

# Texas Law Review

## *See Also*

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### Response

#### The Conscious Congress: How Not to Define Overrides

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##### I. Introduction

Among the many issues on which we and our interlocutors James Buatti and Professor Rick Hasen agree, the most obvious is the critical importance of overrides for the practice and study of statutory interpretation. On this point, a number of the Supreme Court Justices are also in accord. Our previous article began with Justice Ginsburg’s dissent in *Vance v. Ball State University*,<sup>1</sup> in which she implored Congress to override the Court’s decision, reminding her colleagues—and the public—of the importance of congressional overrides of Supreme Court statutory decisions.<sup>2</sup> Hasen began his 2013 article with another example of how overrides work in the Supreme Court, chronicling the ways in which Congress’s assumed inability to

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1. 133 S.Ct. 2434, 2454 (2013) (Ginsburg, J., dissenting).

2. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEXAS L. REV. 1317, 1318 & n.7 (2014) (discussing Justice Ginsburg’s dissent in *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013)).

override the Supreme Court casts a shadow over oral argument in *NFIB v. Sebelius*.<sup>3</sup>

The Supreme Court's 2013 Term provides a perfect example of overrides' continued importance. Old overrides demonstrated their lasting vitality: *American Broadcasting Companies, Inc. v. Aereo, Inc.*,<sup>4</sup> one of the term's blockbuster cases, turned on the meaning of the seminal overrides contained in the 1976 Copyright Act.<sup>5</sup> And the Court planted the seeds of potential new overrides: its high-profile, controversial decisions in *Paroline v. United States*<sup>6</sup> and *Burwell v. Hobby Lobby Stores, Inc.*<sup>7</sup> inspired a flurry of proposed overrides.<sup>8</sup>

The continued importance of overrides in the eyes of all three branches of government<sup>9</sup> reinforces the need for this exchange with Hasen and Buatti. Given overrides' importance to these key statutory interpreters, it is imperative that scholars develop a robust understanding of the overrides phenomenon. The wealth of overrides literature that has followed Eskridge's 1991 article, including Hasen's 2013 article and our own, are valuable steps toward that goal.<sup>10</sup> This exchange is another important step, and we thank Buatti and Hasen for taking considerable time to engage with our article in order to produce their thoughtful response.

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3. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB v. Sebelius*), 132 S. Ct. 2566 (2012); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 205–08 (2013).

4. 134 S. Ct. 2498 (2014).

5. *Id.* at 2504–11. See also Christiansen & Eskridge, *supra* note 2, at 1320 (describing the Copyrights Act of 1976 as a “[l]andmark” policy-updating statute).

6. 134 S. Ct. 1710 (2014). See also James Buatti & Richard L. Hasen, *Conscious Congressional Overriding of the Supreme Court, Gridlock, and Partisan Politics*, 93 TEXAS L. REV. SEE ALSO 263, 279–80 (2015).

7. 134 S. Ct. 2751 (2014).

8. See Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, S. 2301, 113th Cong. (2014) (proposed override of *Paroline* introduced by Orrin Hatch R-Utah); Buatti & Hasen, *supra* note 6, at 279–80; Rick Hasen, *Shorter Supreme Court in Child Pornography Case: Congress, Please Override Us*, ELECTION LAW BLOG (Apr. 23, 2014, 5:34 PM), <http://electionlawblog.org/?p=60802>, archived at <http://perma.cc/4SBG-TH22> (noting the possibility of an override in *Paroline*); Wesley Lowery, *Senate Democrats Unveil Bill to Override Hobby Lobby Decision*, WASH. POST, July 9, 2014, <http://www.washingtonpost.com/blogs/politics/wp/2014/07/09/senate-democrats-to-unveil-bill-to-override-hobby-lobby-decision/>, archived at <http://perma.cc/9Z27-E93R>.

9. The proposed override of *Hobby Lobby* was “put together in consultation with the Obama administration.” Robert Pear, *Democrats Push Bill to Reverse Supreme Court Ruling on Contraceptives*, N.Y. TIMES, July 8, 2014, [http://www.nytimes.com/2014/07/09/us/politics/democrats-draft-bill-to-override-contraception-ruling.html?\\_r=0](http://www.nytimes.com/2014/07/09/us/politics/democrats-draft-bill-to-override-contraception-ruling.html?_r=0), archived at <http://perma.cc/6WNR-NGSF>. See also Christiansen & Eskridge, *supra* note 2, at 1377 (“No group or institution enjoys the attention of Congress more than the Executive Branch of the federal government . . . ”).

10. See the discussion of articles in Christiansen & Eskridge, *supra* note 2, at 1317–18 nn.3–4, 1326–28, 1326 n.34, 1327 n.42.

As Buatti and Hasen observe, we agree on a number of issues in addition to our subject's general importance.<sup>11</sup> We agree that overrides have declined in the new millennium.<sup>12</sup> And we agree that, at least in the near term, the prospects for an overrides revival are not encouraging.<sup>13</sup> Most emphatically, we agree that this decline is very bad for the vitality of American governance and disrupts the balance of powers within our national government.<sup>14</sup> Thus, on the whole, we agree that the overrides process, and the Court–Congress dialogue more generally, is not in a healthy state.

We disagree on three principal issues: what constitutes an override worth studying, when and why overrides went into decline, and how that decline affects the balance of power between our branches of government. The first and most important issue over which we disagree is exactly what constitutes an override worth studying. Hasen and Buatti focus exclusively on overrides in which Congress has expressly addressed a Supreme Court statutory interpretation case.<sup>15</sup> They deem these overrides “conscious,” and they distinguish them from “unconscious” overrides in which they suggest that Congress either accidentally or inadvertently overrode a statute that had been authoritatively construed by the Supreme Court.<sup>16</sup> We see no reason for this dichotomy and, therefore, we cannot agree with their many conclusions for which acceptance of such a dichotomy is a necessary step. As we explain below, regardless of the reason why one chooses to study overrides, it makes more sense to focus on overrides *simpliciter*, rather than distinguishing between overrides based on subjective impressions of whether Congress was “conscious” of the underlying Supreme Court precedent.

We also disagree with Buatti and Hasen over the timing and cause of the decline in overrides. Although we agree that overrides have sharply declined recently, we place the onset of this decline seven years—and three full Congresses—later than do Buatti and Hasen. As we explain below, this difference is important, not least because those three Congresses were the most override-intensive of any in our study. We also provide a different account for the causes of the decline. The 2013 Hasen article attributes it to partisan polarization. Although polarization provides an appealing scapegoat—and has likely played some role, especially since 2010—polarization alone cannot explain the actual pattern of overrides that we find. Contrary to Hasen, we lay much of the blame for overrides’ decline on a shift in congressional priorities. Congress has moved away from reforming the court-centric super-statutes in which overrides proliferate. In their place, it

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11. Buatti & Hasen, *supra* note 6, at 264.

12. Christiansen & Eskridge, *supra* note 2, at 1340–41; Hasen, *supra* note 3, at 217–18.

13. Christiansen & Eskridge, *supra* note 2, at 1473–74; Hasen, *supra* note 3, at 251.

14. See Christiansen & Eskridge, *supra* note 2, at 1473–74; Hasen, *supra* note 3, at 251.

15. Buatti & Hasen, *supra* note 2, at 268.

16. *Id.* at 264–65.

has focused on entitlement reform, national security, and other subjects in which courts play only a peripheral role—with the result being many fewer opportunities for an override of a Supreme Court statutory decisions.

Finally, although we enthusiastically agree with Buatti and Hasen that a sustained decline in overrides will shift the balance of power in the Congress–Court dynamic toward the Court, we think that an equally (if not more) important shift in power is from Congress to the Executive Branch. As we explained in our initial article, the absence of overrides will empower administrative agencies to reinterpret statutes in a way that effectively overrides or at least mitigates the impact of the relevant Supreme Court decision. Because such an administrative override captures some of the benefits of a congressional override, we are not quite as concerned about the decline in overrides, although we agree that the country would benefit from a return to the heyday of overrides.

## II. Methodological Differences and Congressional “Consciousness”

Our most important disagreement with Buatti and Hasen involves their assertion that because our article “includ[ed] numerous examples of congressional statutes which inadvertently override Supreme Court precedent,” it “does not shed as much light on the inter-branch relationship.”<sup>17</sup> Later in this reply, we present a few reasons why we think Buatti and Hasen are far too quick to infer from silent committee reports or the absence of a clear congressional statement that Congress “inadvertently” overrode the Court. But before we do, we must explain why Buatti and Hasen misconceive the importance of counting overrides, *even* were they correct that many of those in our study were “inadvertent.”

