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ARTICLES

END OF THE DIALOGUE? POLITICAL POLARIZATION, THE SUPREME COURT, AND CONGRESS

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I. INTRODUCTION

On the last of three historic days of oral argument considering the constitutionality of the Obama administration's health care law, the Justices of the U.S. Supreme Court turned to the question of severability: if the Court struck down one or more major components of the law, should the entire, over 900-page law¹ fall as well, or should the Court sever the unconstitutional parts and preserve the rest of it? One of the lawyers arguing in favor of severability contended that even if the Court struck down the heart of the law, "yes, Congress would have wanted"² other provisions kept intact, such as those giving new benefits for victims of black lung disease. In response, Justice Kennedy asked, "[T]he real Congress or a hypothetical Congress?"³ The audience laughed.⁴

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1. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2675 (2012) (Scalia, J., dissenting) ("The ACA is over 900 pages long.").

2. Transcript of Oral Argument, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (Nos. 11-393, 11-400), 2012 U.S. Trans. LEXIS 28, at *72 (2012).

3. *Id.*

4. *Id.* (noting audience laughter).

Justice Kennedy's response was funny, but the issue was serious. The Justices were well aware that the health care law barely passed on a party-line vote, thanks to some arm twisting by the Democratic Obama administration, unusual procedural maneuverings between the House and Senate, and side deals to bring along wary moderate Democrats.⁵ At oral argument Justice Scalia referred to the so-called "Cornhusker kickback," a sweetheart deal for Nebraska which was at one point inserted in the law (and later removed) to ensure Nebraska Senator Ben Nelson's vote.⁶ Partisan acrimony over the health care law only intensified when Republicans took back control of the House and Democrats lost their brief, sixty-vote filibuster-proof majority in the Senate. Republicans vowed to overturn what they called "Obamacare," and they took over thirty votes in the House to do just that, with their efforts predictably never picked up by the majority Democratic Senate.⁷ The partisan divide was national, with twenty-six states—all led by Republicans—filing a brief with the Supreme Court opposing the constitutionality of the health care law.⁸

By the time of the oral argument, the Justices knew that the Court's decision on which provisions of the health care law remained valid would likely be the final word. This was due to the U.S. Senate's rules, which require sixty votes to make changes to most laws, and the fact that partisan polarization and a closely divided Senate meant that neither party had sixty votes to alter the status quo. In response to the lawyer's plea for severability at oral argument, Justice Scalia responded,

You can't repeal the rest of the Act because you're not going to get 60 votes in the Senate to repeal the rest. It's not a matter of enacting a new

5. David M. Herszenhorn & Robert Pear, *Final Votes in Congress Cap Battle on Health Bill*, N.Y. TIMES, Mar. 26, 2010, at A17, available at <http://www.nytimes.com/2010/03/26/health/policy/26health.html>; Robert Pear & David M. Herszenhorn, *Obama Hails Vote on Health Care as Answering 'the Call of History'*, N.Y. TIMES, Mar. 22, 2010, at A1, available at <http://www.nytimes.com/2010/03/22/health/policy/22health.html>; Josh Gerstein, *Pork Greased Reform's Passage*, POLITICO (Dec. 22, 2009), <http://www.politico.com/news/stories/1209/30877.html>.

6. Olivier Knox, *Scalia Mocks Health Care Law 'Cornhusker Kickback' Provision—That No Longer Exists*, YAHOO! NEWS (Mar. 28, 2012), <http://news.yahoo.com/blogs/ticket/scalia-mocks-health-care-law-cornhusker-kickback-provision-205148292.html>. Nelson voted against the health care law. Herszenhorn & Pear, *supra* note 5.

7. Robert Pear, *Repeal of Health Care Law Approved, Again, by House*, N.Y. TIMES, July 12, 2012, at A11, available at <http://www.nytimes.com/2012/07/12/health/policy/house-votes-again-to-repeal-health-law.html>.

8. Linda Greenhouse, *Never Before*, N.Y. TIMES OPINIONATOR (Mar. 21, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/03/21/never-before/> ("Republican officeholders in all 26 states joined together in the case now known as United States Department of Health and Human Services v. State of Florida. In 22 of those states, the officeholder was the attorney general. In four states with Democratic attorneys general (Nevada, Wyoming, Iowa and Mississippi), Republican governors filed in their own names.").

act. You've got to get 60 votes to repeal it. So [if the Court severs the unconstitutional parts] the rest of the Act is going to be the law.⁹

The Court's recognition of the political reality at oral argument was not matched in the 193 pages of opinions in the case. The Justices' analysis of the health care law gave no inkling of the intense partisan atmosphere surrounding the law or the legal challenge. When the Justices stated their varying opinions on severability,¹⁰ none mentioned the fact that the Court's word was likely to be final because of partisan deadlock, even as four dissenters said that the rest of the law was not severable and it all needed to fall. That is not to say that the issue of congressional polarization was out of the Justices' thoughts as they wrote their opinions. Instead, legal doctrine had not expressly recognized the defining feature of modern American politics: deep political polarization along party lines.

Nor did the Justices expressly acknowledge that their own decision in the health care case would play into partisan politics and the upcoming presidential election. Partisan realignment hit Congress a long time ago, as Southern Democrats abandoned the Democratic Party and liberal Republicans lost their elections, moved to the right, or retired, to the point that the most liberal Republican in Congress today is more conservative than the most conservative Democrat. But the partisan realignment of the Supreme Court is much more recent. It occurred only in 2011, when liberal / moderate Republican-nominated Justice John Paul Stevens retired, replaced by liberal Democrat-nominated Elena Kagan. The Court now has five conservative Justices who are all Republicans, and four liberal Justices who are all Democrats.¹¹

A 5-4 party split in the health care case threatened the legitimacy of the Supreme Court, which had already begun to see an unprecedented decline in popularity among the public.¹² Chief Justice Roberts's surprise decision to vote with the four liberal Democrats to uphold the health care law startled Republicans and was viewed as a major victory for President

9. Transcript of Oral Argument, *supra* note 2, at *67. Some have suggested that had Republicans retaken control of the Senate, they could have tried to use the "reconciliation" process to repeal the health care law. Reconciliation bills are not subject to a Senate filibuster. For the difficulties Republicans would face in overturning the health care law even using reconciliation, see Ryan Lizza, *Why Romney Won't Repeal Obamacare*, THE NEW YORKER NEWS DESK (June 28, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/06/why-romney-wont-repeal-obamacare.html>.

10. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607-08 (2012); *id.* at 2668-77 (Scalia, J., dissenting).

11. See *infra* Part III.A. I refer to the Justices as "Democrats" or "Republicans" to indicate which party nominated that Justice.

12. See *infra* Part III.B.

Obama's reelection chances.¹³ Roberts's popularity among Republicans unsurprisingly declined sharply following the health care decision,¹⁴ but likely would rise again if he voted, as expected, to strike down affirmative action in education, to strike down parts of the Voting Rights Act, and to uphold new abortion restrictions. The effect of future partisan-divided Supreme Court decisions on public opinion remains uncertain.

This Article considers the likely effects of continued political polarization on the relative power of Congress and the Supreme Court.¹⁵ Polarization is already leading to an increase in the power of the Court against Congress, whether or not the Justices affirmatively seek that additional power. The governing model of congressional-Supreme Court relations is that the branches are in dialogue on statutory interpretation: Congress writes federal statutes, the Court interprets them, and Congress has the power to overrule the Court's interpretations. The Court's interpretive rules are premised upon this dialogic model, such as the rule that Supreme Court statutory interpretation precedents are subject to "super strong" stare decisis protection because Congress can always correct an errant court interpretation. Legislation scholars also write as though congressional overriding remains common.¹⁶

13. Jim Malone, *Analysts: Supreme Court Health Care Ruling Helps Obama*, VOICE OF AM. (June 28, 2012), <http://www.voanews.com/content/analysts-say-supreme-court-health-care-ruling-helps-obama/1349054.html>.

14. Kevin Robillard, *Poll: GOP Down on John Roberts, Dems Up*, POLITICO (July 16, 2012), <http://www.politico.com/news/stories/0712/78562.html>.

15. The presidency's strength against Congress also has been growing as a result of political polarization, which has provided an opening for unilateral presidential action on both domestic and foreign affairs. See Matthew N. Beckmann & Anthony J. McGann, *Navigating the Legislative Divide: Polarization, Presidents, and Policymaking in the United States*, 20 J. THEORETICAL POL. 201, 201–02 (2008); Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 396–97 (2009); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 491–96 (2008); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2342–47 (2006); Jide Nzelibe, *Partisan Conflicts Over Presidential Authority*, 53 WM. & MARY L. REV. 389, 392–95 (2011). Although the Bush presidency was known for its "unitary executive" theory and assertions of executive power, President Obama also has taken some notable steps to assert unilateral power, such as his recent executive order which will allow "[h]undreds of thousands of illegal immigrants who came to the United States as children [to] be allowed to remain in the country without fear of deportation and able to work." Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1, available at <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?hp>. He took this step following the inability of Congress to pass legislation accomplishing similar ends. The Supreme Court's decisions on executive power also affect congressional-presidential relations. These important developments are beyond the scope of this Article.

16. See *infra* Part I.B.

In fact, in the last two decades the rate of congressional overriding of Supreme Court statutory decisions has plummeted dramatically, from an average of twelve overrides of Supreme Court cases in each two-year congressional term during the 1975–1990 period, to an average of 5.8 overrides for each term from 1991–2000, and to a mere 2.8 average number of overrides for each term from 2001–2012.¹⁷ Although some of the decline seems attributable to the lower volume of Supreme Court statutory interpretation decisions, the decline in overrides greatly outpaces this decline in cases. Moreover, the decline does not appear to be driven by a decline in the amount of overall legislation. Instead, partisanship seems to have strongly diminished the opportunities for *bipartisan overrides* of Supreme Court cases, in which Democrats and Republicans come together to reverse the Supreme Court.¹⁸

In its place we see a new, but rarer, phenomenon, *partisan overriding*, which appears to require conditions of near-unified control of both branches of Congress and the presidency. Two recent examples are (1) the Military Commissions Act of 2006,¹⁹ in which Republicans overturned the Court's statutory interpretation decision in *Hamdan v. Rumsfeld*²⁰ on the habeas corpus rights of enemy combatants, and (2) the Lilly Ledbetter Fair Pay Act of 2009,²¹ in which Democrats overturned the Court's statutory interpretation decision in *Ledbetter v. Goodyear Tire & Rubber Co.*²² on how to measure the statute of limitations period in certain employment discrimination lawsuits. In a highly polarized atmosphere and with Senate rules usually requiring sixty votes to change the status quo, the Court's word on the meaning of statutes is now final almost as often as its word on constitutional interpretation.

Although political polarization has benefitted the Supreme Court's power relative to Congress in the short term, the longer-term power relations are more uncertain. Aside from the statutory interpretation dialogue, Congress interacts with the Supreme Court in other ways, including through Senate confirmation of Supreme Court judicial nominees. The recent partisan realignment of the Supreme Court makes it more likely that a Supreme Court judicial nominee will be filibustered in the Senate, thanks to the increasing willingness of senators to oppose

17. See *infra* Part I.B.

18. See *infra* Part I.C.

19. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

20. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

21. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

22. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

nominees on ideological grounds and increased partisan polarization in the Senate. The number of senators from the opposing party of the nominating president voting against Supreme Court nominees is approaching or exceeding the filibuster level. Depending upon how the politics play out in a possible filibuster of a Supreme Court judicial nominee, we may see either an erosion of the use of the filibuster in the Senate or a compromise which would weaken the power of the judiciary, such as term limits imposed upon future Supreme Court Justices.²³

Part I of this Article demonstrates that despite the model of Congress-Court dialogue, and Supreme Court statutory interpretation tools premised on that dialogue, congressional overrides of Supreme Court statutory interpretation precedents have become exceedingly rare. The effect of this change is to empower the Court over Congress. Part II argues that the steep decline in overrides over the last two decades appears to be due in large part to increased polarization in Congress and not simply to a decline in the number of Supreme Court statutory interpretation cases. When Congress does override a Supreme Court case, it is now more likely to be a partisan override, pushed through in periods of unified government. Part III is more speculative, and considers a different aspect of the role political polarization plays in the relationship between Congress and the Supreme Court. It considers how polarization in Congress and the partisan realignment of the Supreme Court—a Court in which all the conservative Justices are Republicans and all the liberal Justices are Democrats—may eventually lead to a major confrontation in Congress over the power of the Senate filibuster. That confrontation may leave the Senate, the Supreme Court, or both, looking very different than they are today. Furthermore, partisan realignment has the potential to harm the Supreme Court's legitimacy in a way which we have not witnessed in modern times.

II. THE DECLINE IN CONGRESSIONAL OVERRIDES OF SUPREME COURT STATUTORY DECISIONS

A. THE DIALOGIC MODEL IN THEORY

The U.S. Constitution gives Congress the power to pass federal legislation (upon the president's agreement or an overriding of a veto)²⁴ and the judiciary the power to review cases arising under these "Laws of

23. *See infra* Part III.

24. U.S. CONST. art. I, § 7.

the United States.”²⁵ The Supreme Court (or a lower court) sometimes strikes down a federal statute as unconstitutional. In response, members of Congress occasionally introduce constitutional amendments to overturn these rulings, and congressional committees hold hearings on proposed constitutional amendments. For example, Congress has considered overturning the Supreme Court’s ruling that flag burning constitutes speech protected by the First Amendment²⁶ and overturning the Court’s recent ruling in *Citizens United v. Federal Election Commission*²⁷ affording business corporations the right to spend their general treasury funds on candidate election campaigns.²⁸ But the very difficult supermajority requirements for a constitutional amendment—two-thirds of Congress and three-quarters of state legislatures must agree—usually leaves the Court’s constitutional decisions standing.

In contrast to judicial pronouncements about the constitutionality of federal statutes, which can be overridden solely through the arduous constitutional amendment process, Congress has the power to override a judicial interpretation of a federal statute simply by passing a new or amended statute under the normal rules for passing legislation.²⁹

The Supreme Court has premised its rules for interpreting federal statutes on this dialogic model in which Congress may correct the Supreme Court’s errors of statutory interpretation.³⁰ Most importantly, the Court applies what William Eskridge has called a “super-strong presumption” of *stare decisis* for statutory rulings.³¹ The leading application, *Flood v.*

25. U.S. CONST. art. III, § 2.

26. Mike Allen, *House Passes Constitutional Amendment to Ban Flag Burning*, WASH. POST, June 23, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/22/AR2005062202155.html>.

27. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

28. Warren Richey, *Constitutional Amendment Required to Undo Citizens United*, *Senate Panel Told*, CHRISTIAN SCI. MONITOR (July 24, 2012), available at <http://www.csmonitor.com/USA/Politics/2012/0724/Constitutional-amendment-required-to-undo-Citizens-United-Senate-panel-told>.

29. I am using the definition of “override” set forth in William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n.1 (1991) (“A congressional ‘override’ includes a statute 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. . . . [O]VERRIDE [does not] include statutes for which the legislative history—mainly committee reports and hearings—does not reveal a legislative focus on judicial decisions.”).

30. For a detailed and critical look at these canons, see Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 428–33 (1992).

31. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1366 (1988).

