

# Texas Law Review

## *See Also*

Volume 92

### Response

## Identifying Congressional Overrides Should Not Be This Hard

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*“It is hard to do empirical studies of statutory overrides, because it is very hard to find them all.”*<sup>1</sup>

—Matthew R. Christiansen & William N. Eskridge, Jr.

### I. Introduction

Professor William N. Eskridge, Jr., and Matthew R. Christiansen’s new article analyzing more than forty years of Congressional overrides is a very significant achievement.<sup>2</sup> The article builds on Professor Eskridge’s groundbreaking study, published in 1991, that demonstrated conclusively that Congress monitors judicial activity and regularly responds to statutory

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\* Associate Professor, Indiana University Maurer School of Law. First and foremost, I thank Bill Eskridge and Matt Christiansen for conducting their study. It is a significant advance in our understanding of overrides, and it is an honor to respond to it. I am also personally grateful that Bill and Matt were willing to share their data with me, even prior to publication, to assist me with a project of my own that explores the extent to which courts continue to rely on overridden precedents. I also thank my coauthor on that project, Brian Broughman, for being my thought partner in exploring these issues and for sharing his statistical and methodological expertise with me, including assisting me with the data analysis that I did for this response. Additionally, I thank Rick Hasen and Matt Christiansen for helpful comments on an earlier draft. Matt Pfaff provided excellent research assistance. And finally, I thank the editorial staff of the *Texas Law Review See Also* for inviting me to write this response and for helping finalize it for publication.

1. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEXAS L. REV. 1317, 1325 (2014).

2. Christiansen & Eskridge, *supra* note 1.

interpretation decisions.<sup>3</sup> The new study, however, goes far beyond the 1991 study in the depth and scope of its analysis, and it should dramatically reframe the way in which scholars approach the study of overrides. Indeed, although the most publicized overrides are highly charged debates in which Congress forcefully repudiates a judicial interpretation as misrepresenting prior Congressional intent,<sup>4</sup> Christiansen and Eskridge conclude such “restorative” overrides are actually rather rare. By contrast, they find that the majority of overrides “update” or “clarify” policy,<sup>5</sup> often in response to a specific plea from the Supreme Court to do so.<sup>6</sup> They also deepen our understanding of factors that are highly correlated with overrides, including their provocative findings that cases that rely upon the whole act or whole code canons of statutory interpretation are disproportionately likely to be overridden<sup>7</sup> and that women and minority groups now increasingly look to Congress rather than the courts to enforce and expand principles of equality.<sup>8</sup> They offer several sensible proposals to make overrides more effective,<sup>9</sup> important insights about the central role that agencies play in both generating and implementing overrides,<sup>10</sup> and a nuanced exploration of the problems that may result from a dramatic decrease in override activity in recent years.<sup>11</sup>

All of this thoughtful analysis invites further exploration and debate.<sup>12</sup> For purposes of this response, however, my comments focus on a threshold—but crucially important—point: It is a major accomplishment simply to compile a relatively comprehensive list of overrides. Christiansen and Eskridge frame their new study in part as a response to the *New York Times*’s declaration, based on a recent study by Professor Richard L. Hasen, that overrides have “fallen to almost none.”<sup>13</sup> They explain their significantly different findings—Christiansen and Eskridge identify 122

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3. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991).

4. See Christiansen & Eskridge, *supra* note 1, at 1374–75.

5. See *id.* at 1370–74.

6. See *id.* at 1409–13.

7. See *id.* at 1401–08.

8. See *id.* at 1381–82.

9. See *id.* at 1439–73.

10. See *id.* at 1375–80, 1450–58.

11. See *id.* at 1473–79.

12. I have already begun to plumb their data for a forthcoming project on ongoing reliance on overridden precedents, and I am sure that many others will use their incredibly rich data set to further deepen our understanding of overrides.

13. Christiansen & Eskridge, *supra* note 1, 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-paralysis-of-congress.html?\\_r=0](http://www.nytimes.com/2012/08/21/us/politics/supreme-court-gains-power-from-paralysis-of-congress.html?_r=0)); see also Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 *S. CAL. L. REV.* 205, 209 (2013).

overrides between 1991 and 2011, whereas Hasen identifies just 46 overrides in the same time period—as the result of different methodologies employed for identifying overrides.<sup>14</sup> That said, as 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.<sup>15</sup>

In this essay, I argue the differing results of these two studies represent more than simply two distinct methodologies for identifying overrides. Rather, in fundamental ways, they speak to the efficacy of overrides. 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.<sup>16</sup>

Christiansen and Eskridge also observe that there was often a delay of several years before courts first flagged a precedent as having been superseded by statute, and that relying on court-based signals yielded high numbers of false positives (that is, cases in which courts suggested a precedent had been superseded or otherwise affected by a statutory amendment but that Christiansen and Eskridge concluded were not overrides).<sup>17</sup> They mention these facts only in passing while showing how they correct for them, but I argue that these findings are important in themselves. Courts, ultimately, are the primary audience for overrides<sup>18</sup>—and these findings suggest deep-set confusion over how to integrate overrides into a judicial system that prioritizes adherence to precedent. Again, original

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14. See discussion *infra* subpart II(A).

15. Hasen, *supra* note 13, at 259 (“Identifying congressional overrides is a challenge, as there is no single repository of such information.”).

16. See discussion *infra* subpart II(B).

17. See Christiansen & Eskridge, *supra* note 1, at 1329 n.48, 1342–43.

18. See *id.* at 1358–59 (explaining that the Supreme Court and Congress do not communicate directly but rather through “judicial decisions and congressional responses, both codifications and overrides”).

analysis of Christiansen and Eskridge's data reveals important patterns: courts generally flag restorative overrides far more quickly than they flag updating or clarifying overrides, even though one would assume that they would be more likely to resist restorative overrides than updating or clarifying overrides.<sup>19</sup> In other words, although political-science literature has framed overrides primarily as part of an interbranch policy struggle,<sup>20</sup> this finding suggests that slow implementation may often stem from information failure rather than wilful resistance.<sup>21</sup> To put it simply, overrides cannot do their work if courts do not know that a prior decision has been overridden.

Accordingly, I argue that an important first step in making overrides more effective would be for Congress simply to state—clearly in statutory text, as well as in any committee reports—that it is enacting an override.<sup>22</sup> The data suggests this would particularly helpful in raising awareness of updating and clarifying overrides. It would make it far easier for relevant congressional offices, administrative agencies, future researchers, and legal search engines such as Westlaw and Lexis to maintain and update a relatively comprehensive list of overrides and thus help ensure that courts can promptly integrate overrides into their analysis. Or, more generally, offices within Congress or administrative agencies could take on the responsibility of systematically identifying overrides and disseminating information about them. These suggestions supplement the drafting proposals, largely designed to make restorative overrides more effective, that Christiansen and Eskridge put forward, which I also heartily endorse (indeed, some build explicitly on proposals I have made in my own prior writing in this area).<sup>23</sup> I end, however, with a note of caution. Christiansen and Eskridge report that women and minority groups have been surprisingly successful at obtaining overrides of narrow interpretations of civil rights laws, a phenomenon that they dub an “inversion of *Carolene Products*.”<sup>24</sup> This is an important insight, but it also important to acknowledge a fact that Christiansen and Eskridge do not highlight: courts retain the ultimate trump card in this particular dialogue,

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19. See discussion *infra* subpart II(C).

20. See Christiansen & Eskridge, *supra* note 1, at 1458 (discussing political-science literature on overrides); see also Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 522–23 (2009) (same).