Our position on the number of overrides is simple: this number is critical to the study of statutory interpretation because it provides an important measure—indeed, one of the most important measures—of the balance of power between Congress and the Court. The 1991 Eskridge article defined an override as any statutory provision that “(1) completely overrules the holding of a statutory interpretation decision, just as a subsequent Court would overrule an unsatisfactory precedent; (2) modifies the result of a decision in some material way, such that the same case would have been decided differently; or (3) modifies the consequences of the decision, such that the same case would have been decided in the same way but subsequent cases would be decided differently.”<sup>18</sup> Other override studies have accepted this core definition—including the 2013 Hasen article.<sup>19</sup> Buatti and Hasen would shift the focus of this definition to what they divine to be Congress’s

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17. Buatti & Hasen, *supra* note 6, at 266.

18. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n.1 (1991).

19. Hasen, *supra* note 3, at 211 n.29.

awareness of the override. In doing so, they prioritize congressional “consciousness”—which, to be sure, was mentioned in the 1991 Eskridge Article—over the definition of override used in the 1991 Eskridge Article. As we shall explain, there is no persuasive doctrinal or theoretical basis for this choice.

Buatti and Hasen appear to agree that the critical issue about which we should care is the actual power Congress and the Court exercise over statutory interpretation.<sup>20</sup> The number of overrides *simpliciter* is perhaps the best measure of this balance of power because it provides the best measure of which branch’s preferences ultimately prevail. The number of times in which Congress makes a Supreme Court decision the *focus* of its override deliberations may provide a perspective on how the branches represent the resolution of some of the high-salience issues, especially for the overrides we characterize as “restorative.”<sup>21</sup> But those overrides are just part, and a modest part, of the override tableau. For scholars and statutory interpreters who want to truly understand when and how each branch has the last word on statutory interpretation, the critical variable is the number of overrides as defined in the previous paragraph.<sup>22</sup> In terms of what *actually* matters for the state of our statutory law and for the courts, agencies, and private individuals who rely on these laws, we should count overrides *simpliciter* rather than distinguishing between overrides based on our assessments of congressional consciousness.

Although Buatti and Hasen insist that a focus on “conscious” overrides provides a better measure of the Court–Congress relationship,<sup>23</sup> they do not provide a persuasive explanation for why that should be the case. For example, we disagree with their assertion that limiting the focus to “conscious” overrides is necessary in order to “key[] into the ‘dialogic’ model of inter-branch relations.”<sup>24</sup> It is virtually beyond question that the best way of understanding the Court–Congress dialogue is an example of sequential lawmaking between the lawmakers—congressional committees, Congress as a whole, and the President—and the law interpreters, which, for the purpose of this exchange is the group of nine Justices on the Supreme Court.<sup>25</sup> The critical variable for understanding this sequential process is, once again, how often Congress has the final word. Separating out overrides based on the committee reports, or other clear statements by Congress, will

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20. Buatti & Hasen, *supra* note 6, at 267 (“If we care about the relative power of the branches, a focus on consciousness makes sense.”). Indeed, the main thesis of the 2013 Hasen article was that the decline in overrides shifted power from Congress to the Supreme Court. See Hasen, *supra* note 3, at 251.

21. See Christiansen & Eskridge, *supra* note 2, at 1374–75.

22. See *supra* text accompanying note 18.

23. Buatti & Hasen, *supra* note 6, at 266.

24. *Id.* at 267.

25. See Eskridge, *supra* note 18, at 334.

provide an interesting sub-sample, but Buatti and Hasen do not explain why that limitation is necessary for the dialogic model, and we are not aware of any such reason.<sup>26</sup>

Nor do we agree that Buatti and Hasen's conception of "consciousness" is necessary for the override process to support the super-strong presumption of statutory stare decisis or any of the Court's other interpretative rules.<sup>27</sup> The best defense of the super-strong presumption is that a statutory precedent can be overridden more easily than a constitutional precedent. This is the insight undergirding Justice Brandeis's famous opinion justifying a super-strong presumption of correctness for statutory (as opposed to constitutional) precedents.<sup>28</sup> And it continues to animate the Court's application of the super-strong precedent today.<sup>29</sup> The variable that provides the best indication of Congress's ability and willingness to override a statutory precedent is the number of overrides we catalogue in our study, not Buatti and Hasen's subset.<sup>30</sup> It is our number that proves the relative ease with which Congress can and does rewrite the U.S. Code.

The overrides to which Buatti and Hasen would limit our focus are, once again, an interesting subset in that they provide an important source of evidence for our argument that the conventional wisdom is wrong in believing that "Congress is not capable of following the Court's legisprudence," a major conclusion of our study.<sup>31</sup> But this is just part of the story of the super-strong presumption. Indeed, resting the super-strong presumption entirely on Congress's "consciousness" would leave the presumption open to Judge Easterbrook's famous—and devastating—critique.<sup>32</sup> Again, the best evidence for the Brandeis rationale is the number in our study, not the limited subset in Buatti and Hasen's.

More important, our study establishes that the large majority of overrides are *not* the "restorative" overrides that Buatti and Hasen valorize, but are instead congressional amendments that "update" statutory policy, and in the

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26. Buatti & Hasen also appear to suggest that limiting the count to restorative overrides might also better fit the dialogic model. Buatti & Hasen, *supra* note 6, at 267. That, too, is incorrect. As we explain, "restorative" overrides are those that replace a Supreme Court decision with the previous statutory regime. Christiansen & Eskridge, *supra* note 2, at 1319. But there is no reason why an override cannot override a decision with a third option.

27. See Buatti & Hasen, *supra* note 6, at 267.

28. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting).

29. For the most recent iteration of this rationale, see *Kimble v. Marvel Entm't, LLC*, No. 13-720, 2015 WL 2473380, at \*6 -7 (U.S. June 22, 2015) ("[S]tare decisis carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.").

30. See *supra* note 21 and accompanying text.

31. Christiansen & Eskridge, *supra* note 2, at 1460.

32. Judge Easterbrook's critique of the super-strong presumption is perhaps the most forceful in its discussion of the problems created by inferring congressional approval from congressional inaction. See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 425–29.

process override obsolete Supreme Court decisions.<sup>33</sup> (Most of the overrides reported in the 1991 Eskridge Article were updating and not restorative overrides.<sup>34</sup>) This fact requires the thoughtful scholar to think more carefully about what is meant by an *institutional dialogue*. A personal conversation requires consciousness on both sides: We tell Calabresi to fetch soupmeat, and he does so to the best of his ability, which might generate a reprimand from us, conscious that he has made a mistake and taking him to task for that.<sup>35</sup> Restorative overrides often resemble this sort of dialogue: Congress tells the judiciary to implement a nondiscrimination rule, and judges do that with a libertarian slant, which often generates a rebuke from Congress, conscious that the judges have made a mistake.

But we repeat: only a small minority of overrides are restorative and susceptible to the soupmeat style of dialogue. Most overrides are policy updates<sup>36</sup>—and for these overrides it does not matter whether Congress is “conscious” that the Court’s interpretation is old and needs to be changed. For Congress and the country, the value of the override is that policy is updated to reflect changed circumstances, new values, or political compromises. For the Court, the value of the override is that it allows the more democratically accountable branch to correct and/or update its statutory decisions, which provides the justification for super-strong stare decisis, at least in part. In short, the value of an *institutional dialogue* has less to do with legislative anger and rebukes and more to do with legislative responsibility and democratically accountable policymaking. Again, the best measure of these values is the number reported in our original study.

The fact that Congress is a “they, not an it,” further complicates the task of determining congressional “consciousness” and makes it one for which the juice simply is not worth the squeeze.<sup>37</sup> Although the notion of Congress as a “they” is typically associated with the problem of assigning a collective congressional “intent” to a particular statute, it is equally relevant to the “consciousness” of an override. With this insight in mind, it is not obvious how we should determine whether an override that clearly displaces a Supreme Court precedent is an override of which *Congress* was conscious. Buatti and Hasen draw that line essentially at whether the committee reports

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33. Christiansen & Eskridge, *supra* note 2, at 1370.

34. See Eskridge, *supra* note 18, at 424–41 (listing congressional overrides of Supreme Court decisions from 1967 to 1990).

35. The full story of the soupmeat hypothetical is in William N. Eskridge, Jr., “Fetch Some *Soupmeat*”, 16 CARDOZO L. REV. 2209 (1995).