Kuhn,³² involved the Supreme Court's failure to overturn earlier precedents which had concluded that professional baseball was exempt from federal antitrust laws. In the years after the Court had initially held that baseball was entitled to an exception, the Court then inconsistently held that professional boxing and professional football were not entitled to such an exemption. In *Flood*, the Court reaffirmed its earlier inconsistent precedent giving baseball the exemption even though “[i]t appears that every member of the Court thought that [the earlier precedent] was wrongly decided.”³³ Justice Blackmun, for the Court, wrote that “[i]f there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.”³⁴

Other Court statutory interpretation doctrines also presume the ability of Congress to correct an errant statutory precedent. The Court has justified literal-if-illogical applications of congressional statutes on grounds that Congress can fix any drafting problems in response to the Court's decision.³⁵ As the Court wrote in *Griffin v. Oceanic Contractors, Inc.*, a case allowing for an exceedingly large penalty under federal maritime law, “The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not.”³⁶

Three statutory construction rules related to legislative inaction—sometimes applied by the Court—also presume Congress's ability to override mistaken court interpretations of federal statutes. Under the acquiescence rule, “[i]f Congress is aware of an authoritative agency or judicial interpretation of a statute and doesn't amend the statute, the Court has sometimes presumed that Congress has ‘acquiesced’ in the interpretation's correctness.”³⁷ Under the reenactment rule, “[i]f Congress reenacts a statute without making any material changes in its wording, the Court will often presume that Congress intends to incorporate authoritative agency and judicial interpretations of that language into the reenacted statute.”³⁸ For example, in *Faragher v. City of Boca Raton*,³⁹ the Court

32. *Flood v. Kuhn*, 407 U.S. 258 (1972).

33. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 640 (4th ed. 2007).

34. *Flood*, 407 U.S. at 284.

35. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 520 & n.32 (2009).

36. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982).

37. ESKRIDGE, FRICKEY & GARRETT, *supra* note 33, at 1048.

38. *Id.* (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”) (quoting *Lorillard v.*

noted that in the Civil Rights Act of 1991 Congress overrode a number of the Court's statutory interpretation decisions regarding Title VII hostile-work-environment claims but Congress did not override the Court's earlier decision in *Meritor Savings Bank, FSB v. Vinson*.⁴⁰ The Court therefore concluded that its earlier interpretation in *Meritor* was sound.⁴¹ Under the rejected proposal rule, “[i]f Congress (in conference committee) or one chamber (on the floor) considers and rejects specific statutory language, the Court has often been reluctant to interpret the statute along lines of the rejected language.”⁴²

Finally, in explaining application of the severability test for federal legislation, the dissenting Justices in the recent health care case premised their arguments for striking down the whole statute (and not severing the unconstitutional parts) on the ability of Congress to restore any parts of the law worthy of restoration:

The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact. That can be a more extreme exercise of the judicial power than striking the whole statute *and allowing Congress to address the conditions that pertained when the statute was considered at the outset.*⁴³

Pons, 434 U.S. 575, 580 (1978)). Justice Scalia and Bryan Garner give qualified support to this rule in their 2012 book. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322–26 (2012). However, they do not base it in legislative agreement, but instead on the fact that “members of the bar practicing in that field reasonably enough assume that, in statutes pertaining to that field, the term bears this same meaning. . . . This footing is sounder than the fanciful presumption of legislative knowledge.” *Id.* at 324.

39. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

40. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

41. *Faragher*, 524 U.S. at 804 n.4 (“We are bound to honor *Meritor* on this point not merely because of the high value placed on *stare decisis* in statutory interpretation, but for a further reason as well. With the amendments enacted by the Civil Rights Act of 1991, Congress both expanded the monetary relief available under Title VII to include compensatory and punitive damages, and modified the statutory grounds of several of our decisions. The decision of Congress to leave *Meritor* intact is conspicuous. We thus have to assume that in expanding employers’ potential liability under Title VII, Congress relied on our statements in *Meritor* about the limits of employer liability. To disregard those statements now (even if we were convinced of reasons for doing so) would be not only to disregard *stare decisis* in statutory interpretation, but to substitute our revised judgment about the proper allocation of the costs of harassment for Congress’s considered decision on the subject.”) (citations omitted). *See also ESKRIDGE, FRICKEY & GARRETT, supra* note 33, at 1049 (discussing *Faragher*).

42. ESKRIDGE, FRICKEY, & Garrett, *supra* note 33, at 1049.

43. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2668 (2012) (Scalia, J., dissenting) (emphasis added). The dissenters would have struck down the entire health care law, including nongermane provisions such as one requiring chain restaurants to display nutritional content:

The Court has not previously had occasion to consider severability in the context of an omnibus enactment like the ACA, which includes not only many provisions that are ancillary

B. THE DIALOGIC MODEL IN PRACTICE OVER TIME

1. 1967–1990

Many scholars have examined the circumstances under which Congress responds to a Supreme Court decision through a legislative override and how the Court reacts to such overrides.⁴⁴ In the idealized pluralistic model of politics and dialogue, “[i]f litigation reveals statutory flaws, or produces objectionable judicial interpretations, interest groups can appeal to Congress, which can scrutinize the courts’ decisions and revise the original statute in light of lessons learned from litigation.”⁴⁵

William Eskridge’s leading 1991 study, using an empirical analysis of overrides, game theory, and positive political theory, presented a more nuanced picture of how the Court interprets federal statutes. He argued that “the Court’s statutory interpretation decisions are more responsive to the expectations of the current Congress than to those of the enacting Congress. But the Court is also responsive to its own institutional and personal preferences—especially its preference for coherence and predictability in the law.”⁴⁶

Consistent with Eskridge, there is a broad, technical literature in public choice and positive political theory which generally posits that the Justices seek to interpret federal statutes as close as possible to their own preferences without being overridden by Congress.⁴⁷ The chances of

to its central provisions but also many that are entirely unrelated—hitched on because it was a quick way to get them passed despite opposition, or because their proponents could exact their enactment as the *quid pro quo* for their needed support. When we are confronted with such a so-called ‘Christmas tree,’ a law to which many nongermane ornaments have been attached, we think the proper rule must be that when the tree no longer exists the ornaments are superfluous. We have no reliable basis for knowing which pieces of the Act would have passed on their own. It is certain that many of them would not have, and it is not a proper function of this Court to guess which. To sever the statute in that manner would be to make a new law, not to enforce an old one. This is not part of our duty.

Id. at 2675–76 (internal quotation marks omitted).

44. See generally, e.g., JEB BARNES, OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS (2004); Eskridge, *supra* note 29; Lori Hausegger & Lawrence Baum, *Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation*, in GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990S 224, 224–247 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998); Richard A. Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143, 198–205 (1991); Solimine & Walker, *supra* note 30; Widiss, *supra* note 35. For a detailed look at Congress’s overrides of Supreme Court preemption decisions, see Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604 (2007).

45. Barnes, *supra* note 44, at 6.

46. Eskridge, *supra* note 29, at 334.

47. See, e.g., Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court*

congressional override depend not only upon the preferences of the median member of Congress but also upon the preferences of committee chairs and party leaders, who act as the gatekeepers for legislation.

Jeb Barnes's detailed study of one hundred randomly selected overrides in the 1974–1990 period found that “members of Congress—or, more precisely, members of prestige and re-election committees—tend to draft more comprehensive and effective overrides, especially when the override issue involves the collection of tax revenue.”⁴⁸ Further, “if the override issue split the courts along partisan lines in the pre-override period, federal judges seemed more likely to resist congressional oversight, especially when the issue involved the interpretation of the statutory rights of discrete, insular minorities, such as African Americans or immigrants.”⁴⁹

Nancy Staudt, René Lindstädt, and Jason O'Connor canvassed all express congressional responses—and not just overrides—to Supreme Court tax decisions from 1954 to 2005. The authors found that

the Court-Congress dynamic is not unidimensional but rather nuanced and varied. The existing literature implies when Congress responds to the Court, it does so in a hostile manner. To be sure, judicial decisions often spark a negative response in Congress, but nearly as often the cases lead to supportive and positive responses, like codification legislation.⁵⁰

Most recently, Deborah Widiss has written a pair of articles examining congressional overrides in the employment law context. In the first article, she demonstrated that the Supreme Court often narrowly construes congressional override attempts.⁵¹ In the second article, she showed that the Court often sidesteps congressional overrides when construing similar language in a parallel statute,⁵² in apparent violation of the rule to interpret

Statutory Decisions with Applications to the State Farm and Grove City Cases, 6 J.L. ECON. & ORG. 263 (1990); Thomas G. Hansford & David F. Damore, *Congressional Preferences, Perceptions of Threat, and Supreme Court Decision Making*, 28 AM. POL. Q. 490 (2000); Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEGIS. STUD. Q. 5 (2005); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949–1988*, 23 RAND J. ECON. 463 (1992). For some skepticism about the approach, see Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

48. BARNES, *supra* note 44, at 18.

49. *Id.*

50. Nancy C. Staudt, René Lindstädt & Jason O'Connor, *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340, 1401 (2007).

51. See generally Widiss, *supra* note 35.

52. See generally Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012).

identical language in related statutes to mean the same thing in each statute.⁵³

Eskridge's 1991 article on overrides was an important corrective to the belief that congressional overrides were rare.⁵⁴ Whether or not the total number of overrides has in the past counted as "rare" in any absolute sense, in the 1970s and 1980s, Congress used its override power with increasing frequency. As Eskridge described,

The four Congresses from 1967–74 generated an average of six Supreme Court overrides per [two-year congressional period], not many more than the numbers uncovered in prior studies. In contrast, the eight Congresses from 1975–90, beginning with the 94th, generated an average of twelve Supreme Court overrides per [two-year congressional period].⁵⁵

Like Eskridge's study, Barnes's study ended with an examination of congressional overrides occurring in 1990.⁵⁶ Barnes found that "[d]espite obstacles, absolute levels of congressional override activity have increased."⁵⁷ Although Eskridge's empirical study ended with 1990, his article also described the Civil Rights Act of 1991, which overrode at least ten Supreme Court cases.⁵⁸

In 2005, Barnes noted that there might be a need for congressional overrides to rise over time:

Congress may need to revise statutes because today's statutes may be increasingly prone to obsolescence and inconsistency; today's Supreme Court is increasingly overwhelmed and less likely to harmonize

53. Justice Scalia and Bryan Garner endorse the canon, but reject its basis as following the Legislature's intent:

Though it is often presented as effectuating the legislative "intent," the related-statute canon is not, to tell the truth, based upon a realistic assessment of what the legislature actually meant. That would assume an implausible legislative knowledge of related legislation in the past, and an impossible legislative knowledge of related legislation yet to be enacted.

SCALIA & GARNER, *supra* note 38, at 252. They justify the canon as based on "a realistic assessment of what the legislature ought to have meant." *Id.*

54. Eskridge, *supra* note 29, at 335. *But see* Bertrand L. Ross, II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1228 (2011) ("[O]verrides are exceedingly rare, making it risky to rely on them as a means of ensuring consistency between the Court's statutory interpretations and legislative preferences. In fact, one scholar . . . famously argued [in 1960] that statutory overrides are so rare that the Court's interpretation of statutes is 'hardly less "final" than the Court's decisions interpreting the Constitution.'").

55. Eskridge, *supra* note 29, at 338.

56. BARNES, *supra* note 44, at 15.

57. *Id.* at 43 (emphasis omitted). *See also id.* at 44 ("Congress is increasingly relying on the passage of overrides as a check on the courts.").

58. Eskridge, *supra* note 29, at 333 n.4. I say "at least" ten because Eskridge counts more than ten as overrides. But using Eskridge's own methodology, my results count ten overruled cases, with the other cases modified or clarified, but not overruled. *See Appendix I.*

conflicting lower court statutory interpretations; and today's federal judges have greater opportunities to overreach—from the right or the left—under the guise of statutory interpretation.⁵⁹

2. 1991–2012

Perhaps because of the strength of the evidence of a rise in override activity reported in the earlier studies, scholars have failed to notice that congressional overruling of Supreme Court cases slowed down dramatically since 1991 and essentially halted in January 2009. Thus, writing in 2012, James Brudney stated that “[a]s scholars in law and political science have observed, Congress has become more inclined to override Court decisions since the early 1970s.”⁶⁰ Similarly, the 2005 study of congressional responses to Supreme Court tax decisions over a fifty-one-year period by Staudt, Lindstädt, and O’Connor failed to note that of the twelve overrides of tax decisions by Congress in the 1954–2005 period, only two occurred later than 1986 (and the last in 2001).⁶¹

I examined evidence of congressional overrides of Supreme Court statutory interpretation decisions from the end of Eskridge’s study (ending in 1990) to the end of 2012, trying my best to replicate Eskridge’s methodology so as to allow for an apples-to-apples comparison of congressional override activity.⁶² This proved to be methodologically difficult, in part because Congress is now less likely to note the overruling of a Supreme Court opinion in a committee report. The Methodological Appendix (appendix IV) at the end of this Article describes in detail how I sought to identify overrides from 1991 to 2012; in addition, I erred on the side of inclusion in doubtful cases.

The results are dramatic: according to Eskridge’s data, the number of overrides rose from an average of six Supreme Court overrides per Congress in the years 1967–1974 to twelve overrides per Congress in the years 1975–1990. According to my updated data, overrides then fell to 5.8

59. BARNES, *supra* note 44, at 34.

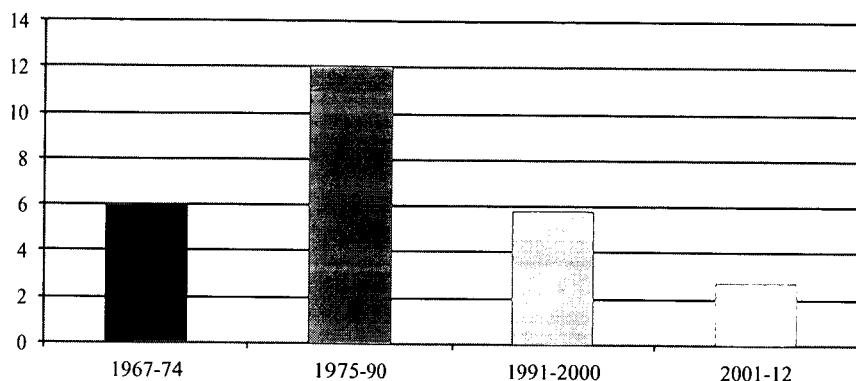
60. James J. Brudney, *Distrust and Clarify: Appreciating Congressional Overrides*, 90 TEX. L. REV. SEE ALSO 205, 212 (2012).

61. Staudt, Lindstädt & O’Connor, *supra* note 50, at 1384 n.169.

62. Eskridge describes his methodology in Eskridge, *supra* note 29, at 418–20. Hausegger and Baum, using what they describe as “similar search methods” to Eskridge’s, identified eight overrides. Hausegger & Baum, *supra* note 44, at 227, 231–32. Hausegger and Baum graciously shared their list of 1991–1996 overrides with me. Our lists overlap but are not entirely consistent given different definitions of “override.” For example, both they and I identify eight overrides in the 1995–1996 period, although we have not made identical judgments on which statutes qualify as overrides. Hausegger and Baum’s list is on file with the author.

per Congress from 1991–2000 and fell even further to 2.8 overrides per Congress from 2001–2012.⁶³ Figure 1 depicts these changes.

