention of a conscious override in committee reports or other legislative materials, such as floor statements or hearings, it does not seem fair to say that a majority in Congress (or even much less than a majority) had a conscious intent to override the Supreme Court.

We recognize that Congress is a "they," not an "it,"[18] and for any given statute a Member of Congress, staffer, or lobbyist who drafted a measure may have harbored an intent to override the Supreme Court. But absent any communication in some form to the rest of Congress of this intent, or any other indication that Congress or the public considered legislation to be a response to the Supreme Court, it is wrong to count a mere effect on statutory interpretation following Supreme Court and congressional action as an override.

As Widiss emphasizes,[19] there is no good way right now to accurately track all congressional overrides. All methodologies have errors. One has to decide whether to potentially miss cases because of the absence of good legislative history (the Eskridge 1991 and Hasen strategies) or to be vastly overinclusive and include cases for which no one in Congress intended an override (the Christiansen and Eskridge study). For purposes of studying interbranch relations, the first error is more acceptable especially because, as we show in the next Part, the decline in the value of committee reports may not be as severe as Christiansen and Eskridge believe.

Fortunately, there is a way to have the best of both worlds. We now believe the best solution for identifying conscious overrides (short of Congress adopting Professor Widiss's suggestion to publicly announce such overrides) is to use the new Christiansen–Eskridge methodology as a first cut for capturing overrides and then carefully examine that large set to separate conscious overrides from the rest. In short, Christiansen and Eskridge have designed a much better net for catching tuna, but they inadvertently are also capturing even more dolphins which need to be thrown back in the water.

In the next Part, we show that if we focus solely on conscious overrides, the conclusions of the two studies are quite similar. Of the 80 extra "overrides" identified in the Christiansen–Eskridge study but not the Hasen

17. "The paucity of overrides in [Hasen's] study is, in large part, the result of the radical decline of committee reports as a useful source of information for major legislation." Christiansen & Eskridge, *supra* note 5, at 1328.

18. Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). As applied to courts, see Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

19. Widiss, *supra* note 7, at 147.

study as overrides, 25 demonstrate congressional intent to consciously override Congress.

III. The Revised Evidence Shows a Decline in Conscious Overrides, Especially Since 2000, But an Uncertain Decline in the Value of Committee Reports for Identifying Overrides

Although Christiansen–Eskridge and Hasen both found a dramatic decline in overrides between 2001–2011,[20] they differed greatly with respect to the 1991–2000 period. Where Hasen found a less dramatic but still significant decline in conscious overrides,[21] Christiansen–Eskridge proclaimed this same period as the "golden age, both quantitatively and qualitatively."[22] In preparing this Response, we examined these disparate findings and accounted for them. We hypothesized that Christiansen and Eskridge's decision to include unconscious overrides would explain much of the difference, as would gaps in Hasen's methodology resulting both from technical search limitations and the "radical" decline in the value of committee reports.[23]

A. A Revised Measure of the Decline in Conscious Overrides

Apparently anticipating concerns that their wider net was producing false positives, the Christiansen–Eskridge study carefully coded whether the legislative history of each override they found contained (a) "[a] mention of . . . the override provision;" or (b) "the problems with the Supreme Court decision subsequently overridden."[24] Christiansen and Eskridge provided Professor Widiss with their raw data on this point for her use in preparing her response to their study. Based on her analysis of this data, Professor Widiss noted that "in a high percentage (approximately 85%) [of overrides identified by the study] there was at least some explicit mention" of (a) or (b).[25] The fact that the remaining 15% are not mentioned in any legislative history materials straightforwardly explains why the Hasen study did not identify most of them.[26] According to the data collected by Christiansen and

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20. *Compare* Christiansen & Eskridge, *supra* note 5, at 1340–41, *with* Hasen, *supra* note 3, at 209.

21. *See* Hasen, *supra* note 3, at 209. For the 1991–2000 period, Hasen found 5.8 overrides per session, a decline from 12 overrides per session during the 1975–1990 period. *Id.*

22. Christiansen & Eskridge, *supra* note 5, at 1337. Christiansen and Eskridge found an average of over 20 overrides per session during the overlapping 1991–1999 period. *Id.* at 1337.

23. *See supra* note 18.

24. *See* Widiss, *supra* note 7, at 151 (citing Christiansen & Eskridge, *supra* note 5, at 1534, app. 3 (describing criteria)).

25. *Id.*

26. *See* Eskridge, *supra* note 1, at 332 n.1 (requiring a conscious reaction by Congress and, in most cases, a legislative focus on judicial decisions). Although the data compiled by Christiansen and Eskridge, and reviewed by Professor Widiss, classified 18 overrides during the 1991–2011 period as "unmentioned," three of these overrides were nonetheless identified by the Hasen study.

Eskridge and reviewed by Professor Widiss, this accounted for 15 overrides that the Christiansen–Eskridge study identified but the Hasen study did not, 11 of which occurred during the 1991–1998 period.[27]

However, this 15-override difference only tells part of the story. In examining an updated set of data that Christiansen and Eskridge kindly provided us,[28] we noted that a significant number of cases satisfied either (a) or (b) but not both; that is to say, some overrides identified by the Christiansen–Eskridge study contained mentions of the override provision but not any corresponding Supreme Court case (and vice versa). While we agree that legislative-history materials noting problems with Supreme Court interpretations—what we call the "(b)" coding—are likely to signal conscious overrides, mentions of override provisions *only*—the "(a)" coding—are not. As explained above, we generally did not identify as overrides any statutes for which there was no evidence Congress was responding negatively to a Supreme Court decision.[29]

In all overlapping years, the Christiansen–Eskridge study's data contained 38 overrides not identified in the Hasen study[30] for which the legislative history materials failed to discuss an overridden Supreme Court case. This accounted for nearly half of the extra overrides identified by Christiansen and Eskridge. Of the 38 unconscious overrides, 31 occurred during the disputed 1991–2000 period.[31]

Notably, 4 additional overrides identified by the Christiansen–Eskridge study but not by the Hasen study mentioned Supreme Court cases in committee hearings but not in committee reports.[32] While discussions in hearings may potentially signal a conscious override, we agree with Professor Widiss that hearing testimony is a less reliable indicator of Congressional intent than committee reports.[33] Still, we counted such

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See Hasen, *supra* note 3, at 252–55 app. 1. These were *Hoffman v. Blaski*, 363 U.S. 335 (1960), *Brown v. Gardner*, 513 U.S. 115 (1994), and *Demarest v. Manspeaker*, 498 U.S. 184 (1991).