36. Christiansen & Eskridge, *supra* note 2, at 1370 fig.10.

37. See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992). Buatti and Hasen sensibly acknowledge the Shepsle point about Congress. Buatti & Hasen, *supra* note 6, at 268.

evince a focus on the Supreme Court,<sup>38</sup> but they provide no explanation for why that line is drawn in the right place.

We can quite readily imagine a few reasons why this measure is not sophisticated enough to capture “congressional consciousness.” What if a bill’s sponsor supports an override, but for political reasons chooses not to frame it as a response to the Supreme Court, because she does not want to draw attention to the provision or endow it with unnecessary political salience? Does that make it any less important to assessing the Congress–Court dialogue? We think not. Similarly, what if the same sponsor is acting at the request of constituent who dislikes the law as articulated by the Supreme Court, but does not frame the request in that manner and thus it is never so framed in the legislative history? And what if the Department of Justice, which, along with other administrative agencies, is the single most important constituency for overrides,<sup>39</sup> chooses not to frame an override as a response to the Court because the majority vote being overridden was composed of Justices nominated by a President of the opposite party? We think these overrides are every bit as important to assessing Congress’s power vis-à-vis the Court as are the more famous overrides, such as the Lily Ledbetter and Curt Flood Acts.

Indeed, the line between “conscious” and “unconscious” overrides is almost impossible to draw in many cases. Consider the many overrides of Supreme Court habeas corpus decisions in the 1996 AEDPA. Unlike most of the other jumbo overrides in our study, AEDPA did not generate a definitive committee report that could catalogue which Supreme Court decisions were being codified and which were being overridden, the way the reports for the 1978 Bankruptcy Reform Act (BRA) did. But the congressional staff who drafted the final statutory text showed a relentless awareness of the language of Supreme Court habeas rules and standards and carefully codified some rules, but with more limits than abrogated fairness standards recognized by the Court’s statutory precedents.<sup>40</sup> For both the 1978 BRA and the 1996 AEDPA, one can demonstrate an awareness of Supreme Court language by

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38. Although Buatti and Hasen reviewed materials in addition to committee reports, *see infra* note 54 and accompanying text, and, as noted below, included overrides of which there was no mention in the committee reports, *see infra* notes 65–90 and accompanying text, we understand their methodology and their discussion of congressional “consciousness” as one that is focused overwhelmingly on the statements that one finds in committee reports.

39. *See* Christiansen & Eskridge, *supra* note 2, at 1450.

40. For example, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1214, 1217–18 (codified as amended at 28 U.S.C. § 2253 (2012)), largely codified the Burger Court’s restrictive standards for certifying habeas appeals, *see Barefoot v. Estelle*, 463 U.S. 880, 892–93 (1983), but made the standards more restrictive by limiting certification to denial of federal *constitutional* rights, and therefore denying certification on the basis of federal *statutory* rights. Without any reference to legislative history, and simply by reading the statutory text in light of prior precedent, the Supreme Court has readily understood that AEDPA codified and at the same time narrowed the *Barefoot* rule. *See Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

statutory drafters and an awareness that many of the Court's rules and standards were being modified. Are these not "conscious" overrides?

One might respond, of course, that the average member of Congress does not pay attention to the drafting process—but neither does the average member of Congress pay attention to a committee report's description of which Supreme Court decisions are being overridden and which are being codified. As a formal matter, moreover, it is hard to say that the House, as a whole body, and the Senate, as a whole body, and the President, as the final step in the Article I, Section 7 process, were **ALL** "conscious" of the overrides contained in the 1978 BRA or in the 1996 AEDPA. Even when many members of Congress are aware and critical of specific Supreme Court decisions (as is the case for many restorative overrides), it is not uncontroversial to think about Congress, as an institution, not being "conscious" of an override. In short, the fact that some members may not have been aware of the drafting process does not necessarily distinguish it from the statute that ultimately results from that process.

Finally, we cannot resist the impulse to discuss Buatti and Hasen's neat simile, that overrides not "consciously" aimed at displacing a Supreme Court precedent are like the unconscious utterings of a sleep talker.<sup>41</sup> Though clever, their comparison is ultimately inapt. In fact, it shows precisely why using their definition of "consciousness" is not a helpful way to talk about, much less limit, overrides. If Kate talks in her sleep and instructs José to fetch a ton of soupmeat, José knows not to obey unconscious chatter from his boss. But if Kate is Congress and "unconsciously" (whatever that means) tells an agency that it must buy only soupmeat for its cafeterias, the agency—and any court asked to enforce that directive—will take that congressional mandate seriously and implement it to the letter. Although we might discredit the stray utterings of a sleep talker—and it would certainly be unfair to hold someone to his or her somnambulatory utterances—agencies, courts, and private actors do not have that luxury when it comes to congressional overrides; they must obey the override, unless it is a scrivener's error or an unconstitutional directive.

Thus, the problem with Buatti and Hasen's analogy is that it would imbue the legislative history with a type of meaning that it does not have in practice. Simply put, the effect of an override on the U.S. Code is *exactly* the same regardless of whether it is "conscious" or "inadvertent," to use Buatti and Hasen's lexicon.<sup>42</sup> A minor change to the scope of a tax provision is every bit as binding on the courts as the *Ledbetter* override. And this minor

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41. Buatti & Hasen, *supra* note 6, at 267.

42. Of course, we agree with Professor Widiss's point that Congress may enhance the efficacy of its overrides by clearly alerting the courts to the presence of an override in the definitive committee reports. Deborah A. Widiss, *Response: Identifying Congressional Overrides Should Not Be This Hard*, 92 TEXAS L. REV. SEE ALSO 145, 165 (2014).

override is important to understanding the Congress-Court balance of power, for all the reasons discussed above and in our article. The *Ledbetter* override may have more *symbolic* importance, but both overrides need to be counted in order to have an accurate assessment of “Congressional Overrides of Supreme Court Statutory Interpretation Decisions.”<sup>43</sup>

Throughout their response, Buatti and Hasen insist that the “premise” of our article is wrong because of our definition of override. Accordingly, they term certain overrides “false positives,” “unconscious,” or “inadvertent,” and they suggest that we have “erred” by over-counting overrides.<sup>44</sup> But, as we have explained, their response does not provide any persuasive reason why the overrides that they would exclude are not critically important to inter-branch relations and the balance of powers within our government. Where Buatti and Hasen see errors, we see important data points that should not be artificially excluded from study. Accordingly, we remain convinced that our article accurately represents the number of congressional overrides of Supreme Court decisions.

### III. The Number and Prevalence of Overrides

For the reasons already explained, we think it makes little sense to distinguish between overrides based on the extent to which committee reports discussed Supreme Court decisions or floor debates mentioned the Court by name. Yet even were we to adopt this distinction, we would reach different conclusions than Buatti and Hasen.

The 2013 Hasen article identified 46 overrides enacted after the 1991 Eskridge article.<sup>45</sup> In that article, Hasen argued that shortly after the 1991 CRA, which was passed just after the Eskridge article went to print, overrides “slowed down dramatically,”<sup>46</sup> and he identified just thirty-five<sup>47</sup> overrides since the 1991 CRA.<sup>48</sup> We found many more—roughly one hundred and twenty overrides since the 1991 Eskridge article and more than a hundred since the 1991 CRA.<sup>49</sup> As explained above, Buatti and Hasen now suggest that much of this difference arises because Hasen counted only “conscious” overrides, while we supplemented our numbers with “inadvertent” overrides—statutes for which Congress was unaware that it

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43. The title of our article. Christiansen & Eskridge, *supra* note 2.

44. E.g., Buatti & Hasen, *supra* note 6, at 265, 268–71.

45. See Hasen, *supra* note 3, app. I.

46. *Id.* at 217.

47. One of the post-1991 Eskridge Article overrides that Hasen identifies were enacted prior to the 1991 CRA: *Duro v. Reina*, 495 U.S. 676 (1990), by Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended at 25 U.S.C. § 1301 (2012)).

48. See Hasen, *supra* note 3, app. I.

49. See Christiansen & Eskridge, *supra* note 2, app. I.

was displacing a Supreme Court decision.<sup>50</sup> We are skeptical of this suggestion. Our extensive review of the hearings and reports for each override suggested that the legislators and individuals testifying in the hearings understood the overridden Supreme Court decision and its consequences.

In this Part, we first establish an absolute minimum number of “conscious” overrides by counting the instances in which the Supreme Court case was analyzed in the report leading to the override. We then consider a handful of reasons why even this minimum number underestimates the number of conscious overrides.