21. See discussion *infra* subpart II(C), Part III.

22. See discussion *infra* subpart IV(A).

23. See Christiansen & Eskridge, *supra* note 1, at 1442–44 (citing Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEXAS L. REV. 859 (2012)); see also generally Widiss, *supra* note 20.

24. Christiansen & Eskridge, *supra* note 1, at 1381 (referring to *United States v. Carolene Products Co.*, 304 U.S. 144 (1937)).

in that they have often held that more expansive understandings of equality that Congress seeks to implement are unconstitutional.<sup>25</sup>

## II. Identifying the Overrides

### A. *Congressional-Focused Strategies Versus Judicial-Focused Strategies*

Both Professor Hasen and Professor Eskridge and Mr. Christiansen began with Eskridge's foundational 1991 study, generally considered the leading empirical study of overrides (prior to the publication of these two new studies). In the 1991 study, Eskridge defined an override as anytime Congress "reacts *consciously to*, and modifies a statutory interpretation decision" such that similar cases in the future would be "decided differently."<sup>26</sup> The 1991 study stated that, "[w]ith only a few exceptions," it did not include as overrides statutes for which the "legislative history—mainly committee reports and hearings—[did] not reveal a legislative focus on judicial decisions."<sup>27</sup> In other words, it largely excluded "implicit" overrides, in which a new statute may affect the viability of a prior statutory interpretation precedent but Congress may not realize it is doing so.

To identify the overrides for the 1991 study, Eskridge and his research assistants searched all committee reports printed in *U.S.C.C.A.N.* for the relevant time period, noting every reference to judicial interpretations that the reports described as being "'overruled,' 'modified,' or 'clarified' by a provision in the proposed statute," and then "weeding out" provisions that were not enacted or that Eskridge determined did not override a decision in a "substantial way."<sup>28</sup> Recognizing that (even then) not all laws generated committee reports and not all committee reports are reported in *U.S.C.C.A.N.*, Eskridge also reviewed additional reports, hearing transcripts, and secondary sources.<sup>29</sup> This generated a list of 121 Supreme Court decisions overridden by subsequent statutory provisions enacted between 1967 and 1990.<sup>30</sup>

25. See discussion *infra* subpart IV(B).

26. See Eskridge, *supra* note 3, at 332 n.1 (emphasis added).

27. *Id.*; see also *id.* at 419 & n.308 (explaining that a "few" overrides were included even absent legislative history on point where the "relevant communities of interpretation" "clearly linked" the new statute to a Supreme Court case).

28. *Id.* at 418. For an argument that even statements in legislative history criticizing a prior judicial interpretation should sometimes lead to reconsideration of settled precedent, see James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994), and James J. Brudney, *Distrust and Clarify: Appreciating Congressional Overrides*, 90 TEXAS L. REV. SEE ALSO 205 (2012) (arguing that courts should pay particular attention to legislative history accompanying overrides).

29. See Eskridge, *supra* note 3, at 418.

30. See *id.* at 338. The 1991 Eskridge study also included 220 overridden lower court decisions. *Id.* In the years after Eskridge's pioneering study, various other researchers have employed his methodology to update it and check it for completeness. See, e.g., JEB BARNES, *OVERRULED?*

Hasen explicitly framed his new study as an updating of Eskridge's 1991 study, and, to permit an "apples-to-apples comparison," he used largely the same methodology as Eskridge's 1991 study.<sup>31</sup> That is, he searched committee reports on Westlaw, using the USCCAN-REP database, looking for any reports or other materials that included words such as "overruled" or "modified" close to a mention of the Supreme Court and, for a subset of the years he studied, simply looking for any mention of the Supreme Court at all.<sup>32</sup> He recognized that committee reports appeared "less likely than twenty years ago" to mention an override and accordingly supplemented this search with secondary sources that identified additional overrides.<sup>33</sup> Although he did not require that the legislative history mention the override, he also did not include any statutes that "implicitly overruled a Supreme Court statutory interpretation decision."<sup>34</sup> In total, this generated a list of 46 Supreme Court decisions that had been overridden since 1991,<sup>35</sup> and it showed a significant decline in override activity that began early in the 1990s and slowed to a trickle in recent years.<sup>36</sup>

In their new study, Christiansen and Eskridge assert that Professor Hasen's data set was artificially deflated not (primarily) by the absence of overrides but rather by the absence of references in legislative history to overrides, an artifact of the decline in the use of legislative history more generally.<sup>37</sup> To address this potential shortcoming, they and their research assistants engaged in an extraordinarily labor-intensive process to supplement the results that the committee report search uncovered. First, they identified every Supreme Court decision during the relevant time period. Then, they used Westlaw to identify all cases in which a lower court decision, or other legal document, flagged the case as having been affected by a subsequent statutory enactment. They then followed up on all such leads, reading the case and the later legislation to determine whether the legislation met their criteria for an override.<sup>38</sup>

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LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 77 (2004) (discussing how the author independently researched congressional reports and the Congressional Record for a specific year and did not identify any overrides that had been included in the 1991 Eskridge study); Lori Hausegger & Lawrence Baum, *Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation*, in GREAT THEATER: THE AMERICAN CONGRESS IN THE 1990S, at 224, 225 n.1, 227 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998) (using Eskridge's framework but extending analysis through 1996).

31. See Hasen, *supra* note 13, at 217.

32. See *id.* app. IV at 259–61.

33. *Id.* app. IV at 259.

34. *Id.* The methodological index does not indicate what other markers of Congressional intent were used to make this distinction.

35. See *id.* app. I at 252–55 (listing all overrides).

36. See *id.* at 218.

37. See Christiansen & Eskridge, *supra* note 1, at 1327–29.

38. See *id.* at 1328–29.

In total, Christiansen and Eskridge compiled a list of 286 statutory provisions overriding 275 Supreme Court decisions, including 122 since 1991.<sup>39</sup> Notably, employing the Westlaw supplementary approach also expanded the list of overrides of Supreme Court decisions for the earlier time period that was the focus of the Eskridge 1991 study from 121 to 164 overrides.<sup>40</sup> Thus, the bottom-line results of the Christiansen and Eskridge study differed sharply from those of the Hasen study, especially for overrides enacted during the 1990s. Whereas Hasen found a sharp decline in override activity during that decade,<sup>41</sup> Christiansen and Eskridge declared the 1990s the “golden age of overrides.”<sup>42</sup> Christiansen and Eskridge found overrides began to drop off after 1999, although they did not find as complete a decline as Hasen reported.<sup>43</sup>

Christiansen and Eskridge characterize their use of Westlaw primarily as a mechanism to respond to the “diminished value of committee reports” since 1990.<sup>44</sup> This seems to me to be a reasonable strategy, but it is important to highlight the extent to which this shift is more than simply gap filling. By moving from reliance on primarily committee reports, or other Congressional materials such as hearing transcripts, to lower court flags, Christiansen and Eskridge move from a Congressional-focused vehicle for identifying overrides to a judicial-focused vehicle for identifying overrides (mediated, as discussed below, through Westlaw’s coding conventions). In so doing, they also move from an *ex ante* focus—that is, what was understood as the intent prior to enacting the override—to an *ex post* focus—that is, how has the override been interpreted.

Importantly, after using the Westlaw mechanism to identify overrides, Christiansen and Eskridge reviewed the congressional hearings and committee reports on each bill that included an override and found that in a high percentage (approximately 85%) there was at least some explicit mention of either the override provision or the problems with the Supreme Court decision subsequently overridden.<sup>45</sup> This suggests that at least some congressional drafters were likely aware of the interaction between the bill language and the prior precedent for many of the overrides. Nonetheless, since hearing testimony is far less central to the legislative process than

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39. *Id.* at 1329; *see id.* app. 1.