27. Widiss, *supra* note 7, at 146–47; Christiansen & Eskridge, *supra* note 5, at 1480–94 app.1; Hasen, *supra* note 3, at 252–55 app. 1.

28. We noted some discrepancies between the data analyzed by Professor Widiss and Christiansen and Eskridge's updated data. Any such discrepancies are likely attributable to the updating process that occurred after the publication of the Christiansen–Eskridge article and Professor Widiss's article.

29. *See supra* note 28.

30. There were 40 overrides that did not discuss the corresponding Supreme Court case in a report or hearing. Of these 40, two were identified by the Hasen study: *Brown v. Gardner*, 513 U.S. 115 (1994), and *United Steelworkers v. Bouligny*, 382 U.S. 145 (1965). The fact that *Hoffman* and *Demarest* are not on this wider list is one of the discrepancies we noted. *See supra* note 26.

31. Christiansen & Eskridge, *supra* note 5, at 1480–94 app. 1; Hasen, *supra* note 3, at 252–55 app. 1.

32. *See supra* note 31.

33. *See* Widiss, *supra* note 7, at 151–52 (citing 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, 977 fig.8 (2013)). While we consider committee reports to be a superior indicator of congressional intent, we did not limit our search to

mentions in our own recoding of the data, and erred on the side of including close cases as conscious overrides.

Specifically, we examined the legislative history of the remaining 42 overrides to determine whether they qualified as conscious overrides. For each override, we followed several steps: first, to test for gaps in Hasen's[34] and Eskridge's 1991[35] methodology, we ran a search for case names or portions of case names within the results of Hasen's initial USCCAN-REP search.[36] Second, we ran a search for the same case names or portions of case names within the entire USCCAN-REP database. We reviewed any reports that resulted from this search. Third, we searched through any hearings linked by Westlaw to the override's public law number, including in any compiled legislative histories. Lastly, we searched for case names or portions of case names in Westlaw's Congressional Testimony database.[37]

To sort conscious overrides from unconscious overrides, we applied the same definition as the Hasen and Eskridge 1991 studies: a conscious override is a statute that completely overrules, modifies in a material way, or modifies the consequences of, a Supreme Court statutory decision *and* for which the legislative history—mainly committee reports and hearings—explicitly states or clearly implies Congress' conscious intent to do so.[38] Thus, the legislative history of conscious overrides must, at the very least, reveal a legislative focus on judicial decisions.[39] We define any override that falls outside this definition to be an unconscious override. This distinction could fairly be criticized for requiring significant judgment; reasonable minds could disagree as to whether a specific close case qualifies as conscious or not. However, we do not believe we are adding anything new to the criteria

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committee reports only. We looked to any indicator of conscious congressional intent, including committee hearings and even bill titles. For example, see *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), overridden by the 1995 law and described by Westlaw as "Reversal of Adams Fruit Co. v. Barrett." Reversal of Adams Fruit Company, Inc. v. Barrett, Pub. L. No. 104-49, 109 Stat. 432 (1995) (Westlaw). *See also* Hasen, supra note 3, at 260 n.3.

34. *See* Hasen, *supra* note 3, at 259 (running the following search in the USCCAN-REP database: "(OVERRUL! MODIF! CORRECT! CLARIF! REVERS! REJECT! DISAGREE! ERRONEOUS! MISINTERPRET! OVERTURN! RESTOR!) /10 'SUPREME COURT' & date(aft 1990)").

35. *See* Eskridge, *supra* note 1, at 336–37 (searching printed USCCAN reports for every time a proposed statutory provision "overruled," "modified," or "clarified" a federal judicial interpretation of a statute, and supplementing "this method with a more selective search" of other sources).

36. For the purposes of this test, we coded an override as "caught" by the Hasen methodology if a report section uncovered by this search could have reasonably led researchers to conclude that the report contained a potential conscious override. We also coded an override as "caught" if the Hasen methodology uncovered another case overridden by the same public law, even if the methodology did not directly uncover the exact report in which the override was expressed.

37. Importantly, Westlaw's Congressional Testimony coverage does not begin until 1993, although we were able to locate quite a few hearings that occurred prior to 1993 through Westlaw's legislative history materials.

38. *See* Hasen, *supra* note 3, at 211 n.29 (citing Eskridge, *supra* note 1, at 332 n.1).