FIGURE 1. Average Number of Overrides Per Two-Year Congressional System



The 5.8 average overrides per Congress in the 1991–2000 period may overstate the amount of override activity, as it is heavily influenced by the Civil Rights Act of 1991, a single law which overturned ten Supreme Court cases.

Overrides have slowed to a trickle in the last four years. Congress passed two technical overrides in 2011, one involving trademark issues and the other a court-venue provision.⁶⁴ The last significant congressional overrides occurred in early 2009. The Lilly Ledbetter Fair Pay Act of 2009, the first bill signed by President Obama, overturned a Supreme Court employment decision.⁶⁵ In addition, the Family Smoking and Tobacco Act of 2009 responded to a 2000 Supreme Court decision, giving the FDA some authority to regulate tobacco.⁶⁶ Figure 2 shows a dramatic drop in the number of congressional overrides.

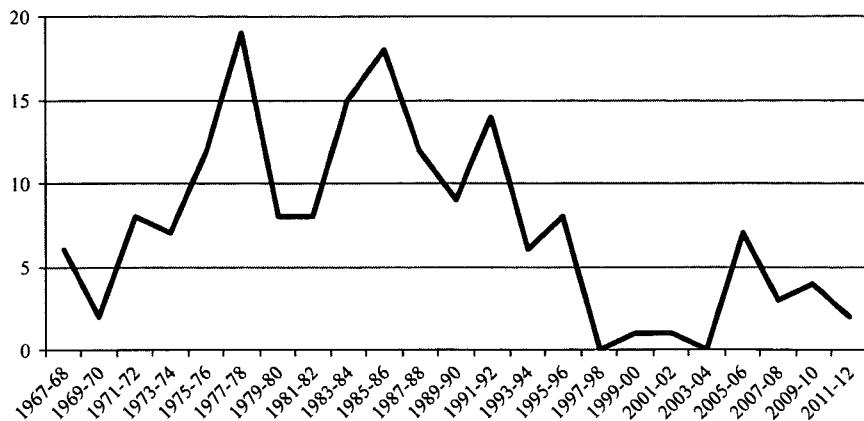
63. I list all the overridden cases I discovered in Appendix I.

64. See Appendix I.

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

66. Jeff Zeleny, *Occasional Smoker, 47, Signs Tobacco Bill*, N.Y. TIMES, June 23, 2009, at A15, available at http://www.nytimes.com/2009/06/23/us/politics/23obama.html?_r=0. See Appendix IV.

FIGURE 2. Number of Overrides Per Two-Year Congressional Session



3. A Closer Look at Post-2000 Congressional Overrides

In the twelve years since January 2001, Congress has passed only fourteen pieces of legislation overriding Supreme Court decisions, and overriding a total of seventeen Supreme Court statutory interpretation decisions. The overrides fall into three categories: technical overrides, bipartisan overrides, and partisan overrides.

a. Technical Overrides

Seven of the bills since 2001 were technical overrides contained in larger bills. These overrides likely did not garner the attention of many members of Congress, with some overrides folded in much larger bills and not subject to debate.⁶⁷ These seven bills included eight overrides making generally minor changes to Supreme Court statutory precedent.⁶⁸

67. I classify an override as “technical” if the *New York Times* contained no article the same year as the bill’s passage noting that Congress was considering overriding, or in fact overrode, one or more Supreme Court cases. See Hausegger & Baum, *supra* note 44, at 228 (noting that many overrides are contained in larger bills where “[i]n all likelihood their inclusion in a bill had little effect on its passage; rather, the override was successful because a bill had congressional support for other reasons. In several instances it is doubtful that most members of Congress were even aware of the override provisions . . .” (citation omitted)).

68. The Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (2002), included a reversal of *Gitlitz v. Commissioner*, 531 U.S. 206 (2001), a case involving “narrow and technical” tax issues concerning the “correct method for determining basis in S Corporation stock.” Staudt, Lindstädt & O’Connor, *supra* note 50, at 1353 n.37. See also H.R. REP. NO. 107-251, at 52 (2001); H.R. REP. NO. 107-367, at 3 (2002). The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), included a provision reversing a Supreme Court case on the habeas corpus rights of immigrants accused of crimes, *INS v. St. Cyr*, 533 U.S. 289 (2001). See H.R. REP. NO. 109-72, at 173–76 (2005).

b. Bipartisan overrides

Two of the six nontechnical override bills passed with broad bipartisan majorities. One bill amended the Americans with Disabilities Act (“ADA”) to strengthen its protections.⁶⁹ Another renewed expiring provisions of the Voting Rights Act for another twenty-five years and changed the standards for proving discrimination under the Act.⁷⁰ Each bill reversed two major Supreme Court statutory precedents, and each bill passed in large part thanks to the strong leadership and support of the then-chair of the House Judiciary Committee, James Sensenbrenner (R-WI). It is unclear whether either bill would have passed without Sensenbrenner’s interest, passion, and power.⁷¹

The Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (2006), eased the standard of proof for trademark holders in dilution claims, overruling *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003). *See* H.R. REP. NO. 109-23, at 5 (2005). The OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007), reversed a major Supreme Court opinion on attorney’s fees in public-interest litigation, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001), but only as to attorney’s fees in litigation related to FOIA requests. H.R. REP. NO. 110-59, at 4 (2007) (discussing an earlier version of the Act containing the same relevant language as the Act ultimately passed). The Leahy-Smith America Invents Act of 2011, Pub. L. No. 112-29, 125 Stat. 284 (2011), “responds to the decision of *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, by conferring plenary authority on the U.S. Court of Appeals for the Federal Circuit to hear all patent appeals from lower courts.” H.R. REP. NO. 109-407, at 3 (2006); H.R. REP. NO. 112-98, pt. I, at 81 (2011) (explicitly endorsing the earlier H.R. REP. NO. 109-407’s explanation “for abrogating *Holmes*”). The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) reversed two Supreme Court cases dealing with the standard for proving federal money laundering violations. S. REP. NO. 111-10, at 4, 10 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 438. The Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011), reversed a 1960 decision, *Hoffman v. Blaski*, 363 U.S. 335 (1960), to craft a more permissive venue rule in certain federal cases. H.R. REP. NO. 112-10, at 23-24 (2011), *reprinted in* 2011 U.S.C.C.A.N. 576.

69. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). The Act’s language rejected *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, v. Williams*, 534 U.S. 184 (2002). *See* Appendix I.

70. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006). The Act’s language reversed two Supreme Court cases, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), which “misconstrued Congress’ original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.” H.R. REP. NO. 109-478, at 2 (2006). The 2006 Amendments were intended to “restore the original purpose to Section 5 with respect to intentionally discriminatory voting changes.” *Id.* at 65.

71. *See* Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 195-96 (2008) (“The first serious breakthrough for the ADA Restoration Act happened in the summer of 2006. Congressman Jim Sensenbrenner (R-WI), then Chair of the House Judiciary Committee, conveyed his interest in sponsoring a bill that would restore the broad coverage of disability under the ADA. Congressman Sensenbrenner’s wife, Cheryl Sensenbrenner, had been on the board of the AAPD since 2003 and was an enthusiastic supporter of the ADA Restoration Act. . . . Having a senior Republican Member of Congress and Chair of the House Judiciary Committee express his interest in sponsoring an ADA Restoration Act significantly changed the political dynamics

The ADA Amendments clearly overturned Supreme Court (and lower court) precedent in a number of important ways, although they left some key statutory questions unresolved.⁷²

As for the Voting Rights Act (“VRA”) amendments, the story is more complicated. Nathaniel Persily explained that Congress’s overriding of one of the two Supreme Court voting rights decisions, *Georgia v. Ashcroft*, was done in a deliberately murky way to avoid a deep partisan divide about the workings of the Act.⁷³

The procedure by which the VRA amendments passed was highly unusual. As Richard Pildes explained,

[T]he enacted law was “virtually unchanged” from the version first introduced in the House. . . . [I]t is widely known that the bill was drafted by the civil rights community, then pushed through the House process by Chairman Sensenbrenner, for whom, as Persily does note, “nothing was going to stand in [the] way.” The House hearings were not designed to provide a full airing of the issues, but for advocates to build what Persily calls “a lawyer’s brief,” one that would enable the renewed VRA to withstand later constitutional challenge. In the House, virtually none of the academics with years of expertise in the study of the VRA were called to testify. Second, Persily exposes just how dramatically the enacted VRA papered over and obscured the profound policy conflicts that actually exist on these issues in Congress. While the Senate passed the law by a 98-0 vote, the Senate Judiciary Committee could not agree on a committee report explaining what the bill actually did, and did not even issue the report until *after* the Senate had approved the bill and just

around the possible success of such a bill.”); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 180–81 (2007) (“One cannot overstate the importance of the unlikely leadership of James Sensenbrenner, Chairman of the House Committee on the Judiciary, in pushing through the legislation. He wanted the reauthorization of the Voting Rights Act to occur on his watch, and, consistent with his leadership style on other issues, nothing was going to stand in his way. Pursuant to the rules of the Republican Conference, however, his term as Chairman was to expire at the end of 2006, a year before section 5 of the VRA was scheduled to sunset. Therefore, the timetable for the legislation was moved up a year, with House hearings held between October 2005 and May 2006.”).

72. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 51–54 (2009).

73. Persily, *supra* note 71, at 218 (“[T]here are good reasons why Congress left this important provision [reversing *Georgia v. Ashcroft*] undefined. The fractious Senate Report makes clear that Democrats and Republicans hold dramatically differing views as to what this standard requires. The other available legislative history elides the likely political effects of various valid interpretations. The potential interpretations of the law run the gamut from entrenching either Republican or Democratic gerrymanders. The central conceptual disputes revolve around the types of districts and candidates protected by the standard, the data necessary to evaluate the ability to elect, and the degree of flexibility jurisdictions should be accorded to adapt to political changes throughout the twenty-five year tenure of this law.”).

before the President signed it into law—and even then, with the support of committee members from only one political party.⁷⁴

A third bipartisan override was the Family Smoking Prevention and Tobacco Control Act of 2009, which gave the FDA the power to regulate tobacco as a drug.⁷⁵ Congress used the law to respond to a 2000 Supreme Court decision holding that Congress had not given the FDA such power.⁷⁶ The largest tobacco company in the United States, Philip Morris, supported the bill, and the final vote was broadly bipartisan⁷⁷—although twenty-nine Senate Republicans (and one Democrat) first voted to filibuster the bill.⁷⁸

c. Partisan overrides

Three overrides during the 2000–2012 period divided Congress strongly on party lines. This contrasts sharply with the prior period, when partisan overrides were rare.⁷⁹ In the Military Commissions Act of 2006, Congress partially reversed the Supreme Court’s decision in *Hamdan* by further limiting the habeas corpus rights of alien enemy combatants at Guantanamo Bay, Cuba and elsewhere.⁸⁰ Republicans favored the bill in the House by a vote of 218-7 and in the Senate by a vote of 53-1. Democrats opposed the bill in the House by a vote of 32-162 and in the Senate by a vote of 12-32.⁸¹

74. Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 151 (2007).

75. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009). *See Appendix IV.*

76. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000); Family Smoking Prevention and Tobacco Control Act § 3(1); H.R. REP. NO. 111-58(I) (2009), reprinted in 2009 U.S.C.C.A.N. 468, 470 (noting a 2000 Supreme Court case finding that the FDA lacked authority over tobacco products and quoting language appearing in *Brown & Williamson*, 529 U.S. at 161).

77. Duff Wilson, *Senate Approves Tight Regulation Over Cigarettes*, N.Y. TIMES, June 12, 2009, at A1, available at <http://www.nytimes.com/2009/06/12/business/12tobacco.html>; Duff Wilson, *Congress Passes Measure on Tobacco Regulation*, N.Y. TIMES, June 13, 2009, at B3, available at http://www.nytimes.com/2009/06/13/business/13tobacco.html?_r=0.

78. *On the Cloture Motion S.Amdt.1247 to H.R.1256 (Family Smoking Prevention and Tobacco Control Act)*, GOVTRACK (June 8, 2009), <http://www.govtrack.us/congress/votes/111-2009/s204>.

79. *See infra* fig.12 and accompanying text; Solimine & Walker, *supra* note 30, at 452 (noting that only seven of eighteen overrides identified by Eskridge during the 1981–1988 period provoked partisan controversy).

80. *See generally* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); John Yoo, *Congress to Courts: “Get Out of the War on Terror,”* WALL ST. J., Oct. 19, 2006, at A18, available at <http://www.aei.org/article/society-and-culture/congress-to-courts-get-out-of-the-war-on-terror/>.

81. For the House totals, see *Final Vote Results for Roll Call 508 (Military Commissions Act)*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Sept. 29, 2006, 2:47 PM), <http://clerk.house.gov/evs/2006/roll508.xml>. For the Senate totals, see *U.S. Senate Roll Call Votes 109th Congress—2nd Session*, U.S. SENATE BILL CLERK, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00259 (last visited Jan. 15, 2013).

In the Lilly Ledbetter Fair Pay Act of 2009, Congress reversed the Supreme Court's decision in *Ledbetter*⁸² by extending the statute of limitations in certain employment discrimination suits.⁸³ President Obama campaigned on the Republicans' earlier blockage of this bill as an issue of equal rights for women, pushing heavily for its passage as a presidential candidate, and the Act was the first bill he signed as president.⁸⁴ Democrats favored the bill in the House by a vote of 247-4 and in the Senate by a vote of 54-0 (Ted Kennedy did not vote). Republicans opposed the bill in the House by a vote of 3-173 and in the Senate by a vote of 4-36.⁸⁵ Notably, the four Republican senators who voted in favor of the bill were the Senate's four Republican women senators (Susan Collins, Kay Bailey Hutchison, Lisa Murkowski, and Olympia Snowe).

Finally—and perhaps a bit more debatably—I classify the Detainee Treatment Act of 2005 as a partisan override even though the final larger Pentagon bill containing the override passed on a bipartisan basis. The part of the bill consisting of an override reversed the Supreme Court's decision in *Rasul v. Bush*, which gave Guantanamo detainees the right to challenge their detentions in civilian court.⁸⁶ On an amendment to add this provision to a larger bill, forty-two of forty-seven Democrats voting cast a vote against the amendment.⁸⁷ Despite these partisan beginnings, Democrats ultimately voted for the final bill for a number of reasons, including the fact that it contained another amendment barring torture of enemy combatants, and that it was within an even broader defense bill.⁸⁸ Further, Democrat and chief conference negotiator, Senator Carl Levin, responded to criticism from human rights groups for agreeing to a bill containing the detainee court provision, explaining “that he had settled for the less damaging of two bad outcomes, [and] saying he had deflected more onerous provisions that House Republicans wanted, including a demand that interrogators who

82. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

83. Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

84. Stolberg, *supra* note 65; Stephanie Mencimer, *Lilly Ledbetter: Obama's Newest Ad Star*, MOTHER JONES (Sept. 23, 2008, 9:44 AM), <http://www.motherjones.com/mojo/2008/09/lilly-ledbetter-obamas-newest-ad-star>.

85. For the House totals, see *House Vote #37 in 2009, S. 181 (111th): Lilly Ledbetter Fair Pay Act of 2009*, GOVTRACK, <http://www.govtrack.us/congress/votes/111-2009/h37> (last visited Jan. 4, 2013). For the Senate totals, see *Senate Vote #14 in 2009, S. 181 (111th): Lilly Ledbetter Fair Pay Act of 2009*, GOVTRACK, <http://www.govtrack.us/congress/votes/111-2009/s14> (last visited Jan. 4, 2013).