#### A. Establishing a Floor for Conscious Overrides

To test our recollections, we conducted a supplemental round of coding in which we sought to measure the attention that the overridden decision received in the legislative record. For each override, we coded the extent to which the override was a focus in the hearings and the reports. We repeated the same exercise for the override provision.<sup>51</sup> Our findings show that a difference between “conscious” and “implicit” overrides cannot explain the variance between our results and those in the 2013 Hasen article. We identified sixty-two overrides since the 1991 CRA in which the congressional report(s) *analyzed* the Supreme Court decision being overridden, a figure nearly twice as large as Hasen’s total number of post-1991 CRA overrides.<sup>52</sup> In their response, Buatti and Hasen appear to agree

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50. In her comment on our article, Deborah Widiss postulates something similar, although she does not speculate on the extent to which these overrides explain the difference between our results and Hasen’s. Widiss, *supra* note 42, at 151–52.

51. In particular, for every override, we coded whether the congressional reports (1) did not mention the Supreme Court decision; (2) gave the decision only a passing mention; (3) provided some description of the holding; or (4) analyzed the holding. We then repeated the same exercise for the relevant congressional hearings. We also repeated this methodology for the statutory provision containing the override—i.e., we coded for whether the reports or hearings (1) did not mention the override; (2) gave the override only a passing mention; (3) provided some description of the override; or (4) analyzed the override.

52. Hasen counts three post-1991 CRA statutes that we have excluded: *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992), by the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001), by the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified as amended at 5 U.S.C. § 552 (2012)); *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat.183 (codified as amended in scattered titles of U.S.C.); and *Demarest v. Manspeaker*, 498 U.S. 184 (1991), by the Incarcerated Witness Fees Act of 1991, Pub. L. No. 102-417, 106 Stat. 2138 (1992) (codified as amended at 28 U.S.C. § 1821 (2012)). See Hasen, *supra* note 3, app. I. Although we believe that only the Incarcerated Witness Fees Act constitutes an override, see, e.g., Christiansen & Eskridge, *supra* note 2, at 1319 n.9 (explaining why we did not include *Buckhannon*), if we adjust for this discrepancy by removing those statutes from his number or adding them to ours, the difference between our two override counts is even greater.

in significant part with our assessment, as they have added twenty-five additional post-1991 overrides to the total in the 2013 Hasen article (a three-quarters increase in their measure of overrides enacted after the 1991 CRA).<sup>53</sup>

To be clear, we are *not* suggesting that this is an appropriate estimate of “conscious” overrides (or that there is a justification for counting only “conscious” overrides)—as we explained above, limiting the measure of “consciousness” to the language used in the committee reports is a much too conservative approach. These sixty-two overrides include only those instances in which the committee reports *analyzed* the decision being overridden. Both the 1991 Eskridge article and the 2013 Hasen article cast a much broader net when identifying overrides—considering reports, hearings, other legislative materials, and secondary sources.<sup>54</sup> Indeed six of Hasen’s post-1991 CRA overrides would not be conscious overrides under this conservative definition.<sup>55</sup> Thus, this preliminary figure should be thought of as a floor for the number of “conscious” overrides; it is not an apples-to-apples comparison with Hasen’s method or the 1991 Eskridge study. In the next section we present a few reasons why we believe this minimum estimate undercounts conscious overrides. But before we do so, we pause to compare our minimum estimate of conscious overrides with the results from our article.<sup>56</sup>

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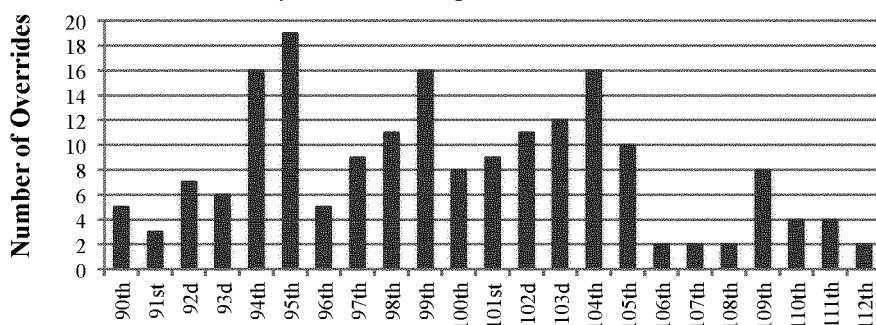
53. See Buatti & Hasen, *supra* note 6, app. 1.

54. See Eskridge, *supra* note 18, at 332 n.1 (identifying overrides by reviewing the “the legislative history—mainly committee reports and hearings”); Hasen, *supra* note 3, app. IV (detailing methods for identifying additional overrides not captured through his principal methods).

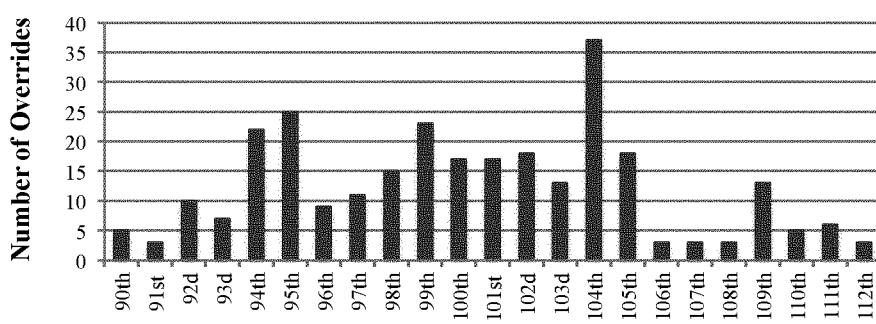
55. They are *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992), by the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)); *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), by the Migrant and Seasonal Agricultural Workers’ Compensation Act, Pub. L. No. 104-49, § 1(a)(2), 109 Stat. 432, 432 (1995) (codified as amended at 29 U.S.C. 1854(d) (2012)); *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 183 (codified as amended in scattered titles of U.S.C.); *Brown, v. Gardner*, 513 U.S. 115 (1994), by the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub. L. No. 104-204, § 422(1), 110 Stat. 2874, 2926 (1997) (codified as amended at 38 U.S.C. § 1151 (2012)); *Steelworkers v. Bouligny, Inc.*, 382 U.S. 145 (1965), by the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–12 (codified as amended at 28 U.S.C. § 1332 (2012)); *Rasul v. Bush*, 542 U.S. 466 (2004), by the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741–44 (codified as amended at 28 U.S.C. § 2241 (2012)). See Hasen, *supra* note 3, app. I.

56. The numbers in Figure 1A correspond to category (4) in the coding methodology listed at *supra* note 51.

**Figure 1A. Number of Overrides  
by Congress in which the Overridden Decision Was  
Analyzed in the Reports, 1967–2011**



**Figure 1. Number of Overrides  
by Congress, 1967–2011**



These figures show that, even when looking only at this minimum number of overrides, the distribution of overrides between 1965 and 2011 does not look dramatically different from the figure reported in our original article. To be sure, the y-axis values are lower, and the 104th Congress in particular has fewer overrides relative to the other prolific Congresses. (This difference is largely the result of AEDPA and the Prison Litigation Reform Act, among others, as we explain in the next section.)<sup>57</sup> Nevertheless, the

57. See *infra* notes 81–89 and accompanying text.

overall shape of the charts is nearly the same and the 103rd-to-105th Congresses remain critically important to the overrides story. As Figure 1A reports, that period averaged nearly thirteen overrides per Congress, a number exceeded only by the periods covering the 94th and 95th Congresses, which produced the Bankruptcy Reform Act of 1978,<sup>58</sup> the Copyright Act of 1976,<sup>59</sup> the Pregnancy Discrimination Act,<sup>60</sup> and amendments to the Clean Water Act,<sup>61</sup> Clean Air Act,<sup>62</sup> and the Endangered Species Act.<sup>63</sup> By any measure the period 1991–1998 was *not* the beginning of a substantial decline in overrides, as Buatti and Hasen now appear to agree.<sup>64</sup> This distinction has implications for Buatti and Hasen’s arguments on the timing of the overrides drought and the effect of political polarization—points to which we return shortly.

#### B. Toward a More Holistic List of “Conscious” Overrides

As noted, looking only to committee reports is a much too conservative means of counting “conscious” overrides. Many overrides of which Congress was undoubtedly aware will escape detection under that approach. In this section we propose a few initial reasons—but by no means a comprehensive list—why Congress was likely “conscious” of far more overrides than are included above. In doing so, we discuss only overrides enacted following the 1991 Civil Rights Act, as this was the period studied by both the 2013 Hasen Article and the Christiansen & Eskridge Article.