40. *Id.* at 1328–29, app. 1. They also removed a few statutes that had been classified as overrides in the initial 1991 study after determining, upon further consideration, that they were not overrides.

41. Hasen concluded that there was an average of 5.8 overrides during 1991–2000, and that this was heavily skewed by inclusion of the 1991 Civil Rights Act, which (by his count) overrode 10 Supreme Court cases. *See* Hasen, *supra* note 13, at 209, 218.

42. Christiansen & Eskridge, *supra* note 1, at 1336–40.

43. *Id.* at 1340–42.

44. *Id.* at 1328.

45. *See id.* at 1534, app. 3 (describing criteria). Analysis of data available upon request.

committee reports,<sup>46</sup> it is likely that these connections were less prominent—and sometimes entirely ignored—in debate or discussion over bills in which an override was mentioned in a hearing but not referenced in the committee report or legislative language. And, notably, there were several bills in which the overrides were not mentioned even in the hearings. Thus, in 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.<sup>47</sup>

### *B. Classifying Overrides: Updating, Clarifying, and Restorative*

Christiansen and Eskridge then further categorize the overrides into three different “kinds” of overrides: updating, clarifying, and restorative.<sup>48</sup> Although the political science literature, and many in the legal academy (myself included), have focused on the interbranch struggles implicit in Congress “challenging” the Court on contested policy matters through the enactment of overrides, the picture of overrides that emerges from this new study is much more nuanced. Christiansen and Eskridge conclude that approximately two-thirds of overrides are “updating” overrides, in which Congress did not express “negative judgment” about the Court’s interpretation but merely replaced an older interpretation with a new rule that is better suited for the modern regulatory state.<sup>49</sup> Many of these overrides were in some sense incidental to more general overhauls of a given statutory scheme, such as the Bankruptcy Reform Act of 1978 or the Judicial

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46. See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Look Study of Legislative Drafting, Delegation, and the Canons*, 95 STAN. L. REV. 901, 972–73, 977 (2013) (surveying congressional staff, finding that committee reports play the central role in educating members and staff about proposed legislation and that reports are considered far more reliable than hearing transcripts).

47. Of course, some judges and commentators would dispute the premise that Congress, a collection of 535 independent legislators, can have a specific intent at all, but I agree with commentators who argue that one can ascribe “group intent” to Congress. See LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 82–83 (2010) (noting “we routinely attribute intent to a group of people based on the intent of a subset of that group, provided that there is agreement in advance about what role the subgroup will play”); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864–65 (1992) (acknowledging that “ascribing purposes to groups and institutions is a complex business, and one that is often difficult to describe abstractly[.]” but arguing “that fact does not make such ascriptions improper[.]” and explicitly endorsing ascribing group intent to Congress).

48. See Christiansen & Eskridge, *supra* note 1, at 1370–75. Hasen classifies overrides differently into “technical”, “bipartisan”, and “partisan”, see Hasen, *supra* note 13, at 219, and finds a particularly steep drop off for bipartisan overrides. *Id.* at 237–38. Hasen’s bipartisan category seems likely to overlap with Christiansen and Eskridge’s updating and clarifying categories, which they also concluded had fallen off sharply. Christiansen & Eskridge, *supra* note 1, at 1368–69.

49. Christiansen & Eskridge, *supra* note 1, at 1370.



Improvements Act of 1990.<sup>50</sup> They conclude that an additional group of overrides, about 10% of the total, are “clarifying,” where the primary justification was responding to confusion in the law.<sup>51</sup>

Accordingly, it is a relatively small subset of the total population of overrides—approximately one-fifth—that Christiansen and Eskridge classify as “restorative” overrides, where Congress repudiated the prior Court interpretation as a flawed interpretation of the pre-existing law and “restored” the status quo ante.<sup>52</sup> These overrides disproportionately involved civil rights and antidiscrimination statutes where partisan divides tend to run deep,<sup>53</sup> although even here, most of the overrides were at least somewhat bipartisan and several were signed into law by conservative Republican presidents.<sup>54</sup> Notably, as Hasen highlights, this includes two relatively recent overrides: the ADA Amendments Act, passed in 2008, and a reauthorization of the Voting Rights Act, enacted in 2006.<sup>55</sup> In other words, well into the period of divided government, Congress could still put together bipartisan majorities to override unduly restrictive interpretations of civil rights legislation.

One potential limitation of this classification approach is that it takes Congress’s word, primarily as expressed in committee reports, for the nature of an override—when Congress may have political reasons for how it characterizes an override that depart from the substantive reality of the override.<sup>56</sup> That said, the classification of overrides—and the striking finding

50. *Id.* at 1370–71.

51. *Id.* at 1373–74.

52. *Id.* at 1374.

53. *Id.* at 1375.

54. *Id.* at 1375.

55. Hasen, *supra* note 13, at 220. That said, Hasen also emphasizes that Congress was deliberately ambiguous in the VRA’s override of a prior Supreme Court decision so that the bill could garner a bipartisan majority. *See id.* at 221 (citing Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 218 (2007)).

56. For example, one of the court decisions that Congress responded to in the 1991 Civil Rights Act—a massive bill that included at least 12 overrides—was *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a decision concerning the causation standard applied in employment discrimination cases. *See* Christiansen & Eskridge, *supra* note 1, at 1353–54 n.155. *Price Waterhouse* was a splintered decision, with a plurality opinion, two concurrences, and a dissent. The bill that became the 1991 Civil Rights Act was referred jointly to the House Education and Labor Committee and the House Judiciary Committee. The Education and Labor committee report titles its discussion of the response to the case “The Need to *Overturn Price Waterhouse*,” emphasizes that the Supreme Court’s decision departed from the interpretation adopted by numerous circuit courts, the Equal Employment Opportunity Commission, and the Justice Department, and states that it “severely undercut” the “effectiveness” of Title VII. H.R. REP. NO. 102-40, pt. I, at 45–46 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583 (emphasis added). Christiansen and Eskridge thus (reasonably) classify the override as “restorative.” *See* Christiansen and Eskridge, *supra* note 1, app. 1 at 1493. Interestingly, however, the House Judiciary Committee report (discussing the same proposed language, which is also very similar to the language ultimately adopted), while also critical of the Supreme Court decision and noting that it departed from the interpretation adopted by several

that a significant majority are updating or clarifying overrides rather than restorative overrides—is a dramatic advance in our understanding of overrides. Broadly speaking, the political science literature has framed overrides as a check on the extent which the Court can implement its own political objectives.<sup>57</sup> Legal scholars, by contrast, have typically described overrides as part of a “colloquy” between courts and legislators, in which courts welcome “corrections” from Congress.<sup>58</sup> The new taxonomy that Christiansen and Eskridge develop in this article suggests that these competing characterizations are probably both too broad-brush. It may be, for example, that updating and clarifying overrides typically function as a productive colloquy between courts and Congress, whereas restorative are often a power struggle. Thus, one of the primary takeaways from this new study is that empirical work on, and theoretical explorations of, overrides needs to be sensitive to these nuances.