86. See *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004).

87. Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, N.Y. TIMES, Nov. 11, 2005, at A1, available at <http://www.nytimes.com/2005/11/11/politics/11detain.html>.

88. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2006) (codified at 42 U.S.C. § 2000dd (2006)).

abused prisoners be granted immunity from prosecution.”⁸⁹

C. THE CONSEQUENCES OF FEW CONGRESSIONAL OVERRIDES

Whether or not one subscribes to the view of positive political theorists that Supreme Court Justices interpret federal statutes in line with their personal preferences and their strategic calculations about the chances of reversal, there seems to be little doubt as things currently stand that a majority of Supreme Court Justices is usually getting its way when it comes to statutory interpretation. Supreme Court interpretations of federal statutes are now very likely to be final. The combination of Supreme Court interpretive rules premised on the Court-Congress dialogue, and the failure of Congress to override any significant number of Court interpretations of federal statutes, has given the Justices the last word on statutory interpretation questions almost as often as they get the last word on constitutional questions.

Consider in this regard the Court’s dispute over severability in the hyperpartisan and uniquely prominent Supreme Court health care case. A majority of the Court held that the requirement that states opt into a new Medicaid program or risk losing all of their medical funding was unconstitutional as exceeding Congress’s spending power.⁹⁰ The dissenters agreed on this point, but also would have struck down the “individual mandate” portion of the law, requiring individuals to purchase health insurance or pay a penalty to the government, as exceeding Congress’s taxing and commerce clause powers.⁹¹ The majority upheld this provision as a permissible exercise of Congress’s taxing power.⁹²

89. Eric Schmitt & Tim Golden, *Lawmakers Back Use of Evidence Coerced from Detainees*, N.Y. TIMES, Dec. 17, 2005, at A21, available at http://www.nytimes.com/2005/12/17/politics/17detain.html?_r=0. See also Carl Hulse & Eric Schmitt, *Negotiators Say Differences Over Ban on Abuse Remain*, N.Y. TIMES, Dec. 12, 2005, at A19, available at <http://www.nytimes.com/2005/12/12/politics/12abuse.html>. Finally, there is one override that is difficult to classify into one of the three categories. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005), was a major piece of legislation. One relatively minor provision changed the rules for assessing the citizenship of an unincorporated association for purposes of diversity jurisdiction. In changing the standard, Congress arguably overruled a 1965 Supreme Court case, *United Steelworkers of Am., AFL-CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965). The bill was supported mainly by Republicans. Only nineteen Democratic Senators (and one Independent Senator, Jim Jeffords, who was a Republican but then left the party and caucused with the Democrats) voted for the bill. *Senate Vote #9 in 2005*, S.5 (109th): *Class Action Fairness Act of 2005*, GOVTRACK (Feb. 10, 2005), <http://www.govtrack.us/congress/votes/109-2005/s9>. This seems to stand on the cusp of the three categories.

90. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604–08 (2012).

91. *Id.* at 2643 (Scalia, J., dissenting).

92. *Id.* at 2593–2601 (majority opinion).

Both the majority and dissent had to confront the question of severability, because each took the position that a portion of the law was unconstitutional. With part of the law unconstitutional, should the remaining parts survive? Both opinions referred to congressional intent in their severability analyses.

The majority held that the unconstitutional Medicaid provision was severable from the rest of the Act:

We have no way of knowing how many States will accept the terms of the [Medicaid] expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. The other reforms Congress enacted, after all, will remain fully operative as a law, and will still function in a way consistent with Congress' basic objectives in enacting the statute. Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding.⁹³

The dissenters reached the opposite conclusion, holding that even the unrelated provisions of the health care law needed to fall with the unconstitutional provisions. Striking the entire statute, the dissenters claimed, was actually a lesser exercise of judicial power than keeping the rest intact because striking the entire act would “allow[] Congress” to decide after the decision which provisions to reenact.⁹⁴

Justice Scalia (one of the dissenting Justices) had it half right when he remarked on the third day of the health care oral argument that the danger of severance was that there would not be enough votes in the Senate to overcome a filibuster of a bill repealing the rest of the Act: “You can’t repeal the rest of the Act because you’re not going to get 60 votes in the Senate to repeal the rest.”⁹⁵ This was only half right because if the Court would have stricken the entire statute (as Justice Scalia voted to do with the other dissenters), there also would not have been enough votes in the Senate to overcome a filibuster of a bill reinstating the rest of the Act.

Indeed, during the same oral argument at which Justice Scalia made the “60 votes” comment, he could only see the danger of the Court mistakenly *allowing* the rest of the law to stand but not the parallel danger of mistakenly *striking down* the entire law. Justice Scalia called upon lawyer Paul Clement to recognize the danger of “legislative inertia” when Clement conceded in response to a question by Justice Sotomayor:

93. *Id.* at 2608 (internal quotation marks and citations omitted).

94. *Id.* at 2668 (Scalia, J., dissenting).

95. Transcript of Oral Argument, *supra* note 2, at *67.

[I]f you strike down only the individual mandate, Congress could say the next day: Well, that's the last thing we ever wanted to do so we will strike down the rest of the statute immediately and then try to fix the problem. So, whatever you do, Congress is going to have options.⁹⁶

More realistically, Clement should have said, "So whatever you do is likely to be the last word." The Court's severability decision was almost certain to be final because neither party in the partisan Congress would be able to repeal or reinstate the relevant parts of the health care law through the normal legislative process.

A bipartisan override might have been possible under special circumstances, such as if the Court struck the mandate and retained the entire rest of the law—putting the powerful insurance industry into an untenable situation financially. There will still be some overrides that even a polarized Congress will agree on with a bipartisan basis.⁹⁷ But the main point remains clear: the end of override dialogue increases the Court's

96. Consider this exchange:

JUSTICE SOTOMAYOR: I want a bottom line is why don't we let Congress fix it?

MR. CLEMENT: Well, let me answer the bottom line question, which is, no matter what you do in this case, at some point there's going to be—if you strike down the mandate, there is going to be something for Congress to do. The question is really, what task do you want to give Congress. Do you want to give Congress the task of fixing the statute after something has been taken out, especially a provision at the heart, or do you want to give Congress the task of fixing health care? And I think it would be better in this situation—

JUSTICE SOTOMAYOR: We are not taking—if we strike down one provision, we are not taking that power away from Congress. Congress could look at it without the mandatory coverage provision and say, this model doesn't work; let's start from the beginning. Or it could choose to fix what it has. We are not declaring—one portion doesn't force Congress into any path.

MR. CLEMENT: And of course that's right, Justice Sotomayor, and no matter what you do here, Congress will have the options available. So if you, if you strike down only the individual mandate, Congress could say the next day: Well, that's the last thing we ever wanted to do so we will strike down the rest of the statute immediately and then try to fix the problem. So whatever you do, Congress is going to have options. The question is—

JUSTICE SCALIA: Well, there is such a thing as legislative inertia, isn't there?

MR. CLEMENT: That's exactly what I was going to say, Justice Scalia, which is, I think the question for this Court is, we all recognize there is legislative inertia. And then the question is: What is the best result in light of that reality?

JUSTICE SOTOMAYOR: Are you suggesting that we should take on more power to the Court?

MR. CLEMENT: No—

JUSTICE SOTOMAYOR: Because Congress would choose to take one path rather than another. That's sort of taking onto the Court more power than one I think would want.

Id. at *4–6.

97. To take another recent example, Congress passed the Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177 (2010), in response to *United States v. Stevens*, 130 S. Ct. 1577 (2010), which held that an earlier statute barring depiction of animal cruelty violated the First Amendment. See 156 CONG. REC. S7653–54 (daily ed. Sept. 28, 2010) (statement of Sen. Patrick Leahy). While this was not a statutory override, it does illustrate that there are some instances in which even a polarized Congress may find common ground against the Supreme Court.

power at Congress's expense.

D. OVERRIDES IN BROADER PERSPECTIVE

Although the decline in the number of overrides has strengthened the Supreme Court compared to Congress, a full assessment of the relative power of the Court and Congress depends on more than the number of congressional overrides. Consider three additional factors:

First, and significantly, Congress retains some power over the Court through the Senate's power to confirm Supreme Court Justices (of course, Congress also has the power to impeach Justices), an issue considered below in Part III.

Second, even in the rare circumstance in which Congress overrides a Supreme Court statutory interpretation decision, Widiss's evidence shows that the Court sometimes ignores or sidesteps it. Widiss notes that Congress was careful in its override of the *Ledbetter* decision to amend not just the statute directly at issue in the case (Title VII), but parallel provisions under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act in order to avoid this reaction from the Court.⁹⁸ More generally, the Court has great control over its docket and the scope of its rulings. These facts help expand the power of the Court against Congress.

Third, when it comes to constitutional adjudication, the Court also has expanded its power against Congress to strike down federal statutes as unconstitutional. For example, the Court in the last few decades has required Congress, like litigants in court, to come forward with specific evidence of unconstitutional action by states in order to be permitted to exercise some of its powers against the states.⁹⁹ In one of the most recent important examples of the Court imposing a tough evidentiary standard on Congress, the Court warned Congress that it was likely to overturn a key provision of the Voting Rights Act if Congress did not go back and rewrite the law, taking into account recent evidence of state racial discrimination in

98. Widiss, *supra* note 52, at 923 n.371. Widiss notes an interesting lower court application of the acquiescence rule:

[Congress's override] was insufficient to end reliance on *Ledbetter* as a shadow precedent. In a recent case arising under the FMLA, the district court held *Ledbetter* controlling because Congress had not amended the FMLA when it amended these other statutes.

Widiss, *supra* note 52, at 923 n.371 (citing *Maher v. Int'l Paper Co.*, 600 F. Supp. 2d 940, 950 n.5 (W.D. Mich. 2009)).

99. See generally Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001) (exploring recent judicial activism and the corresponding disrespect of Congress).

voting which might justify the new law.¹⁰⁰ Yet the same forces that seem to inhibit congressional overrides of Court statutory interpretation decisions may also be responsible for Congress's failure to respond to the Court's invitation to update the Voting Rights Act, and the issue of the Act's constitutionality likely will be back before the Court soon.

In the health care case, it is unclear whether the Court's spending clause holding or the opinion of the four dissenters combined with Chief Justice Roberts's opinion on the scope of Congress's commerce clause power will rein in congressional power when similar issues arise. Whether it does or not is in the hands of Supreme Court Justices, not Congress.

III. EXPLAINING THE DECLINE IN CONGRESSIONAL OVERRIDES

What explains the steep decline in overrides by Congress of Supreme Court statutory decisions? I argue below that the increase in political polarization in Congress is a likely (at least partial) culprit. Before turning to polarization, I consider other potential sources for the decline, finding that a decline in Supreme Court statutory interpretation decisions may also be part of the answer.

A. DECLINE IN (MAJOR) FEDERAL LEGISLATION

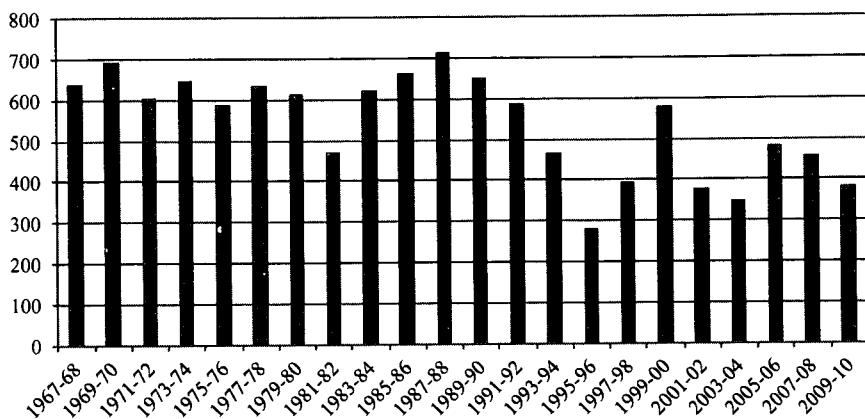
At first blush, it might appear that the decline in overrides simply tracks a decline in the number of federal statutes passed by Congress. If Congress is generally passing fewer laws, then it is possible that laws that override Supreme Court statutory interpretation cases have declined at a proportional rate. The data show that the number of public laws passed by Congress indeed has declined markedly in the past two decades. But the pattern of passage in federal legislation does not match up with the pattern of congressional override activity.

As illustrated in figure 3, according to data from the "Resume of Congressional Activity" produced by Congress, the number of public laws passed by Congress has declined over time.¹⁰¹

100. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 229 (2009) ("The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute."). *See generally* Richard L. Hasen, *Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181 (analyzing how the Court avoided making a constitutional decision in *NAMUDNO*).

101. I computed the data using the Résumé of Congressional Activity for each Congress. *Résumé of Congressional Activity*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm (last visited Jan. 4, 2013). See also Ezra Klein's WonkBlog, which alerted me to

FIGURE 3. Number of Public Laws Passed by Congress



Note: This information can be found at *Résumé of Congressional Activity*, *supra* note 101.

Despite the decline, the pattern on legislation rates generally does not track the pattern on congressional override activity illustrated in figure 1. From 1967–1974, the first period of Eskridge’s override study, Congress passed an average of 648 public laws per two-year Congress. From 1975–1990, during the period of a doubling of the amount of override activity compared to the 1967–1974 period, the average number of public laws actually fell to 559. From 1991 through 2010, the average number of public laws fell to 410 per Congress, a drop of 27 percent compared to the 1975–1990 period. During the same period, the number of overrides per session dropped 68 percent compared to the 1975–1990 period (and nearly 78 percent comparing the 1975–1990 period with the 2001–2012 period). Looking at the overall trends, the number of overrides does not appear closely correlated to the total number of public laws which Congress passes.

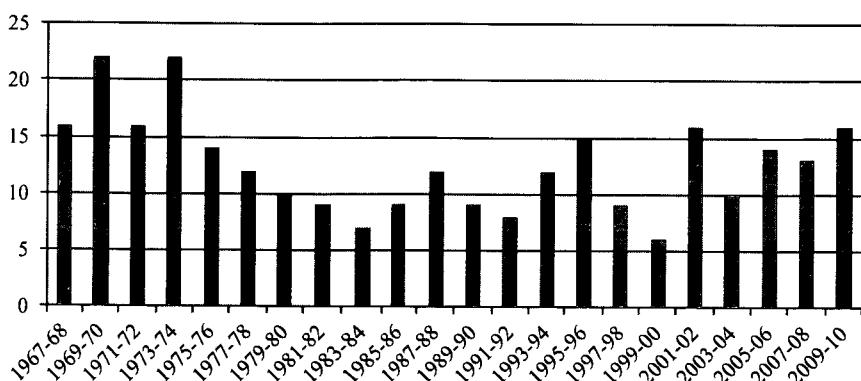
Nor does the override pattern seem related to the amount of “major legislation” passed in Congress, at least according to one measure of “major legislation.”¹⁰² Using data compiled by David Mayhew of major

this data set. Ezra Klein, *14 Reasons Why This Is the Worst Congress Ever*, WASH. POST (July 13, 2012), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/>.