39. *Id.*

already listed in the Hasen or Eskridge 1991 studies and thus are not exercising any greater degree of judgment than was involved in past scholarship.[40]

Upon completing our review, we found that 25 cases not found by Hasen's team did indeed qualify as conscious overrides, giving the benefit of the doubt by counting close cases as a conscious overrides. We have updated Hasen's 2012 Appendix to account for them.[41] Many of these conscious overrides were not picked up by Hasen's methodology due to Congress' use of indirect override language in reports.[42] Several others were identified by Hasen's methodology and were determined to not be conscious overrides, but review of additional hearings or reports coded by the Christiansen–Eskridge study convinced us otherwise.[43] Given the size and complexity of these projects, coding error was also a minor factor.[44] We mostly attribute the remaining 17 disputed overrides to differences in judgment and definitional differences resulting from the Christiansen–Eskridge study's *ex post* court-focused approach (coding these overrides so long as they have an effect upon a case's holding and a mention of the Supreme Court case in legislative history materials) and Hasen's and Eskridge's 1991 *ex ante* legislative approach (requiring an affirmative statement or clear implication by

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40. That identifying overrides has never been easy was a key theme of Professor Widiss' insightful article. *See* Widiss, *supra* note 7, at 147 ("[A]s emphasized by the quotation that opened this essay and a similar statement by Hasen, both research teams agree that it is very difficult to identify overrides.").

41. *See infra* Appendix 1.

42. *See*, *e.g.*, H.R. REP. NO. 105-220, at 701 (1997) (Conf. Rep.), *reprinted in* 1997 U.S.C.C.A.N. 1129, 1512–13 (discussing the outcome for the taxpayer in *Commissioner v. Lundy*, 516 U.S. 235 (1996), and how the Taxpayer Relief Act of 1997, Pub. L. No. 105-34 (codified as amended in scattered sections of 5 U.S.C., 19 U.S.C., 26 U.S.C., 29 U.S.C., 31 U.S.C., 42 U.S.C., and 46 app.) would give the taxpayer a different result). Congressional reports occasionally employ a multiple-paragraph structure in which Congress will describe the state of the law, attribute that law to the Supreme Court, and then in a separate paragraph state its intent to change the law without explicitly contradicting the Supreme Court. *See, e.g.*, H.R. REP. NO. 105-364(I), at 53–54 (1997), *reprinted in* 1998 U.S.C.C.A.N. 1, 725 (using the multiple-paragraph structure to override *Welch v. Helvering*, 290 U.S. 111 (1933), with the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C. app., 16 U.S.C., 19 U.S.C., 22 U.S.C., 23 U.S.C., 26 U.S.C., 31 U.S.C., 28 U.S.C., and 49 U.S.C.)); S. REP. NO. 105-174, at 54 (1998) (discussing *U.S. v. Williams*, 514 U.S. 527 (1995), in the same manner). Where the implication is clear, we count this as an override. Difficulty catching overrides that follow this structure is one limitation of Hasen's search methodology, which requires override language to occur within 10 words of "Supreme Court." *See supra* note 34.

43. *See, e.g.*, *Hearing Before the Subcomm. on Econ. and Commercial Law of the Comm. of the Judiciary, H.R.*, 103d Cong. 220 (1994) (discussing *Owen v. Owen*, 500 U.S. 305 (1991), in the course of passing the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 310 (codified at 11 U.S.C. § 1322(c)(1)–(2) (1994)); *Hearing Before the Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary*, U.S. S., 103d Cong. 206 (1993) (discussing *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), in a similar manner).

44. *See, e.g.*, S. REP. NO. 105-63, at 21 (1997) (overriding *Commissioner v. Soliman*, 506 U.S. 168 (1993), with the Taxpayer Relief Act of 1997); H.R. REP. 105-220, at 463 n.35 (1993) (Conf. Rep.) (same). This was identified by Hasen's search and it is a conscious override.

Congress that it was consciously responding to, and altering, a Supreme Court statutory holding).[45]

Importantly, many of the additional conscious overrides missed by the original Hasen study but caught by reanalyzing the Christiansen–Eskridge data are additional overrides in the same laws already identified by the Hasen study as containing overrides. For example, two additional overrides came from the Antiterrorism and Effective Death Penalty Act of 1996 and three additional overrides came from the Class Action Fairness Act of 2005.[46]

Adding these additional 25 conscious overrides to the Hasen study raised the total number to 71, up from 46.[47] This is a major increase, and evidence that Christiansen and Eskridge's methodology—despite producing a large number of false positives—is extremely effective at locating conscious overrides. These additional overrides would raise the Hasen study's estimates during the during the disputed 1991–2000 period from 5.8 per session to 9.4 per session.[48] Despite the size of this increase, it still constitutes a decline from the 1975–1990 period.[49] Revised numbers for conscious overrides during the 2001–2012 period went from 2.8 to 4 per session.[50] While this too is a significant increase from the original numbers, it still constitutes a precipitous decline from the previous periods.

Further, the trend in the Obama presidency through 2014, not fully covered by the Christiansen–Eskridge study, shows an even further decline in conscious overrides. With the resumption of divided government in 2011, the average number of conscious overrides per two-year congressional

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45. *See* Widiss, *supra* note 7, at 155. Additionally, there were several cases which the Christiansen–Eskridge study coded as containing hearing mentions that we were unable to find in Westlaw's legislative history materials or the Congressional Testimony database. See, for example, *McCleskey v. Zant*, 488 U.S. 467 (1991), potentially overridden by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (codified as amended at 28 U.S.C. § 2244). Although there are fifteen hearings linked to this statute on Westlaw, we did not find a reference to "Zant" in any of them or in the Congressional Testimony database.

46. 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) (2012)) (overriding *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992), and *Teague v. Lane*, 489 U.S. 288 (1989)); 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)) (overriding *Snyder v. Harris*, 394 U.S. 332 (1969), *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)), and *Strawbridge v. Curtiss*, 7 U.S. 267 (1806)). The AEDPA in particular contributed to making 1996 an outlier year. Christiansen–Eskridge found a full 14 overrides in the law. However, 1996 would remain an outlier even if the AEDPA were excluded altogether from the count.

47. *See* Hasen, *supra* note 3, at 252–55 app.1.

48. *See id.* at 209.