In fact, I did original analysis of Christiansen and Eskridge’s data,<sup>59</sup> using their distinction between restorative and non-restorative overrides to

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appellate courts, titled its discussion of the response to the case “*Clarifying* [the] Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex or National Origin in Employment Practices,” and states that Section 5 “overturns *one aspect* of the Supreme Court’s decision in *Price Waterhouse*.” H.R. REP. NO. 102-40, pt. II, at 16 (1991), *reprinted in* 1991 U.S.C.A.N. 694, 709 (emphasis added). In fact, there was significant debate more generally over whether the 1991 Act would state that its purpose was “restoring” or that its purpose was “expanding” civil rights protections; a word choice that was thought to be important for determining whether the overrides would be applied retroactively. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 307–08 (1994); Widiss, *supra* note 20, at 540–541. As far as the response to *Price Waterhouse* went, although the substance of the override replaced an affirmative defense on liability with a limitation on remedies, the practical effect of the override was in many respects identical to the standard adopted by the plurality and Justice White’s concurrence in *Price Waterhouse*. *See* Widiss, *supra* note 23, at 883, 885, 902–04 (discussing the override and prior judicial interpretations in more detail). Indeed, in a recent Supreme Court decision, several of the justices emphasized the extent to which the 1991 Act’s response “*endorsed* the [*Price Waterhouse*] plurality’s conclusion” regarding what kind of claims were actionable and merely “supersede[d] *Price Waterhouse in part*.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2539 (2013) (Ginsburg, J., dissenting) (emphasis added); *see also* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 185 (2009) (Stevens, J., dissenting) (stating that “Congress *ratified Price Waterhouse’s* interpretation of the plaintiff’s burden of proof” in the 1991 Act) (emphasis added). My point here is not that there is anything inherently incorrect in classifying the *Price Waterhouse* response as a restorative override—I would do the same myself—but to emphasize the extent to which it also could plausibly be called a clarifying override or even (in many respects at least) a codification. *See also* Christiansen & Eskridge, *supra* note 1, app. 3 at 1535 (discussing how they coded the reasons for the override of *Price Waterhouse*). The broader point is that these lines are fuzzy and subject to manipulation for the sake of political or doctrinal arguments.

57. *See* Christiansen & Eskridge, *supra* note 1, at 1458 (noting that most of the major political-science models “assume the Supreme Court is primarily a strategic actor, seeking to impose its political and institutional preferences onto statutes and avoiding overrides through crafty dodges”).

58. *See id.* at 1458–59 (describing the most popular legal model’s notion of Congress as the “principal” and the Court as the “faithful agent” carrying out the directives that have been legally enacted) (internal quotation marks omitted).

59. Again, I am grateful to them for their willingness to share their data with me.

look back at Hasen's findings, and I discovered an interesting pattern. As noted above, Hasen's study included only 46 Supreme Court decisions overridden since 1991 (including 5 that were not included in Christiansen and Eskridge's list),<sup>60</sup> while the Christiansen and Eskridge study includes 122 for the same time period. Thus, on average, Hasen's study included only 34% of the overrides included in Christiansen and Eskridge's list. But these differences were not evenly distributed. Hasen's methodology identified a far higher percentage of the overrides that Christiansen and Eskridge classified as restorative than the overrides they classified as updating or clarifying. To be specific, looking only at the overlapping years, Hasen included 73% of the overrides coded as restorative in the Christiansen and Eskridge study, while only 17% of the non-restorative (that is, updating and clarifying) overrides. A similar pattern appears when considering Christiansen and Eskridge's depth variable, a variable that is highly correlated with restorative overrides.<sup>61</sup> Hasen included 7% of the overrides coded as depth "1" or "2"; 35% of the overrides coded as depth "3"; and 67% of the overrides coded as depth "4", where increasing numbers indicate "deeper" overrides—that is, overrides that disapprove not only of a specific result but also of the reasoning employed to reach that result.<sup>62</sup>

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. This raises interesting questions that future researchers may wish to explore: Does Congress even "know" the range of statutory precedents that might be affected by significant restructurings of the statutory law? And if it doesn't, what effect, if any, should that fact have on subsequent interpretation of an override?

### C. False Positives, False Negatives, and Delay

Both Professor Hasen and Professor Eskridge and Mr. Christiansen forthrightly admit that neither research methodology—that is, the legislative-

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60. See, e.g., Christiansen & Eskridge, *supra* note 1, at 1353–54 n.155 (discussing Christiansen and Eskridge's rationale for excluding certain decisions that are included in Hasen's study).

61. Analysis available upon request.

62. Analysis available upon request. I combined cases coded by Christiansen and Eskridge as having a depth of "1" or "2" to create a reasonably-sized sample. I did not report results in the text for overrides coded as "0" or "5" because there were only two of each. Hasen did not include any of the depth "0" or "5" overrides.

history-focused strategy or the judicial-citation-focused strategy—is infallible.<sup>63</sup> The legislative-history approach generates “false positives” in the form of disapproving mentions of Supreme Court decisions in committee reports for bills that are not actually enacted, and characterizations of bills as disagreeing with a prior judicial interpretation, where further consideration of the enacted language suggests a codification. And it generates “false negatives,” in that it fails to identify some statutory amendments that are clearly overrides. As Hasen observes, the committee-report method failed to capture a law explicitly titled “The Reversal of Adams Fruit Co. v. Barrett Act.”<sup>64</sup> More generally, as described above, Christiansen and Eskridge concluded that the Westlaw identification system uncovered significantly more overrides than the legislative-history-focused strategy.

But the Westlaw identification strategy was also very inaccurate. Christiansen and Eskridge little discuss the import of these findings beyond noting that they and their research assistants independently assessed the statutory language and prior precedent to correct for them. My objective here is not to question the accuracy of this process of sorting the wheat from the chaff, but rather to highlight how the false positives, false negatives, and delay they observed have important implications for assessing the efficacy of overrides.

First, the Westlaw identification strategy generated a lot of false positives. Christiansen and Eskridge identified every decision issued by the Supreme Court during the relevant time period and followed up on any Westlaw flags that indicated that the precedent had been affected by subsequent legislation. But many of these leads did not pan out. In their words, they found that “about half the time, they were not overrides.”<sup>65</sup> This means that courts are frequently flagging precedents as “superseded by statute,” “abrogated by statute,” or “called into doubt by statute” that careful review suggests did not qualify as overrides under the definition Christiansen and Eskridge employed.<sup>66</sup>

In part, this may reflect the simple point that, as noted above, “override” is in some sense a term of art. In some instances, courts—and researchers—

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63. See Hasen, *supra* note 13, at 260 (asserting that his research methods revealed most major overrides, but nonetheless undoubtedly missed some); see also Christiansen & Eskridge, *supra* note 1, at 1325 (asserting that they identified a more comprehensive list of statutory overrides than any previous study, but that they “surely . . . missed a few”).

64. Hasen, *supra* note 13, app. IV at 260 n.3.

65. Christiansen & Eskridge, *supra* note 1, at 1328.

66. In an email exchange with Christiansen, I asked how frequent these false positives were and whether they were more frequent when the flag indicated “called into doubt by statute” rather than stronger signals such as “superseded by statute” or “abrogated by statute.” He explained to me that they had not kept records of all of the false positives. He thought, however, that there was a higher percentage of false positives for the “called into doubt” flags but that there were “an awful lot” of false positives for each of the Westlaw signals. E-mail from Matthew Christiansen, Yale Law School, to author (Aug. 29, 2013, 11:06 EST) (on file with author).

can legitimately disagree about whether an amendment is an override.<sup>67</sup> It may also reflect impreciseness in the coding protocol employed by Westlaw. Coders need to translate a court's description of the interaction between precedent and statutes into a limited number of flags. This is a complex and nuanced interplay and sometimes the Westlaw researchers may not properly code the import of the court's discussion. But most importantly, it likely reflects some real confusion on the part of lower courts about how statutory amendments interact with precedent.