A brief review of the cases included in the minimum floor discussed above reveals some startling omissions. It appears that sometimes Congress simply does not discuss the case it is overriding, even when the override is a direct response to the Supreme Court. The best example, identified in both articles,<sup>65</sup> is the override of *Rasul v. Bush*<sup>66</sup> by the Detainee Treatment Act of 2005.<sup>67</sup> It was no secret that Section 1005(e) of the Act was intended to override the Supreme Court’s extension of the writ of habeas corpus to

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

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

60. Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)).

61. Pub. L. No. 95-217, § 61, 91 Stat. 1566, 1598 (1977) (codified as amended in scattered sections of 33 U.S.C.).

62. Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended in scattered sections of 42 U.S.C.).

63. Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended in scattered titles of 5, 16, 42 U.S.C.).

64. See Buatti & Hasen, *supra* note 6, at 269.

65. Christiansen & Eskridge, *supra* note 2, at 1431; Hasen, *supra* note 3, at 223.

66. 542 U.S. 466 (2004).

67. Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741–44 (codified as amended at 28 U.S.C. § 2241)

Guantanamo Bay.<sup>68</sup> *Rasul's* absence from the reports certainly does not suggest to us that Congress was not “consciously,” and quite purposefully, overriding the Supreme Court’s holding. A similar example (also noted by Hasen)<sup>69</sup> is the override of *Adams Fruit Co. v. Barrett*<sup>70</sup> by a statute entitled “Reversal of Adams Fruit Company, Inc. v. Barrett.”<sup>71</sup> As these examples show, looking only to the reports will exclude some obvious overrides that, for whatever reason, simply did not receive much analysis in those reports. Buatti and Hasen’s inclusion of both the *Rasul* and *Adams Fruit* overrides appears to indicate their agreement that statutes like these should count towards the total override tally.<sup>72</sup>

A second reason to believe that our minimum floor underestimates the number of “conscious” overrides is that overrides are often passed along with much larger bills (such as appropriations measures), and so they receive scant attention in the legislative history of the entire bill.<sup>73</sup> But that hardly suggests that these overrides were unconscious, inadvertent or otherwise not viewed as an important response to the Court, at least by some segment of Congress. An excellent example is one of our most recent overrides, that of *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*<sup>74</sup> by the Dodd-Frank Act.<sup>75</sup> *Graham County* held that the False Claims Act’s general six-year statute of limitations did not apply to claims for retaliation and that these claims were instead governed by the applicable state statute of limitations.<sup>76</sup> Dodd-Frank overrode that holding by making retaliation claims—the only claims addressed in *Graham Soil*—subject to the six-year statute of limitations.<sup>77</sup> The fact that the legislative history of this

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68. See *id.*; *Rasul*, 542 U.S. at 485. Indeed the DTA was the first step in “an extensive back-and-forth [between the Congress and the Court] regarding the scope of federal court jurisdiction over claims brought by Guantanamo detainees.” *Aamer v. Obama*, 742 F.3d 1023, 1028 (D.C. Cir. 2014).

69. Hasen, *supra* note 3, app. I., at 254.

70. 494 U.S. 638 (1990).

71. Pub. L. No. 104-49, 109 Stat. 432 (1995) (codified as amended in scattered sections of 29 U.S.C.).

72. See Hasen, *supra* note 3, app.I.

73. This theory of course is not entirely separate from our first point. It may help explain why *Rasul* went unmentioned in the legislative history to the Detainee Treatment Act: it was passed as an amendment to the gargantuan 2006 Defense Appropriations Bill. It does not, however, explain the omission of the *Adams Fruit* case in the legislative history leading to that override.

74. 545 U.S. 409 (2005).

75. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered titles of U.S.C.).

76. 545 U.S. at 422.

77. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A(b), 124 Stat. 1376, 2079 (2010) (codified at 18 U.S.C. § 3301(b) (2012)).

“sprawling,”<sup>78</sup> highly contentious override focused overwhelmingly on the higher profile problems associated with the Great Recession does not suggest to us that the new statute of limitations was an accident, or that members of Congress—including the drafters and sponsors of that provision—were unaware that they were displacing a Supreme Court precedent. The override may not have been the primary purpose of the statute, but that alone does not convince us that Congress—or at least the subset of Congress interested in the bill’s passage—was unaware of the effect the provision had on Supreme Court precedent.

Many of the overrides discussed in our study are similar, in that while the Supreme Court case was not explicitly mentioned, that case was the best cite for a rule that was *directly* overridden. The override of *United States v. Burke*<sup>79</sup> is a perfect example. *Burke* exempted from the federal income tax damages awarded to tort victims on the basis of personal injuries, including damages intended to compensate for non-physical injuries, such as reputational damage or emotional harm.<sup>80</sup> Just four years after *Burke* was decided, Congress narrowed the *Burke* tax exemption by “repeal[ing]” it insofar as the exemption applied to nonphysical personal injuries.<sup>81</sup> This direct and temporarily proximate refutation of the Supreme Court’s holding makes us highly skeptical that Congress did not know *exactly* what it was doing to the *Burke* rule, even if it did not mention the case by name.

A third reason to suspect that our minimum floor underestimates the number of conscious overrides is that some override statutes rewrote a substantial area of the law, including many Supreme Court precedents, and so had no reason to enumerate every decision that they displaced. The best example is the 1996 AEDPA. We found 14 overrides in that statute, seven of which were analyzed in the reports.<sup>82</sup> But AEDPA’s history and context makes us skeptical that Congress believed it was overriding only those seven decisions. AEDPA’s habeas reforms were the culmination of a long law-and-order campaign to curtail prisoners’ access to the Great Writ.<sup>83</sup> Indeed, some of the unanalyzed overridden decisions had been discussed in the legislative history of earlier attempts to restrict access to habeas. It seems a

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78. See *Saunders v. District of Columbia*, 789 F. Supp. 2d 48, 52 n.2 (D.D.C. 2011) (noting that “[t]he amendment was a small part of the Dodd–Frank Act, which spans 2,319 pages and has been described as ‘sprawling.’”).

79. 504 U.S. 229 (1992).

80. *Id.* at 233–35, 235 n.6.

81. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838–39 (codified as amended at 26 U.S.C. § 104 (2012)).

82. Buatti and Hasen find only three. See Buatti & Hasen, *supra* note 6, app. 1 (listing *Schlup v. Delo*, 513 U.S. 298 (1995), *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and *Teague v. Lane*, 489 U.S. 288 (1989), as being overridden).

83. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4–48 (1997).

stretch to say that Congress was completely “unaware” of the cases not mentioned explicitly simply because they were no longer treated as the leading cases for a particular line of habeas jurisprudence supposedly gone awry. And as we explained in our previous article, a large part of the AEDPA involved replacing conservative court decisions with even more conservative statutory rules.<sup>84</sup> It is not terribly surprising that in lambasting the supposed abuse of the writ, Congress elected not to focus on all of the relatively conservative Burger Court decisions that it was replacing with even more restrictive rules,<sup>85</sup> although the reports did analyze some of those conservative Supreme Court decisions.

Another example of this phenomenon is AEDPA’s sister statute, the Prison Litigation Reform Act (PLRA), which overrode three Supreme Court decisions.<sup>86</sup> It was no secret that the purpose of the PLRA was to sweep away a series of decisions, including Supreme Court cases, that Congress considered too favorable to prisoners. We doubt that Congress was unaware of the seminal decisions it was overriding, especially in those cases in which Congress enacted a provision that was *directly* contrary to a prior Supreme Court decision. Consider the case of *McCarthy v. Madigan*<sup>87</sup> (unmentioned in the reports), which held that prisoners did need not to exhaust their administrative remedies before bringing a *Bivens* action.<sup>88</sup> Four years later, the PLRA overrode *McCarthy* to establish just such an exhaustion requirement.<sup>89</sup> Given the PLRA’s focus on replacing pro-prisoner decisions and the fact that Congress established a rule directly contrary to a prominent Supreme Court decision, we are confident that the override of *McCarthy* was no accident. Although it is possible that some of the overrides in statutes like AEDPA and the PLRA were implicit overrides, we suspect that, on the whole, Congress had a far more nuanced appreciation than is revealed by a narrow focus on the committee reports.<sup>90</sup>

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84. Christiansen & Eskridge, *supra* note 2, at 1337.

85. *E.g.*, *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Rose v. Lundy*, 455 U.S. 509 (1982); *Jackson v. Virginia*, 443 U.S. 307 (1979).

86. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 18, 28, 42 U.S.C.).

87. 503 U.S. 140 (1992).

88. *Id.* at 149.

89. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803, 110 Stat. 1321-66, 70–73 (codified as amended at 42 U.S.C. § 1997 (2012)).

90. In reanalyzing our results, we noted several other phenomena that don’t fit into one of these categories, but help explain why the override of a case of which Congress was almost certainly aware is not explicitly mentioned in the reports. One example is the story of *Pulliam v. Allen*, 466 U.S. 522 (1984), and *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719 (1980). Both were overridden by the Section 309 of the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853 (codified as amended at 28 U.S.C. 2412 (2012), 42 U.S.C. 1988, (2012)), although only *Pulliam* was mentioned in the reports. *Pulliam*, however, was arguably an extension of the holding in *Consumers Union* permitting prospective relief against judicial officials. The fact that Congress focused on *Pulliam* as the most recent—and

The “conscious” overrides not discussed in the committee reports or similar sources are important for two reasons. *First*, this exercise shows one of the perils of relying on a fuzzy concept, such as congressional consciousness. It is difficult to draw a bright line corresponding to that definition and so there is a significant chance that any study based on this distinction won’t reflect the distinction it purports to study. This flaw plagued the 2013 Hasen article and it is one that we believe still affects the updated Buatti and Hasen numbers, although to a lesser extent given their addition of many overrides. *Second*, and more importantly for our purposes here, the phenomena discussed in this section provide reasons to have serious doubts that the minimum floor established based on congressional committee reports accurately reflects the true number of “conscious” overrides. For these reasons, we believe that the actual number of “conscious” overrides looks even closer to Figure 1 than Figure 1A suggests.

#### IV. When Did Overrides Decline? And Why?

A second principal disagreement relates to the recent decline in overrides that both articles identify. Buatti and Hasen suggest that we don’t seriously dispute two of Hasen’s earlier conclusions about this trend: (1) that overrides have declined and (2) that partisanship has been a major cause of this decline.<sup>91</sup> We agree in certain respects, but disagree in others.<sup>92</sup> Hasen’s 2013 article placed the beginning of the decline shortly after the 1991 CRA.<sup>93</sup> We find it shortly after the Clinton Impeachment in 1998.<sup>94</sup> This difference is important, as quite a bit happened during those seven years. Between the 1991 CRA and the end of 1998 (i.e., the end of the 105th Congress), Congress enacted seventy-two overrides—that’s roughly 25 percent of our total in just 13 percent of the Congresses we studied. For this reason we called this period the “golden age of overrides.”<sup>95</sup> Any understanding of overrides during the last half-century would be at most a partial picture without accounting for this surge in override activity.

This timing question has also implications when it comes to identifying the cause of the decline. Putting the onset of the overrides drought in 1991 fits the partisanship hypothesis much better than putting it in 1998. The period between the 1991 CRA and the end of the 105th Congress was a period of intense and sharply increasing partisanship, highlighted by the federal government shutdown in 1995 and, ultimately, President Clinton’s

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strongest—articulation of that rule hardly suggests to us that we should consider Congress not to have also understood that it was overriding *Consumers Union* in addition to *Pulliam*.

91. Buatti & Hasen, *supra* note 6, at 266.

92. See Christiansen & Eskridge, *supra* note 2, at 1331–32.

93. See Hasen, *supra* note 3, at 216–17.

94. Christiansen & Eskridge, *supra* note 2, at 1332–33.

95. *Id.* at 1336.

impeachment in 1998. But, as explained above, the 103rd–105th Congresses were the most prolific three-Congress group in our study (in terms of overrides *simpliciter*), and the 104th Congress—the Congress that caused the government shutdown—was the single most prolific. If partisanship was inversely related to overrides, then we would at least expect the Congresses in the early-to-mid-1990s to produce fewer overrides than those in the prior decade. We certainly would not expect the override boom that we saw.

In his original article, Hasen elegantly bolstered the partisanship hypothesis by illustrating the sharp increase in several measures of partisanship over the last 35 years.<sup>96</sup> Partisanship certainly has increased over that period, and the last fifteen years have seen many fewer overrides than the first twenty-five of our study. But as the next five figures show, the steady increase in partisanship does not bear a clear relationship to the pattern of overrides that we found. To be sure we wouldn't expect a variable like partisanship to exhibit a perfect correlation with overrides; there are simply too many variables affecting the number of overrides for that to be the case.<sup>97</sup> But even allowing for a somewhat attenuated relationship, were partisan as important as Buatti and Hasen postulate, we would expect at least a weak correlation between partisanship and overrides.

We don't see one. In the next five figures, we have replicated segments of the five illustrations of partisanship in Hasen's original article. In each figure, the left axis reports the measure of polarization, while the right axis has the number of overrides. The dashed line represents the number of overrides, while the two solid lines report the measures of partisanship.<sup>98</sup>

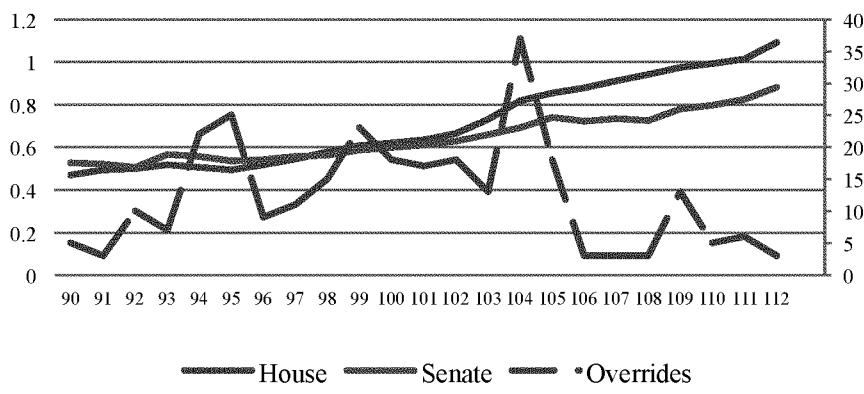
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96. See Hasen, *supra* note 3, at 235–37 & figs. 7–11.

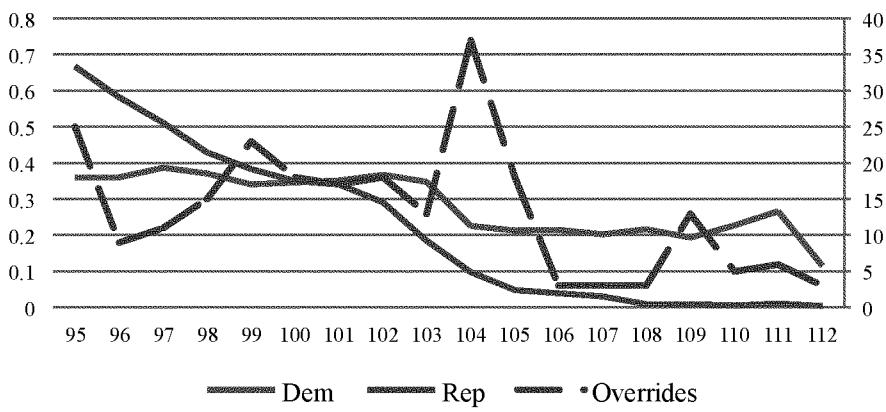
97. See Victoria F. Nourse, *Overrides: The Super-Study*, 92 TEXAS L. REV. SEE ALSO 205, 216 (2014).

98. The polarization data is reproduced from voteweb.com with the permission of Keith T. Poole and Howard Rosenthal. We thank them for generously providing access to their data.