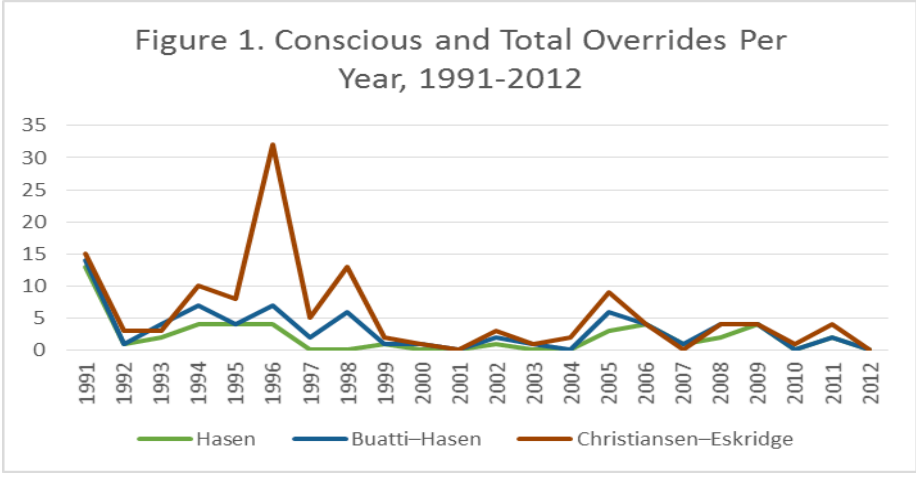
49. *Id.* The original Eskridge study identified an average of 12 overrides per two-year congressional session for each two-year congressional period during the 1975–1990 period. *See* Eskridge, *supra* note 1, at 335–36. Notably, this Eskridge 1991 study figure comes before the Christiansen–Eskridge study supplemented this number with additional cases found through their new methodology. We expect the number of overrides in 1975–1990 would increase significantly for this period if we applied their new methodology to find more conscious overrides.

50. *See* Hasen, *supra* note 3, at 209.

session fell to 2 through the end of 2014.[51] In the last two years ending in 2014, we have identified only 2 conscious overrides by Congress using our original methodology (the Christiansen–Eskridge methodology might ultimately find a few more). They came in a technical bill benefiting the land use of one Native American tribe.[52]

Figure 1 compares the original Hasen study of conscious overrides, the Christiansen–Eskridge study of total overrides, and the revised Buatti–Hasen numbers of conscious overrides for the 1991–2012 period

The biggest differences in the studies occur between 1994–1998, with 1996 remaining a clear outlier. Otherwise, the results track reasonably closely. As revealed below, an unusually high number of "unmentioned" cases occurred during these years, particularly in 1996. In addition, as expected all three studies show a clear and marked decline in overrides from 2000 to the present times.



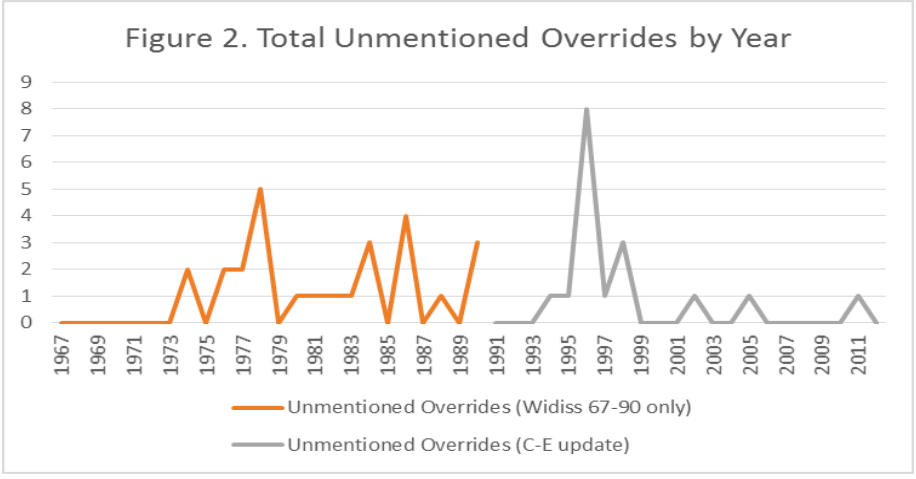
51. Using the Christiansen–Eskridge methodology for the 2012–2014 period no doubt could pick up additional conscious overrides. We note that including the 2008–2010 Congress would increase this number from 2 overrides per session to 4 overrides per session. We believe the slightly higher number of overrides passed during the period of united government is consistent with political polarization being a primary culprit in limiting overrides.

52. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014) (overriding *Carcieri v. Salazar*, 555 U.S. 379 (2009) and *Pottawatomi v. Patchak*, 132 S. Ct. 2199 (2012)). *See* H.R. REP. NO. 113-590, at 2 (2014) ("In 2009, the Supreme Court clarified that Section 5 of IRA does not authorize the acquisition of land in trust for a tribe, such as Gun Lake, whose members were not recognized and under federal jurisdiction on the date of enactment of IRA, or June 18, 1934. Carcieri v. Salazar (555 U.S. 379 (2009)). . . . Accordingly, S. 1603 is necessary for the Secretary to lawfully hold the Bradley Property in trust. . . . S. 1603 would void a pending lawsuit challenging the lawfulness of the Secretary's original action to acquire the Bradley Property. The lawsuit, filed by a neighboring private landowner named David Patchak, has been dormant for most of the last two years since the U.S. Supreme Court upheld Patchak's standing to pursue the action."); H.R. REP. NO. 112-752, at 11 (2013) ("The bills would overturn the effects of the Supreme Court decision by delegating authority to the Secretary of the Interior to acquire lands in trust for a tribe recognized at any time.").