102. The measure I use for “major legislation,” David Mayhew’s count based primarily upon year-end press coverage, is controversial. See SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 79 (2003) (noting that Mayhew and his critics disagree on whether the consequence of major legislation differs in times of divided or united government). On the relationship of Mayhew’s laws and political polarization, see Nolan McCarty, *The Policy Effects of Political Polarization, in THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 223, 237–40 (Paul Pierson & Theda Skocpol eds., 2007). See also

federal legislation in the post-World War II period,¹⁰³ I examined Congress's record of passing such legislation from 1967 to 2010. The average number of major laws passed per Congress in the 1967–1974 period was nineteen. Congress averaged just 10.1 major laws from the 1975–1990 period (the period in which overrides doubled) and that number rose to twelve major laws per Congress from 1991–2010 when overrides fell dramatically. There appears to be no relationship between the number of overrides and the amount of "major legislation" passed by Congress.

FIGURE 4. Major Legislation Passed by Congress (Mayhew Count)



Note: This information can be found at MAYHEW, *supra* note 103; Mayhew, *supra* note 103.

One obvious question is why the amount of "major legislation" has not declined along with the decline in overrides. The answer seems to be that not all "major legislation" is equally important, and Congress always has an incentive to pass some legislation to show that Congress is "working" and sometimes needs to respond to major external events (such as September 11 or the 2008 financial crisis). It would take a much finer-

NOLAN McCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 183 (2006) ("Polarization appears to reduce output across a broad spectrum of possible legislation."). For purposes of this Article, Mayhew's rough measure seems adequate enough to measure whether the pattern of passage of major legislation mirrors the override patterns in Congress.

103. Mayhew originally compiled data through 1991 for his book, DAVID MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–1990* (1991), and posted that data, along with updates on major legislation (for the second edition of his book) through 2008 on his website. David Mayhew, *Datasets for Divided We Govern (1991)*, <http://pantheon.yale.edu/~dmayhew/data3.html> (last visited Jan. 4, 2013). He supplied the 2009–2010 list of major legislation to me via email, as it is not yet posted on his site.

grained measure than Mayhew's "major legislation" measure to know if the quality and reach of congressional legislation has declined over time.

B. A DECLINE IN (OR CHANGE IN DIRECTION OF) SUPREME COURT STATUTORY INTERPRETATION DECISIONS

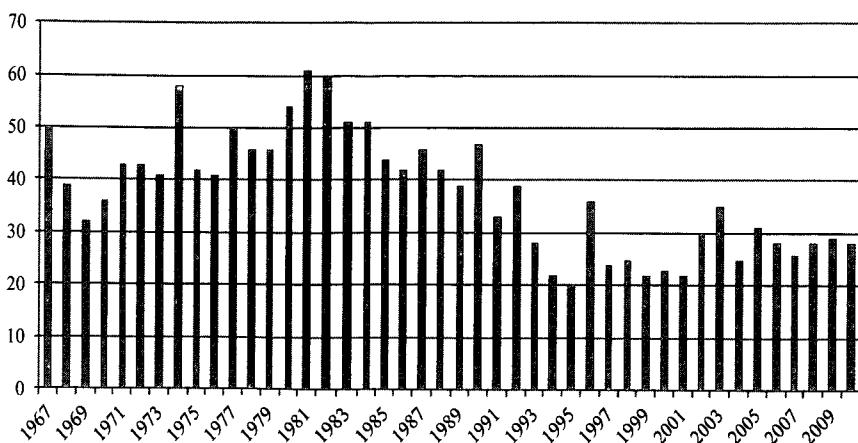
Although override activity does not track the general trend of lawmaking in Congress, trends of Supreme Court statutory interpretation activity look somewhat more promising. Over time, the Supreme Court has decided fewer federal statutory interpretation cases, just as it has decided fewer cases overall.¹⁰⁴

I analyzed the trends with Supreme Court statutory interpretation case law using the Supreme Court Database maintained at Washington University in St. Louis.¹⁰⁵

104. On the reasons for the decline in the Court's docket over time, see Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012). Chief Justice Roberts recently opined that the overall number of Supreme Court cases may be dropping because of a supposed drop in the amount of "major legislation" passed by Congress. Jeannette Lee, *Chief Justice Notes Lack of Major Legislation Passed by Congress*, U-T SAN DIEGO (May 4, 2007), <http://legacy.utsandiego.com/news/politics/20070504-0318-wst-chiefjustice-alaska.html> ("No one actually knows why the number of cases we are taking is declining," said Roberts "I think there really are three significant reasons. The first is the lack of any major legislation coming out of Congress in the last couple of decades.""). Mayhew's data are inconsistent with this hypothesis.

105. THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/index.php> (last visited Jan. 4, 2013). The database is based upon data originally coded by Harold J. Spaeth. *The Genesis of the Database*, THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/about.php> (last visited Jan. 4, 2013).

FIGURE 5. Number of Supreme Court Statutory Interpretation Cases by Year



Note: This information can be found at Spaeth, *supra* note 105.

As figure 5 illustrates, from 1967–1974, the first period of Eskridge’s override study, the Supreme Court averaged about forty-three statutory interpretation cases per year.¹⁰⁶ From 1975–1990, the Court averaged forty-eight statutory interpretation cases per year. The doubling in overrides from the first to the second periods in Eskridge’s study cannot be explained by the slight rise in the number of statutory interpretation cases in the second period.

In the years 1991–2010, the Court averaged 27.7 cases per year, a 43 percent drop compared to the 1975–1990 period. The drop in the number of Supreme Court statutory interpretation cases therefore may explain part of the drop in the number of congressional overrulings: there are simply fewer Supreme Court cases for Congress to overrule (though of course Congress can also choose to overrule cases from earlier periods). It is not clear how much of the decline in override activity may be attributable to a decline in the number of Supreme Court statutory interpretation decisions, given how the earlier patterns in overrides and Supreme Court decisions do not match up.

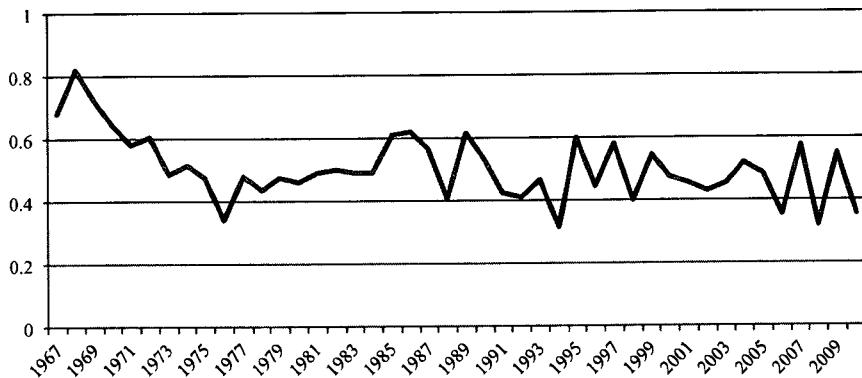
A related possibility is that Congress now overrides fewer cases because members of Congress are now more likely to agree with the

106. I computed these figures using the U.S. Supreme Court Database, searching all Supreme Court opinions from 1967–2010 coded as involving “Federal Statutes.” See THE SUPREME COURT DATABASE, *supra* note 105.

outcome of Supreme Court statutory interpretation cases: there is no need to override a correct decision.¹⁰⁷

This hypothesis seems unlikely when judged against the evidence. As figure 6 demonstrates, since the mid-1970s, Supreme Court statutory interpretation decisions coded as “liberal” have generally ranged between 40 and 60 percent of total statutory decisions.¹⁰⁸ There is no general pattern of ideological direction which could explain a decline in overrides: liberals and conservatives in Congress each are likely to disagree with around half of the Court’s statutory interpretation decisions. Thus, there is no overall change in ideological direction on the Court in the relevant period that would explain the pattern of sharply declining overrides.

FIGURE 6. Percentage of “Liberal” Supreme Court Statutory Interpretation Decisions



C. POLITICAL POLARIZATION

With these other potential explanations at most providing only a part of the story, I turn to the possibility that overrides are declining in part because of political polarization. The data here draw from Keith Poole and Howard Rosenthal’s well-accepted data posted at Voteview.com.¹⁰⁹ Poole,

107. Alternatively, it is possible that congressional deference to Supreme Court statutory interpretation has increased in the last twenty years. I am unaware of any evidence that the attitudes of members of Congress toward the Supreme Court has recently shifted in this direction.

108. The U.S. Supreme Court Database coded the direction of these cases as “liberal” or “conservative.” See THE SUPREME COURT DATABASE, *supra* note 105.

109. These data and next five charts (figures 7–11) are used with the permission of Professor Poole.

Rosenthal, and additional collaborators have coded roll call votes and other data to produce ideological measures for each member of the House and Senate.

Using these data, there is no question that today's Congress is the most polarized by party since the late nineteenth century.¹¹⁰ Congress is likely to become even more polarized going forward, especially as the few remaining moderate senators leave the Senate, with many likely replaced by Tea Party Republicans (for example, Ted Cruz replaced Texas's Kay Bailey Hutchison).¹¹¹

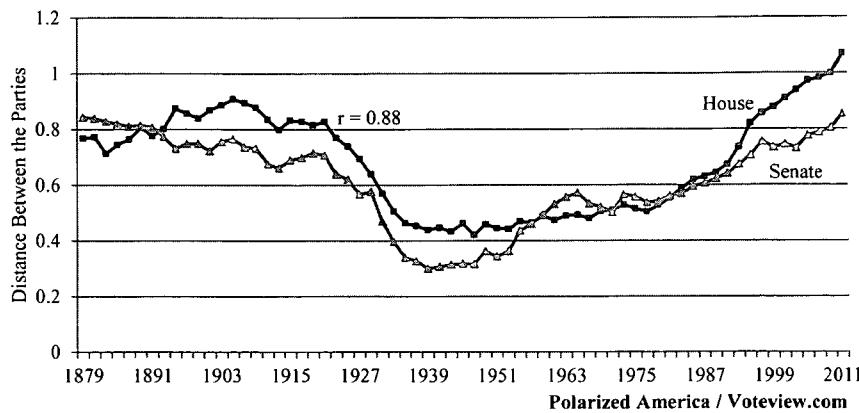
In a story told in great detail elsewhere,¹¹² polarization in Congress began with the ideological realignment in the South following the Civil Rights Era, as conservative Southern Democrats moved to the Republican Party. Figure 7 shows the ideological distance between the parties over time using the well-respected database of roll-call votes compiled by Poole, Rosenthal and their newer collaborators.

110. *An Update on Political Polarization (Through 2011)*, VOTEVIEW BLOG (Jan. 30, 2012), <http://voteview.com/blog/?p=284>.

111. *Tea Party Darling Cruz Wins Texas' US Senate Race*, ASSOCIATED PRESS, Nov. 7, 2012, available at <http://www.kvue.com/news/Tea-party-darling-Cruz-wins-Texas-US-Senate-seat-177570921.html>.

112. See, e.g., McCarty, *supra* note 102, at 224–32; Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 287–97 (2011).

FIGURE 7. Party Polarization 1879–2011, Distance Between the Parties' First Dimension



Figures 8 and 9 show the steep decline in the percentage of moderates in the House and Senate.

FIGURE 8. House 1879–2011, Percentage of Moderates (-0.25 to 0.25) in the Parties on Liberal-Conservative Dimension

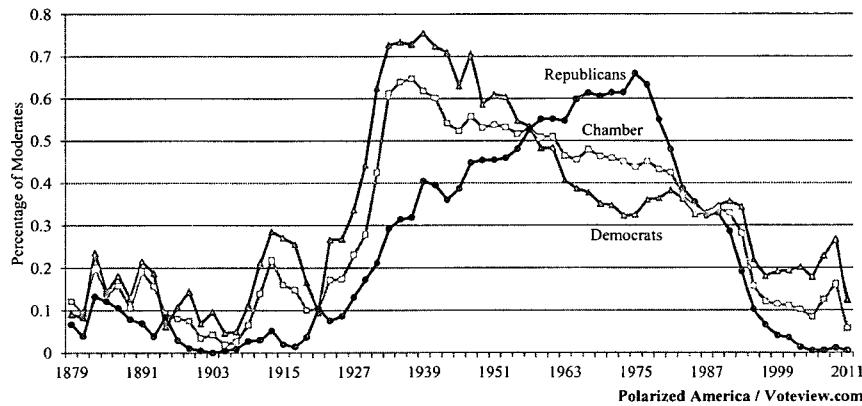
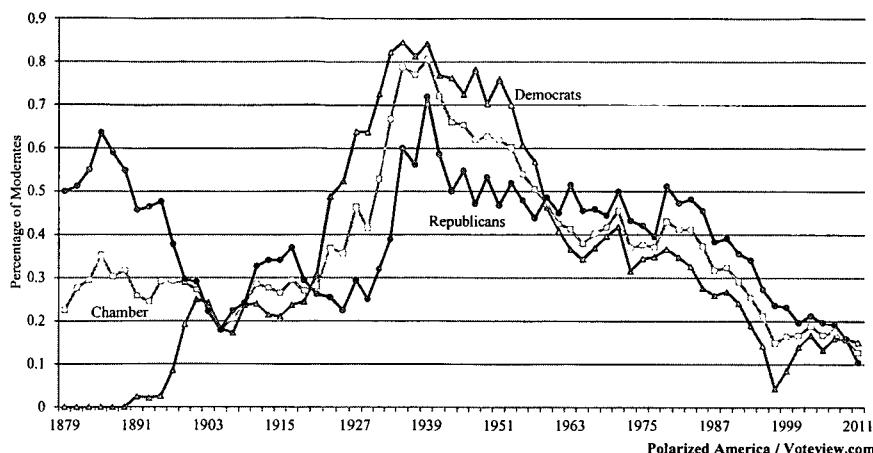


FIGURE 9. Senate 1879–2011, Percentage of Moderates (-0.25 to 0.25) in the Parties on Liberal-Conservative Dimension



Figures 10 and 11 show the sharp drop in the number of “overlapping” senators and House members—Republicans who are more liberal than the most conservative Democrat and Democrats who are more conservative than the most liberal Republican. These political animals are now extinct.