The Westlaw identification system is also slow. Christiansen and Eskridge report that, on average, it takes six years after an override is enacted before the precedent it addresses is *first* flagged by a lower court as potentially superseded, although the average delay for overrides enacted in the 100th and later Congresses (that is, 1987 and later) decreased to just under four years.<sup>68</sup> Christiansen and Eskridge suggest, reasonably, that the decreased lag time likely reflects the increased availability of electronic search tools. If this is correct, it seems likely that the lag time will continue to diminish as search tools become more refined and affordable. But it will likely continue to take several years for some precedents to be flagged. During the later time period (that is, 100th through 112th Congresses, 1987–2012), they report that nearly three-quarters of the overrides—already flagged on Westlaw—were identified within five years.<sup>69</sup> But Christiansen and Eskridge do not explicitly state the corollary, which I think is perhaps more important: that more than 25% of the overrides ultimately identified were *not* flagged by *any lower court* (or at least not identified in Westlaw as flagged by any lower court) within the first five years after the override.

And finally, the Westlaw identification system is incomplete, or, to put it in social science language, it also generates false negatives—that is, older precedents that should be flagged as superseded but that appear, on Westlaw at least, as fully binding precedent. For more recent Congresses, this may simply reflect the time lag. Christiansen and Eskridge explain that for the 106th through 112th Congresses (1999–2012), about a third of the overrides they identified through other research tools had not yet been flagged on Westlaw, while only 10% of the overrides from the 100th through the 105th (1987–1998) had not yet been flagged.<sup>70</sup> But it is again important to emphasize the flip of this observation: *even fifteen years* after an override has been enacted, one out of ten decisions identified by Christiansen and Eskridge as having been overridden have *never been indicated as such by lower courts*. In total, Christiansen and Eskridge report that 56 out of the total of 275 Supreme Court cases in their data set have not (yet) been flagged

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67. See, e.g., sources cited *supra* note 60.

68. Christiansen & Eskridge, *supra* note 1, at 1343.

69. *Id.*

70. *Id.*

by lower courts as superseded or otherwise affected by later statutory enactments.<sup>71</sup>

These findings may actually understate the problem, in that the Christiansen and Eskridge study focuses only on Supreme Court decisions that have been overridden. It is not uncommon, however, for Congress to supersede lower court decisions. In Professor Eskridge's 1991 study, where he sought to identify all Supreme Court and lower court decisions that had been overridden from 1967 to 1990, roughly two thirds of his total data set were lower court decisions.<sup>72</sup> Subject-specific studies of overrides, such as a study that sought to identify all bankruptcy decisions that had been overridden, likewise identify numerous lower court decisions.<sup>73</sup>

It seems quite possible that lower courts would miss overrides of earlier lower court decisions more frequently than they would miss overrides of Supreme Court decisions, simply because Supreme Court decisions generally receive more attention and because Congressional overrides of Supreme Court decisions also probably receive more attention. If future research were to confirm that this is the case, this would suggest that the delay and the problem of "false negatives" is even greater than that suggested by Christiansen and Eskridge's current study—that is, that probably far more than 10% of all overrides may never be flagged by lower courts as overridden. Additionally, putting together these two observations—that the committee-report identification process is incomplete and that the Westlaw identification process is also incomplete—suggests that there are almost certainly at least a few overrides that have been enacted that are not captured through *either mechanism* (or the various supplementary mechanisms the researchers employed).

Christiansen and Eskridge do not further disaggregate these findings, but I was curious as to whether these lag times and the failure to flag at all varied according to the "kind" of override enacted. Accordingly, I ran some additional analysis using the data that Christiansen and Eskridge compiled. Recall that Christiansen and Eskridge found that it took, on average, just under four years for overrides enacted by the 100th or later Congress (1987 or later) to be flagged.<sup>74</sup> Breaking down these results by type of override shows striking differences.<sup>75</sup> The lag time for most restorative overrides was extraordinarily short. The mean lag time was 2.57 years, but the median lag

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71. *Id.* at 1343 n.128.

72. *See* Eskridge, *supra* note 3, at 338.

73. *See* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887 (2000).

74. *See supra* text accompanying note 68.

75. Like Christiansen and Eskridge in their analysis of lag time, I excluded all overrides that have not yet been flagged by lower courts, obviously skewing the time frame for "recognition" shorter, since some have still not been recognized.

time was only 0.32 years—in other words, 50% of restorative overrides are flagged by a lower court on Westlaw in less than four months.<sup>76</sup> The picture looks dramatically different when considering the overrides that Christiansen and Eskridge classify as non-restorative. For these updating or clarifying overrides, the mean was 4.23 years and the median was 2.08 years, that is, more than six times longer than the median for restorative. Moreover, a true measure of the “lag time” for flagging non-restorative overrides would be even longer—and the gap with restorative even greater—because a higher percentage of the non-restorative overrides have not been flagged on Westlaw at all, and thus were excluded entirely from the averages.<sup>77</sup> This suggests, as I discuss more fully below, that there are significant information failures in implementing updating or clarifying overrides, or at least that courts do not routinely flag their effect on prior precedents. This finding is particularly striking because one would expect courts to be far less resistant to implementing updating and clarifying overrides than to implementing restorative overrides.

If Westlaw were only a mechanism to identify overrides in a “research” sense, this combination of false positives, delay, and false negatives would simply go to the accuracy of the data set. Some amount of play at the edges is common in any quantitative study that analyzes developments in the real world rather than the controlled world of a laboratory. But at a fundamental level, the Westlaw identification system *is itself* a marker of the efficacy of overrides. That is, one of Westlaw’s (and Lexis’s) primary services is that it flags when subsequent developments affect the reliability of prior precedent. The evidence above suggests that there are deep-rooted problems in the reliability with which Westlaw (and likely Lexis) handle overrides, and/or the reliability of the way lower courts handle overrides, problems that are explored more fully below.

#### *D. Westlaw and Lexis Coding Conventions Regarding Overrides*

In developing my own study of overridden precedents, I sought to gain a working understanding of how and when Westlaw’s Keycite service and Lexis’s Shepard’s service flag precedents as having been overridden.<sup>78</sup> In many respects, the processes are broadly similar, although the “top-level” signals typically employed by the two services to overrides differ considerably, as discussed below.

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76. Analysis available upon request.

77. Looking at overrides that occurred in 1987 or later, 93% of the restorative overrides have been identified on Westlaw, but only 82% of the non-restorative overrides. Analysis available upon request.

78. To gain this information, I corresponded via email and spoke with representatives of each company. Copies of the emails and my notes from these conversations are available upon request.

Both Westlaw and Lexis rely primarily on signals from courts to make determinations about the reliability of prior precedent. Within a purely caselaw-based system, this approach makes good sense. Lower courts cannot overrule binding precedent by a higher court, so in most instances a decision will remain binding until a court at the same level says that it is no longer binding. This is an oversimplification, in that the Supreme Court, at least, is often somewhat obscure about the extent to which it is overruling a prior precedent.<sup>79</sup> Nonetheless, lower courts generally may safely wait for clear signals from higher courts before disregarding otherwise binding precedent.

The interaction of statutes and case law is necessarily more complicated. Of course, it is clear that as a formal matter, Congress has the power to supersede prior judicial interpretation of statutes.<sup>80</sup> Westlaw, however, generally will not flag in any way that statutory language calls into question the validity of a precedent until a lower court makes a statement to this effect in an opinion. Any such indications by lower courts flip the “flag” on the prior precedent to “yellow” rather than “red”. (These are the flags that Christiansen and Eskridge used to identify potential overrides.) Given the number of false-positives that Christiansen and Eskridge identified, this is a reasonable decision by those who designed the Westlaw coding protocol. But for a very significant number of cases, it incorrectly signals that a case is still “good law” when in fact it has been overridden, at least in part. This problem is particularly acute under the “Westlaw Classic” search mechanism that is currently being phased out but that, until quite recently, was widely used.<sup>81</sup> On the newer Westlaw Next system, the flag is “yellow” but it is also accompanied by specific textual phrases indicating the nature of the warning (e.g., “superseded by statute” as opposed to “distinguished by”). On Westlaw Classic, by contrast, the flag is yellow and the textual signal is a generic signal assigned to *all* yellow flags, the vast majority of which simply signal that some later decision has distinguished the earlier decision: “Some negative history but not overruled.”