B. The Uncertain Declining Value of Committee Reports

The second prong of our hypothesis concerned the diminished value of committee reports. Although we did not limit our search to committee reports, every scholar to have addressed this issue, including Hasen, appears to agree that committee reports are decreasingly useful for most purposes.[53] Christiansen and Eskridge's detailed coding presented us with the opportunity to run some preliminary tests to determine whether committee reports truly had become less valuable in identifying overrides. We reasoned that if these assumptions held true, we should expect to see fewer committee report mentions in Christiansen and Eskridge's data over time, with "unmentioned" cases clustered in the 2001–2011 period.[54] Recall that, for an override to count as "unmentioned," the legislative history must not discuss (a) the override provision; or (b) the overridden Supreme Court case.

We began our analysis by examining the data that Christiansen and Eskridge compiled for their original study, and that they shared with Professor Widiss, which identified unmentioned cases during 1967–1990, complementing it with Christiansen and Eskridge's updated data for 1991–2012. Figure 2 displays how unmentioned overrides mapped out over time:

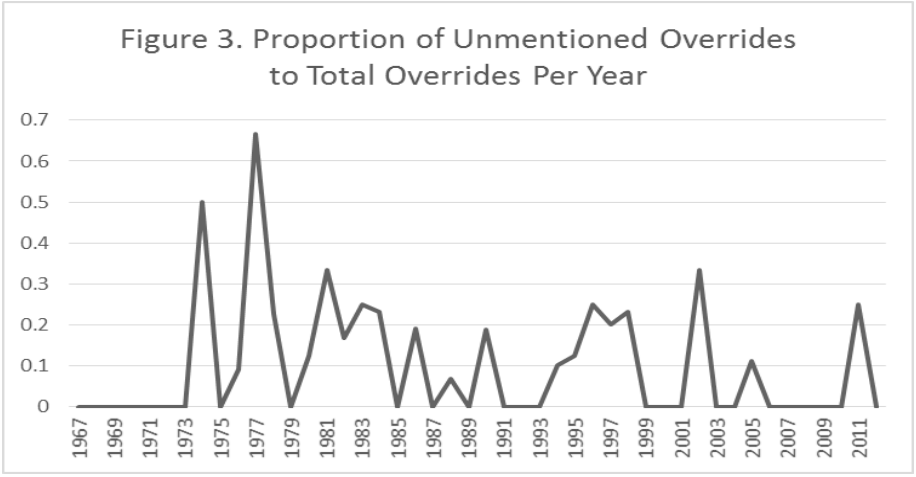


Providing again that unmentioned overrides may be underrepresented in these data for the latter several years, the results were somewhat surprising.

53. Christiansen & Eskridge, *supra* note 5, at 1328 ("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."); Hasen, *supra* note 3, at 259; Victoria F. Nourse, *Overrides: The Super-Study*, 92 TEXAS L. REV. SEE ALSO 205, 208 (2014); Widiss, *supra* note 7, at 151.

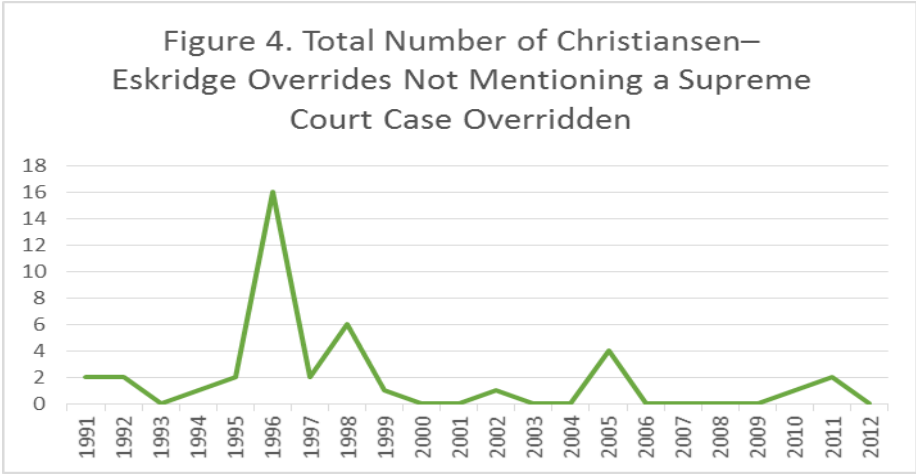
54. This hypothesis comes with the caveat that it may take time for courts to identify an override. *See* Christiansen & Eskridge, *supra* note 5, at 1342–33. Thus, "unmentioned" overrides from recent years could be underrepresented.

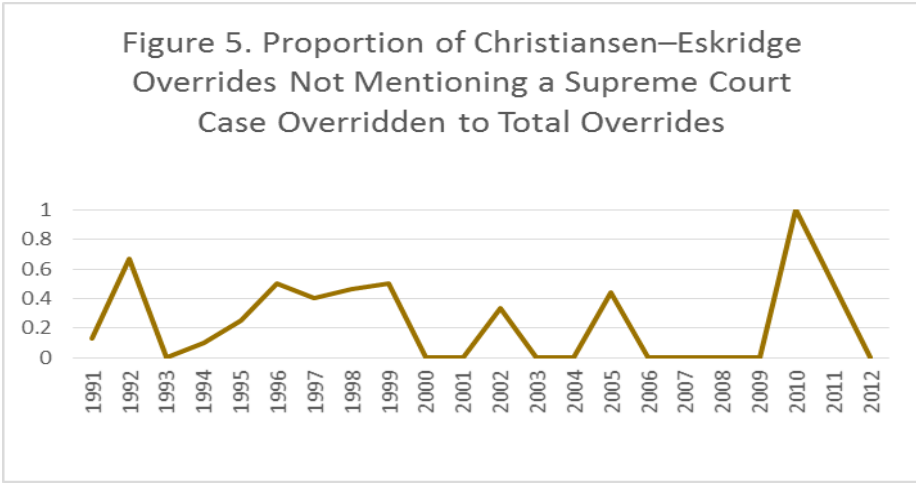
Although unmentioned overrides were indeed clustered in 1996, they were otherwise fairly evenly distributed. This is consistent with our finding that, with the significant exception of 1996 and to a lesser extent the surrounding 1994–1998 years, conscious overrides and total overrides track reasonably closely. In addition, unmentioned overrides generally do not constitute a very great proportion of total overrides, let alone a majority of total overrides, for any given Congress after 1977. Even the spike in 1996 is proportionally leveled out when considering the vast number of overrides Christiansen and Eskridge found for that year. In Figure 3, we show the proportion of unmentioned overrides to total overrides per year:



Because Christiansen and Eskridge designed their new methodology for the purpose of catching unmentioned overrides (which everyone, including Hasen, expected to increase in the face of the "radical" decline in the value of committee reports) we were surprised to see that unmentioned overrides had not substantially increased over time, either absolutely or proportionally.

Finally, we wanted to see whether the results changed if "unmentioned" referred only to overrides identified by the Christiansen–Eskridge study in which the hearings and reports concerning the statute had no discussion of the Supreme Court case overridden. That is, in this revised count we count an override as unmentioned even if the legislative history material explicitly referred to the override provision (without connecting it to a Supreme Court case). This revised definition expanded the total number of unmentioned overrides from 17 to 40. Figure 4 shows the total distribution of Christiansen–Eskridge overrides in which the legislative history materials make no reference to a Supreme Court case being overridden, and Figure 5 shows the proportion of such cases to total overrides.





These results showed no discernable pattern. We see clusters of times in which statutes whose legislative history did not mention an overridden Supreme Court case spiked, passing the 40% mark for all overrides in their respective years in 1992, 1996–1999, 2005, and 2010–2011. Aside from the lack of a pattern, the overall numbers are very small and might simply be the result of randomness. We would be very interested to see whether the same general pattern applies since 1967. In any case, this preliminary evidence does not show a steady increase in legislative history materials failing to mention an overridden Supreme Court case.

C. Conclusion

We drew several conclusions from our empirical analysis. First, the thoroughness (and labor intensiveness) of the Christiansen–Eskridge methodology is difficult to overstate. Consistent with the first prong of our

hypothesis, their successful identification of 25 conscious overrides did account for significant gaps in Hasen's and Eskridge's 1991 methodologies. Relatedly, the Christiansen–Eskridge study methodology also produced a large number of false positives in the form of unconscious overrides. This is partially reflected in Figure 1, which concentrates unmentioned overrides during Christiansen and Eskridge's golden age of 1991–1999. While our augmentation of the Hasen study does include more conscious overrides during this period than initially thought, the decline from previous periods means that 1991–1999 was not the golden age of *conscious* overrides. Similarly, we agree with both the Christiansen–Eskridge study and the Hasen study that all overrides, including both conscious and unconscious overrides, have dropped precipitously in the last fifteen years.

The second prong of our hypothesis was more difficult to verify. Applying the findings of the Widiss study along with Christiansen and Eskridge's updated data, we were not able to find an absolute or proportional increase in the number of "unmentioned" overrides over time. Thus, we were not able to confirm that the value of committee reports had declined, let alone radically declined. When we expanded the definition of "unmentioned" to include all cases that did not discuss a corresponding Supreme Court decision in a legislative committee report or hearing, we did find clusters that could be consistent with a radical decline. However, we were unable to verify this with a dataset that ranged from 1991–2012 only.

The Christiansen–Eskridge study's methodology has been very useful in catching a great many conscious overrides otherwise missed by Hasen's and Eskridge's 1991 methodology. However, the radical diminution in the value of committee reports in identifying overrides that their methodology was designed to address is not clearly reflected in the override context. Instead, the Christiansen–Eskridge methodology seems to solve a different problem: the difficulty of using direct Westlaw database searches of legislative history materials to find all conscious overrides. The labor-intensive *ex post* approach of Christiansen–Eskridge is clearly better as a first cut.

IV. Political Polarization Means Few Overrides in Periods of Divided Government

The Hasen study shows that the decline in conscious congressional overrides of Supreme Court statutory decisions corresponds neatly to increased polarization in Congress. Specifically, with the demise of moderates (especially Senate Republican moderates) in Congress, the chances for bipartisan overrides seem to have fallen off a cliff. In its place is a rise of partisan overrides (that is, overrides supported mostly by members of one party) during brief periods of united government when the same party controls the presidency and both Houses of Congress.[55]

55. *See* Hasen, *supra* note 3, at 238–39.

The Christiansen–Eskridge study does not appear to disagree with the conclusion that there has been a precipitous decline in overrides, although they point to the decline happening a bit later (1998) than the Hasen study (after 1991).[56] The authors suggest that despite the "very significant fall-off"[57] in overrides and an acknowledgement that "there is no relief in sight,"[58] overrides could pick up again even as Congress remains divided and polarized.

Christiansen and Eskridge may well be right that the number of conscious *and* unconscious overrides of the Supreme Court's statutory interpretations could pick up again—a point on which we express no view. But the authors offer no good reason to believe that in the near future the numbers of solely *conscious* overrides will pick up except during periods of united party government or that overrides will again become more bipartisan.