FIGURE 10. House 1879–2011, Percentage of Overlapping Members in the Parties on Liberal-Conservative Dimension

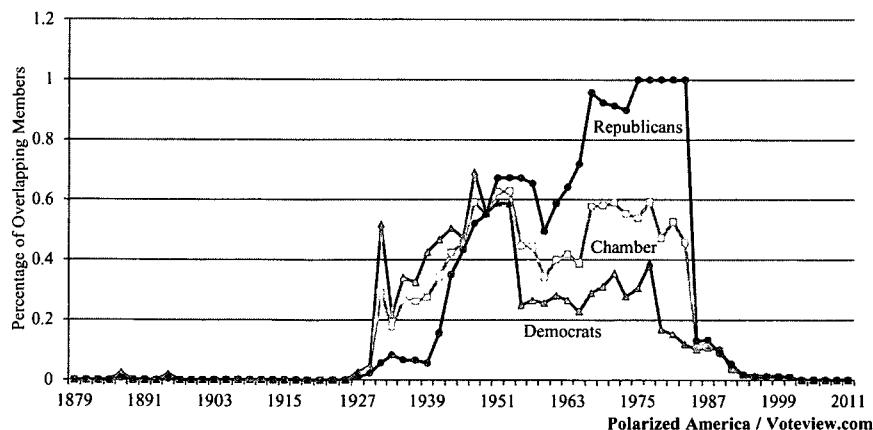
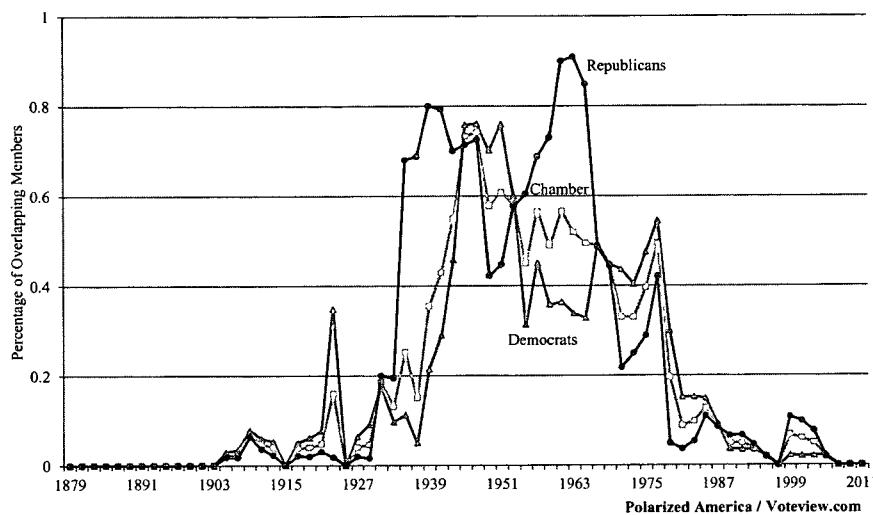


FIGURE 11. Senate 1879–2011, Percentage of Overlapping Members in the Parties on Liberal-Conservative Dimension



These charts tell a story consistent with Eskridge's evidence of the changes over time in the number of congressional overrides. Before the 1990s, there were a number of liberal Republicans and conservative Democrats in the House, and many more moderates in both parties. This created ample space for bipartisan overrides of Supreme Court statutory decisions. The number of moderates started plummeting in the 1980s and the trend has continued ever since. The decline of these moderates has made it harder to put together a winning voting coalition to overturn Supreme Court statutory decisions.

It is not only that moderates, liberal Republicans, and conservative Democrats have left Congress; it is that those who remain have become less willing to seek bipartisan compromise. Of the "Gang of 14" who sought a compromise on federal judicial nominations in 2005 and averted a filibuster showdown, "just seven will be in the Senate in 2013. And that number includes Arizona Sen. John McCain (R) who moved heavily rightward to win his primary election in the 2010 election cycle."¹¹³

Before the 1990s in Congress, there was more room for bipartisan legislation to reverse the Supreme Court. The realignment in Congress and steep dip in the number of moderates in the late-1980s and early-1990s

113. Chris Cillizza, *Think This Congress is Bad? Just Wait.*, WASH. POST (Aug. 1, 2012, 11:20 AM), http://www.washingtonpost.com/blogs/the-fix/post/think-this-congress-is-bad-just-wait/2012/08/01/gJQAvdTKPX_blog.html.

coincides with the steep decline in the number of congressional overrides.¹¹⁴

Consider the Civil Rights Act of 1991, which reversed a large number of conservative Supreme Court decisions interpreting Title VII of the Civil Rights Act of 1964. It is almost unthinkable today that such a measure could pass in the very conservative Republican House, or get past a Republican filibuster in a Democratic Senate. Even the Voting Rights Act renewal, which passed the Senate on a 98-0 vote in 2006, could well have been filibustered if it came up now given a sea change in Republican attitudes about the Act within the covered states and the rise of mainstream Republicans ready to contend that a key part of the Act is unconstitutional.¹¹⁵ Indeed, renewal might not even get a vote in the Republican House today. The hardening of positions likely explains congressional silence after the Supreme Court signaled that Congress needed to fix the Voting Rights Act or the Court would declare it unconstitutional.

Partisan overrides of Supreme Court statutory decisions remain possible, but only when the conditions are right. Republicans were able to overturn the *Hamdan* decision granting certain habeas rights to enemy combatants by having a Republican president strongly pushing for the reversal and enough Senate Democrats conservative on national security issues to allow the vote to go through in the Senate. Democrats were able to overturn *Ledbetter* and its tough statute of limitations for certain employment discrimination claims when the president made it a campaign issue and a priority as he entered office with high political capital, Democrats controlled the House and Senate (and at the time had nearly a filibuster-proof majority), and Senate Democrats gained the support of women Republican senators who crossed party lines to vote in favor of the bill.

Both of these overrides required an unusual set of events: a president, House, and Senate majority of the same party; a president with ample political capital; and enough crossover votes to beat a filibuster (something

114. See Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 782 (2011) (“[P]arty polarization has played a significant role in the decline in constitutional hearings in every congressional committee except the Judiciary Committees.”).

115. Josh Gerstein, *Voting Rights Act Under Siege*, POLITICO (Feb. 19, 2012, 7:06 AM), <http://www.politico.com/news/stories/0212/73058.html>; Richard L. Hasen, *Online VRA Symposium: The Voting Rights Act, Congressional Silence, and the Political Polarization*, SCOTUSBLOG (Sept. 10, 2012, 11:45 AM), <http://www.scotusblog.com/2012/09/online-vra-symposium-the-voting-rights-act-congressional-silence-and-the-political-polarization/>.

which looks unlikely to occur frequently as the remaining Senate moderates retire or are beaten in elections). Consider again how President Obama got the health care law through Congress without a vote to spare in the Senate. Unless those conditions arise again, it is hard to see either side being able to accomplish much to change health care law even if Republicans capture the Senate and the presidency in 2016.

To test whether we are seeing a decline in the number of bipartisan overrides compared to partisan overrides, I examined each of the laws that appeared on both Mayhew's list of major legislation and on either Eskridge's list of overrides (confined to overrides of the Supreme Court, and not lower federal court cases) or my list of overrides from 1991–2010 contained in appendix I.¹¹⁶ By focusing on these major cases, I aim to eliminate most technical overrides and focus on those laws that were likely to be significant pieces of legislation salient to members of Congress.¹¹⁷

With one exception,¹¹⁸ I classified an override from the list as "bipartisan" if on the final roll-call vote the bill obtained "yes" votes from at least twenty senators of each party and at least forty House members of each party. If there were fewer than twenty senators from each party or forty House members from each party supporting the bill, I classified it as "partisan."¹¹⁹

There are thirty overlapping laws on Mayhew's list of major legislation and on Eskridge's or my list of overrides.¹²⁰ Six of these overrides occurred in the 1967–1974 period, and five of six were bipartisan overrides (83 percent). Seventeen of these overrides occurred in the 1975–1990 period, and fifteen of seventeen (88 percent) were bipartisan

116. In the analysis which follows, I exclude 2011–2012 because Mayhew has not yet listed his major legislation for this period.

117. Some of these overrides appear to be minor pieces of more significant legislation, however.

118. This exception is for the Detainee Transfer Act. See *supra* notes 86–89 and accompanying text.

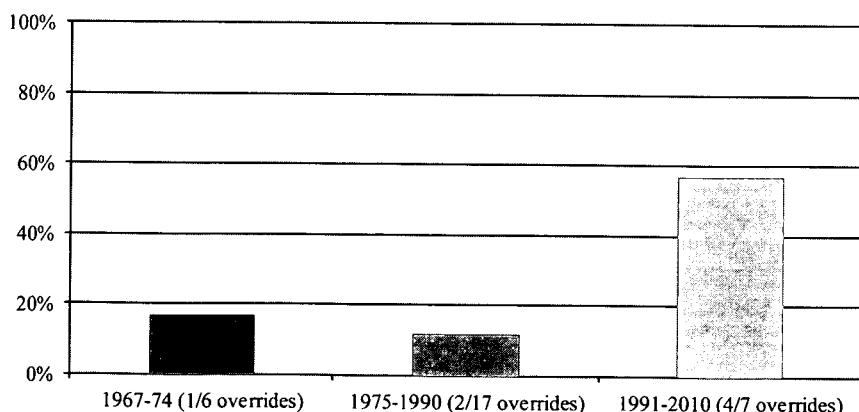
119. These figures for measuring bipartisan support are somewhat arbitrary. If I lower the number of supporting senators in each party from twenty to only ten senators, I would classify as "bipartisan" only three additional overrides out of the total number of overrides of major legislation (including amendments) from 1967–2010. If I raise the number of supporting House members from each party from forty to eighty House members, I would classify as "bipartisan" only three fewer overrides out of the total number of overrides of major legislation (including amendments) from 1967–2010. The fact that my numbers change little if I halve the number of senators or double the number of House members indicates that my standard of twenty senators and forty House members is a reasonable measure of bipartisanship. Note that of these six total possible changes, only one of the six involves legislation passed since 1990, the Military Commissions Act of 2006, which was supported by twelve Democratic senators and would be classified as bipartisan if I lowered the standard to the support of ten senators of each party.

120. See *infra* app. II for the list of overlapping overrides.

overrides. One of the two partisan overrides in this period missed being classified as bipartisan by a single Senate vote (nineteen Republican senators voted for it).

Seven overrides from this list occurred from 1991–2010. Just under half of the overrides were bipartisan; just over half were partisan, with one law barely being classified as bipartisan. The seven overrides are: (1) the Civil Rights Act of 1991 (overruling nine Supreme Court civil rights cases) (bipartisan); (2) the Financial Services Modernization Act of 1999 (bipartisan, although the override of *Barnett Bank of Marion County, N.A. v. Nelson*¹²¹ seems minor and did not get mentioned at any point in the *New York Times*); (3) the Detainee Treatment Act of 2005 (overruling *Rasul*) (partisan); (4) the Class Action Fairness Act of 2005 (overturning a Supreme Court decision on diversity jurisdiction of unincorporated associations) (barely partisan); (5) the Military Commission Act of 2006 (overruling *Hamdan*) (partisan); (6) the Family Smoking Prevention and Tobacco Control Act of 2009 (giving the FDA authority to regulate tobacco products) (bipartisan); and (7) the Lilly Ledbetter Fair Pay Act of 2009 (overruling *Ledbetter*) (partisan). Figure 12 shows the percentage of partisan overrides in each of the three periods.

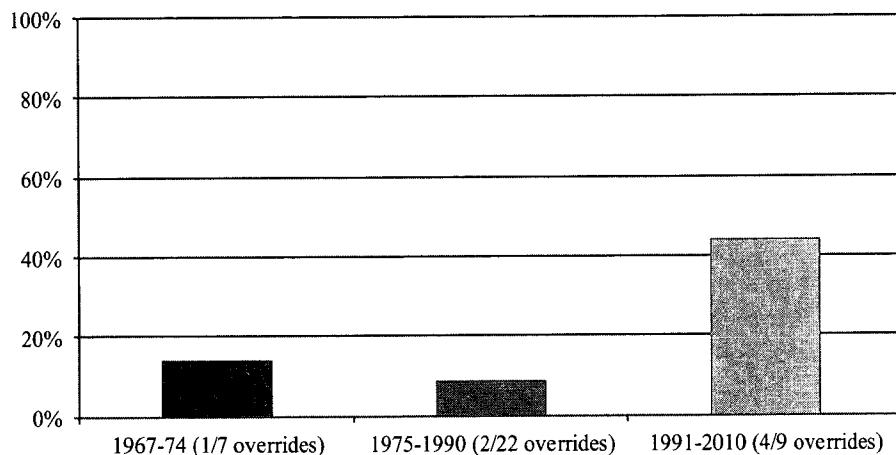
FIGURE 12. Percentage of Partisan Overrides Among Overrides of “Major Legislation”



121. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996).

This rise in partisan overrides of major legislation is subject to a caveat. Mayhew's list of major legislation does not count many significant *amendments* to existing law (which override Supreme Court case law).¹²² I identified eight significant amendments from Eskridge's or my list not included on Mayhew's list from 1972–2010.¹²³ Each of these amendments, including two in the most recent 1991–2010 period, were bipartisan overrides of Supreme Court cases. Figure 13 shows that with these laws included, the extent of bipartisan overrides in the most recent period does not look quite as dramatic, but is still much higher compared to the earlier periods.

FIGURE 13. Percentage of Partisan Overrides Among Overrides of Major Legislation (including amendments)



Whether or not one considers the amendments in this assessment, the trend is clear: Congress is passing fewer bipartisan overrides of major legislation (both absolutely and as a percentage of all override legislation), and there is a potential for more partisan overrides in the future under the right conditions.

As moderates continue to leave Congress, and as members of both Houses become more polarized, the chances of bipartisan overrides

122. On the conditions in which Congress is likely to amend significant legislation, see generally Forrest Maltzman & Charles R. Shipan, *Change, Continuity, and the Evolution of the Law*, 52 AM. J. POL. SCI. 252 (2008).

123. The list of these amendments appears *infra* Appendix III. Each of these amendments received significant coverage in the *New York Times*.

diminish. Polarized overrides will arise in periods of unified government. In addition, Congress will continue to pass technical overrides on occasion. There is enough legislation passed by even a polarized Congress of a more technical nature, and overrides of Supreme Court decisions will likely continue on issues of low salience or those pushed by lobbyists. But the most important overrides of Supreme Court decisions are likely to remain fewer in number and supported by one party over the opposition of the other in conditions of unified government.

IV. POLARIZATION AND THE SUPREME COURT NOMINATIONS PROCESS

Overrides of Supreme Court statutory interpretation decisions are one important way in which Congress interacts with the Supreme Court. Another key interaction is the Senate's role in confirming Supreme Court judicial nominees. Aside from overrides and confirmation, Congress has little leverage to influence the Supreme Court. Polarization in both the Senate and the Supreme Court could complicate the confirmation process going forward, potentially changing the nature of the Senate, the Supreme Court, or both.

A. SUPREME COURT PARTISAN REALIGNMENT

Part II of this Article described the rise of polarization in the Senate and the loss of Senate moderates. Consider now polarization at the Supreme Court.

Ideological polarization at the Supreme Court is nothing new. Each Term, the Court issues a fair number of decisions on 5-to-4 ("5-4") votes, and many of those decisions are ideological, with liberals siding against conservatives.¹²⁴ Among the issues on which the Court has divided 5-4 along ideological lines in the last few years are abortion,¹²⁵ affirmative action,¹²⁶ campaign finance,¹²⁷ and the treatment of enemy combatants.¹²⁸

124. The statistics in this section come from Tom Goldstein's SCOTUSblog StatPack. Tom Goldstein, *Stat Pack, Final, October Term 2011*, at 14, SCOTUSBLOG (June 30, 2012), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_five-to-four_OT11_final.pdf.

125. See *Gonzales v. Carhart*, 550 U.S. 124 (2007).

126. See *Grutter v. Bollinger*, 539 U.S. 306 (2003). This issue is back before the Court in the October 2012 Term in the case *Fisher v. University of Texas at Austin*, and the result may be to overrule *Grutter*. Adam Liptak, *College Diversity Nears Its Last Stand*, N.Y. TIMES, Oct. 16, 2011, at SR4, available at <http://www.nytimes.com/2011/10/16/sunday-review/college-diversity-nears-its-last-stand.html>.

127. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Over the last twelve years, the Court has issued an average of nineteen 5-4 decisions each Term, with 70 percent of those 5-4 divides representing an ideological split and 62 percent of those ideological splits resulting in a conservative victory.¹²⁹ Justice Kennedy has been the most important swing voter, as a conservative Justice who sometimes sides with liberals: from the October 2006 to October 2010 Term, Justice Kennedy has been in the majority in 5-4 decisions 80 percent of the time.¹³⁰ The big surprise in the health care ruling was that it was Chief Justice Roberts, and not Justice Kennedy, who cast the deciding vote with the liberal Justices in upholding the bulk of the health care law.