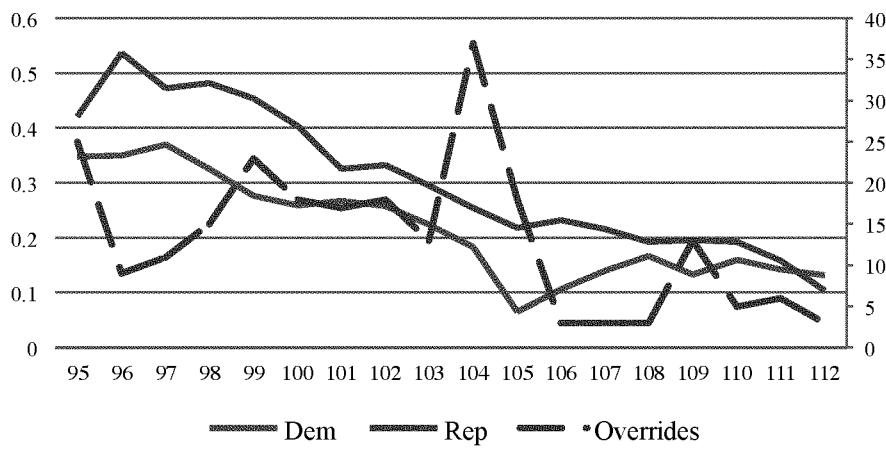
**Figure 2A. Party Polarization, Distance Between the Parties' First Dimension Compared to Number of Overrides**



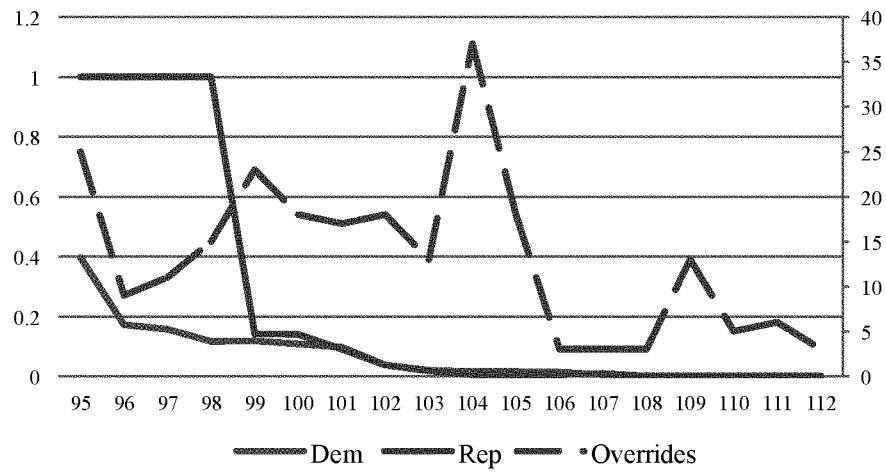
**Figure 3A. House, Percentage of Moderates Compared to Overrides**



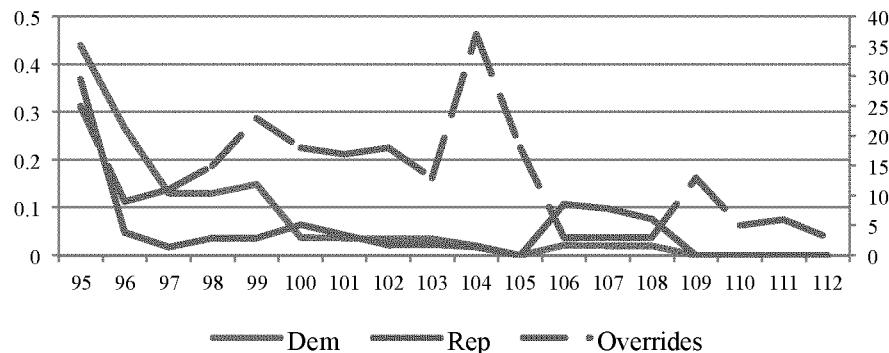
**Figure 4A. Senate, Percentage of Moderates Compared to Overrides**



**Figure 5A. House, Percentage of Overlapping Members in the Parties Compared to Overrides**



**Figure 6A. Senate, Percentage of Overlapping Members  
in the Parties Compared to Overrides**



These charts reveal two broad trends. First, we see a general increase in partisanship (or, alternatively, a decrease in moderation), with that increase accelerating beginning in the late 1980s and early 1990s. Second, we see a slight downward trend in overrides—the result of the fact that the post-golden age era has seen many fewer overrides than the years prior to the golden age. But what we don't see is much of a relationship between the various measures of partisanship and the number of overrides in a given Congress. Indeed, the override boom occurred during a sharp increase in partisanship.

While the partisanship thesis may seem especially appealing after the last few Congresses' pitiful record in enacting substantive legislation, the decline in overrides began long before that (and our study ended in 2011, right as the most extreme partisanship set in with the Republican takeover of the House in the 2010 midterm elections). It's tempting to view this puzzle through the lens of our current, acutely partisan period, but the decline in overrides began in 1998 and more-or-less persisted through to 2011, with the exception of a few spikes in override activity. Were the early 2000s under President George W. Bush (including more than four years of single party government) that much more partisan than the mid-1990s? Probably not, as the five figures above show.

To be clear, we do not categorically reject the partisanship argument. In the last few Congresses in particular, the extreme polarization (between the parties and even within the Republican majorities in the House and Senate) has prevented Congress from enacting much substantive legislation of any sort. We may have recently reached a tipping point the result of which is that acute polarization and partisanship make it difficult for Congress to do much

of anything, overrides included. Under these circumstances, Congress seems unlikely to enact even the restorative overrides that persisted during the period of relative decline.<sup>99</sup> But that does not make polarization and partisanship a good explanation of the pattern of overrides observed over the last quarter century. As the figures listed above make clear, the decline began much before this recent period of hyper-polarization, and it started much later than sharply increasing polarization trends that commenced in the 1980s and early 1990s.

We also agree with Buatti and Hasen that the absence of moderates likely complicates any substantial reforms, reducing the opportunities for override-heavy legislation. The slight up-ticks in override activity that we see during the periods of one-party government over the last fifteen years lend support to the common-sense notion that it's easier to enact overrides when the congressional and executive leadership share similar beliefs and priorities, especially in recent years.

But we still doubt that polarization and partisanship are the primary explanation for the decline in overrides. As we document in our article, the post-1998 falloff has disproportionately affected the "updating" and "clarifying" overrides, rather than the high-profile restorative overrides that would seem most likely to be impacted by partisanship.<sup>100</sup> Congress has continued enacting statutes such as the FDA Tobacco Act, the Lily Ledbetter Act, the ADA Amendments of 2008, and the Real ID Act, and many of these have been along partisan lines, consistent with Hasen's data and overall conclusions.<sup>101</sup> What we have lost are the comprehensive reforms to court-centric areas of the U.S. code, areas such as bankruptcy, intellectual property, regulated industries, tax, government administration, antitrust, and (with a few notable exceptions) the most fertile ground for overrides of all: federal jurisdiction and procedure. Although partisanship may play a role in this phenomenon, we are skeptical it can explain the drop-off in these areas, especially when the higher profile partisan overrides have not experienced as sharp a decline as we see for the updating overrides.

Instead, we have documented that the decline in overrides correlates more closely with a shift in congressional priorities.<sup>102</sup> With the exception of the 111th Congress, which produced both the Affordable Care Act and the Dodd-Frank Wall Street Reform Act, the post-2000 Congresses have overwhelmingly focused on enacting intransitive statutes<sup>103</sup> and shied away

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99. Christiansen & Eskridge, *supra* note 2, at 1374–75.

100. *Id.* at 1375.

101. Christiansen & Eskridge, *supra* note 2, app. 1; Hasen, *supra* note 3, at 222–23, 233–42, app. I.

102. Christiansen & Eskridge, *supra* note 2, at 1347–53.

103. I.e., statutes that generally do not create judicially enforceable rights and that are aimed at government officials rather than the general public. *Id.* at 1359 (citing Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 381 (1989)).

from reforming the super-statutes in which courts and private parties play a major role and which produce the statutory decisions that can be subsequently overridden. For this reason, recent congressional legislation has encountered much less in the way of Supreme Court statutory interpretation decisions in need of amendment.

Buatti and Hasen argue the moderate Presidents who held the White House in the 1990s—George H.W. Bush and William Clinton—provide an explanation why despite the sharp increase in partisanship during that period, the number of overrides took off, according to our story, or continued on pace, according to theirs. But as we explain in our article, Presidents George W. Bush and Barack Obama—at least in his first term—were not appreciably less successful in securing the passage of major legislation.<sup>104</sup> This legislation, however, was concentrated in areas where courts play a *much* more limited role than the legislation enacted during the golden age of overrides in the 1990s. Buatti and Hasen have not articulated a theory why partisanship should disproportionately affect override-heavy legislation, even as Congress continued to produce important and consequential statutes—at least until recently.

One update is in order. As noted, our study ended in 2011, the year that the GOP assumed control of the House of Representatives. Since then, substantive congressional activity has dropped off dramatically and, as Buatti and Hasen note, override activity really does appear to have fallen to almost none.<sup>105</sup> It may well be that the extreme partisanship of the last three Congresses will be an insuperable roadblock to further overrides, at least in the near term. But the intense partisanship of the last half decade does not explain the results chronicled in our original articles.