Consider two examples. First, contrast Congress's bipartisan override of two Supreme Court decisions in amending and extending the Voting Rights Act in 2006[59] with its failure to come together to pass the Voting Rights Amendments Act, which would update the Act's coverage formula in light of the Supreme Court's 2013 decision in *Shelby County v. Holder*[60] to strike the coverage formula as unconstitutional.[61] Only eleven Republicans signed on as co-sponsors of the 2014 version of the VRAA.[62] The measure was supported almost exclusively by Democrats. Where there used to be bipartisan support for the preclearance provision of the Act, even as far as the mid-2000s, that support has withered away as more moderates have left Congress and Congress has become even more polarized. Things have gotten that much worse even in the last decade.

Second, Congress has not yet overriden the Supreme Court's decision in *Paroline v. United States*[63] In *Paroline*, the Supreme Court interpreted a federal statute allowing restitution for victims of child pornography to recover only a small amount from the wrongdoers.[64] The Senate in 2015

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56. *See* Christiansen & Eskridge, *supra* note 5, at 1331–32 (tracing Clinton impeachment as beginning of overrides declining precipitously).

57. *Id*. at 1341.

58. *Id*. at 1473.

59. *See* Hasen, *supra* note 3, at 221–22 (describing passage of 2006 VRA amendments).

60. 133 S. Ct. 2612 (2013).

61. This is not a statutory override (it is rather a response to a constitutional ruling), but it is similar enough to illustrate the point. On the lack of movement on the Voting Rights Amendments Act, see Kate Nocera, *Judiciary Chairman in No Rush to Move on Voting Rights Act Bill*, BUZZFEED (Jun. 26, 2014, 2:33 PM) http://www.buzzfeed.com/katenocera/judiciary-chairman-in-no-rush-to-move-on-voting-rights-act-r, *archived at* http://perma.cc/HST6-S53F.

62. *Cosponsors H.R.3899 - 113th Congress (2013-2014): Voting Rights Amendment Act of 2014*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/3899/cosponsors, *archived at* https://perma.cc/N9N3-Z2C7.

63. Paroline v. United States, No. 12-8561, slip op. at 1710 (U.S. Apr. 23, 2014).

64. *Id.* at 21.

finally passed a bill on a 98–0 vote to overturn this Supreme Court case and it awaits House approval.[65] It seems like the perfect sort of case for a bipartisan override: both parties like to be tough on child pornographers—it is one issue on which there is no partisan divide. In the old days such legislation seemed likely to quickly sail through Congress with bipartisan support. These days, passage of even this uncontroversial bill is uncertain given overall congressional gridlock.

Something has changed about the nature of conscious congressional overrides, and, for reasons given in the Hasen study, the rise in partisanship seems a likely explanation. Overrides have declined as voting in Congress has become more ideological, the parties voting patterns became more sharply divided, and ideological moderates have left Congress.

Christiansen and Eskridge, however, are not convinced that partisanship is the main cause:

> [Hasen's] 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.[66]

The premise of the analysis is incorrect. As explained in Part III above, the 1990s were not the golden age of *conscious* overrides, although there were more overrides in that period than indicated in the original Hasen study.[67] Such overrides still declined after 1991, which marked the passage of the Civil Rights Act of 1991 reversing at least 10 Supreme Court opinions.[68] The decline which began in 1992 increased dramatically during the 2001–2014 period.[69]

More importantly, the amount of partisanship helps explain any transitory bump in the 1990s. Despite the decade ending with the Clinton impeachment and great partisan drama, the Presidents in the 1990s were political moderates, George H.W. Bush and Bill Clinton, who were willing to make deals with the other party,[70] a point on which Christiansen and

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65. S. 295 Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, https://www.govtrack.us/congress/bills/114/s295.

66. Christiansen & Eskridge, *supra* note 5, at 1344.

67. *See supra* Figure 1.

68. *Id.*

69. *Id.*

70. As measured by DW-Nominate scores, President George H.W. Bush was more moderate than President Reagan and his son, President George W. Bush. President Clinton was more moderate than President Jimmy Carter, but President Obama is more moderate than Clinton. David Dayen, *New Study: Presidents Getting More and More Conservative*, FIREDOGLAKE (Feb. 6, 2012), http://news.firedoglake.com/2012/02/06/new-study-presidents-getting-more-and-more-conservative/, *archived at* http://perma.cc/47E7-7H6V.

Eskridge agree.[71] Further, in 1993 and 1994, President Clinton presided over a united Democratic Congress.[72] Both the moderation of the presidents and a period of unified government can help explain any uptick in conscious overrides in the 1990s, although they do not explain the 1996 spike.

The next two presidents did not fare as well with Congress on overrides or legislation generally. After first giving President George W. Bush some of what he wanted on his legislative agenda, Democrats eventually sought to limit Bush initiatives.[73] With fewer Republican moderates in Congress and the rise of the Tea Party movement, Republicans from the beginning of the Barack Obama presidency sought to block and weaken him despite his ideological moderation (he was more moderate than George H.W. Bush, Clinton, and George W. Bush),[74] and few significant overrides occurred during the Obama presidency.[75] Conscious overrides are at the lowest point since at least 1967, the start of the original Eskridge 1991 study.

From the 1970s to today, the ideological distance between the parties has only grown, as the parties realigned after the civil rights movement and the number of moderates in Congress has shrunk, shrinking even further with the 2014 election's loss of Democratic Senate moderates such as Kay Hagan, Mark Pryor, Mark Begich and Mary Landrieu.[76] In a Senate with no Bob Doles and no Robert Byrds, but with a Ted Cruz and an Elizabeth Warren, legislative compromise seems less likely. Aside from ideological distance there is also an intransigence among many members of Congress, who see compromise in order to pass legislation as a victory for the other side.

Christiansen and Eskridge agree that the remainder of the Obama administration will see few overrides, but they suggest overrides will pick up again, maybe after this decade, because of a need for Congress to update statutes.[77] No doubt there is such a need, but that does not mean Congress

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71. Christiansen & Eskridge, *supra* note 5, at 1339.