Westlaw generally will “red” flag a Supreme Court case only when the Supreme Court *itself* clearly indicates that Congress’s subsequent action superseded the prior precedent. This is a significant bar. The Supreme Court decides relatively few cases in any given year, so it may take many years

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79. See generally, e.g., Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010) (collecting examples of this phenomenon and discussing its significance).

80. See generally Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283–94 (1989) (describing “strong” and “weak” conceptions of supremacy).

81. According to Thomson Reuters’s second quarter 2013 report, 80% of Westlaw revenue had been converted to WestlawNext. Press Release, Thomson Reuters, Thomson Reuters Reports Second-Quarter 2013 Results (July 30, 2013), available at <http://thomsonreuters.com/press-releases/072013/thomson-reuters-reports-second-quarter-2013-results>.



before it decides a case in which it would naturally cite an overridden case. But even when the Supreme Court *does* cite an overridden case, it frequently does not indicate in any way that the precedent has been superseded.<sup>82</sup> And if this occurs, Westlaw will not change the color of the flag to red. The only other way in which, pursuant to its coding protocol, Westlaw will assign a “red” flag to the overridden case is if Congress clearly indicates *in statutory language* that a new law superseded a prior judicial interpretation.<sup>83</sup> Congress, however, rarely does this—although, as discussed below, it should.

The effects of Westlaw’s cautious approach to “red” flagging overridden precedents are quite dramatic. As noted above, most of the cases Christiansen and Eskridge identified as having been overridden are eventually flagged by some lower court as potentially superseded. But *very few* have actually been “red flagged” by Westlaw. In my independent analysis of a subset of the Christiansen/Eskridge data containing overrides between 1985 and 2011,<sup>84</sup> I found that only 33 out of 166, or 20%, currently have “red” flags on Westlaw. On Lexis, by contrast, 79% bear Lexis’s “red circle” warning signal, because Lexis generally changes the signal as soon as a lower court indicates that a prior precedent has been superseded. This, however, may cause the opposite problem of overstating the effects of some

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82. For example, *Brown v. Gardner*, 513 U.S. 115 (1994)—a case that relied on plain-meaning and whole-text analysis to disregard a long-standing agency interpretation—was overridden just two years after it was decided (almost twenty years ago now). See Act of Sept. 26, 1996, Pub. L. No. 104-204, 110 Stat. 2874, 2927 (codified at 31 U.S.C. § 501). Nonetheless, as of March 13, 2014, the Supreme Court has cited *Brown* sixteen times without ever indicating that it was overridden, and accordingly *Brown* is still “yellow-flagged” on Westlaw. The Court has never cited the case for the specific substantive interpretation that was overridden, but it often cites *Brown* for statutory interpretation principles where the fact that the case was subsequently overridden is arguably relevant to the validity or persuasiveness of the interpretive principle. See, e.g., *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012) (quoting *Brown* for the proposition that “there is a presumption that a given term is used to mean the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence”); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (quoting *Brown* for the proposition that “Age [of an agency’s interpretation] is no antidote to clear inconsistency with a statute”).

83. Westlaw is not consistent in applying red flags even when statutory language specifically disapproves of a Supreme Court decision. For example, the Voting Rights Act Reauthorization and Amendments Act of 2006 included among its findings a statement that “effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress’ original intent in enacting the Voting Rights Act of 1965,” and Section 5 of the 2006 Act overrode the interpretation at issue in those cases by amending the relevant language (although in a rather obscure manner). See Pub. L. No. 109-246, §§ 2(b)(6), 5, 120 Stat. 577, 578, 580–81 (2006) (codified at 42 U.S.C. §§ 1973-1973bb-1). But Westlaw (as of February 27, 2014) does not red flag either case.

84. This data set contains all overrides included in the Christiansen and Eskridge data set that occurred between 1985 and 2011, except for the few cases overridden in that window that were decided before 1946 and a few overrides that addressed cases that had already been overridden. This limitation excluded 12 overrides, out of a total of 178 overrides.

subsequent statutory amendments, since Christiansen and Eskridge's research found a high level of "false positives", that is, warnings by lower courts that a given precedent had been superseded that Christiansen and Eskridge ultimately found was not an override. The bottom line is that neither Lexis's nor Westlaw's signals with respect to overrides are very reliable.

### III. After the Override

My own prior work in the area has focused on judicial interpretations of overrides in the employment discrimination context, most of which were restorative overrides (often implementing an interpretation that had been urged by a passionate dissent in the Supreme Court decision). I have argued that courts often interpret such overrides unduly narrowly,<sup>85</sup> and improperly refuse to reinterpret identical language in related statutes.<sup>86</sup> Christiansen and Eskridge agree that this is a recurring and important issue.<sup>87</sup> That said, Christiansen and Eskridge's overall findings suggest that these problems may not be generally representative of overrides (although, as discussed below, these findings are quite different from those of the other relatively large scale effort to explore empirically the effects of overrides). Although Christiansen and Eskridge's primary focus in their new study is the factors that tend to correlate with overrides and the nature of the overrides themselves, they also include two variables that track the effects of overrides: An assessment of whether the override statute has been interpreted "normally" by lower courts, or whether it has been interpreted unusually broadly or narrowly, and an assessment of whether lower courts agree or disagree about the meaning of an override.<sup>88</sup>

Given the problems that have spurred my prior work, I was struck by Christiansen and Eskridge's finding that about 75% of the overrides were given what they deemed to be a "normal" interpretation.<sup>89</sup> Those that were not "normally" interpreted were split roughly 50/50 between interpretations that Christiansen and Eskridge characterized as unduly narrow, or actually invalidating the override, and those that they characterized as surprisingly broad.<sup>90</sup> They also found that courts quickly reached consensus on the meaning of most overrides, with about two-thirds resulting in an "immediate" consensus and 99% percent reaching a consensus within 10

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85. *See* Widiss, *supra* note 20, at 567–80.

86. *See* Widiss, *supra* note 23, at 926–41.

87. *See* Christiansen & Eskridge, *supra* note 1, at 1443 & n.446 (citing to Widiss, *supra* note 20, and Widiss, *supra* note 23).

88. *See id.* at 1434–36

89. *Id.* at 1435 fig. 34.

90. *Id.*

years.<sup>91</sup> Christiansen and Eskridge do not break these findings down by “types” of overrides, but again, I independently assessed the data for overrides since 1985 to see if there were differences between restorative and non-restorative overrides. I found that there was not much variation, but that the levels of judicial consensus were a little higher for restorative overrides than for other overrides.<sup>92</sup>

These results merit further investigation, in part because they are strikingly different from the results of a study of overrides conducted by political scientist Jeb Barnes. Barnes looked at a data set of 100 randomly selected overrides that was based largely on Eskridge’s 1991 study (and accordingly included overrides of both Supreme Court and lower court decisions). He found that there was a high level of judicial dissensus—defined as either a circuit split or a significant intracircuit split—about the rule established by the override in just under half of his total.<sup>93</sup> And he found that the levels of judicial dissensus varied dramatically by subject matter.<sup>94</sup> There was almost total consensus about the rule established by tax overrides.<sup>95</sup> By contrast, there was dissensus in *every civil rights* override in his database; more generally, he found that only one in ten cases concerning minority rights, in any context, yielded consensus.<sup>96</sup> His research also found that contexts where there had been high levels of partisan divide in the interpretation of a statute *before* an override tended to yield higher levels of dissensus *after* the override.<sup>97</sup>

There are several possible explanations for the differences between Barnes’s findings and Christiansen and Eskridge’s findings. The research teams may have used different coding conventions regarding what constitutes “dissensus” or “consensus.”<sup>98</sup> They also covered different time periods.<sup>99</sup>

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91. *Id.* at 1435, 1436 fig. 35.