While ideological polarization at the Supreme Court is not new, what is new is that ideological polarization lines up with a partisan polarization: on the current Court, all the conservative Justices have been nominated by Republican presidents and all the liberal Justices have been nominated by Democratic presidents. President George W. Bush replaced conservative / moderate Justice Sandra Day O'Connor with strong conservative Justice Samuel Alito. Justices John Paul Stevens and David Souter were the last liberal-leaning Republican-appointed Justices to leave the Court, replaced by Democratic President Obama with Justices Sonia Sotomayor and Elena Kagan. Justice Byron White was the last conservative-leaning Democrat-appointed Justice to leave the Court, replaced with strong liberal Justice Ruth Bader Ginsburg by President Clinton.¹³¹ Given the extraordinary length of Supreme Court Terms, there can well be a lag between popular (or congressional) opinion and the opinions of Supreme Court Justices. Justices have huge room to maneuver and decide cases consistent with their preferences, regardless of current public opinion.¹³²

However, the new alignment of ideology and party poses dangers for the Court. Partisan divides may undermine the Court's legitimacy, as the public may be more inclined to view the Court's decisions—fairly or not—as partisan decisions made by partisan actors. Public approval of the Supreme Court has been declining recently,¹³³ and it is possible (although

128. See *Boumediene v. Bush*, 553 U.S. 723 (2008).

129. Goldstein, *supra* note 124, at 14.

130. *Id.* at 15.

131. *Supreme Court Nominations, Present-1789*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Jan. 4, 2013).

132. See generally Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 139–42 (noting the lag-time issue).

133. Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in Poll*, N.Y. TIMES, June 7, 2012, at A1, available at <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of>

by no means certain) that the decline will continue, undermining the Court's legitimacy. Some observers have speculated that Chief Justice Roberts sided with the liberals in the health care case precisely to maintain the Court's legitimacy among elites and the public.¹³⁴

In addition to affecting public opinion, party realignment threatens the Supreme Court judicial confirmation process, the issue to which I now turn.

B. SENATE CONFIRMATIONS IN THE NEW PARTISAN ERA

Recent attacks on the Supreme Court from the left have accused the five conservative, Republican-appointed Justices of deciding cases such as *Citizens United*—which opened up corporate spending in federal elections—to benefit Republicans politically.¹³⁵ The more people think of the Justices as dividing on partisan lines and deciding cases the same partisan way in which legislators decide on legislative actions (whether or not that is an accurate characterization),¹³⁶ the easier it will be for senators to oppose judicial nominations on ideological and partisan grounds.

Despite Chief Justice Roberts's vote to uphold the health care law, his opinion on the scope of the commerce clause narrowed congressional power and was very similar to the position taken by the four health care dissenters and opposed by the four liberal, Democrat-appointed Justices on the Court. In coming Terms, we can expect similar ideological and partisan splits on the Court regarding issues such as affirmative action, voting rights, and abortion rights, with the Chief Justice proving to be no liberal.¹³⁷ The claim that "Republican Justices" decide controversial

americans-approve-of-supreme-court-in-new-poll.html. For a careful assessment of how the Court's legitimacy has fared in the wake of its controversial decision in *Bush v. Gore*, 531 U.S. 98 (2000), see James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535 (2003). The question is whether the Court which survived a crisis of legitimacy after the 2000 election would be able to survive a new crisis at a time of increased polarization and partisan realignment.

134. See, e.g., David L. Franklin, *Why Did Roberts Do It? To Save the Court*, SLATE (Jun. 28, 2012, 3:51 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/john_roberts_broke_with_conservatives_to_preserve_the_supreme_court_s_legitimacy.html.

135. Adam Liptak, *In Supreme Court Term, Striking Unity on Major Cases*, N.Y. TIMES, Jun. 30, 2012, available at <http://www.nytimes.com/2012/07/01/us/supreme-courts-recent-term-a-new-phase.html> ("In the wake of the blockbuster *Citizens United* decision, which by a 5-to-4 vote along ideological lines opened the door for corporations and unions to spend as much as they like to support or oppose political candidates, the court was accused of naked partisanship for seeming to favor Republican interests.").

136. See *id.* ("But in the last term, the Roberts court proved itself resistant to caricature.").

137. Ronald Dworkin, *A Bigger Victory Than We Knew*, N.Y. REV. OF BOOKS, July 13, 2012, available at <http://www.nybooks.com/articles/archives/2012/aug/16/bigger-victory-we-knew/> ("The Court will have the opportunity to overrule its 2003 decision allowing state universities to take an

constitutional cases in line with Republican values and that “Democratic Justices” decide many such cases in line with Democratic values will have increasing resonance.

This partisan realignment comes as senators have become more vocal and explicit in opposing Supreme Court nominees on ideological grounds. As Lee Epstein, Jeffrey A. Segal, and Chad Westerland found,

While it is true that ideology has always played some role in [Supreme Court] judicial appointments, its importance seems to be increasing with time. . . . [T]he degree to which candidates share the political values of their nominating President is higher now than it was just three decades ago. And . . . although Senators of today—no less than those of yesterday—attend to the nominees’ qualifications, ideological compatibility now takes precedence.¹³⁸

Consider the 2005 statement then-Senator Obama made against the nomination of John Roberts to be Chief Justice of the United States:

There is absolutely no doubt in my mind Judge Roberts is qualified to sit on the highest court in the land. Moreover, he seems to have the comportment and the temperament that makes for a good judge. He is humble, he is personally decent, and he appears to be respectful of different points of view. It is absolutely clear to me that Judge Roberts truly loves the law. He couldn’t have achieved his excellent record as an advocate before the Supreme Court without that passion for the law, and it became apparent to me in our conversation that he does, in fact, deeply respect the basic precepts that go into deciding 95 percent of the cases that come before the Federal court—adherence to precedence, a certain modesty in reading statutes and constitutional text, a respect for procedural regularity, and an impartiality in presiding over the adversarial system. All of these characteristics make me want to vote for Judge Roberts.

admission candidate’s race into account, as one factor among others, in seeking a diverse student body. The conservative Justices might wish to abolish affirmative action altogether, or to impose more stringent restrictions on it. They will also have the opportunity to reverse lower courts by upholding the Defense of Marriage Act, which forbids federal agencies to treat gay marriages as real, for example by allowing a gay couple to file a joint income tax return. The same Justices will also be asked to strike down an important part of the Voting Rights Act of 1965, which requires states with particularly bad voting rights records to seek federal permission for new changes in their election laws. No doubt, moreover, they will soon find a chance further to constrict or even to abolish abortion rights. Roberts may want to blunt the anticipated accusations of political partisanship that any right-wing decisions in these cases will likely attract by supporting Obama’s health care program now. If so, he will have been immeasurably helped by his new enemies in the right-wing media who are painting him as a secret liberal, or as a turncoat villain with a deteriorating mind.”).

138. Lee Epstein, Jeffrey A. Segal & Chad Westerland, *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 610 (2008).

The problem I face—a problem that has been voiced by some of my other colleagues, both those who are voting for Mr. Roberts and those who are voting against Mr. Roberts—is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.¹³⁹

The shift to explicit consideration of ideology and away from at least an ostensible focus on judicial competence has coincided with increasing partisan split on votes for Supreme Court judicial confirmations. Putting aside the contentious Bork hearings (to which I will return) and Justice Thomas's confirmation vote, which occurred after a highly contentious hearing in which he was accused of sexual harassment,¹⁴⁰ Supreme Court nominees until recently¹⁴¹ enjoyed bipartisan support in confirmation votes. Justices Scalia and Kennedy were approved on unanimous votes,¹⁴² and Justices Breyer and Ginsburg had few votes against them.¹⁴³

More recent votes have seen much more substantial opposition to nominees along party lines. Chief Justice Roberts had twenty-two votes cast against him, all by Democrats and without any objections raised to his qualifications.¹⁴⁴ Justice Alito had forty-two votes cast against him (two

139. 151 CONG. REC. S10365–66 (daily ed. Sept. 22, 2005) (statement of Sen. Barack Obama), available at <http://www.gpo.gov/fdsys/pkg/CREC-2005-09-22/pdf/CREC-2005-09-22-pt1-PgS10365.pdf>.

140. Nancy Gibbs, *Hill vs. Thomas: An Ugly Circus*, TIME MAGAZINE, Oct. 21, 1991, available at <http://www.time.com/time/magazine/article/0,9171,974074,00.html>.

141. Senate rejections of Supreme Court nominees have fluctuated over time. The Senate rejected three nominees besides Bork in the twentieth century, and Justice Fortas withdrew his nomination to be Chief Justice after a filibuster. *Supreme Court Nominations, Present–1789*, *supra* note 131. Nonetheless, the vast majority of Supreme Court nominees in the last century were confirmed. In the twenty-first century, so far only one nominee, Harriet Miers, withdrew her nomination. None have been filibustered. *Id.*

142. Justice Scalia was approved on a 98–0 vote and Justice Kennedy on a 97–0 vote. *Id.* Justice Thomas's vote was 52 to 48, but the nomination became embroiled in controversy over sexual harassment allegations. *See* Gibbs, *supra* note 140.

143. Justice Ginsburg was approved on a 96–3 vote, and Justice Breyer, 87–9. *Supreme Court Nominations, Present–1789*, *supra* note 131.

144. U.S. Senate Roll Call Votes 109th Congress—1st Session, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1

more than necessary for a filibuster, had Democrats decided to filibuster), gaining “yes” votes from only four Democrats.¹⁴⁵ Justice Sotomayor had thirty-one votes cast against her, garnering the support of nine Republicans.¹⁴⁶ The most recent nominee, Justice Kagan, had thirty-seven votes cast against her, gaining only five Republican votes.¹⁴⁷ Opposing senators did not raise any serious questions about the qualifications of any of these nominees.

Notably, three of the four Democrats voting for Justice Alito (Senators Kent Conrad, Ben Nelson, and Robert Byrd) left the Senate, and three of the five Republicans voting for Justice Kagan (Senators Judd Gregg, Richard Lugar, and Olympia Snowe) also have left the Senate. Each of these senators was known as a moderate. Figure 14 shows the number of “no” votes received by each current member of the Supreme Court during the nomination process.

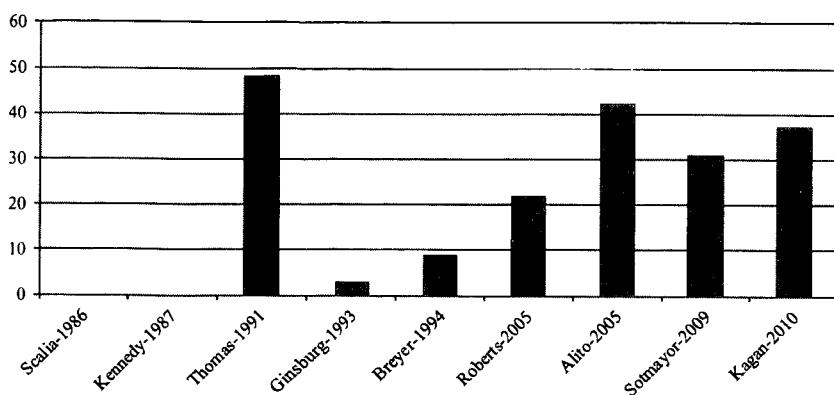
&vote=00245 (last visited Jan. 5, 2013).

145. *U.S. Senate Roll Call Votes 109th Congress—2nd Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00002 (last visited Jan. 5, 2013).

146. *U.S. Senate Roll Call Votes 111th Congress—1st Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00262 (last visited Jan. 5, 2013).

147. *U.S. Senate Roll Call Votes 111th Congress—2nd Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00229 (last visited Jan. 5, 2013).

FIGURE 14. Number of “No” Votes on Nomination of Current Supreme Court Justices



Note: This information can be found at *Supreme Court Nominations, Present–1789*, *supra* note 131.

The big question is whether the increasing partisan opposition to Supreme Court nominees on ideological grounds will lead senators to begin to consider filibustering Supreme Court nominees from the other party. The issue could come to a head when Justice Kennedy, the perennial “swing” Justice, leaves the Court.¹⁴⁸

In recent years, both Democratic senators and Republican senators have filibustered, stalled, or put holds on lower-court nominees, especially nominees to the federal appellate courts. Senators are especially interested in filibustering young appellate court judges, such as Republican Miguel Estrada (filibustered by Democrats) or Democrat Goodwin Liu (filibustered by Republicans), who appear on track for a Supreme Court nomination and who would benefit from having judicial experience on the resume.¹⁴⁹

The trend to fight over lower-court nominees has only accelerated during the Obama administration.¹⁵⁰ Increasingly, partisans on both sides

148. On Justice Kennedy’s importance as a “super median” Justice, see Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37 (2008).

149. John Steele Gordon, *A Filibuster That Goes Around Comes Around*, COMMENTARY (May 20, 2011, 1:55 PM), <http://www.commentarymagazine.com/2011/05/20/filibuster-that-goes-around-comes-around/>; Meredith Shiner, *Senate GOP Filibusters Goodwin Liu*, POLITICO (May 19, 2011, 2:41 PM), <http://www.politico.com/news/stories/0511/55320.html>.

150. For histories and analyses of this period, see generally Michael Gerhardt & Richard Painter, “Extraordinary Circumstances”: *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RICH. L. REV. 969 (2012); Carl Tobias, *Filling the Judicial Vacancies in a Presidential Election Year*, 46 U. RICH. L. REV. 985 (2012); Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769 (2010).

(when their party was in the Senate majority) have called for the majority to use the so-called “nuclear option”: a parliamentary move in which a bare Senate majority would eliminate the filibuster for judicial nominees.¹⁵¹

It is hard to know how the much the battle over lower-court judicial nominations would resemble a battle over a Kennedy replacement. Lower-court nominations are of much lower salience than Supreme Court nominations, especially a nomination to replace a swing Justice on a sharply divided partisan court. When the moment comes for a new nomination, interest groups will mobilize, social media will buzz, and political partisans from all sides will put intense pressure on senators from the opposition party to filibuster any nominee who would be a strong conservative or liberal on the Court. Some will defend the filibuster as a means of insuring the placement of ideological moderates on the Court.¹⁵² But in the past, senators have not been willing to pull the trigger even when it came to controversial nominations such as Justice Thomas’s and where there were more than enough votes to filibuster.

The hardening of partisan positions in the Senate and the lack of Senate moderates increases the chances that a stalemate over a Supreme Court judicial nominee could lead to a standoff over the use of the filibuster. In this way, a coming dispute differs markedly from the fight over the Bork nomination. While some attribute the current tensions over judicial nominees to the Bork fight,¹⁵³ the Senate in the years following the fight managed to overcome that division, easily confirming four of the next five Supreme Court nominees (two Democrats and two Republicans) unanimously or by lopsided majorities. But the four most recent nominees now sitting (in the years furthest from the Bork hearings)—all eminently well-qualified jurists—have been confirmed on sharply divided votes, with

151. For an explanation of how the “nuclear option” would work, see Gerhardt & Painter, *supra* note 150, at 974–76. On the modern filibuster as “one of the central features of American politics,” see McCarty, *supra* note 102, at 236.