## V. The Effect of a Decline in Overrides

A final area on which we differ is the principal shift in power created by the decline in overrides. Professor Hasen believes that fewer overrides will result in more power to the Supreme Court.<sup>106</sup> He finds this concerning in part because it may embolden the Court to advance a particular agenda, knowing that the risk of a congressional rebuke has dissipated.<sup>107</sup> At least

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104. See Christiansen & Eskridge, *supra* note 2, at 1347–53 (relying on David Mayhew's dataset on major legislation found at David Mayhew, *Datasets and Material: Divided We Govern*, <http://davidmayhew.commons.yale.edu/datasets-divided-we-govern/>, archived at <http://perma.cc/88N8-4ZHQ>).

105. Buatti and Hasen, *supra* note 6, at 274.

106. Hasen, *supra* note 3, at 226–27. Conservative and anti-regulatory are our terms, and they do not have the same meaning. Even when Congress has been controlled by conservative Republicans, such that the Court was *arguably* to the left of Congress, the Court still exhibited relatively libertarian or anti-regulatory tendencies. See, e.g., Christiansen & Eskridge, *supra* note 2, at 1383.

107. See Hasen, *supra* note 3, at 251.

with the Court's current composition, this will presumably result in a statutory code that is more conservative and anti-regulatory. For these reasons, he believes the decline in overrides may also increase the stakes of the Supreme Court appointments process.<sup>108</sup>

We don't doubt that an absence of overrides will shift some power to the Supreme Court, at least vis-à-vis Congress.<sup>109</sup> But we believe that a sustained decline in overrides is even more likely to empower the Executive Branch. Our article explains this theory in detail.<sup>110</sup> The critical point is that the Executive Branch has many ways of responding to the Court's statutory jurisprudence through "administrative overrides." Doctrines such as *Brand X* give the President the authority to change statutory interpretations that were resolved at *Chevron* Step Two.

In our article, we focused on the biggest environmental law case of the 2013 Term: *Utility Air Regulatory Group v. EPA*.<sup>111</sup> We considered the rule at issue in that case an "administrative override" because EPA's interpretation of the Clean Air Act increased by several-hundred-fold the statutory threshold (which had been conclusively interpreted by the Supreme Court) at which it must begin regulating emissions of carbon dioxide from a particular source.<sup>112</sup> Justice Scalia's opinion (issued after our article went to print) resolved important aspects of the statutory interpretation question at *Chevron* step two,<sup>113</sup> thereby preserving presidential authority for a future President to revoke the Obama Administration's interpretation of the CAA's GHG requirements. At some point, we might see a congressional override that expressly permits EPA to treat greenhouse gases differently from more traditional pollutants, but probably not until there is single-party government with a filibuster-proof majority in the Senate—a conclusion squarely in line with Buatti and Hasen's thesis about overrides in especially partisan areas of the law.<sup>114</sup> But for the foreseeable future, it seems safe to say that the fate of greenhouse gas regulation under the Clean Air Act lies with the EPA and the President (with the courts, of course, also having their chance to weigh in).<sup>115</sup>

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108. *Id.*

109. Christiansen & Eskridge, *supra* note 2, at 1474.

110. Christiansen & Eskridge, *supra* note 2, at 1450–58.

111. 134 S. Ct. 2427 (2014).

112. Christiansen & Eskridge, *supra* note 2, at 1451–52.

113. *Utility Air Regulatory Group*, 134 S. Ct. at 2442, 2448.

114. Buatti and Hasen, *supra* note 6, at 279–80.

115. In another example, the Obama Administration recently proposed another environmental override of a case discussed in our Article. Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pt. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401). See also Christiansen & Eskridge, *supra* note 2, at 1476 n.623. This past April, the EPA proposed a rule that essentially adopts the standard proposed by Justice Kennedy, but joined by no other Justice, in *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring). The proposed rule would define the waters of the United States to include any waters that bear a "significant nexus"—essentially overriding the

That is the important shift in power created by the absence of legislation overriding the Court's earlier interpretation.

This shift in power is not limited to "administrative overrides." Even where the Executive Branch cannot administratively override a decision as discussed above, it can often "work around" a disfavored holding through regulations that nullify or mitigate much of the decision's effect.<sup>116</sup> This phenomenon was on display in the aftermath of the 2013 Term. While concurring in the *Hobby Lobby* decision's holding that RFRA applied to certain for-profit corporations, Justice Kennedy noted that his conclusion that the contraception mandate violated the RFRA was based on the availability of less-restrictive alternatives—in this case, the program through which the government supplied contraceptives to employees of certain non-profit organizations that objected to contraceptives on religious grounds.<sup>117</sup> We think it fair to say that Justice Kennedy was "imploring"<sup>118</sup> the government to pursue an "administrative workaround."

Less than two months after *Hobby Lobby* was decided, the HHS proposed a workaround consistent with the Kennedy observation<sup>119</sup>: It proposed expanding the set of organizations that could opt-out of their obligation to provide contraceptive services for female employees.<sup>120</sup> Employees of these companies would receive contraceptive coverage directly from their insurance companies, supported with government funding.<sup>121</sup> Although the workaround does not touch the holding that RFRA applied to certain for-profit corporations—the target of the proposed congressional override mentioned at the outset<sup>122</sup>—it cabins the practical consequences of *Hobby Lobby* for contraceptive access. And, most importantly for this essay,

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four-justice plurality that interpreted "waters of the United States" to require, *inter alia*, that the waters be "relatively permanent" rather than intermittent. Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22,189; *Rapanos*, 547 U.S. at 732 & n.5.

116. Christiansen & Eskridge, *supra* note 2, at 1450–51.

117. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring).

118. See Christiansen & Eskridge, *supra* note 2, at 1409–13 (discussing the Justices' practice of imploring Congress to override a Supreme Court decision).

119. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118, 51,118 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147) (stating that "in light of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), to ensure that participants and beneficiaries in group health plans (and enrollees and dependents in student health insurance coverage arranged by institutions of higher education) obtain, without additional cost, coverage of the full range of Food and Drug Administration (FDA) approved contraceptive services").

120. The proposed rule also responded to the Supreme Court's interim order in *Wheaton College* that held that organizations eligible for the exemption need not submit a form to the government stating the religious objection. *Id.* at 51,121 (citing *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2087 (2014)). The proposal provided that the organizations could contact the HHS, which would then arrange for coverage. *See id.* at 51,124.

121. *Id.* at 51,121.

122. *See supra* note 8 and accompanying text.

it shows how executive rather than legislative officials have again taken the lead in shaping our statutory law in response to a Supreme Court decision.<sup>123</sup>

Our goal is not to evaluate the *efficacy* of this possible workaround.<sup>123</sup> Nor is it to suggest that this workaround is a perfect substitute for a congressional override. Again, the workaround does not address the Supreme Court's interpretation of RFRA, as would the proposed overrides we discussed at the outset. Instead, our point is that the absence of overrides empowers the President and agencies to do through regulation what Congress will not do through statute. This is not to say that a lack of overrides will not affect the Court's power,<sup>124</sup> just that it will give the executive an even more important and prominent role in shaping statutory law. That, we believe, is the most important take-away from the decline in overrides.

The foregoing analysis of executive branch overrides and workarounds returns us to the main theme of this reply. The importance of overrides does not depend on whether every member of Congress—or Congress as an institution—is specifically “conscious” that a statute is overriding a Supreme Court decision in a particular way. The importance of overrides, as both a descriptive matter and (even more) as a normative matter, is that the democratically accountable legislative process has deliberated about an issue (provisionally) resolved by the Supreme Court and has adopted a new rule of law. Even if Congress were entirely oblivious that its new statute is displacing a Court-generated rule (a prospect we consider doubtful at best), the agency implementing the statute is acutely aware of the new statutory rule and its effect on the settled law. Likewise, if Congress does not deliberate and does not legislate, and the agency does not expect it to do so, the agency is not only aware but is motivated to work around or even override the Court-generated rule if expert administrators believe that it undermines their statutory mission. Normatively, of course, it would be better for Congress itself to make this determination—not because democracy demands that Congress “consciously” monitor and rebuke the Court, but instead because statutory updates are more democratically legitimate than administrative updates.

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123. Although the override already survived one potential challenge in the D.C. Circuit in *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014), the ultimate fate of this less restrictive avenue is still very much up in the air.

124. Here is where efficacy is important. If the administrative action fails to become a substitute, then some power has accrued to the Court. But we suspect that agencies are likely to try, try, and try again even in the face of adverse judicial decisions.