92. Specifically, of those for which there was sufficient information available to make a judgment, 70% of the restorative overrides were coded as reaching immediate consensus, whereas 67% of the non-restorative overrides were coded as reaching immediate consensus. There was also little variation between categories when looking at the scope of the interpretation. Analysis on file with author.

93. BARNES, *supra* note 30, at 90.

94. *See id.* at 169–71.

95. *See id.* at 169.

96. *Id.* at 171.

97. *Id.* at 169–70.

98. Barnes’s analysis focused on whether there were circuit splits or significant intracircuit dissensus in the years shortly after the override, and also looked at the extent to which later decisions were applied consistently by judicial appointees from both parties. *Id.* at 79–98. He used a seven-to-ten-year time horizon that seems roughly consistent with that employed by Eskridge and Christiansen. *Id.* at 78.

99. A quick review of the data suggests that the different time periods covered is unlikely to be the explanatory factor. Looking at overrides enacted after 1991 shows about 70% of those for which there was sufficient information to make a judgment were coded as reached consensus quickly, which is roughly consistent with Christiansen and Eskridge’s findings for the full data set.

And one data set included lower court cases, while the other was made up entirely of Supreme Court cases. But a key difference may also be the process through which Christiansen and Eskridge identified lower court cases to assess the level of consensus and whether the override language is “fairly” interpreted. They generated the cases for review by using Westlaw’s “citing reference” function to identify cases that cited the override statutes.<sup>100</sup> This approach thus necessarily focuses *only on* cases where courts have flagged the override as potentially relevant to the matter and then gone on to interpret it. This method will not catch any cases in which the override arguably *could* be deemed relate to the case at hand but is not. The time lags discussed above demonstrate that for many overrides, there are considerable delays in linking together an override and the precedent that it addresses. Looking at the other side of the coin—that is, citation patterns of overridden cases—my coauthor and I find that often there is very little change after an override. This suggests that in a significant number of instances, courts may continue to cite the overridden precedent without citing, let alone interpreting, the override statute at all.<sup>101</sup>

#### IV. Making It Easier

##### A. *Identifying Overrides*

Christiansen and Eskridge have done a remarkable amount of work to compile their list of overrides. Professor Hasen, likewise, did a remarkable amount of work to compile his list of overrides. But it should not be this difficult. That is, the findings regarding false positives, false negatives, and delay in the Westlaw identification process demonstrate that in some instances lower courts may not even *know* about an override for several years after an override occurs, and, in many instances, lower courts are not sure how to integrate the statutory amendment into their otherwise precedent-focused analysis. Thus, in addition to the many suggestions that Christiansen and Eskridge lay out for making overrides more effective (all of which seem quite sensible to me), I add a simple one: Congress should state in statutory language that it is intending to override a prior judicial decision.

Congress does this occasionally.<sup>102</sup> But it is rare. Looking at the overrides Christiansen and Eskridge identify that were enacted since 1985, I

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100. E-mail from Matthew Christiansen, Yale Law School to author (Feb. 14, 2014, 14:12 EST) (on file with author).

101. Brian Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedents* (Feb. 27, 2014) (unpublished manuscript) (on file with author).

102. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, 5 (“Congress finds . . . [t]he Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades[,] by unduly restricting the time period in which victims of discrimination can challenge and recover for

found that less than 10% included the name of the case in legislative language, and generally this was in restorative overrides where Congress was especially vehement about wanting to express its disapproval of prior Supreme Court decisions.<sup>103</sup> This should change. When Congress knows it is responding to a prior judicial decision, it should indicate its intent in statutory text, as well as in any committee reports for the statute. These are precisely the kind of statements that were typically found in legislative history a generation ago, the disappearance of which posed such challenges for the more recent research teams.<sup>104</sup> Such statements could also indicate whether Congress seeks to supersede a prior decision completely or only in part.

This would have several benefits. First, it would clarify Congressional intent in a form that fully satisfies bicameral and presentment requirements. Second, pursuant to Westlaw protocol, it should result in the overridden precedent being immediately red flagged, thereby presumably helping decrease the considerable lag time that otherwise often occurs before lower courts start to consider the interaction of the precedent with the override.<sup>105</sup> And finally, it would make it relatively easy for the Congressional Research Service (CRS), the Legislative Counsel's office, administrative agencies, or other enterprising researchers to regularly compile and disseminate a list of all (identified) overrides.

Of course, this might invite a different problem. As indicated above, looking at *ex ante* indicators to determine Congressional intent to override suggests that sometimes Congress may be unaware of precisely which prior precedents are affected by subsequent statutes, particularly when Congress is

discriminatory compensation decisions or other practices, contrary to the intent of Congress.”); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553 (“Congress finds . . . the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”); Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (“The Congress finds that, as result of the decision of the Supreme Court in *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967.”)

103. See Broughman & Widiss, *supra* note 101.

104. See Christiansen & Eskridge, *supra* note 1, at 1328; Hasen, *supra* note 13, app. IV at 259. Moreover, Congress could also include, again ideally in statutory language, more general statements regarding the proposed intent of its override, such as an expectation that the overridden precedent would no longer be relied upon in general or applied to other statutes. Christiansen & Eskridge, *supra* note 1, at 1444–45; Widiss, *supra* note 20, at 562–63; see also Widiss, *supra* note 23, 920–25 (discussing proposed override bill that would have applied to “any Federal law forbidding employment discrimination” and “any law forbidding . . . retaliation”, an approach which was reasonable in light of recent Supreme Court decisions refusing to apply overrides to statutes with similar language but which would cause a host of new interpretative problems).

105. In fact, Westlaw is not totally consistent in red-flagging cases even when the statutory language clearly indicates disapproval with a prior decision and the substantive provisions override the interpretation in that decision. See *supra* note 83.

enacting a wholesale restructuring of a given area of statutory law. Christiansen and Eskridge have already suggested that the CRS or the Legislative Counsel's office undertake research to determine when multiple statutes might need to be amended to end reliance on an overridden decision. This addresses a problem that I have called "the hydra problem," in which failure to amend all statutes containing similar language is interpreted as acquiescence to ongoing application of an overridden precedent or other disfavored interpretation.<sup>106</sup> (In principle, I agree with Christiansen and Eskridge's suggestion, but, as I have discussed elsewhere, in practice, it would often be difficult to correctly identify the full universe of potentially affected statutes and politically unworkable to open up multiple statutes to revision.<sup>107</sup>) I would add to their suggestions that CRS or Legislative Counsel, or perhaps executive branch offices, should also take on responsibility for systematically assessing when new statutory language would modify existing precedents. They could flag this fact for bill drafters so that they could explicitly address such precedents in the bill language, or so that agencies could disseminate information about an override.

However, even if one of these offices were to endeavor to identify overrides regularly, it would be extremely difficult to develop a comprehensive list. Accordingly, it would be imperative that where a fair reading of new statutory language impacts prior precedent, a failure on Congress's part to explicitly state its intention to do so in statutory text would not be interpreted as grounds for narrowly interpreting the import of the new statutory language to leave a prior precedent in place. Christiansen and Eskridge argue for reduced reliance on the meaningful variation, whole act, and whole code canons of interpretation generally, noting that cases that rely on these canons are disproportionately likely to be overridden<sup>108</sup> and do not accord with the realities of the legislative process.<sup>109</sup> At the very least, given the challenges in identifying all precedents that are affected by an override, the fact that in certain statutes Congress explicitly mentions an intent to override should not be read to infer lack of a comparable intention in other contexts.