152. See William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 323 (2008) (“In the meantime . . . de facto governance by supermajorities in the Senate should continue. We simply see no other means of restraining the possibility that now, by the slimmest of margins, presidents may imbed fellow partisans on the Supreme Court for spans of a quarter-century or more.”); John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257, 258 (describing that Senate filibuster “will tend to make Justices more moderate, where moderate means having a jurisprudential view closer to the view held by the median Senator”).

153. See generally Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296 (2006) (“[E]xplor[ing] the extent to which the Bork nomination has affected the decisions of U.S. Senators.”). For a skeptical view of the importance of the Bork controversy on more recent judicial nomination battles, see SARAH A. BINDER & FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* 7–9 (2009).

substantial numbers of senators from the opposing party voting against the nominee. Something seems to have changed fundamentally in the Senate.

C. POSSIBLE RAMIFICATIONS OF A SENATE SHOWDOWN

If the partisan Senate has an extended confrontation over a Supreme Court judicial nominee, the confrontation might end in a number of ways. The nominating president might withdraw a nomination, and nominate a replacement candidate seen as more moderate by the minority threatening a filibuster.¹⁵⁴ Alternatively, the president and Senate majority might hold firm on the original nominee, and trigger the nuclear option, removing the possibility of filibustering Supreme Court (or all federal) judicial nominees. Senators alternatively might conclude that triggering the nuclear option could have potentially negative consequences for the Senate's conduct of business. They could strike a more radical compromise on Supreme Court judicial nominations. For example, senators might limit judicial terms to eighteen years, which would lower the costs of confirming an ideological Justice to the Court and insure more turnover on the Court.¹⁵⁵

The second of these options could change the nature of the Senate greatly. A move away from the filibuster would turn the Senate into a more majoritarian institution,¹⁵⁶ and, in making the Senate more like the House, it could further exacerbate partisan tensions. Ending the filibuster only as to judicial nominees would strengthen the Senate compared to the Court, by allowing greater control over the Court's composition. Ending the filibuster more broadly could give political parties in times of united government (where a single party controls House, Senate, and presidency) an unprecedented opportunity to enact and change major public policies, subject only to control by an ideologically divided Supreme Court.

Alternatively, Supreme Court term limits could change the nature of the Court. By lowering the stakes, term limits should make ideological judges easier to confirm. However, term limits might further solidify the

154. I assume that if the president and Senate majority are of opposite parties, the president will be more likely to nominate a moderate nominee marginally acceptable to the Senate majority.

155. For a review and critique of the various term limits proposals, see generally Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841 (2011). Some of the proposals would require constitutional amendment, and the precise nature of the proposals is beyond the scope of this Article.

156. It would only be *internally* majoritarian. Because each state gets two senators regardless of population, and some states have vastly larger populations than others, some filibusters actually could promote (voter) majority rule. *See generally* FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999) (examining the effects of Senate apportionment on political outcomes and realities).

ideological nature of Supreme Court judging by providing a path for presidents to nominate more ideological Justices. More speculatively, term limits create a risk that Justices will judge keeping their future career prospects in mind, especially as a judicial term comes to an end.¹⁵⁷ Both of these paths suggest dangers to the long-term legitimacy of the Court, as the public and elites may tend to see Justices as both ideological and self-interested.

All of this analysis in Part III is undoubtedly speculative. Perhaps the correlation of ideology and party in the Supreme Court will not matter to the increasingly partisan Senate, and the Court's legitimacy will remain stable. The Senate confirmation process may chug along as always. But the loss of Senate moderates makes it more likely than in the past that a Supreme Court nomination could explode into a major political crisis.

V. CONCLUSION

Political polarization is changing power relationships between Congress and the Supreme Court, in some ways which are evident, such as through a more ideological Supreme Court confirmation process, and in some ways that have been mostly hidden, such as through the dramatic decline in congressional overrides of Supreme Court statutory interpretation case law.

As Congress becomes ever more partisan and its moderates are forced out or retire, and as Supreme Court Justices become associated increasingly with the views of the president and party which appointed them, the Congress-Supreme Court relationship is likely to change further. Congressional overrides likely will occur infrequently, but more often on a partisan basis in periods of unified government. Otherwise, the Court is more likely to have the last word on federal statutory meaning.

In the longer term, the task of replacing a swing Supreme Court Justice could lead to an unprecedented confrontation in the Senate, with the potential to change the nature of the Senate, the Supreme Court, or both bodies. As the institutions respond to the pressures of polarization, power relationships will continue to shift.

157. See Clark, *supra* note 155, at 904 (arguing against the ability of retiring Article III judges to return to private practice following a term as a judge because of “the real and apparent threats to judicial independence, impartiality, and integrity presented” by return).

APPENDIX I

TABLE. Congressional Overrides of Supreme Court Statutory Interpretation Cases, 1991–2012

Year	Congressional Act	Supreme Court Case Overridden
2011	America Invents Act of 2011	Holmes Grp, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002)
2011	Federal Courts Jurisdiction and Venue Act of 2011	Hoffman v. Blaski, 363 U.S. 335 (1960)
2009	Fraud Enforcement and Recovery Act of 2009	United States v. Santos, 553 U.S. 507 (2008)
		Allison Engine Co., Inc. v. United States <i>ex rel.</i> Sanders, 553 U.S. 662 (2008)
2009	Family Smoking Prevention and Tobacco Control Act of 2009	FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)
2009	Lilly Ledbetter Fair Pay Act of 2009	Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)
2008	ADA Amendments Act of 2008	Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002)
2007	Open Government Act of 2007	Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001)

2006	Trademark Dilution Revision Act of 2006	Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003)
2006	Military Commission Act of 2006	Hamdan v. Rumsfeld, 548 U.S. 557 (2006)
2006	Voting Rights Act Amendments of 2006	Georgia v. Ashcroft, 539 U.S. 461 (2003) Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000)
2005	Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief	INS v. St. Cyr, 533 U.S. 289 (2001)
2005	Detainee Treatment Act of 2005	Rasul v. Bush, 542 U.S. 466 (2004)
2005	Class Action Fairness Act of 2005	United Steelworkers of Am., AFL-CIO v. R. H. Bouliny, Inc., 382 U.S. 145 (1965)
2002	The Job Creation and Worker Assistance Act of 2002	Gitlitz v. Comm'r, 531 U.S. 206 (2001)
1999	Financial Services Modernization Act of 1999 (Graham-Leach-Bliley)	Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25 (1996)
1996	Antiterrorism and Effective Death Penalty Act of 1996	Schlup v. Delo, 513 U.S. 298 (1995)
1996	False Statements Accountability Act of 1996	Hubbard v. United States, 514 U.S. 695 (1995)

1996	Federal Courts Improvement Act of 1996	Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72 (1991) Pulliam v. Allen, 466 U.S. 522 (1984)
1995	Reversal of Adams Fruit Co. v. Barrett	Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990)
1995	ICC Termination Act of 1995	Okl. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995)
1995	Reconciliation of Budget of 1996	Brown v. Gardner, 513 U.S. 115 (1994)
1995	Paperwork Reduction Act of 1995	Dole v. United Steelworkers of Am., 494 U.S. 26 (1990)
1994	Money Laundering and Suppression Act of 1994	Ratzlaf v. United States, 510 U.S. 135 (1994)
1994	Bankruptcy Reform Act of 1994	Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989) United States v. Nordic Vill., Inc., 503 U.S. 30 (1992) Rake v. Wade, 508 US 464 (1993)
1993	Religious Freedom Restoration Act of 1993	United States v. Nordic Vill., Inc., 503 U.S. 30 (1992)
1993	Negotiated Rates Act of 1993	Maislin Indus., U.S. v. Primary Steel, Inc., 497 U.S. 116 (1990)
1992	Federal Facility Compliance Act of 1992	United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992)

1991	Criminal Jurisdiction Over Indians Act of 1991	Duro v. Reina, 495 U.S. 676 (1990)
1991	Incarcerated Witness Fee Act of 1991	Demarest v. Manspeaker, 498 U.S. 184 (1991)
1991	FDIC Improvement Act of 1991	Lampf v. Gilbertson, 501 U.S. 350 (1991)
1991	Civil Rights Act of 1991	Patterson v. McLean Credit Union, 491 U.S. 164 (1989) Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) Lorance v. AT&T Techs., 490 U.S. 900 (1989) Library of Cong. v. Shaw, 478 U.S. 310 (1986) Marek v. Chesny, 473 U.S. 1 (1985) Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) Evans v. Jeff D., 475 U.S. 717 (1986) Martin v. Wilks, 490 U.S. 755 (1989) Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989)

APPENDIX II

CONGRESSIONAL OVERRIDES OF SUPREME COURT STATUTORY
INTERPRETATION CASES, 1967–2010, ALSO APPEARING ON MAYHEW'S
LIST OF "MAJOR LEGISLATION"

Congressional Act

Family Smoking Prevention and Tobacco Control Act of 2009
Lilly Ledbetter Fair Pay Act of 2009
Military Commission Act of 2006
Detainee Treatment Act of 2005
Class Action Fairness Act of 2005
Financial Services Modernization Act of 1999
Antiterrorism and Effective Death Penalty Act of 1996
Civil Rights Act of 1991
Immigration Act of 1990
Omnibus Budget Reconciliation Act of 1990
Financial Institutions Reform, Recovery and Enforcement Act of 1989
Anti-Drug Abuse Act of 1988
Civil Rights Restoration Act of 1987
Immigration Reform and Control Act of 1986
Tax Reform Act of 1986
Comprehensive Crime Control Act of 1984
Deficit Reduction Act of 1984
Voting Rights Act Amendments of 1982
Omnibus Budget Reconciliation Act of 1981
Airline Deregulation Act of 1978
Clean Air Act Amendments of 1977
Federal Land Policy and Management Act of 1976
Copyrights Act (1976)
Tax Reform Act of 1976

Voting Rights Act Extension (1975)

Magnuson-Moss Warranty FTC Improvements Act (1974)

Freedom of Information Act (1974)

Fair Labor Standards Amendment of 1974

Trans-Alaska Pipeline Authorization Act (1973)

Equal Employment Opportunity Amendment of 1972

Organized Crime Control Act of 1970

APPENDIX III

TABLE 3. Significant Congressional Overrides of Supreme Court Statutory Interpretation Cases Through Amendments, 1967–2010, Not Appearing on Mayhew's List of "Major Legislation"

<i>Congressional Act</i>
Americans with Disabilities Act Amendments of 2008
Voting Rights Act Amendments of 2006
Clean Air Act Amendments of 1990
Bankruptcy Reform Act of 1978
Endangered Species Act Amendments of 1978
Pregnancy Discrimination Act of 1978
Age Discrimination in Employment Act Amendments of 1978
Longshoreman's & Harbor Workers Compensation Act Amendments of 1972

APPENDIX IV

METHODOLOGICAL APPENDIX

Identifying congressional overrides is a challenge, as there is no single repository of such information. It turns out to be an increasingly difficult challenge, as committee reports appear less likely than twenty years ago (the end of Eskridge's study) to explicitly note a congressional override. Thus, while Eskridge wrote that he did not count as overrides "statutes for which the legislative history—mainly committee reports and hearings—does not reveal a legislative focus on judicial decisions,"¹ it appears necessary to count some overrides of statutes where there is no committee report showing a legislative focus on Supreme Court decisions. On the other hand if, thanks to new technology, I am able to delve more deeply into the legislative weeds than Eskridge was able to do in 1990, then I may lose the apples-to-apples comparison with his data that I am hoping for.

I began my search using Westlaw, searching House and Senate committee reports from 1991 to the present for indications that a successful piece of federal legislation overturned, reversed, or modified a Supreme Court statutory interpretation holding. Like Eskridge, I did not count congressional bills that simply "codified" or "clarified" Supreme Court cases, and I did not count bills that implicitly overruled a Supreme Court statutory interpretation decision.²

When I shared an earlier draft of this Article with other scholars, some scholars suggested additional possible overrides to me that did not come up on my initial searches. I then refined my Westlaw search to capture these additional overrides. I used the following search in the USCCAN-REP Westlaw database: (OVERRUL! MODIF! CORRECT! CLARIF! REVERS! REJECT! DISAGREE! ERRONEOUS! MISINTERPRET! OVERTURN! RESTOR!) /10 "SUPREME COURT" & date(aft 1990). It

1. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n.1 (1991). Another problem is that Congress has no uniform method of expressing its intention to override a statute. The language used in reports can vary wildly, and even direct overrides often involve vague or oblique language. This makes it difficult to predict exactly how Congress might express itself in any given instance, and occasionally gives rise to considerable ambiguity as to whether a statute truly qualifies as an override.

2. Like Eskridge, Barnes excluded implicit overrides "on practical grounds; such overrides are extremely difficult—if not impossible—to identify systematically." JEB BARNES, *OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* 23 (2004).

captured almost all of the cases I and others had identified.³ As a backup, my research assistant or I examined every mention of “Supreme Court” in this database from January 1, 2001 through December 31, 2012, and it yielded a single additional case beyond the more restrictive search. I also compared my results with Hausegger and Baum’s 1991–1996 results.⁴

I also searched the Westlaw “JLR” (Journals and Law Review) database for law review articles from 1990 forward mentioning potential congressional overrides of federal statutes. This JLR search yielded a handful of additional cases. Finally, I was able to get a copy of Hausegger and Baum’s list of overrides from 1991–1996. By cross-referencing this list, I yielded a few additional overrides.

I believe that these research methods have revealed most major overrides of Supreme Court statutory interpretation cases since 1991. However, despite these efforts, there is no doubt that I have missed some, probably minor, overrides. For example, none of the legislative materials on Westlaw indicate that the Anti-Terrorism and Effect Death Penalty Act of 2006 overruled any Supreme Court cases. But upon hearing that Congress passed the law with that intent, I asked UCI librarians to search additional sources for express evidence of a congressional intent to override. The librarians located a report, not available on Westlaw, that confirms the intent to override.⁵ There may be other isolated overrides neither mentioned in committee reports available on Westlaw nor noted in journals or law reviews.

I have also erred on the side of including, rather than excluding, questionable laws as overrides. For example, a House report on the 2009 law giving the FDA authority to regulate tobacco as a drug describes the Supreme Court as having concluded in a 2000 case that Congress did not intend to give the FDA such authority. The report describes Congress in 2009 as giving the FDA such authority at this point going forward—thereby modifying the law going forward, as opposed to reversing the Court’s prior interpretation.⁶ I nonetheless coded this law as an override.

3. Ironically, this search did not find a 1995 law entitled “Reversal of Adams Fruit Co. v. Barrett.”

4. See generally Lori Hausegger & Lawrence Baum, *Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation*, in GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990S 224 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998).

5. *Federal Habeas Corpus Reform: Eliminating Prisoners’ Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 90 (1995) (“Each of the current bills would apparently overrule the recent Supreme Court case of *Schlup v. Delo*, 115 S.Ct. 851 (1995) by setting a higher burden of proof for newly discovered evidence of actual innocence.”).

6. H.R. REP. NO. 111-706, at 127 (2011) (“A resulting Supreme Court decision in 2000, while

acknowledging that tobacco use posed ‘perhaps the single most significant threat to public health in the United States,’ found that Congress had not given FDA authority over tobacco products as part of the FFDCA. The Family Smoking Prevention and Tobacco Control Act amends the FFDCA to grant FDA the authority to regulate tobacco products.”).