72. CQ PRESS, GUIDE TO CONGRESS 83 (7th ed. 2013).

73. Dan Balz, *Democrats are United in Plans to Block Top Bush Initiatives*, WASH. POST (Jan. 5, 2005), http://www.washingtonpost.com/wp-dyn/articles/A61686-2005Jan9.html, *archived at* http://perma.cc/4G6L-7AT9.

74. Dayen, *supra* note 70.

75. *See* Christiansen & Eskridge, *supra* note 5, at 1480–81 (identifying few overrides during President Obama's term); *see infra* Appendix 1 (displaying congressional overrides during Obama's presidency).

76. Catalina Camia, *Democrats Who Voted for Obamacare Cut By Half in New Senate*, USA TODAY (Dec. 8, 2014), http://onpolitics.usatoday.com/2014/12/08/democrats-senate-obamacare-landrieu/, *archived at* http://perma.cc/V4FG-UGG3.

77. "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." Christiansen & Eskridge, *supra* note 5, at 1325 n.31. *See also id.* at 1333 ("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.").

rationally will respond to it. Christiansen and Eskridge offer no path for the revival of overrides, acknowledging that they "have no solution" to stop the decline in overrides, which they see as a "consequence of both Congress's post-9/11 agenda and its hyper partisan divisions."[78] We are similarly pessimistic that in times of divided government, even post-Obama, a return to major bipartisan overrides is possible. We will have to wait for partisanship to ebb in Congress, whenever and however that may happen. We hope it happens soon, but have no expectation that it will.

V. Conclusion

On one key point, the wonderful Christiansen–Eskridge study misses the mark: when it comes to the Congress–Supreme Court dialogue, it makes the most sense to limit the study of overrides to conscious ones. Considering all three studies on this issue, as well as Professor Widiss's analysis, there seems little doubt that conscious congressional overrides of Supreme Court statutory interpretation opinions have declined precipitously, especially since 2000, and polarization in Congress means this trend will continue, except in limited periods of united government, until polarization diminishes.

78. Christiansen & Eskridge, *supra* note 5, at 1474.

Appendix 1: Conscious Congressional Overrides of Supreme Court Statutory Interpretation Cases, 1991–2014

Year	Congressional Act	Supreme Court Case Overruled
2014	Gun Lake Trust Land Reaffirmation Act, Pub L. No. 113-179, 128 Stat. 1913 (2014)	Carcieri v. Salazar, 555 U.S. 379 (2009)
		Pottawatomi v. Patchak, 132 S. Ct. 2199 (2012)
2011	Leahy-Smith America Invents Act of 2011, Pub. L. No. 112-29, § 19(b), 125 Stat. 284, 331–32	Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002)
2011	Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 204, 125 Stat. 758	Hoffman v. Blaski, 363 U.S. 335 (1960)
2009	Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617	
	§ 2(f)(1)(B)	United States v. Santos, 553 U.S. 507 (2008)
	§ 4(a)	Allison Engine Co. v. U.S. *ex rel.* Sanders, 553 U.S. 662 (2008)
2009	Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 101, 123 Stat. 1776, 1783–1830	FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)
2009	Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6	Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)
2008	ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56	Sutton v. United Airlines, Inc., 527 U.S. 471 (1999)
		Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002)
		Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999)
		Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999)

2007	Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. No. 110-175, § 4, 121 Stat. 2524, 2525	Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001)
2006	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)
2006	Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36	Hamdan v. Rumsfeld, 548 U.S. 557 (2006)
2006	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.	Georgia v. Ashcroft, 539 U.S. 461 (2003)
		Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000)
2005	REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a), 119 Stat. 302, 310–11	INS v. St. Cyr, 533 U.S. 289 (2001)
2005	Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. 10, § 1005(e), 119 Stat. 2739, 2741–43	Rasul v. Bush, 542 U.S. 466 (2004)
2005	Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–12	United Steelworkers of Am., AFL-CIO v. R. H. Bouligny, Inc., 382 U.S. 145 (1965)
		Snyder v. Harris, 394 U.S. 332 (1969)
		Zahn v. Int'l Paper Co., 414 U.S. 291 (1973)
		Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)
2003	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)
2002	Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 402(a), 116 Stat. 21, 40	Gitlitz v. Comm'r, 531 U.S. 206 (2001)
2002	Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804(a), 116	Lampf, Pleva, Lipkind, Prupis & Petigrow v. John Gilbertson,

	Stat. 745, 801	501 U.S. 350 (1991)
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)
1999	Graham-Leach-Bliley Act, Pub. L. 106-102, § 104(c)–(d), 113 Stat. 1338 (1999)	Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25 (1996)
1998	Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685	
	§ 3001(a)	Welch v. Helvering, 290 U.S. 111 (1933)
	§ 3106(b)(1)	United States v. Williams, 514 U.S. 527 (1995)
	§ 3202(a)	United States v. Brockamp, 519 U.S. 347 (1997)
1998	Curt Flood Act of 1998, Pub. L. No. 105-297, § 3, 112 Stat. 2824, 2824	Flood v. Kuhn, 407 U.S. 258 (1972)
1998	Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469, 3469–70	Bailey v. United States, 516 U.S. 137 (1995)
1998	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)
1997	Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788	
	§ 932(a)	Comm'r v. Soliman, 506 U.S. 168 (1993)
	§ 1282(a)	Comm'r v. Lundy, 516 U.S. 235 (1996)
1996	Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214	
	§ 104	Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)
		Teague v. Lane, 489 U.S. 288 (1989)
	§ 106	Schlup v. Delo, 513 U.S. 298 (1995)
1996	False Statements Accountability	Hubbard v. United States, 514

	Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 3459	U.S. 695 (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)
	§ 309	Pulliam v. Allen, 466 U.S. 522 (1984)
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