### *B. Applying Restorative Overrides*

The interventions discussed above would help ensure that courts know overrides have occurred and provide guidance to courts on Congress's intent in enacting them. But it might not address a deeper set of issues that arises

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106. Christiansen & Eskridge, *supra* note 1, at 1445–47; Widiss, *supra* note 23, at 887–81.

107. See Widiss, *supra* note 20, at 563–64; Widiss, *supra* note 23, at 920–26.

108. Christiansen & Eskridge, *supra* note 1, at 1401–08.

109. *Id.* at 1406 (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, 934–35 (2013)).

with interpreting restorative overrides. The data reviewed above suggest that restorative overrides are quickly red flagged, but, in at least some cases, they are unreasonably narrowly interpreted. In prior work, I have suggested that in many instances, this could stem from “good faith” confusion on the part of judges, particularly lower court judges, about the extent to which a subsequent statutory amendment supersedes otherwise binding precedent.<sup>110</sup> I have also posited that, at least in some cases, it could also reflect judges’ efforts to implement their own policy preferences, and that they use the interpretive complexities posed by overrides as a fig leaf to justify this practice.<sup>111</sup> Christiansen and Eskridge agree that these problems are recurring, largely endorsing the concerns I have explored and proposing several concrete steps that Congress could take in drafting override that might minimize them.<sup>112</sup> They also suggest that Congress might choose to delegate more interpretative functions to agencies generally, and specifically to the Equal Employment Opportunity Commission, which is charged with enforcing the primary civil rights laws that govern employment.<sup>113</sup>

These proposals are helpful, and I hope Congressional drafters will heed them. But it is also important that Christiansen and Eskridge’s provocative assertion that their study of overrides suggests an “inversion of *Carolene Products*”<sup>114</sup> should not be read to alleviate larger concerns regarding the restrictive way in which the Supreme Court frequently interprets civil rights statutes. That is, Christiansen and Eskridge highlight the extent to which minority groups and women have been “winners” at obtaining overrides. The corollary of this statement, however, is equally important: Courts have repeatedly interpreted civil rights statutes narrowly enough to trigger efforts to enact overrides. Moreover, at least if later Congresses are to be believed, such interpretations have repeatedly been contrary to the intent of the original enacting Congress.<sup>115</sup> To make it worse, the Court has often then interpreted the override itself narrowly, requiring Congress to enact yet another override.<sup>116</sup> Obviously, this requires additional political muscle and drains Congressional and advocates’ resources that could be focused elsewhere. And, while it is true that advocacy groups have successfully lobbied to have

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110. See Widiss, *supra* note 20, at 523.

111. See *id.*

112. Christiansen & Eskridge, *supra* note 1, at 1442–48.

113. *Id.* at 1448–49.

114. *Id.* at 1381.

115. See *supra* note 102.

116. See, e.g., Widiss, *supra* note 20, at 542–46 (discussing *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), in which the Court adopted a very narrow interpretation of a previous override). *Ledbetter* was subsequently overridden by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5,-16); Widiss, *supra* note 23, at 879 & n.98 (discussing a series of overrides and narrow interpretations of such overrides leading to more overrides related to fee-shifting provisions in civil rights statutes).

some of these decisions overridden, many other constraining interpretations remain on the books.<sup>117</sup>

There is a deeper issue here. Since these statutes often implicate core principles of equality and the interaction of the state and federal government, courts retain the ultimate trump card in this back-and-forth: The possibility of declaring Congress's more expansive understanding of equality, and the necessary steps to achieve equality, to be unconstitutional. For example, the Court recently held that a key provision the Voting Rights Act reauthorization—which included two overrides<sup>118</sup>—to be unconstitutional.<sup>119</sup> It may also soon hold that disparate impact liability in employment discrimination law—also the subject of an important override<sup>120</sup>—is unconstitutional.<sup>121</sup> More generally, the Court has proven quite hostile to efforts by Congress or state and local governments to implement substantive understandings of equality, striking down, for example, affirmative action plans in government employment or contracting<sup>122</sup> and in education,<sup>123</sup> as well as efforts by school districts to use race as a factor in assigning students to schools to facilitate integration efforts.<sup>124</sup>

One response is to deem this wholly appropriate. It is the Court's job to protect Constitutional guarantees of individual rights against potential incursion by a majority insufficiently responsive to minority interests. But this easy answer ignores a deeper truth implicit in Christiansen and Eskridge's findings—these statutes and government programs are being struck down in “reverse discrimination” claims brought by white litigants challenging what they contend is unjustified discrimination against them. And the Court refuses to defer to the legislative or governmental interests put forward in support of the law or policy because the Court is applying

117. *See, e.g.*, Widiss, *supra* note 23, at 920–26 (discussing unsuccessful efforts to override *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), in which the Court, in a 5–4 decision, adopted a very narrow interpretation of a previous override). The Court subsequently relied on *Gross*, again in a 5–4 decision, to further curtail the significance of the prior override. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2520 (2013).

118. *See Hasen, supra* note 13, at 221–22 (discussing the overrides in the VRA).

119. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (holding Section 4 of the Voting Rights Act unconstitutional).

120. Civil Rights Act of 1991, Pub. L. No. 102-166, §2(2), 105 Stat. 1071, 1071 (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B)) (overriding *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

121. *Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring) (warning of a coming “war” challenging the constitutionality of disparate impact doctrine).

122. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); .

123. *See Gratz v. Bollinger*, 539 U.S. 244 (2003). The Court did permit a more limited use of race as a factor to achieve educational diversity—see *Grutter v. Bollinger*, 539 U.S. 306 (2003)—but has recently signaled such policies must be very carefully scrutinized. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

124. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).



heightened scrutiny under the Equal Protection Clause,<sup>125</sup> a heightened scrutiny that was initially premised on the assumption that minority groups lack sufficient power in the democratic process.<sup>126</sup> If the concerns articulated in *Carolene Products* have in fact been inverted, it may be time to reconsider the way in which the heightened scrutiny to which it gave birth is exercised to undermine legislative efforts to implement expansive understandings of what equality can, or should, mean.

## V. Conclusion

Overrides are presumed to play an extremely important role in protecting Congress's authority to shape the meaning of legislation. But despite their centrality in theories of the separation of powers, we have known relatively little about when and how they occur—or even *that* they occur. Professor Eskridge's 1991 study was enormously influential not only because of its own findings, but also because simply compiling a relatively comprehensive list of overrides made it possible for other researchers to further explore the subject. The new study likewise provides many important—and some quite surprising—conclusions about the nature of overrides and the factors that tend to predict overrides, as well as a treasure trove of new data for future explorations. But I hope that we will not need to wait twenty years for the *next* comprehensive list of overrides. Overrides do not just matter to political science and legal scholarship; they matter to courts and to all of the individuals, businesses, and government agencies whose actions are regulated by statutory law. Congress needs to flag more clearly in statutory language when it overrides a judicial decision so that courts can promptly and accurately integrate these statutory amendments into their analysis. Identifying overrides should not be this hard.

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125. See, e.g., *Parents Involved*, 551 U.S. at 720, 733–35; *Gratz*, 539 U.S. at 270, 275; *City of Richmond*, 488 U.S. at 494, 508 (each explaining that all racial classifications receive strict scrutiny and holding that each challenged policy failed to survive such scrutiny).

126. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *But cf.* *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (arguing that the interests of white working class men are inadequately protected in Congress because of the strength of organized groups asserting the interests of specific minority constituencies).